



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

**WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3RD)
3RD session
Rome, 26 – 29 May 2008**

UNIDROIT 2008
Study L – Misc. 28
(English only)
October 2008

SUMMARY RECORDS OF THE 3RD SESSION

(ROME, 26 TO 29 MAY 2008)

(Prepared by the Secretariat of UNIDROIT)

1. The Working Group for the preparation of the third edition of the UNIDROIT Principles of International Commercial Contracts held its third session in Rome from 26 to 29 May 2008. The session was attended by Berhooz Akhlaghi (Iran), Guido Alpa (Italy), M. Joachim Bonell (UNIDROIT), Paul-André Crépeau (Canada), Samuel Kofi Date-Bah (Ghana), Bénédicte Fauvarque-Cosson (France), Paul Finn (Australia), Marcel Fontaine (Belgium), Michael Philip Furmston (United Kingdom), Henry D. Gabriel (United States), Lauro Gama, Jr. (Brazil), Sir Roy Goode (United Kingdom), Arthur Hartkamp (The Netherlands), Alexander Komarov (Russian Federation), Takashi Uchida (Japan), Pierre Widmer (Switzerland), Zhang Yuqing (China) and Reinhard Zimmermann (Germany). Ole Lando (Denmark) was excused. The session was also attended by the following Observers: Ibrahim Al Mulla for the Emirates International Law Center, Eckart Brödermann for the Space Law Committee of the International Bar Association, Alejandro Carballo for the Private International Law Group of the American Society of International Law, Christine Chappuis for the *Groupe de travail contrats internationaux*, François Dessemontet for the Swiss Arbitration Association, Alejandro Garro for the New York City Bar, Attila Harmathy for the Arbitration Court of the Hungarian Chamber of Commerce and Industry, Emmanuel Jolivet for the ICC International Court of Arbitration, Pilar Perales Viscasillas for the National Law Center for Inter-American Free Trade, Marta Pertegás for the Hague Conference on Private International Law, Hilmar Raeschke-Kessler for the German Arbitration Institution, Giorgio Schiavoni for the Chamber of National and International Arbitration of Milan, Jeremy Sharpe for the Center for American and International Law, Institute for Transnational Arbitration, Renaud Sorieul for the United Nations Commission on International Trade Law (UNCITRAL), Christian von Bar for the Study Group for a European Civil Code and Wang Wenying for the China International Economic and Trade Arbitration Commission. The session was also attended by Herbert Kronke (Secretary-General of UNIDROIT) and Alessandra Zanobetti (Deputy Secretary-General of UNIDROIT). Paula Howarth (UNIDROIT) acted as Secretary to the Group. The list of participants is attached as APPENDIX.

2. After a short address of welcome by Kronke, Bonell took the Chair and welcomed the five new Observers von Bar, Carballo, Harmathy, Pertegás and Wang. He emphasised the great expertise they all had in their respective fields. Particularly significant and important for the Group's work was the presence of the Chairman of the Study Group for an European Civil Code, von Bar. He also informed the Group that Gama, who so far had been Observer for the Brazilian Branch of the International Law Association, would henceforth be a Member of the Group in replacement of João Baptista Villela who for family reasons had to resign.

3. Before turning to the first item on the Agenda, Bonell invited Members and Observers to report on any developments they knew of regarding the promotion of the UNIDROIT Principles.

4. Sorieul recalled that on the occasion of its 40th session in June 2007 UNCITRAL, following a practice established with respect to other soft-law instruments such as the INCOTERMS and the UCP issued by the ICC, had endorsed the text of the UNIDROIT Principles 2004 and "commended their use, as appropriate, for their intended purposes". During the discussion leading to the adoption of this decision, a question was raised as to the relationship between the United Nations Sales Convention and the Principles. It was observed that the United Nations Sales Convention contained comprehensive specialized rules governing contracts for the international sale of goods and applied in accordance with its scope-of-application provisions to the exclusion of the Principles. Equally, questions concerning matters governed by the United Nations Sales Convention that were not

expressly settled in it were to be settled, as provided in article 7 of the Convention, in conformity with the general principles on which the Convention was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. Thus, the optional use of the Principles was subordinate to the rules governing the applicability of the United Nations Sales Convention. It was noted that the preamble of the Principles referred to their application “when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like”. It was clarified that, depending on the circumstances, the Principles might be regarded as one possible expression of the *lex mercatoria* but that that issue ultimately depended on applicable law, existing contractual arrangements and the interpretation taken by users of the Principles.

5. Zhang reported on the important congress held in China in October 2007 at the University of Wuhan to celebrate the 20th anniversary of the entry into force of the CISG. On that occasion Bonell had been invited to present a paper on the relationship between the CISG and the UNIDROIT Principles. Subsequently Bonell, on the invitation of the University for Political Science and Law in Beijing and of the Beijing Bar Association, gave lectures on the UNIDROIT Principles and their use in international contract and arbitration practice. His seminars were attended by many lawyers and academics.

6. Fontaine reported on the important Colloquium on “The Harmonisation of Contract Law within OHADA” held in November 2007 in Ouagadougou and organised by UNIDROIT and the Training and Research Department (UFR) for Legal and Political Science of the University of Ouagadougou, in association with the Organisation for the Harmonisation of Business Law in Africa (OHADA). The purpose of this colloquium was to revitalise interest in and further discuss the preliminary draft Uniform Act on Contract Law which he had prepared on the basis of the UNIDROIT Principles and which was currently under consideration by the competent organs of OHADA. While the colloquium - which saw the participation of a large number of most eminent lawyers from all OHADA member States and neighbouring countries and was also attended by himself together with other Members and Observers of the Group, namely, Chappuis, Date-Bah and Jolivet - was definitely a great success, its impact on the future of the project as such had still to be determined. After the first fifteen years of existence of OHADA during which a number of uniform laws were enacted, recently there had been a sort of disenchantment with the harmonisation process. One of the reasons could be an institutional problem: every time there is a uniform act the Supreme Court of OHADA becomes competent as a last resort of jurisdiction which means that all the national Supreme Courts are deprived of some of their competence, clearly thereby creating some resistance to new harmonisation projects.

7. Uchida informed the Group of two important developments that had taken place in Japan. In December 2007 the 6th Annual Intercollegiate Negotiation Competition was held at Sophia University in Tokyo. The competition, sponsored by the Sumitomo Group Public Relations Committee, the Japan Arbitration Association and White & Case Law Office and involving the participation of 16 Japanese and 2 Australian Universities, set a practical case concerning international commercial contracts and dispute resolution that students had to solve on the basis of the UNIDROIT Principles. Moreover, in October 2006 the Japanese Government started preparatory work on a major reform of the Japanese Civil Code and decided to begin work on the general law of obligations. Currently a commission consisting of more than twenty civil law scholars was preparing the first draft which was expected to be finalised in March 2009. In order fully to participate in this important reform process he had left the University of Tokyo and was working for the Ministry of Justice as a full-time senior advisor. Since one of the most important goals of the reform was the modernisation of the

Japanese Civil Code, the UNIDROIT Principles were of course one of the most important sources of inspiration.

8. Finn mentioned that several of the major universities in Australia now teach the UNIDROIT Principles as part of their contract courses and, in order further to promote the Principles in Australia he and Ian Govey, member of the UNIDROIT Governing Council, had secured the insertion of a course on the Principles in the diploma programme leading to the accreditation of arbitrators in Australia and he had recently spoken about the Principles at the annual educational conference of the Federal Court judges. He announced that, thanks to the invitation of the Attorney-General's Department, the Federal Court of Australia and the University of Sydney School of Law, Bonell would in the near future visit Australia to give a series of lectures on the UNIDROIT Principles to judges, members of the bar and academics.

9. Chappuis informed the Group that, as requested, she had consulted the *Groupe de travail contrats internationaux* on a number of issues addressed in the new chapters of the UNIDROIT Principles under preparation and announced that when these issues come up for discussion during the present session she would illustrate in detail the replies received.

10. Sharpe reported that every year the American Society of International Law and the Institute of Transnational Arbitration have a half-day conference that precedes the Society's annual meeting, and that on his suggestion this year the subject was "Soft Law Instruments in International arbitration". The Conference took place in April and was divided into two sessions: one on the sources and legitimacy of soft law instruments in international arbitration; the other on their impact. The Conference was very well attended (among others by top arbitrators such as Martin Reissen, Jan Paulson, Gabriel Kaufman Kohler, Charles Brower). Others (such as Hans-Peter Berger, Hal Burman and Bonell) who were unable to attend submitted papers. The papers will be published by the Oxford University Press and in this respect he invited also the other Members of the Group to contribute to this publication. Lastly he strongly recommended that accounts of the Group's work be published on the *Opinio Juris* website and that he would be glad to act as intermediary in this respect.

11. Crépeau pointed out that the Principles were being widely used as teaching material at McGill University where the law of obligations was no longer being taught on the basis of civil law or common law but on a trans-systemic basis. He also mentioned a book recently published indicating in both French and English the comparative values between UNIDROIT and the private values of the new Quebec civil law.

12. Gama announced that the UNIDROIT Principles would be a central part of the 73rd Conference of the International Law Association to be held in Rio de Janeiro in August and that Garro and Raeschke-Kessler were among the speakers.

13. Fauvarque-Cosson reported that at her university – Paris II – a new four year international course was to be created for the best students who would be taught exactly in the same manner as described by Crépeau; since she was in charge of part of this course she would of course heavily rely on both the UNIDROIT Principles and the Principles of European Contract Law (PECL). With respect to the French reform project she had referred to last year there were two things worth mentioning. First the new law on limitation periods, about to be adopted by Parliament [it was adopted in June 2008], was clearly inspired by both the UNIDROIT Principles and PECL. Second, she has been asked by the Ministry of Justice to give an expertise in view of the French reform of the law of obligations currently under preparation by the Government and this draft is much more influenced by international instruments such as the UNIDROIT Principles and PECL than the *Avant-projet*

de réforme de droit des obligations et de la prescription (also called the *Avant-projet Català*), an academic draft published in 2005 and since then circulated throughout Europe.

14. Akhlaghi informed the Group that the current Commercial Code of Iran, promulgated in 1937 on the basis of French law, was now under revision, and that since he was in charge of supervising the new draft it was his intention to use the UNIDROIT Principles as the main framework of commercial contracts in the new Commercial Code.

15. Zimmermann recalled the Lando Commission's positive experience with respect to its holding of interim meetings of small drafting groups. He felt that also this Group could benefit from such an approach and had therefore invited last March the Rapporteurs on the individual chapters as well as the Chairman and Goode to meet at the Max-Planck-Institut in Hamburg to refine and harmonise the preliminary drafts now submitted to the Group at its plenary session.

16. Bonell entirely agreed and wanted to take this opportunity to thank Zimmermann once again for the generous invitation: thanks also to the most valuable assistance of a team of young scholars from the Max-Planck-Institut the meeting was extremely useful.

17. Von Bar informed the Group of the recent publication of an interim outline edition of the "Draft Common Frame of Reference" (DCFR) prepared by the Study Group on a European Civil Code chaired by himself and by the Acquis Group, chaired by Hans Schulte-Nölke. The main difference between this project and the UNIDROIT Principles was that it was not confined to contract law in general but included also chapters on a number of specific types of contract together with chapters on unjust enrichment, tort law, *negotiorum gestio* and select property law issues. Moreover it aimed to combine in one and the same instrument both general contract law and consumer protection law. While publication of the final version of this "academic" CFR was expected for mid-2009, the discussion on the "political" CFR, i.e. the instrument to be adopted eventually by the competent bodies of the European Union, was still in course.

18. Brödermann reported the creation of a Chinese European Arbitration Center in Hamburg which was intended to differ from all other international arbitration centers insofar as the appointing authority was composed for one third of Chinese members, for one third of European members and for one third of members from other parts of the world, and as the choice of law rule recommended by the Center provided as an alternative to a particular domestic law, the parties could choose as the law applicable to the merits of the dispute either CISG supplemented whenever necessary by the UNIDROIT Principles or the UNIDROIT Principles supplemented whenever necessary by the law of a particular State.

19. Howarth presented a CD-ROM she had prepared containing all the preparatory work of the first and second editions of the Principles in a linked format. The CD-ROM contains a total of 154 documents running to 5353 pages covering the years 1972 to 2004.

I. EXAMINATION OF THE DRAFT CHAPTER ON UNWINDING OF FAILED CONTRACTS (UNIDROIT 2008 – Study L – Doc. 105)

20. Bonell then called on Zimmermann, Rapporteur on Unwinding of Failed Contracts, to present his draft Chapter on Unwinding of Failed Contracts.

21. Zimmermann recalled that the discussion the Group had had at its previous session on this matter had focussed in particular on termination with respect to which it had been

objected that in both the present edition of the UNIDROIT Principles and in the draft rules proposed by the Rapporteur the paradigm case taken was the sales contract with the consequence that termination as a rule involved restitution, whereas in long term contracts the rule was that accrued rights and obligations were not affected by termination unless one party fails to receive any part of what it had bargained for, in which case restitution would be appropriate. For this reason in the revised draft he was now presenting, termination was dealt with first and the two above-mentioned situations were put on an equal footing.

22. Article 1 of the new draft deals with contracts to be performed at one time of which sales contracts were the most important but not the only example. Paragraph 1 states the basic rule, i.e. that on termination either party may claim restitution of whatever it has supplied under the contract provided concurrently it makes restitution of whatever it has received under the contract. This rule already appears in Article 7.3.6 of the current edition of the UNIDROIT Principles and had proved to be non-controversial at last year's session. Paragraph 2 addresses the situation where restitution in kind is not possible or appropriate, in which case an allowance has to be made in money whenever reasonable. This provision had been questioned on several grounds. First of all it was not clear what was meant by "allowance" and he himself had felt that the term was too vague and therefore had proposed replacing it with the term "value". The majority view however was in favour of keeping "allowance" not only because it was widely used, e.g. in the United States, but also because it was sufficiently flexible so as to cover the concepts of both objective value and subjective value. Second, also the notion of "whenever reasonable" had been questioned as being too vague but again the majority wanted a sufficiently flexible rule to cover all kinds of contingencies that might come up and therefore the decision was taken to keep "whenever reasonable". Paragraph 3 addresses the situation in which restitution in kind is not possible and the impossibility, e.g. due to the destruction or disappearance of the object, is attributable to the other party, and provides that in such case the recipient of the performance does not have to make an allowance in money. Finally paragraph 4 deals with the expenses the party who has received the performance may have incurred and provides that that party is entitled to compensation only for the necessary expenses linked to the performance received while compensation for other expenses may be claimed only as far as the other party is enriched by them.

23. The revised draft no longer contains a provision dealing with the different kinds of benefits the recipient of the performance has received or could have received from the performance. The matter had been extensively discussed by the Group at its previous session on which occasion basically three different views had emerged: that there should be no rule on benefits at all since such a rule would only engender litigation; that the recipient should be bound to return only the benefits it actually received from the performance (along the lines of Article 84 CISG and of Articles III.-3:511 *et seq.* DCFR); that the recipient should be bound to return such benefits only if it knew or ought to have known of the ground for avoidance (along the lines of Articles 549-550 of the Quebec Civil Code). In view of the fact that the last two views did not receive sufficient support, he had decided not to include any rule on benefits. However in Appendix A he had included a memorandum dealing further with the issue and had given a list of examples of benefits to be returned or not, together with a memorandum he had received from Crépeau.

24. Bonell thanked Zimmermann for his excellent introduction and suggested that the Group discuss first paragraphs 1 and 2, then paragraphs 3 and 4, and finally the controversial benefits issue.

25. Goode raised two points of substance. First he wondered what the relationship between the rules on the passing of risk and the rules on restitution was and gave the example of a sales contract where the goods had been destroyed after having been handed over to the buyer but at a time when the risk was still with the seller. Secondly, he wanted to know what the situation would be where not only restitution in kind was not possible or appropriate but also the payment of an allowance in money was unreasonable.

26. In reply to Goode's first question Zimmermann thought that if the UNIDROIT Principles including his proposed rule were applied, the risk of accidental destruction was on the purchaser. Asked by Goode whether this meant that the Principles were therefore going to override CISG's rules on risk, Zimmermann confirmed.

27. Fontaine pointed out that sales contracts, though being the most important, were not the only type of contract to be performed at one time: there were also some service contracts involving performance at one time.

28. With respect to Goode's second point, Gabriel too wanted to know what the answer would be and gave the example of a contract to build a bridge and the constructor builds a bridge leading to nowhere. In such a case restitution in kind is clearly not possible and a monetary allowance would make no sense because there is no value to the person who has received performance.

29. Zimmermann agreed with Gabriel's conclusions and added that he himself had given in Illustration 5 of the Comments another example of such cases.

30. Gabriel thought that in the Comments further examples could be given and, on Zimmermann's request, announced that he would provide such examples in time for the Rapporteur to incorporate them in the Comments.

31. Von Bar had some difficulty with the two notions of contracts to be performed at one time and contracts to be performed over a period of time since, for instance, sales contracts could come under both categories and service contracts could fall under the first category. So what was the distinction between these two notions? What was meant by "over a period of time"? Was it a question of days or even months and years?

32. Fontaine agreed that there were always border cases so that a sharp distinction between the two categories could never be made. The time factor was only one of the factors to be taken into consideration. Another was the type of relationship the contract created between the parties. There were contracts that even taking a certain amount of time to perform do not create a relationship between the parties as on the contrary occurs in the case of so-called relational contracts.

33. Goode agreed with Fontaine and pointed out that there were various ways of expressing the distinction between the two categories and an alternative for the second category would be to speak of contracts to be performed in stages or divisible contracts. He gave the example of a sales contract where in case of termination the result would necessarily be a situation similar to avoidance *ex tunc* insofar as the buyer has to give back the goods and the seller has to repay the price. On the other hand in the case of a leasing contract providing for the lease of equipment for a period of five years against payment of a monthly rental, if the lessee defaults after a year the rule should be not to disturb accrued rights, i.e. the lessor is entitled to retain the rentals already received and the only thing that disappears is the future obligation which may be replaced by a claim for damages.

34. Zimmermann agreed with Goode that the two categories of cases should be distinguished in a teleological way, i.e. under which circumstances it is right to apply Article 2 and under which circumstances it is right to apply Article 1. Article 2 should apply to contracts in which performances have been made in the past and it would be inconvenient to unravel them, and in this context he referred to Appendix B of his draft containing further illustrations of such cases.

35. Crépeau first of all wondered at what moment would the evaluation of the allowance refer to: depending on whether reference is made to the moment of reception, deterioration or loss, or of restitution of the amount of allowance may vary considerably. Moreover he felt that the draft should also address the problem of the costs of restitution since, particularly in the context of international contracts, such costs might be quite high.

36. Zimmermann recalled that in his previous draft he had used the term “value” instead of “allowance” and had specified in the Comments that “objective value” was meant. In the course of the discussion at last year’s session he had also addressed the time issue but the majority view had been that the black letter rule should not enter into such details. As to Crépeau’s second point, he pointed out that costs were not the only problem, another being that of the place where restitution is to be performed. He also recalled that the problem of who has to bear the costs of restitution had recently been addressed by the European Court of Justice with respect to a consumer sales contract. On that occasion the Court decided that the costs of restitution should always be borne by the seller because otherwise the consumer might be dissuaded from exercising his/her right of termination. He felt that in the context of commercial contracts such a rigid rule was not advisable and for this reason he preferred not to deal at all with the problem in a black letter rule.

37. Finn entirely agreed with Zimmermann not only in this respect but also concerning other issues discussed so far. In his view the more general and flexible the Principles the greater their utility.

38. While von Bar, Zhang and Furmston had some difficulty in accepting Illustration 3 and suggested that it either be replaced by another or that mention no longer be made of the different values of the painting, Gabriel and Perales found the Illustration as presently worded entirely acceptable.

39. Chappuis suggested that the sentences introducing Illustration 4 in the Comments should contain a reference to Art. 7.2.2. lit. b) of the Principles because the reasonableness test would probably be the same in the context of restitution and of right to performance.

40. Fontaine recalled that Article 6.1.11 stated the general rule that each party must bear the costs of performance of its obligations. He thought that this rule would also fit perfectly with restitution.

41. Date-Bah and Komarov wondered what the relationship was between compensation referred to in paragraph 4 and damages the terminating party may claim. Was there any risk of overlapping?

42. Zimmermann agreed that of course overcompensation must be avoided. A party could not claim compensation under paragraph 4 for something it has already claimed as damages.

43. Bonell felt that paragraph 4 might come into play in cases where there was no right to damages because non-performance was due to force majeure.

44. Zhang thought that paragraph 4 might also cover the case where when restitution is made the equipment returned has depreciated on account of outdated technology.

45. Von Bar first of all saw a certain imbalance in Article 1 because there was no rule on benefits of use but paragraph 4 laid down a rule on improvements and thought some explanation was needed. He also questioned the appropriateness of the wording “expenses linked to the performance” and suggested speaking instead of “improvements”. Finally he pointed out that the notion of enrichment was an extremely complex one and wondered whether it was not preferable to use a less controversial term.

46. Bonell recalled that the question as to whether or not there should be a rule on benefits was still open.

47. Zimmermann agreed and felt that when discussing the issue of benefits von Bar’s remarks should be taken into consideration. With respect to Von Bar’s second point he recalled that the wording “expenses linked to the performance” had been agreed upon by the Group on the ground that improvements could only be related to an object but not to services. As to the expression “enriched”, he pointed out that it was not to be understood in a technical sense, i.e. in the context of unjust enrichment.

48. Chappuis proposed using in the black letter rules the same language used in the Comments, i.e. “as far as the other party actually benefits from them”.

49. It was so decided.

50. Furmston and Goode expressed reservations about Illustration 10 insofar as it involved sale of land which in most jurisdictions was subject to special rules. In addition, they objected to the conclusion that the mere fact that A does not intend to use the property for agricultural purposes was sufficient to exclude that B is entitled to compensation for the amelioration of the property: in their view the decisive factor was that B had considerably increased the value of the land while A’s intention was totally irrelevant since A could always sell the land and get a much higher price for it.

51. Zimmermann agreed to redraft the example so that it did not involve land. As to the second objection he agreed that if A actually re-sells the land and gets a higher price on account of B’s improvements, A must compensate B for this benefit. However in his illustration A did not re-sell and in such a case the question arises as to whether A has to compensate B for so-called imposed improvements, i.e. improvements which A never wanted and which are actually of no benefit to A.

52. Bonell wondered whether the moment had not come to discuss the benefits issue in general and asked Chappuis to report on the outcome of her consultation with the *Groupe de travail contrats internationaux*.

53. Chappuis stated that practitioners seemed rather sceptical in the sense that in their experience the question as to whether in case of restitution also the benefits received must be taken into account seldom occurred. In practice parties are normally satisfied to get back what they have delivered under the contract and in the rare case that one party intends to claim in addition compensation for the benefits the other party has received from that

performance, such a claim would be part of the claim for damages. In the light of these comments she too questioned the utility of a rule on benefits.

54. Bonell thanked Chappuis and, through her, the other members of the *Groupe de travail contrats internationaux* for their most valuable contribution.

55. Zimmermann first of all informed the Group that he too had made some enquiries in the business world and the answers he had received were basically the same as those reported by Chappuis, i.e. that in case of termination parties wanted to get back their performance but did not care about additional benefits. In his view the reason was that in commercial practice normally both parties receive some benefits and it would be inconvenient to try to evaluate them with a view to their return. He then drew attention to the fact that the DCFR uses the term “benefit” in the sense of any performance received (Article III.-3:511(1)) and then provides “The obligation to return a benefit extends to any natural or legal fruits received from the benefit” (Article III.-3:511(5)).

56. Jolivet reported that at the ICC a brief enquiry had been made concerning awards mentioning restitution of benefits and over the last 10 years only 4 awards were found in which restitution of benefits had been claimed by one of the parties.

57. Brödermann agreed with those who thought it unwise to have a rule on benefits which could only be a source of further litigation between the parties. He mentioned an important State contract he was negotiating which for the case of termination merely provided “After notice of termination has taken effect the customer shall promptly a) pay all invoices due and yet unsettled and the amount of any loss of profit or other losses suffered; b) pay an appropriate compensation for all onshore construction services rendered and not yet invoiced”.

58. Von Bar raised the question of interest, i.e. whether the party bound to return a sum of money has to return also the interest accrued.

59. Zimmermann felt that if there was to be a rule on benefits in the Principles, it would of course have to include also interest which is the benefit derived from money and in this respect referred to Article 84 CISG which in paragraph 1 provides that if the seller is bound to refund the price it must also pay interest on it and in paragraph 2 provides that the buyer must account for all benefits it has derived from the goods.

60. Komarov, though confirming that in international commercial arbitration cases are very rare where a party terminating the contract claims not only restitution of the performance but also restitution of the benefits, nevertheless thought it advisable to have a rule on benefits if only for pedagogical reasons. Article 84 CISG could be taken as a model and such a general rule would be a kind of guidance to business communities in emerging countries.

61. Goode, Gama and Finn, on the contrary, expressed strong reservations about the inclusion of a rule on benefits and interest in the context of restitution for the reasons already pointed out by, among others, Chappuis and Brödermann.

62. Gabriel too was against such a rule but suggested that the issue should not be dealt with even in the Comments so as to leave open the possibility for a party, in exceptional cases where it is appropriate under the circumstances, to claim compensation also for benefits.

63. Bonell pointed out that since an overwhelming majority had expressed reservations about the inclusion of a rule on benefits and interest in the context of restitution time had come to take a decision to this effect. This all the more so since the majority view was backed by the information received from the interested business circles themselves.

64. The Group decided not to have any rule on benefits and interest in the context of restitution.

65. Von Bar wondered what the consequences would be of such a decision with respect to the related issue of improvements of the assets to be returned addressed in the second sentence of paragraph 4 of Article 1.

66. Widmer asked whether business circles had been contacted also on this point. He himself was in favour of deleting the second sentence of paragraph 4.

67. Fontaine agreed with Widmer.

68. If it were decided not to have the second sentence, Zimmermann asked whether the question of luxury or useful expenses should at least be mentioned in the Comments.

69. Gabriel suggested that not even the Comments should address the question so as to leave it entirely open.

70. Brödermann proposed getting rid also of the notion of “necessary expenses” and redrafting paragraph 4 in a more general way, i.e. that compensation may be claimed for expenses linked to the performance as far as reasonable.

71. Zimmermann felt that such language was too vague and favoured retaining the present wording of the first sentence.

72. It was decided to delete the second sentence of paragraph 4 and to keep the first sentence in its present wording.

73. Turning to Article 2 Zimmermann pointed out that it complemented Article 1 as it dealt with contracts to be performed over a period of time. In substance the content of the article corresponded to Article 7.3.6(2) of the Principles. The main thrust of the provision was that on termination of contracts to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, whereas there is no restitution for past performances. In other words, termination has no retroactive effect. As to the proviso “provided the contract is divisible”, it says something which is self evident because the rule laid down in Article 2 obviously could only be applied if one could separate past performances from performances following termination. He then recalled an exchange of messages he had with Goode on the subject and as a result Appendix C contained three examples from the commercial world relating to long term contracts and involving problems that arise in practice: they could all be settled under Article 2 as proposed or under other provisions contained in the Principles.

74. Gabriel had some difficulty with the Comments which suggested that the only types of contracts that are not performed over a period of time are sales contracts whereas all service contracts are contracts to be performed over a period of time. In his view also some service contracts could be performed at one time.

75. Zimmermann agreed and was prepared to amend the language stating that the category of contracts to be performed over a period of time included complex equipment leases, many construction contracts, services contracts, and so on just to make it clear that not all services or construction contracts fell within that category.

76. Raeschke-Kessler thought that even complex works contracts, if concluded on a turnkey basis, could be considered contracts to be performed at one time.

77. Furmston and Goode disagreed, arguing that in practice even turnkey contracts provided for payments in stages. Quite different was the case, e.g. of the purchase of an Airbus where payment was made against delivery even though the construction had required years of complex work.

78. Gabriel saw no need to have in the Comments any indication as to what specific contracts fell under one or other of the two categories.

79. Brödermann on the contrary strongly recommended that a clear indication as to the nature, e.g. of such important contracts as turn key contracts be given in the Comments so as to avoid the risk that the users of the Principles have to dispute in each given case as to whether Article 1 or Article 2 applied.

80. Bonell felt that this last recommendation was well taken.

81. Von Bar had difficulties in understanding both the text of Article 2 and the Comments. The article states that restitution can only be claimed for the period after termination has taken effect. If by this it intended to express the idea that termination has no retroactive effect, it makes sense and as such cannot but apply in all cases. It could hardly be that it applied only in cases where termination has taken effect and after that point in time one of the parties – which must be an idiot - still performs. As to Illustration 2 the five paintings were completed before termination has taken effect but nevertheless B must return the five paintings to A.

82. Zimmermann pointed out that Illustration 2 was supposed to illustrate the qualification of Article 2, i.e. provided the contract is divisible. Indeed the rule that restitution can only be claimed for the period after termination has taken effect can only be implemented if the contract is divisible and Illustration 2 gives an example of a contract which is divisible.

83. Goode thought that the example could be reworked a little bit so as to make it clear that the contract was for the entire work, i.e. ten paintings. With respect to von Bar's problems with the text, in his view Illustration 1 clearly indicated what was meant by the words "on termination ... restitution can only be claimed for the period after termination has taken effect", i.e. if one party has paid not merely for what has already been supplied but has made a payment in advance, e.g. has paid some rent in advance under the lease, then that party may claim restitution of this sum but not restitution of the rent for the period that has accrued at the time of termination.

84. Raeschke-Kessler was not convinced by this argument and gave the example of a turn key contract in which at a very late stage the static of the building turns out to be totally wrong. If the purchaser terminates the contract, according to Article 2 it could not claim restitution of the instalments paid before termination has taken effect, with the

consequence that notwithstanding the fact that the building could not be used for its intended purpose, the constructor would retain e.g. 75% of the purchase price. He felt that this was an unfair result.

85. Furmston pointed out that none of the provisions under discussion excluded the damages remedy so that in Raeschke-Kessler's case the purchaser could recover in damages the whole of the cost of rebuilding the building.

86. Zimmermann agreed with Furmston and stressed that at least 2 of the 3 examples listed in Appendix B mention how damages come into play there. Moreover Article 7.3.5(2) expressly states "Termination does not preclude a claim for damages for non-performance."

87. Finn suggested having in the Comments a reference to that Article.

88. Zimmermann agreed.

89. Hartkamp pointed out that there would not always be a claim for damages, for instance, as Bonell had mentioned earlier, in the case of force majeure, or where the contract otherwise limits the party's liability

90. Bonell agreed but thought that the language used in Article 7.3.5(2) was flexible enough not to exclude such cases.

91. Alpa wondered whether instead of referring the notion of divisibility to the contract, it should be referred to the performance.

92. Garro agreed and in any case urged that the text of Illustration 2 be amended so as to make it clear that while the contract was for 10 paintings, the performances were divisible.

93. Zimmermann agreed.

94. Turning to Article 3 Zimmermann indicated that it dealt with restitution following avoidance. In accordance with the Group's decision of last year, no distinction had been made between contracts performed at one time and contracts performed over a period of time and the content of Article 3 basically mirrored that of Article 1.

95. Goode had no problem with the text but thought Illustration 2 quite unreal. In fact most people doing business would not think this was a case in which the contract could be avoided. The work had been done, the house has been completed. Although there had been a sort of misrepresentation it appeared to him strange that because of that the contract could be avoided from the beginning with the consequence that the price could be claimed back against the payment of the value of the paint work. He felt that the only remedy should be damages.

96. Zimmermann recalled that under Article 3.8 of the Principles the contract could be avoided, it being another question whether that was sensible or not. He would be happy to replace the example by another and asked Goode to send it to him at a later stage.

97. Von Bar asked more in general whether the defence of the enrichment had ever been discussed by the Group. In his view the ground for avoidance mattered a lot in this connection: e.g. in case of threat or fraud why should the threatened or defrauded party

recover its performance only on the condition that it return what it had received from the other party?

98. Zimmermann confirmed that the notion of change of position had never been discussed because the Group had so far refrained from drafting enrichment rules. He thought that it was a wise decision because even in legal systems in which there were enrichment rules and restitution rules after failure of contracts, there was always the problem of adjusting them with each other. The easy answer to von Bar's question was to be found in paragraph 2 providing "If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable".

99. In support of Zimmermann's remarks, Bonell recalled that the decision not to have separate rules on unjust enrichment had also been influenced by the experience of the American Law Institute which when revising the Restatement on Restitution had been faced with considerable difficulties in bringing into harmony the instrument with the rules on restitution contained in the Restatement of Contracts. The decisive difference between the Principles and the DCFR in this respect however was that the Principles, unlike the DCFR, were confined to contracts only and therefore so far deliberately focused on restitution in the context of the different kinds of failure of contracts, leaving aside the issue of unjust enrichment in general.

100. Zhang had difficulties with Illustrations 2 and 3. As to Illustration 2, he thought that it was fairly common practice in commerce for businesses to claim that their products or services are better and/or cheaper than those of their competitors. In Illustration 3 apparently A had never claimed to be the famous painter. He therefore could see no reason for granting B the remedy of avoidance.

101. Zimmermann, while recalling that it had already been decided to replace the present Illustration 2 by another to be provided by Goode, said he had taken Illustration 3 from the present edition of the Principles (Article 3.17).

102. As a general point Bonell insisted on drafting the illustrations in as precise a manner as possible so as to make it absolutely clear what the solution would be under the black letter rule in question leaving no room for arguing in favour of any other solution.

103. Fontaine suggested choosing examples more closely connected to international trade which was not necessarily the case of decorating a bedroom.

104. Zimmermann once more urged members of the Group to provide him with better illustrations.

105. Raeschke-Kessler pointed out that the international art market was increasingly becoming a subject of international arbitration. Maybe the painting of a bedroom could be replaced by the painting of a famous building.

106. Brödermann felt that the more examples coming from the Anglo-Saxon world in the Principles the better because, while civil lawyers are quite accustomed to work with a codification such as the Principles, common lawyers feel less comfortable and appreciate as many concrete illustrations of the black letter rules as possible, particularly when they come from actual English or US case law.

107. Von Bar wondered whether it would be helpful to add in paragraph 2 after the words “whenever reasonable” “having regard to the ground of avoidance”. Indeed in Illustrations 5 and 6 the different outcome is justified by the fact that the reasons for avoidance are different, i.e. fraud in 5 and mistake in 6. Therefore he suggested that the link between the ground of avoidance and the consequences should somehow be expressed even in the black letter rules.

108. Zimmermann thought that von Bar’s suggestion had already been taken into account by paragraph 3 stating “The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party”. So the question is “has this been attributable to the other party?” and in the case of fraud, obviously yes.

109. Bonell was not sure that von Bar and Zimmermann were addressing the same issues. On his part however he wondered whether von Bar’s concern could be met by explaining in the Comments that the proviso “whenever reasonable” included taking into account the grounds for avoidance.

110. Fontaine agreed with Bonell.

111. Asked by Bonell whether there was anything still to be discussed with respect to the draft chapter, Zimmermann pointed out that what remained was to test the restitution rules so far discussed with respect to other cases of unwinding of failed contracts such as illegality, the occurrence of resolutive conditions, hardship and force majeure. For this purpose he had prepared a set of rules which could be called a preliminary draft chapter on restitution providing for a generalised restitution regime plus a special provision dealing with termination of contracts to be performed over a period of time.

“Restitution

Art. 1 Restitution following avoidance

- 1. On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that such party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.*
- 2. If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.*
- 3. The recipient of the performance does not have to make an allowance in money, if the impossibility to make restitution in kind is attributable to the other party.*
- 4. Compensation may be claimed for the necessary expenses linked to the performance received.*

Art. 2 Restitution following termination

- 1. Art. 1 also applies to termination of a contract to be performed at one time.*
- 2. On termination of a contract to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.”*

112. Asked by Bonell whether the draft rules merely reflected what had been so far discussed and decided or contained new rules, Zimmermann stressed that he had made no changes or additions to the black letter rules so far discussed but had simply re-arranged the rules so as to enable the Group to test their soundness with respect to the other cases of failed contracts different from avoidance and termination.

113. Bonell, after stressing that nothing had yet been decided as to the merits of such a unitary approach versus a separate approach, including the possibility that for pedagogical reasons one might conclude that, though in substance the rules are pretty much the same, it would be preferable to have them placed under each chapter even at the risk of repeating here and there the same rule, wholeheartedly thanked also on behalf of the Group Zimmermann for the extraordinary work he had done in preparation of this meeting.

II. EXAMINATION OF THE DRAFT CHAPTER ON ILLEGALITY (UNIDROIT 2008 – Study L – Doc. 106)

114. Bonell then called on Furmston, Rapporteur on Illegality, to present his draft Chapter.

115. Furmston pointed out that his draft could be divided into three parts: Articles 1 and 2, Articles 3 and 4, and Article 5. In introducing Article 1 he noted that the basic principle was set out in Article 1(1): “A contract is illegal if, whether by its terms, performance or otherwise, it is contrary to principles widely accepted as fundamental in legal systems throughout the world.” This statement was quite similar to the statement in PECL, except that in PECL it refers to principles accepted throughout the European Union whereas in the UNIDROIT Principles it would apply to principles accepted world-wide. Concerning the Illustrations he admitted that not all of them were internationally commercially based but, like Zimmermann, he urged the other members to assist him in finding pertinent examples. As to the Comments, the third paragraph contained a list of the most important practical cases of contracts contrary to fundamental principles, while paragraph 4 indicated that of course the principles and values in question may evolve over time and/or their acceptance may vary in the different parts of the world. Article 2 dealt with the effects of a contract being classified as illegal under Article 1. The basic rule was that such contracts were not enforceable, but there was an important qualification to the effect that if one party neither knew nor ought to have known of facts which made the contract illegal, the contract would not be illegal as regards that party. The classic example of that in domestic law was that of a landlord renting his premises to a prostitute without knowing the purpose for which the property was intended and charging an ordinary rent.

116. Bonell asked for comments on Articles 1 and 2.

117. Gabriel first of all agreed that when discussing Article 1 one should keep in mind Article 2 which sets out the effects of a contract being illegal under Article 1, i.e. to deprive the parties of any remedies. Moreover he had difficulty figuring out what a principle widely accepted as fundamental was. Thus, referring to Example 1, there was a company, that happened to be the world’s largest retailer, which bought every month billions of dollars worth of goods produced in a situation where workers worked 18 hours a day in sweat shops seven days a week. Could that retailer all of a sudden decide no longer to pay the invoices for the goods delivered? He personally had serious doubts that this could be done and thought that suggesting the contrary, as suggested in the Illustration, was extremely dangerous.

118. Widmer wondered why both Articles 1 and 3 did not use the PECL's formula "to the extent that". In his view this wording was more flexible and would better explain the exception contained in paragraph 2.

119. Bonell, while asking the native English speakers whether it was true that there was a substantial difference between "if" and "to the extent that", recalled that even in PECL, which used the formula "to the extent that", there was a special provision on partial illegality.

120. Chappuis wanted to address Articles 1 and 2 together and found this twofold approach, i.e. to separate the definition of what is illegal from the consequences of such illegality, preferable because more flexible than the PECL approach which, by stating that a contract contrary to fundamental principles is of no effect, combined the two aspects in one and the same provision. However she had difficulty with the Comments as presently drafted. For example there could be no doubt that corruption as a rule deprived the contract of any effects but, as shown by the cases referred to last year by Raeschke-Kessler, in practice things may be much more complicated in the sense that if the works have been completed or almost completed one obviously could not completely undo the contract as if there had been no performance or the performance could simply be returned. She therefore urged the Rapporteur to refer to such cases in the Comments and Illustrations to Article 2. Likewise, and more in general, she missed the usual structure of the comment, i.e. the explanation of the black letter rule element by element: for instance, no further explanation and examples were given with respect to the different situations mentioned in paragraph 1, i.e. contracts contrary to fundamental principles by their terms, by performance or otherwise.

121. Bonell first of all recalled that Article 5, yet to be discussed, might provide an answer to Chappuis' first objection. As to her criticism of the Comments, he was confident that the Rapporteur would give it the necessary consideration.

122. According to Raeschke-Kessler the chapter on Illegality was clearly of utmost importance for international arbitrators. He therefore urged the Group to pay particular attention to the examples since, if poorly chosen, they would not only be useless but could even mislead users of the Principles. Just by way of example: Example 3 to Article 1 was completely inappropriate since international arbitration had nothing to do with murders but with contracts having an illegal element.

123. Date-Bah wanted to comment on Gabriel's remarks on Example 1 to Article 1. It seemed to him that since it mentioned that the working conditions in question were contrary to an international convention which is widely accepted, there was no option in the sense that the contracts *had* to be illegal and the suppliers should at most have a restitutionary remedy under Article 5.

124. Zimmermann, coming back to Widmer's remarks, expressed his preference for the twofold approach taken in Articles 1 and 2 of the draft as opposed to the combined approach of PECL and the DCFR. He also preferred avoiding the term "void" as used in the latter two instruments. Finally he shared the critical remarks made with respect to the Comments but thought it preferable to come back to them at a later stage.

125. Goode noted that with respect to partial illegality the draft, by stating that if only part of the contract is illegal the entire contract is illegal unless giving due consideration to all the circumstances it is reasonable to hold otherwise, took a different view from that taken

by PECL and wondered what the reason for this was. In addition he raised a small drafting point: in paragraph 2 reference should be made not to Article 1 but to paragraph 1.

126. In reply to Goode, Zimmermann pointed out that the draft departed from PECL only in paragraph 2 of Article 1 but not in paragraph 2 of Article 3 and thought that the presumption of the illegality of the entire contract in Article 1 was justified on the ground that in this case the contract, though only in part, violated fundamental principles.

127. Von Bar first of all expressed his preference for the combined approach taken by PECL and the DCFR. Furthermore he felt that it was extremely difficult to conceive of “principles widely accepted as fundamental in legal systems throughout the world”, and in this respect he referred to Example 4 to Article 1 with which he completely disagreed: in his country at least it was absolutely unusual for the press to report on politicians’ private affairs so that even a specific agreement to this effect would certainly not be illegal. Finally he confessed that he was unable to understand what the position of the draft was with respect to corruption. If in a given part of the world it was current practice to pay a certain percentage of the contract price as a “commission” in order to be awarded the contract, was such payment and/or the awarding of the contract illegal?

128. Gabriel wanted to come back to Example 1 to Article 1 which he thought would better fit in the context of Article 3 while elevating the prohibited working practice to a fundamental principle caused him some problems. In this respect he also referred to von Bar’s remarks on corruption and pointed out that in the United States the Foreign Corrupt Practices Act, expressly preventing or making illegal bribes to foreign corporations and officials for contract procurement, had been enacted precisely because what is considered illegal under American law is common practice in other parts of the world, and just because bribery is not understood to be a fundamental principle throughout the world there had been a need to enact a domestic statute expressly forbidding this behaviour. As a consequence a contract violating that particular U.S. statute would be unenforceable under Article 3 as in violation of a mandatory rule under the domestic law of the United States. Even if there was an international convention prohibiting corruption contracts violating it would be unenforceable under Article 3 since the Convention would be irrelevant as an international mandatory rule under Article 1.4 of the Principles. In sum he continued to have great difficulties with the fundamental principles referred to in Article 1, all the more so since none of the examples given in the Comments seemed to be convincing.

129. Asked by Bonell whether he intended to re-open the basic question of distinguishing between contracts violating fundamental principles and contracts infringing mandatory rules of law, Gabriel pointed out that this was not his intention. His concerns only related to the Comments.

130. Komarov was in principle in favour of the definition of illegality as proposed in the draft. In his view the Principles should in this area take an approach both flexible and precise: flexible, so as to permit arbitral tribunals to find a contract illegal even where the contract merely may be contrary to international public order, yet at the same time precise, taking into account that the Principles are supposed to be implemented in different legal cultures and in countries where the sense of justice and practice are different. Admittedly such a midway may difficult to be found but he thought it was worth trying.

131. Chappuis too found that flexibility in defining illegality was recommendable, all the more so since the Principles were flexible also with respect to the effects of illegality. She recalled the example offered by Raeschke-Kessler last year (UNIDROIT 2007 – Study 50 –

Misc. 27, paragraph 219): the case related to a construction contract for an oil refinery where the Prime Minister of the host State was entitled to a commission of 5%. That was clearly a case of corruption. But it should affect only part of the contract since once the refinery had been built the result clearly could not be that the whole contract was void. This was precisely the result which would be reached under the Principles, i.e. in accordance with Article 1(2) of the draft only the part entitling the Prime Minister to a 5% fee would be void, while the rest of the contract would be regulated by Article 2.

132. Bonell thought that the case would fall instead under Article 5 and urged the Rapporteur to provide further explanation and examples for partial illegality addressed in Article 1(2) so as to avoid possible misunderstanding as to the scope of this provision.

133. Kronke stressed the importance of being very cautious in referring generically to international instruments laying down fundamental principles. For instance sweat shop labour was not internationally deplored whereas forced labour was in an ILO Convention expressly forbidding it and it would be highly recommendable to name the conventions or legal systems one was talking about. Another example was the OECD Convention on bribery: could it be assumed that the OECD – the club of the rich – represents universal standards or does it basically represent only European, East Asian and North American standards? For these reasons he shared the concerns expressed by Gabriel and Komarov who had insisted that a clear distinction be made between fundamental principles of public international law, internationally mandatory rules and domestic mandatory rules.

134. With reference to the terminology used in Article 1(1), i.e. “principles widely accepted as fundamental in legal systems throughout the world”, Zhang first of all wondered whether the principles in question had to be universally accepted or whether it was sufficient that they be accepted in a number of, but not all, legal systems of the world. If the former was the case he felt that there may only be a few, if any, such principles. At any rate he was not sure that the Principles were authoritative enough to state when a given contract should be considered illegal and therefore having no effects. In his view this could only be done by binding instruments, be they international conventions or domestic mandatory statutes.

135. Furmston pointed out that if the Group could not agree on the existence of universally accepted principles there was no point in drafting rules on illegality. He was definitely of the opinion that such principles, although not many, did actually exist and bribery clearly was one of them and a particularly important one in the context of international commercial contracts.

136. Raeschke-Kessler agreed and recalled that there was the United Nations Convention on Corruption, thus confirming that corruption is considered illegal worldwide. However this Convention did not deal with the consequences of corruption because States had not been able to agree on them. He was perfectly happy with the definition of illegality in Article 1(1) and thought that the Principles could also spell out the effects of illegality.

137. Garro too was satisfied with Article 1(1) which in his view was flexible enough to cover the most relevant cases of contracts *contra bonos mores*. For this reason he did not agree with those who favoured a narrow definition to the effect that illegal contracts were only those violating specific statutory prohibitions, be they of national or international origin. As to the examples, he had no difficulty with either Example 1 or Example 3. With respect to the former he agreed that instead of sweat shop labour it would be better to refer to forced labour or child labour, while with respect to the latter he found that there was a big

difference between an agreement among journalists not to report on the private lives of public figures and to pay a journalist 10,000 Euros not to report on a person's private life.

138. Goode, though admitting that Article 1(2) properly reflected the policy decision taken, wondered whether it should be reconsidered. He gave the example of a contract of which only a tiny portion was affected by illegality, e.g. the sweat shop was taken over by a new owner who was doing things properly so that only some of the shoes were produced under the unlawful regime and most of them were not. Why should the presumption be that nevertheless the contract as a whole would be invalid. He was in favour of changing the policy underlying Article 1(2) and adopting the same policy underlying Article 3(2).

139. Finn disagreed with Chappuis' observation that bribery of an agent produced illegality in the contract of bribery but had no effect as such on the main contract. Like Raeschke-Kessler he felt that corruption was the centrepiece of what the Group was discussing and thought it was of critical importance to understand the types of transactions and the subtlety of the transactions which in practice may be affected by corruption before taking a definite view as to the consequences. Instead of discussing definitions he urged the Group to focus on examples. What should be done when the interference was in a tender process? What should be done in case of bribery of an agent? He felt that the Group had so far discussed too simple cases whereas arbitrators were likely to be confronted with cases ranging from the crude simple to the wonderfully subtle but none the less influential forms of causing a clean contractual process to miscarry. To have a clearer picture of what is going on in the world he suggested looking at Transparency International's reports.

140. Hartkamp on the contrary was rather sceptical of the idea of approaching the issue of illegality by way of example. He was absolutely content with the formula used in Article 1(2) which was a very wide one, especially thanks to the words "or otherwise" which made it clear that it was not only the contract terms or the performance but anything else related to the contract which may render it illegal. However if such a broad formula were to be adopted he, like Goode and Chappuis, found it inappropriate to have in the case of partial illegality a presumption that the whole contract is illegal and preferred to have a presumption to the contrary as provided in Article 3(2) or even no presumption at all.

141. Alpa wondered what the exact meaning of the term "otherwise" in Article 1(1) was. He favoured a very broad interpretation so as to cover also those quite frequent cases where the parties pursue their illegal purpose not by means of the main contract but by means of side letters, side contracts, side companies.

142. Asked by Bonell whether he was suggesting including in the Comments language to this effect, Alpa confirmed and promised to provide the Rapporteur with examples taken from actual awards.

143. Gama objected to Example C to Article 1 since there were jurisdictions in which it was absolutely common practice to compensate members of Parliament for passing/not passing specific legislation, for example by financing their election campaigns.

144. Fauvarque-Cosson, like Hartkamp, had some difficulty with the proposal to start the discussion beginning with examples. Instead she thought that one should rather start with the law and in this respect she urged the Rapporteur to provide the Group with more comparative and international material.

145. Widmer expressed his support of the view expressed by Goode and Hartkamp concerning Article 1(2).

146. Brödermann agreed with the idea expressed in paragraph 4 of the Comments to Article 1 and suggested including it somehow even in the black letter rule itself, for instance by adding in the third line after “accepted as fundamental” the words “within the business communities affected by the contract or legal systems throughout the world”.

147. Harmathy too felt that given the complexity of international commercial contracts one of the most important problems with respect to illegality was the extent to which illegality in one contract affects other related contracts, this all the more so since the basic test in Article 2 was whether the parties knew or ought to have known of the illegality. Referring to Example 1 he pointed out that Gray Boots may have bought from an intermediary, in which case was it relevant that it knew or ought to have know of the sweat shop or forced labour conditions under which the shoes were manufactured? Or – and in this respect he recalled the Bosphorus Case which was before the Court of Human Rights in Strasbourg - what if someone hires a ship to carry spare parts of weapons sold to an intermediary acting on behalf of a terrorist group?

148. Bonell noted that Harmathy’s very interesting remarks went pretty much in the direction of a previous intervention by Alpa.

149. Zimmermann, like Garro, Raeschke-Kessler and some others, was satisfied with Article 1(1) as it stood and thought that the unhappiness some of the Members had with this paragraph were perhaps connected to some infelicities still associated with the Comments. He suggested that the Comments, like PECL and DCFR, should indicate where one could get guidance in identifying such fundamental principles. In his view one could quote for instance international human rights documents: obviously not everything in these documents might be relevant for commercial purposes, but some matters such as prohibition of forced labour, human trafficking, child labour and so on are. As to international conventions, while they may fall under Article 3 of the draft if the requirement of Article 1.4 of the Principles is met, they may also be relevant under Article 1(1) if they express fundamental principles but are not yet ratified by the respective States. He also agreed that corruption and bribery were of utmost importance in this context and suggested that the Rapporteur look to see whether there are international or even national documents actually dealing with corruption and bribery and if so to refer to them in the Comments. He thought that if the Comments stated that the prohibition of corruption and bribery was such a fundamental principle that a contract affected by corruption and bribery was illegal and at the same time provided some clear examples they would be a useful guide to arbitrators. In any case the Comments ought to be restructured so as to address one after the other, under separate headings and with appropriate illustrations, the different issues related to the black letter rules. Concerning the present Comments and Illustrations he pointed out that the fifth paragraph at page 3 of Doc. 106 had nothing to do with Article 1 and that example (e) at page 4 also did not relate to Article but to Article 3. Finally he stated that he would no longer object to a reversal of the presumption in Article 1(2) so as to align it with Article 3(2).

150. Gabriel, like Hartkamp, preferred not to have any presumption in both Article 1(2) and Article 3(2) and consequently suggested deleting the two provisions and explaining in the Comments that the impact of partial illegality on the contract as a whole depended on the circumstances of the case.

151. Furmston and Fauvarque-Cosson, on the contrary, thought that the issue was too important to be dealt with only in the Comments but favoured reversing the presumption as presently laid down in Article 1(2).

152. Hartkamp saw another possibility: the second paragraphs of both Articles 1 and 3 should not lay down any presumption but state that in case of partial illegality there was the possibility either to hold the whole contract invalid or not depending on the circumstances.

153. Widmer agreed with Hartkamp.

154. Komarov was in favour of reversing the presumption in Article 1(2) but thought that Hartkamp's proposal would introduce too great a degree of uncertainty.

155. Furmston said he would be happy to produce over the lunch break alternative texts.

156. In summing up the discussion, Bonell noted that there was wide support for Article 1(1) in its present wording on the understanding, first of all, that the fundamental principles referred to were not only those positively stated in statutory instruments but included also "unwritten" principles and values; secondly, that the principles and values in question must not necessarily be universally accepted but if the contract was concluded between parties belonging both to a particular region of the world even principles and values confined to those regions may become relevant. Concerning Article 1(2) he suggested postponing any decision until the Group had a chance to examine Furmston's written proposals. Concerning the Comments he recalled that there had been numerous interventions urging a re-structuring of the texts in order not only to bring them more in line with the traditional format of the Comments but also, and above all, to explain better the black letter rules. And just because the subject of illegality was particularly difficult and complex, the illustrations were of utmost importance. He was confident that the Rapporteur would take all the comments and suggestions made in due account when rewriting the Comments.

157. Raeschke-Kessler reiterated the need for examples relating to international commercial contracts.

158. Kronke recalled a previous intervention in which Furmston had rightly pointed out that sometimes instead of a clear-cut example what was needed was a borderline case exemplifying that the solution could well go one way or another.

159. Bonell expressed reservations about taking such a course. In practice there were clearly borderline cases for which no clear-cut answer could be given but he saw no use in including them as illustrations in the Comments since what was needed was guidance as to how to handle at least the most common cases.

160. Furmston, pointing out that the task he faced was not an easy one, announced that he would do his best to meet the Group's expectations. Concerning the choice between clear-cut examples and borderline examples, he thought it best to offer each time both kinds of examples so that the Group at its next session would be in a position to strike out those examples on which opinions were clearly divided.

161. Bonell called for comments on Article 2.

162. Zimmermann wondered whether in both Article 2 and Article 4 the first paragraph was needed at all. Given the opening sentence of Article 2(2) and the language used in Article 4(2), there could be no doubt that the respective articles referred to contracts illegal under Article 1 or to contracts infringing mandatory rules under Article 3, respectively. With respect to paragraph 2 he wondered whether by “such remedies as in all the circumstances are reasonable” it was intended to include also restitution, as he personally thought it should be. Finally he raised a small drafting point: in paragraph 3 instead of “contracts” it should read “contract”.

163. Gabriel too was in favour of deleting paragraph 1. With respect to the point of substance raised by Zimmermann he suggested amending paragraph 3 to read “It has the right to exercise such remedies as in all the circumstances are reasonable including restitution as provided for under Article 5” because that would bring in restitution but also flag that restitution is not automatic but limited to those circumstances set out in Article 5.

164. Fauvarque-Cosson likewise favoured the deletion of paragraph 1 and in addition proposed changing the very title of Article 2 to “Effects of contracts contrary to fundamental principles” in order to align it with that of Article 4.

165. Bonell, contrary to Zimmermann and Gabriel, thought that by referring to “remedies under the contract” it was intended to exclude restitution which indeed was dealt with separately and in a different manner in Article 5.

166. Raeschke-Kessler wondered whether a black letter rule on partial remedies was needed if the contract remained partially valid or whether it was sufficient to address the issue in the Comments.

167. Finn decidedly felt that a black letter rule was needed since in case of partial illegality it was necessary to go beyond the ordinary remedies the Principles provided for a valid contract and permit the arbitrator to resort to different remedies such as adaptation or re-negotiation in order to sanitize the partially illegal contract and keep it alive.

168. Goode, on the contrary, thought that a reference in the Comments might be sufficient and in this context he drew attention to the approach taken by PECL which in Article 15:103 simply stated that Articles 15:104 and 15:105 dealing with restitution and damages in case of ineffective contracts applied with appropriate adaptations also in case of partial ineffectiveness.

169. Hartkamp, like Finn and Raeschke-Kessler, thought that Article 2 should provide maximum flexibility as to remedies in case of partial illegality and indicated Article 4 as a possible model.

170. Furmston found this proposal worth exploring further.

171. Bonell asked Hartkamp and Furmston whether they were willing to prepare a draft provision along the lines suggested, and they agreed.

172. Chappuis wondered whether a rule along the lines of Article 3.10, which in paragraph 2 states that in the case of gross disparity the Court may adapt the contract in order to make it accord with reasonable commercial standards, would serve the purpose.

173. Von Bar thought that reference should also be made to the purpose of the fundamental principle violated. For instance, in the case of forced labour the weaker party, i.e. the party that has been under compulsion, should be granted certain remedies.

174. Fauvarque-Cosson pointed out that the more she listened to the discussion the more she got the feeling that the rule presently laid down in Article 2(2) according to which where both parties know or ought to have known of facts which make the contract illegal they cannot exercise any remedies was too harsh at least in some situations. Von Bar had just given an example of a weak party forced to engaged in such an illegal contract, but there may be other examples.

175. Hartkamp agreed.

176. Finn admitted that there were cases where the purpose of the fundamental principle violated was to protect particular people so that if those people happened to be parties to the contract, they would be doubly hit under the rule laid down in Article 2(2). However he felt that this was very rare in the context of international commercial contracts so that there was no real need specifically to address these cases in the Principles.

177. Goode agreed with Finn and objected that in Example 1 to Article 1 the workers were not party to the contract for the delivery of the goods.

178. Bonell asked Fauvarque-Cosson and Hartkamp whether they could be more precise as to the envisaged amendment to Article 2(2).

179. Hartkamp said that a possibility was to add to Article 2(2) language similar to that contained in Article 1(2), i.e. “unless giving due consideration to all the circumstances of the case it is reasonable to hold otherwise”.

180. Fauvarque-Cosson agreed.

181. Bonell noted that the proposed amendment was very far reaching and asked the other Members to express their views.

182. Furmston felt that the concern expressed by Hartkamp and Fauvarque-Cosson could be met by the restitutionary remedies provided in Article 5.

183. Goode and Fontaine also thought that the proposed amendment would go too far.

184. Hartkamp agreed with Furmston but wondered whether Article 2(2) in its present form made it sufficiently clear that the restitutionary remedies provided in Article 5 were not excluded.

185. Goode pointed out that this was precisely the reason why in Article 2(2) reference was made only to “remedies under the contract”.

186. Bonell informed the Group that Furmston and Hartkamp had in the meantime prepared the announced draft amendments:

“Article 1
Contracts contrary to fundamental principles”

Alternative 1 (Existing text)

(2) If only part of the contract is illegal under paragraph 1 the entire contract is illegal unless giving due consideration to all the circumstances of the case it is reasonable to hold otherwise.

Alternative 2

(2) If only part of the contract is illegal under paragraph 1, the remaining part is not illegal unless giving due consideration to all the circumstances of the case it is reasonable to hold otherwise.

Alternative 3

(2) If only part of the contract is illegal under paragraph 1, the effect of the illegality on the remaining part of the contract shall be such as is reasonable giving due consideration to all the circumstances of the case.

Article 2
Effects of Illegality under Article 1

(4) Where it is held that a contract is partially illegal under Article 1 para. 2 each party has the right to exercise such remedies as in all the circumstances of the case are reasonable.

[(5) Where it is held that a contract is partially illegal under Article 1 para. 2 the Court may adapt the contract in such a manner as is reasonable in the circumstances of the case.]”

187. Bonell invited Furmston and Hartkamp to introduce their draft.

188. Furmston explained that as far as Article 1(2) was concerned, Alternative 2 was intended to reverse the presumption so as to align it to Article 3(2), while Alternative 3 did not provide for any presumption.

189. Fontaine pointed out that when choosing between Alternative 2 and Alternative 3 one should consider the impact this would have on Article 3(2). In fact if Alternative 2 were to be chosen one might think of combining Article 2(2) and Article 3(2) into one provision, whereas if Alternative 3 were to be chosen, one might have to reconsider the present text of Article 3(2) since it would be rather strange to have no presumption at all with respect to partial illegality under Article 1 and to have a presumption with respect to partial illegality under Article 3.

190. Gabriel expressed his preference for Alternative 3, but could accept also Alternative 2.

191. Crépeau thought that it all depended on whether the contract was divisible or not.

192. Goode favoured Alternative 2 and pointed out that Alternative 3 combined two things which so far had been kept separate, i.e. what constitutes illegality and the effects of illegality.

193. Finn, referring to Crépeau's remarks, felt that the proposed new paragraph 5 could take care of cases of indivisible contracts in the sense that such contracts might be rendered divisible by means of adaptation. As to the choice between Alternative 2 and Alternative 3, he definitely preferred Alternative 2.

194. Komarov too preferred Alternative 2 since it gave some guidance to arbitrators.

195. Widmer, like Gabriel, preferred Alternative 3 but could also live with Alternative 2.

196. Bonell noted that there was a clear majority for Alternative 2 and it was decided to adopt Alternative 2.

197. In introducing Article 2 of the draft Hartkamp explained that proposed paragraph 4 was intended to take into account the view of those who had advocated some flexibility when a contract was partially illegal under Article 1. As to paragraph 5, it reflected Chappuis' idea but since there was not too much discussion about it the provision had been put in square brackets.

198. Zimmermann had reservations concerning paragraph 5. If the idea of permitting a court to adapt the contract was accepted, why should this be restricted to the case of partial illegality and not extended also where the contract was illegal in its entirety.

199. Goode too felt that the proposal went too far since, if the parties can always go to the court to adapt the contract, there was no really effective sanction for illegality at all.

200. Bonell recalled that already in the context of hardship reservations had been expressed as to the power of the court to adapt a contract.

201. Raeschke-Kessler and Gabriel thought that the provision could serve an important purpose whenever the contract is partially illegal but there were good reasons for keeping the contract going. For instance in the case of bribery discovered after the contract had already been performed damages may not be the proper remedy but it may be appropriate to reduce the contract price and eliminate the bribery aspect.

202. Widmer agreed and, contrary to Zimmermann, felt that it was appropriate to limit the provision to partial illegality.

203. Finn too favoured the proposed paragraph but, like Zimmermann, saw no reason for not admitting such a court intervention exceptionally also in cases of wholly illegal contracts. In the example of the construction contract affected by corruption he would have thought that the entire contract was illegal but nevertheless should be somehow adapted, e.g. by forcing the party who has been bribed to repay the bribe.

204. Zimmermann once more pointed out that he was, for the reasons given by Goode and Bonell, against the provision but at the same time felt that if it was kept it should be extended also to cover wholly illegal contracts.

205. Fauvarque-Cosson questioned whether such a rule was actually needed since, one may argue, even in its absence courts could still adapt an illegal contract.

206. Date-Bah feared that one of the consequences of such a rule would be that in case of corruption a party which because of the other party's corruption had lost all

confidence in that other party could be forced to stick to the contract though somehow adapted.

207. In reply to Fauvarque-Cosson Zimmermann pointed out that according to paragraph 4 a party may either claim specific performance or damages or restitution but certainly cannot unilaterally adapt the contract. Only a court could adapt a contract but to this effect a specific provision granting such a power was needed.

208. Garro agreed in principle but noted that even under paragraph 4 it was up to the court to decide which remedy was reasonable under the circumstances.

209. Gabriel reiterated his support for paragraph 5. As to the objection that it may give rise to too great a degree of uncertainty as to the fate of a partially or wholly illegal contract, he recalled the somewhat similar provision contained in § 2-302 of the Uniform Commercial Code providing that if the court finds the contract or any clause of the contract to have been unconscionable at the time it was made it may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. This provision, though granting courts a considerable degree of discretionary power, had so far not given rise to any problems in practice.

210. Also Raeschke-Kessler confirmed his support. He recalled an actual arbitration case where a contract for the construction of a powerhouse had been fully performed but then was found illegal because of corruption. According to the new government which had in the meantime succeeded the corrupt government, the contract was void because of bribery and the supplier of the powerhouse had no remedy whatsoever. However since this would mean that the supplier would be left with nothing the Arbitral Tribunal should be in a position to adapt the contract and this was precisely the purpose of paragraph 5.

211. Bonell wondered whether Article 5 already provided means for avoiding the all or nothing scenario.

212. Fontaine was against proposed paragraph 5 and confirmed that a similar rule provided in the context of hardship had met with considerable criticism.

213. Bonell asked for an indicative vote on proposed paragraph 5.

214. There was insufficient support for the provision.

215. Bonell recalled that it had been decided to change the title of Article 2 to read "Effects of contracts contrary to fundamental principles" so as to align it with the title of Article 4.

216. Zimmermann wondered whether it had been decided to delete the first paragraph of both Article 2 and Article 4.

217. Bonell confirmed and thanked Furmston and Hartkamp for their most valuable work.

218. Zimmermann wondered what the Group's final view was with respect to the "remedies" referred to in what had now become paragraphs 1, 2 and 3 of Article 2. Did they include or exclude restitution?

219. Hartkamp thought that restitution was not covered by Article 2 but by Article 5.

220. Fontaine agreed with Hartkamp. Article 5 contained special rules on restitution which should not interfere with Article 2. He suggested that in the Comments to Article 2 a reference be included to Article 5.

221. Zimmermann thought that at least the remedies referred to in the new paragraphs 2 and 3 should cover also restitution and suggested taking a final decision on this point only after discussing Article 5.

222. In introducing Article 3 and Article 4, Furmston pointed out that the two articles were inspired by the corresponding provisions of PECL and should be dealt with together because they were clearly closely linked.

223. Bonell noted that in Article 3(2) the reference should be to paragraph 1 and not to Article 99.3.

224. Goode wondered what the relationship between Article 3(2) and Article 4(2) was. The latter stated "The effects of any infringement of a mandatory rule upon a contract are those expressly prescribed by that rule" – and this seemed a very sensible rule – while the former, by stating "If only part of the contract is illegal under paragraph 1, the remaining part is not illegal unless giving due consideration to all the circumstances of the case it is reasonable to hold otherwise", seemed not to take into consideration at all the kind of effects the infringed mandatory rule might possibly prescribe.

225. Gabriel thought that the wording of Article 3(1) should be amended in the sense that the term "illegal" should be replaced by "unenforceable" which was the term used in the Restatement (§ 178(1)) and also in PECL (Article 15:102(2)).

226. Furmston recalled that it had been decided not to use the term "unenforceable" because of its peculiar meaning in English law.

227. Date-Bah agreed with Furmston.

228. Widmer wondered what the relationship between Article 1(2) and Article 3(2) was after the decision to align the two as far as the presumption was concerned.

229. Furmston thought that the two provisions were both justified because though stating the same presumption one related to partially illegal contracts under Article 1(1) while the other to partially illegal contracts under Article 3(1).

230. Goode, coming back to his previous remarks concerning the inconsistencies between Article 3(2) and Article 4(2), suggested combining Articles 3 and 4 and stating in paragraph 1 "where a contract infringes a mandatory rule, the effects are those expressly prescribed by that rule" and adding in paragraph 2 "where the mandatory rule does not expressly prescribe the effects" and so on. Such an approach would make it possible to get rid of the notion of "illegal".

231. Widmer and Fontaine thought there was nothing wrong in using in both Article 1 and Article 3 the notion of "illegal" which after all appeared in the very title of the Chapter.

232. Von Bar recalled that also the DCFR used neither the notion “illegality” nor “unenforceability” but pretty much along the lines suggested by Goode simply stated “Where a contract [...] infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects, if any, expressly prescribed by that mandatory rule [...]” (Article II – 7:302).

233. Zimmermann, like Fontaine and Widmer, preferred the present language in both Article 1 and Article 3 which after all had been deliberately adopted so as to distinguish between the notion of the two types of illegality and their effects.

234. Fauvarque-Cosson and Gama strongly supported Zimmermann’s intervention.

235. Crépeau also favoured keeping illegality in both articles but suggested the deletion of the word “also” in the first paragraph of Article 3.

236. With respect to this last suggestion Bonell, noting no opposition, declared it accepted.

237. Finn, on the contrary, was in favour of Goode’s suggestion and saw no difficulty in adopting different language in Article 1 and Article 3.

238. Komarov too was in favour of the present wording but suggested including in the Comments a statement pointing out that not all legal systems speak of illegality in both situations.

239. Bonell thought the time had come to close the discussion and since there was a clear majority in favour of the present text, he wondered whether the Group could agree on it.

240. Garro noted that the minority view was supported by almost all common law representatives. He felt that this was not at all by chance since illegality from a common law standpoint was restricted to violation of serious public policy while not every violation of a mandatory rule was a violation of serious public policy. He personally was in favour of using the notion of illegality in both articles but at the same time acknowledged that there was a certain inconsistency between Article 3.1 and Article 4.2 in so far as it is incorrect to say that any contract which violates a mandatory rule was illegal. A mandatory rule of law may prohibit one from contracting otherwise but if parties do so the contract is not necessarily illegal in the way the English lawyers understand the notion of illegality. Why not therefore say that a contract that infringes a mandatory rule applicable under Article 1.4 *may* be illegal?

241. Furmston pointed out that what was important was that the notion of illegality appeared in the title of the chapter because at least in English, Australian or Canadian texts books this was the title under which the kinds of situation dealt with in Articles 1 and 3 were normally addressed. As to Goode’s proposal to change the wording in Article 3 he could go along with it but preferred the present text.

242. Goode acknowledged that there was no majority for his proposal. However at the same time he insisted there was an inconsistency between Article 3(2) and Article 4(2) and he suggested changing Article 3(2) so as to state that the effects of a partially illegal contract under Article 3 would primarily be determined by the mandatory rule infringed and that in the absence of such indication paragraphs 3 and 4 of Article 4 would apply.

243. Kronke observed that in many civil law systems only Article 1 would have a counterpart in the civil code while Article 3 would be scattered throughout the code whenever a given provision was declared to be of mandatory nature, with the result that only the general provision corresponding to Article 1 would be under the heading of “illegality” or “immorality” while the specific situations would be called simply infringement of mandatory rules.

244. Raeschke-Kessler noted that the draft contained no examples of Article 3(1). A possible example were the laws of those Middle Eastern countries which prohibited agency contracts. Would an arbitral tribunal sitting in Switzerland consider a contract infringing such prohibitions illegal in accordance with Article 3(1)?

245. Bonell noted that the question put by Raeschke-Kessler was to a certain extent taken care of by the reference in Article 3(1) to Article 1.4 of the Principles, but since not even that latter provision provided an exhaustive answer, he thought it preferable not to re-open the issue in the present context.

246. With respect to Goode’s last suggestion Furmston announced that he would take it into account when revising the draft.

247. Zimmermann saw no contradiction between Article 3(2) and Article 4(2) since the former article had nothing to do with the effects of a partially illegal contract under Article 3(1) which were dealt with only in Article 4(2).

248. Finn and Fauvarque-Cosson, on the contrary, supported Goode’s suggestion.

249. Bonell, noting that there was substantial support for this suggestion, wondered whether the Group could agree on it.

250. It was so decided.

251. In introducing Article 4 Furmston pointed out that it had almost literally been taken from Article 15:102 PECL.

252. Bonell noted that the Comments to the article were extremely succinct and invited the Rapporteur to elaborate them further when revising the draft. In this respect he observed, more in general, that the Comments as they appear in the present edition of the Principles were universally highly appreciated because of their structure and their clear and straightforward language. Especially with respect to a complex provision such as Article 4 it was essential to guide the reader and to explain each issue in the order in which the issues were addressed in the black letter rule. To this effect it would be extremely helpful to divide the Comments into sub-paragraphs and maybe even sub-sub-paragraphs with appropriate titles and sub-titles.

253. Zimmermann thought that the Comments in PECL could provide a useful guide in this respect.

254. Furmston agreed.

255. Gama recalled that it had been decided to delete paragraph 1 from Article 2 and suggested doing the same with respect to paragraph 1 of Article 4.

256. It was so decided.

257. Harmathy noted that the language of Article 4(3) was very similar to that of Article 2(4) as previously adopted by the Group and wondered whether consequently the criteria for determining what was reasonable set forth in Article 4(4) should not be followed also in the context of Article 2(4).

258. Furmston thought that Article 4(4) could become relevant only in the context of contracts infringing mandatory rules and not of contracts violating fundamental principles.

259. Bonell saw the logic behind Furmston's reply but wondered what the criteria for meeting the "reasonableness" test under Article 2(4) would then be.

260. Garro, like Harmathy, felt that Article 4(4) could well apply at least *mutatis mutandis* also in the context of Article 2(4).

261. Finn supported Furmston's view. The criteria set forth in Article 4(4) made sense only with respect to mandatory rules of law because of their extraordinary diversity while in cases of violation of fundamental principles the inquiry as to what remedies, if any, were reasonable was much more case specific and by laying down more general criteria one might lose the required degree of flexibility.

262. Kronke agreed with Finn: Article 1 addressed the outrageous cases and an arbitrator or judge sitting in a Far East or Middle East or South American context may judge certain behaviour outrageous that a judge or arbitrator sitting in Geneva or Berne would not and vice versa.

263. Raeschke-Kessler found it rather surprising that with respect to the less serious cases of illegality under Article 3 the Principles provided a more detailed set of rules than they did with respect to the more serious cases of illegality under Article 1.

264. Zimmermann, on the contrary, agreed with Furmston, Finn and Kronke. Unlike cases of violation of fundamental principles which were normally fairly straightforward, among the cases of infringement of mandatory rules there could be many borderline cases for which more detailed guidance was needed.

265. Brödermann, in support of this view, made the example of certain countries enacting mandatory rules strictly prohibiting any form of trade with a particular third country. Faced with an international contract violating such mandatory rules an arbitrator may find it very helpful to look at some of the criteria set forth in Article 4(4), such as the purpose of the rules in question, any sanctions that may be imposed under the rules infringed, etc.

266. Bonell found that Brödermann's example was extremely helpful and took the opportunity once more to urge the members of the Group to think of similar examples in this or other contexts and send them to the Rapporteur.

267. Garro reiterated his support for having also with respect to the illegality cases under Article 1 criteria similar to those provided for by Article 4(4) for the illegality cases under Article 3. This all the more so since the mandatory rules referred to in Article 3 were not only the mandatory rules of the applicable domestic law but may also be mandatory

rules of supranational or international origin in which case the distinction between Article 3 and Article 1 would be even more blurred.

268. In view of the late hour Bonell proposed closing the discussion on Article 4 and moving on to Article 5.

269. Furmston stressed the importance of this article. Indeed Articles 1 to 4 may well lead to a result which looks in broad terms unfair and unsatisfactory and one way of escaping that would be the granting of a restitutionary remedy. That was what Article 5 dealt with and one question to be considered first of all – particularly while Zimmermann was still present – was whether restitution in the context of illegal contracts should be governed by the same principles previously discussed in the context of avoidance and termination or whether they should be treated separately and differently in Article 5 of the chapter on illegal contracts. He felt it preferable to have special and more flexible rules in view of the fact that in case of illegality so many different aspects had to be taken into account which was impossible under the traditional rules on restitution.

270. Zimmermann expressed his strong support for a flexible regime and felt that the general rule laid down in Article 5(1) was not satisfactory. Admittedly it was the traditional rule going back to Roman law where it was applied to situations involving a very serious infringement, where the transaction was really tainted with a kind of immorality. The rationale behind the rule not to grant restitution in case of illegality was to impose a penalty without the judge wanting to get involved in a transaction in which two villains, after having made some dealings, wanted to claim restitution (so-called dirty hand rationale). Maybe such a rule was still good even in modern times in cases of violations of fundamental principles as envisaged in Article 1. In this respect he recalled that for instance in German law there was such a hard and fast rule but whenever the infringements were of a merely technical nature and the illegality therefore not so strong, courts found ways to circumvent the rule excluding restitution. In the light of this experience he strongly advocated the adoption of a flexible rule which would allow the court widest discretion in granting in a given case either no restitution, unilateral restitution, or concurrent restitution, just as Article 2 and Article 4 provide with respect to other remedies such as specific performance or damages. He could even imagine not having a separate provision on restitution but merely a reference to this remedy in the Comments to Article 2 and Article 4. This would make it even clearer that the granting of restitution very much depended on the kind of illegality involved.

271. Von Bar agreed that restitution should be granted only if and to the extent that it does not contradict the purpose of the relevant principle or rule violated.

272. Bonell, though seeing the logic behind Zimmermann's proposal to get rid of Article 5 and to have a reference to restitution only in the Comments to Article 2 and Article 4, wondered whether it would be convincing to have an express reference to restitution in the black letter rules dealing with avoidance and with termination but not in the black letter rules dealing with illegality despite the fact that in this context the Principles were going to adopt an approach which differed substantially from the generality of domestic laws.

273. Zimmermann thought not and insisted that a reference in the Comments would be sufficient.

274. Date-Bah thought it was in any case important to make it clear that by means of restitution a party could not get more than it would have received under the contract.

275. According to Zimmermann in cases falling under Article 2 such a possibility would be excluded since it would be considered not reasonable while in cases falling under Article 4 restitution must not be against the purpose of the mandatory rule that had been infringed.

276. Crépeau recalled the similar approach taken by the new Quebec Civil Code stating in Article 1699 “(1) Restitution of prestations takes place where a person is bound by law to return to another person the property he has received either unlawfully or by error or under a juridical act which is subsequently annulled retroactively or under which the obligation becomes impossible to perform by reason of superior force. (2) The Court may exceptionally refuse restitution where it would have the effect of according an undue advantage to one party whether the debtor or the creditor unless it deems it sufficient in that case to modify the scope or mode of the restitution instead.” As could be seen the Code provides for a unitary regime on restitution dealing with all types of restitution irrespective of the area in which it would be encountered, and allows restitution as a matter of principle but leaves it to the court or arbitrator to determine whether in individual cases restitution could be refused because it would provide an undue advantage. In other words the Roman law rule has been overturned and full authority given to the courts or to arbitrators to decide according to the circumstances of each case. However he admitted that there had not yet been enough practical experience with the new regime to know whether it was entirely satisfactory.

277. Fauvarque-Cosson, while agreeing in substance with the positions of Zimmermann and Crépeau, thought that the exception to the rule that restitution should be granted should not be based on the criterion of undue advantage but on the criterion of whether the party knew or ought to have known of the facts making the contract illegal. After all this was the criterion in Article 2 and it would be coherent to have the same criterion in all cases. As a consequence the provision on restitution could be very short and simply state “where a party knows or ought to have known of facts which make the contract illegal, the court may refuse restitution.”

278. Goode had some difficulty in understanding the provision of the Quebec Civil Code read out by Crépeau. The article in question, by stating that restitution of prestations takes place where a person is bound by law to return to another person the property received does not indicate when a person is bound by law but apparently refers for that purpose to other rules somewhere in the Code.

279. Crépeau confirmed that this was the case and that one had to look at the rules in the respective areas such as avoidance, termination, unjust enrichment, etc.

280. Fontaine too agreed with the substance of Zimmermann’s proposal but first of all, like Bonell, found it rather surprising if the Principles were to contain special rules on restitution in the area of avoidance and termination but not with respect to illegality where one would expect them most; secondly, while the proposed criteria of reasonableness for granting restitution would work perfectly well in the context of Article 2(3) (now Article 2(2)) and of Article 4(3), he wondered what the solution would be in the context of Article 2(2) (now Article 2(1)). Would restitution always be excluded if parties knew or ought to have known of the facts which made the contract illegal under Article 1?

281. Zimmermann recalled the previous decision to delete the words “under the contract” from Article 2(2). In his view at least, the consequence would be that indeed whenever the parties knew or ought to have known that the contract was illegal under Article 1 not only specific performance and damages but also restitution would be excluded.

282. Bonell thought that Zimmermann, in his earlier intervention, had rejected the ancient Roman maxim "*ex turpi causa non oritur actio*" in favour of a more flexible approach and wondered whether he was now, on the contrary, recommending its adoption.

283. Fontaine felt that the *in turpitudine* rule would be too rigid.

284. Raeschke-Kessler too felt that in particular in the context of international commercial contracts a more flexible approach should be taken and he made the example of a constructor that bribed the government and completed the works: according to the traditional rule the constructor would get nothing for its work and he thought that this would be inherently unfair. He therefore, like Fontaine, suggested having a special rule on restitution, be it the present Article 5 or a provision inverting the presumption contained in Article 5(1).

285. Furmston confessed that he was a little confused. He too thought that Zimmermann had originally criticised Article 5 for not being sufficiently flexible. If Zimmermann was now suggesting the deletion of the words "under the contract" from Article 2(2) (or what had now become Article 2(1)) this would lead to the exclusion of restitution in all cases and hence an entirely unsatisfactory result. He was in favour of keeping Article 5 as it stood.

286. Garro too was in favour of having a separate article on restitution but suggested that the presumption in paragraph 1 be inverted. This would align the article with Article 15:104 PECL which he thought was a model to be followed.

287. Brödermann strongly supported Garro's intervention and suggested that Article 5, like PECL, make the granting of restitution dependent on the circumstances of the case.

288. Harmathy urged giving the special needs of international commercial contracts due consideration.

289. Gabriel was in favour of an open-ended formula such as the one adopted in PECL.

290. Raeschke-Kessler agreed with Gabriel and stressed the need for examples for Article 5.

291. Date-Bah too favoured an open-ended formula.

292. Summing up the discussion Bonell noted that there was a clear majority in favour of keeping in Article 2(2) (now Article 2(1)) the words "under the contract" which would mean that only the remedies of specific performance and damages were excluded but not restitution. Restitution should be specifically addressed in Article 5 but the first paragraph should be amended so as to make the granting of restitution dependent on the circumstances of the case. What still remained to be discussed was Article 5(2).

293. Zimmermann raised a drafting matter: if the words "under the contract" were to be kept in Article 2(1) they should also be added in Article 2(3) (now Article 2(2)) and in Article 4(3) so as to make it clear that all those provisions referred only to the remedies of specific performance and damages and not to restitution which was dealt with in one and the same manner for all cases in Article 5.

294. Bonell thought this a good proposal. At the same time he reiterated his question concerning Article 5(2) and recalled that a suggestion had been made to develop the paragraph further along the lines of the general rules on restitution so far agreed upon earlier during the session with respect to avoidance and termination.

295. Zimmermann expressed his strong support for such an approach.

296. Widmer agreed.

297. Bonell noted that there was sufficient support for such an approach although the precise wording of Article 5(2) had still to be considered. For the time being he suggested repeating in Article 5(2) the rules on restitution agreed upon in the context of avoidance and termination.

298. It was so agreed.

299. Bonell thanked Furmston for his efforts and was confident that he would revise the draft in the light of the very constructive discussion.

III. EXAMINATION OF THE DRAFT CHAPTER ON CONDITIONAL OBLIGATIONS (UNIDROIT 2008 – Study L – Doc. 108)

300. Bonell then called on Fauvarque-Cosson, Rapporteur on Conditional Obligations, to present her draft Chapter.

301. Fauvarque-Cosson, by way of general introduction, pointed out that she had considerably reduced the content of her draft since in the light of last year's discussion she was under the impression that the Group wanted to keep the number of provisions to a minimum. In particular she had deleted the draft provisions on illegal conditions, potestative conditions, but of course was prepared to re-open the discussion thereon if the Group so wished.

302. In introducing Article 1 Fauvarque-Cosson pointed out that the article defined the two types of condition, i.e. "suspensive condition" and "resolutive condition". She recalled that the question of terminology had already been discussed last year and the Group had agreed on these two terms. Likewise there had been agreement that the essence of a condition was that it was an uncertain future event contrary to what in civil law terminology was called "*terme*", i.e. a future but certain event.

303. Gabriel complimented Fauvarque-Cosson on her excellent work and expressed his support for Article 1 in its present form.

304. Crépeau wondered whether the wording in Article 1 ("... upon the occurrence of an uncertain future event ...") covered also non-occurrence. In order to make sure that it did he suggested that at least the Comments should clarify this.

305. Goode agreed with Crépeau and recalled that such a clarification existed also in the Comments to PECL.

306. Chappuis, recalling that a number of black letter rules originally proposed by the Rapporteur had been eliminated, thought that as a consequence the Comments became even more important. In this context she wondered whether the Comments should also briefly

mention the terminology issue and the time within which the event must occur or not occur (the two issues were referred to in paragraphs 395 et seq. and 435 et seq. of the Report on the Group's 2007 session).

307. Bonell thanked Chappuis for her remarks and took this occasion to invite in general members of the Group to comment on the Comments and to make suggestions as to possible amendments and/or additions.

308. Fauvarque-Cosson announced that she would make the requested clarifications and additions in the Comments.

309. Brödermann, pointing out that so far in the Comments there were no illustrations, urged the Rapporteur to include them and to choose examples which are very common and are at the heart of many international business contracts, for example, the condition that certain export licences be granted, or that certain authorisations be given.

310. Fontaine recalled that the Principles already contained provisions on public permission requirements and urged the Rapporteur to coordinate the illustrations in her chapter with those appearing there.

311. In introducing Article 2 Fauvarque-Cosson recalled that last year the Group had discussed at length the question of retroactive or non-retroactive effect and had ultimately decided in favour of non-retroactivity. However in order to make it clear that the rule was not mandatory she had added the words "unless the parties otherwise agree", a formula which was intentionally narrower than "unless the circumstances indicate otherwise".

312. Crépeau, while reiterating his reservations concerning the proposed rule on non-retroactivity, wondered whether it should be made clear that parties must expressly provide otherwise.

313. Gabriel, on the contrary, thought that no express agreement should be required so that the parties may also indicate by their conduct or otherwise that they want the condition to be retroactive. However he wondered whether the proviso should not be placed at the beginning of the rule.

314. Bonell noted that so far the Principles have never required an express agreement in order to derogate from non-mandatory provisions on the understanding that the same result may well be achieved implicitly.

315. Komarov, referring to export or import licences, saw a difference between the cases addressed in Articles 6.1.14 et seq. and those dealt with in the present chapter in the sense that in the former case the condition of granting the licence was implied while in the latter it was expressly agreed upon by the parties.

316. Brödermann, like Gabriel, was against the proposal to require an express agreement in order to derogate from the rule laid down in Article 2. He made the example of a contract negotiated between two lawyers coming from legal systems which adopt the opposite rule, i.e. the retroactive effect of the occurrence of a condition. They may not have read with sufficient attention the content of the Principles including Article 2 and therefore may have taken it for granted that the agreed condition had retroactive effects. Why should they be required to agree expressly in this sense?

317. Bonell noted that there was substantial support for the provision as proposed and asked the Rapporteur briefly to comment on the issues no longer addressed in the draft but mentioned at pages 6-7 of Doc. 108.

318. Fauvarque-Cosson, with respect to unlawful conditions, pointed out that since there was not much difference between an unlawful condition or an unlawful contract term or an unlawful contract and since there was a chapter on illegality the rules on illegality would cover all three cases. As to impossible conditions she thought that, since a condition by its very nature is a future uncertain event, if it was impossible it would no longer be a condition nor would there even be an obligation. Finally as to the so-called potestative condition, she recalled that last year there was a majority against having a rule on it but nevertheless she was still open-minded and asked for further comments.

319. Chappuis recalled an intervention by Zimmermann last year in which he had said it was a question of contract interpretation whether or not an obligation depending on the sole intention of one of the parties was null and void (cf. paragraph 425 of the Report on the Group's 2007 session) and suggested that such a statement should be included in the Comments.

320. Alpa, with respect to the question of impossible conditions, wondered whether in case a resolutive condition was impossible, the contract as such was null and void or, for instance as stated in the Italian Civil Code, the condition should be considered as not having been stipulated (Article 1354(2)). Moreover he raised the question of a contract expressly providing that the performance by one of the parties was conditional upon the performance of the other party. Was this a condition *strictu sensu* or was it just a way of further defining the precise content of each party's obligation?

321. With respect to Alpa's first question, Gama suggested stating in the Comments that if a resolutive condition is impossible it is deemed as not having been stipulated.

322. With respect to Alpa's second question, Bonell recalled the point he had already made in his introductory study (UNIDROIT 2006 – Study L – Doc. 99, page 10) where he had asked whether "an express distinction be made between conditions in a strict sense and future events which are a simple means of measuring the time of the performance (e.g., a sub-contractor is to be paid by the general contractor "when"/"not until" the general contractor is paid by the owner), and/or between conditions in a strict sense and future events which are the subject of a duty (e.g., A contracts to sell and B to buy goods stipulating "selection to be made by buyer before September 1")", as well as the Rapporteur's similar statement in her Position Paper on Conditions (UNIDROIT 2007 – Study L – Doc. 103, page 9), and invited Fauvarque-Cosson to elaborate on it.

323. Fauvarque-Cosson stressed the importance of the distinction between a term of the contract requiring the obligation of one contractual party to be performed before the other contracting party is bound under the terms of the contract to perform and a true condition, i.e. an obligation conditional upon the occurrence of a future uncertain event, and in this respect recalled Comment D to Article 16:101 PECL ("Condition Distinguished from Requirement of Performance of Obligation Under Contract"). She was prepared to include in her Comments similar statements.

324. With reference to unlawful conditions Komarov urged a more comprehensive treatment in the Comments. For sophisticated lawyers it may be rather obvious what the Rapporteur had pointed out earlier on, i.e. that the rules on illegality should apply *mutatis*

mutandis. However, bearing in mind the increasing application of the Principles also in parts of the world where private law has not yet likewise developed, a clearer more didactic explanation in the Comments was necessary.

325. Fauvarque-Cosson expressed great sympathy for Komarov's remarks and recalled last year's discussion on the question of unlawful conditions as reflected in paragraphs 409 et seq. of the Report on the Group's 2007 session. She personally was open to any solution but would at any rate strongly recommend a more detailed explanation in the Comments.

326. Uchida wondered about the appropriateness of the reference in the Rapporteur's draft chapter to the rules on mistake in the context of supervening impossibility.

327. Fauvarque-Cosson agreed with Uchida and explained that it was only due to a clerical error.

328. Alpa wondered whether the Comments should expressly mention also the case where not the entire contract but only part of it was subject to an illegal condition and suggested making in this connection a reference to the rules on partial illegality.

329. Fauvarque-Cosson agreed.

330. In introducing Article 3 Fauvarque-Cosson stressed the importance of this provision which dealt with interference with a condition. She recalled that it had originally been drafted along the lines of the corresponding provision in PECL (cf. Article 16:102), i.e. as a result of interference, the condition "was deemed to be fulfilled". This wording had been criticised on the ground that it could convey the meaning that the available remedies were not only damages but also specific performance. The new formula "that party may not rely on the non-fulfilment of the condition" was intended to avoid such a misunderstanding.

331. Goode expressed his strong support for the new formula. He made the example of a contract of sale subject to obtaining a licence and the seller being unable to obtain the licence because the buyer had actually interfered with the grant of the licence by persuading the governmental department not to grant it. To say that as a result the condition is deemed to be fulfilled could imply that the seller may request specific performance which of course was out of the question in the absence of the licence.

332. Raeschke-Kessler wondered whether it was necessary to mention specifically the duty of cooperation which he thought was already included in the general duty of good faith and fair dealing.

333. Fauvarque-Cosson thought that at least for pedagogical reasons the duty of cooperation should be specifically mentioned.

334. Hartkamp considered the example given by Goode extremely important but pointed out that it did not fall within the scope of this chapter which did not deal with conditions imposed by law. He therefore suggested not speaking of a licence to be granted by the government – a requirement always imposed by a statutory rule - but rather of a condition stipulated by the parties.

335. Uchida wondered whether there was a real difference between the formula "may not rely on the fulfilment or non-fulfilment of the condition" and the formula "the condition is deemed to be fulfilled or non-fulfilled".

336. Fauvarque-Cosson stressed that the new formula was more flexible thereby making it possible to take into account those cases where the remedy of specific performance was not available because performance would be impossible or unlawful.

337. According to Goode the difference was very clear. In his example if the seller wanted to enforce the contract the other party could not raise the absence of a licence as a defence since such absence was due to its own interference; at the same time however the seller could not get specific performance since the delivery of the goods in the absence of a licence was prohibited by law, and could only claim damages.

338. According to Finn “may not rely on” simply meant “may not assert against the other party” and implied the same type of reasoning that lay behind the doctrine of estoppel.

339. Brödermann first of all pointed out that in practice the distinction between a licence requirement imposed by law and one merely stipulated by the parties was not always absolutely clear. Indeed since parties often do not know exactly in advance which countries’ licence requirements will actually become relevant, they may decide to mention all of them in their contract. Furthermore he recalled that with respect to State contracts the situation often arose where it was very much up to the State involved whether a certain condition occurred or not. It was for that reason that in practice the foreign party often insists on the inclusion in the contract of wording such as “we need the necessary visa and working permits for people flying into the country, etc.”.

340. In introducing Article 4 Fauvarque-Cosson pointed out that a similar provision could be found in some domestic codifications while opinions within the Group had so far been divided. She personally would be in favour of having such a provision dealing with the situation *pendente condicione* but thought it advisable to refer in the Comments to arguments in favour as well as against the provision.

341. Widmer, though thinking that the rule was implicit in the general principle of good faith as laid down in Article 1.7 of the Principles, was in favour of keeping the article if only for pedagogical reasons.

342. Gabriel had a slight preference for deleting the article which in his view laid down a rule already implicit in Article 3.

343. Asking for further comments, Bonell urged in particular the practitioners present to express their views as to the provision’s practical usefulness.

344. According to Raeschke-Kessler the provision was useful in view of the fact that common law systems would not necessarily infer such a rule from the general principles of good faith.

345. Brödermann too was in favour but suggested adding “unless otherwise agreed” in order to take into account those cases in which parties have special reasons for not being bound by such a rule during the period in which the condition was pending.

346. Goode was in favour of deleting the provision. He thought that at least with respect to resolutive conditions the rule was absolutely inappropriate as shown by the example given in the Comments which after all in his view was entirely unrealistic. Indeed first of all the parties would normally expressly stipulate the possibility of repurchase in

certain eventualities. Second, he was worried by the very idea that a party that had acquired property has to treat the property as only conditionally belonging to it because if the subsequent condition occurs it has to be prepared to give the property back to the other party in the same condition as it was at the time of purchase.

347. Alpa on the contrary strongly supported Article 4 and pointed out that while Article 3 was devoted to the occurrence or non-occurrence of a condition, Article 4 addressed the issue of the parties' rights while the condition was pending.

348. Crépeau agreed.

349. Fontaine too was in favour of having such a rule but, like Goode, thought that perhaps a distinction should be made between suspensive and resolutive conditions. The proposed rule was all right with respect to the former since in most cases they could be expected to occur or not to occur within a relatively short period of time. On the contrary resolutive conditions may occur only years later so that it would not be fair to prevent the party from enjoying all the benefits of the contract and to oblige it always to have in mind the interests of the other party.

350. Komarov supported the proposed article if only for pedagogical reasons.

351. Finn agreed with Goode that while the proposed article was a perfectly appropriate default rule for suspensive conditions, it was exactly the opposite for resolutive conditions. He thought that if the article was kept the two situations should be dealt with differently. Moreover he criticised the example as it did not relate to international commercial contracts at all and felt that appropriate examples could be found particularly in the context of long term contracts, e.g. in the intellectual property area, licensing of trademarks, etc.

352. Furmston thought that the proposed provision was fine.

353. Schiavoni agreed and made the example of a lump sum turnkey contract which provided a certain tax benefit for the contractor on the condition that part of the construction be completed by a certain date. The condition could not be met by the contractor because of the owner's obstructive conduct. Under the proposed rule the contractor could recover at least part of the envisaged tax benefit.

354. Bonell noted that the provision had met with considerable criticism at least with respect to resolutive conditions which it was thought should be kept out. He asked Members to give a clear indication as to whether the provision should be kept and if so whether it should be restricted to suspensive conditions.

355. Hartkamp felt that Goode's criticism of the example given in the Comments was absolutely correct because in the case at hand the party was acting in perfect accordance with commercial standards. What was decisive for the purpose of Article 4 was that the party concerned did not act in good faith. He therefore suggested amending the article along the lines of the wording used in Article 3.

356. Date-Bah and Widmer agreed with Hartkamp.

357. Fontaine too supported Hartkamp's proposal. After all the new formula would make it possible to differentiate between suspensive and resolutive conditions and this should be expressly stated in the Comments.

358. Goode on the contrary thought Hartkamp's suggested amendment would not solve the problem. Indeed, what precisely did the reference to good faith in this context mean? One buys an asset which in certain circumstances may revert to the transferor. Now, would one be acting in good faith or not if one changed the asset, improved it, or modified it? If good faith meant that one would have to take account of the fact that the property may have to be returned, then the conclusion would be that actually one could not fully exercise the acquired rights unless one was prepared to undo everything and restore the property to its original condition.

359. In the light of the discussion, Gabriel was increasingly inclined to delete the provision but this not for reservations as to the basic idea underlying it. Rather he thought that the rule was implicit in the general duty to act in good faith as laid down in Article 1.7.

360. Brödermann pointed out that in practice there were a number of cases where a provision of the kind proposed in Article 4 would be very useful. He mentioned in particular cases where companies were sold whether under a suspensive or a resolutive condition and either the old management continued to operate or the new management started to operate as if the transfer was not subject to any condition at all. While under certain circumstances and within certain limits this was perfectly reasonable and therefore accepted by the other party, under other circumstances or beyond certain limits, it would be unjustified and therefore unacceptable to the other party. He therefore suggested keeping the provision but adding a proviso such as "unless the circumstances in due consideration of good faith indicate otherwise".

361. Hartkamp reiterated his proposal to amend the provision so as to read "Pending fulfilment of the condition a party shall not act contrary to the duty of good faith so as to prejudice the other party".

362. Finn on the contrary preferred deleting the provision the exact effects of which with respect to intellectual property licensing agreements were still unclear to him.

363. Goode proposed to put the provision in square brackets and asked the Rapporteur to produce practical examples of international commercial contracts where one could see the effects of the rule.

364. In summing up the discussion Bonell noted that, though rather strong reservations had been expressed by some members, a substantial majority was in favour of the provision. At the same time however there was wide support for the proposal put forward by Hartkamp to amend the present wording. There was also a general request to include practical examples relating to international commercial contracts in the Comments.

365. Asked by Bonell whether she was prepared to do so, Fauvarque-Cosson agreed.

366. Fauvarque-Cosson reminded the Group that a decision still had to be taken concerning restitution in case of occurrence of a resolutive condition. She could think of three possible approaches: the first was to refer in the chapter on conditional obligations to Article 1 of the draft on restitution prepared by Zimmermann (see above paragraph 111); the

second was to refer to Article 2 with a cross reference to Article 1; the third was to draft a separate rule modelled on Zimmermann's draft.

367. Bonell thought that the drafting of a separate rule was preferable to a mere reference to Zimmermann's draft if only because the latter had not yet been finalised. Also with respect to the chapter on illegality it had been decided to include separate rules on restitution. If the same approach were to be taken with respect to the chapter on conditional obligations the Group would eventually be in a position to decide whether to deal with restitution in every pertinent chapter or to have a unitary set of rules.

368. Chappuis agreed with Bonell and noted that with respect to the case where the parties have stipulated the retroactive effect of the resolutive condition the rule laid down in Article 2(2) of Zimmermann's draft might not be suitable.

369. In closing the discussion Bonell thanked Fauvarque-Cosson for her most valuable contribution which had permitted the Group to make considerable progress.

IV. EXAMINATION OF THE DRAFT CHAPTER ON PLURALITY OF OBLIGORS AND/OR OBLIGES (UNIDROIT 2008 - Study L – Doc. 107)

370. Bonell then called on Fontaine, Rapporteur on Plurality of Obligors and/or Obligees, to present his draft Chapter.

371. In introducing his draft chapter Fontaine pointed out that the draft provisions had been drafted in the light of the Group's previous discussions on the topic of plurality of obligors and/or of obligees. As to the Commentaries accompanying the provisions, their purpose was merely to introduce the discussion while the final Comments would be prepared only on the occasion of a revised draft to be discussed at the Group's session next year. With respect to Article 1(1) it contained the definitions of joint and several obligations and of separate obligations. He drew attention in particular to the opening sentence where the formula "undertake the same obligation" had been used so as to make it clear that the obligation, though normally arising from one and the same contract, could also originate in different contracts.

372. Crépeau wondered whether "joint and several" was the equivalent of the French "obligation solidaire".

373. Fontaine confirmed that the French text would read "solidaire" but this did not mean that the Principles would be adopting the regime of "obligation solidaire" as known in French or Quebec law.

374. Dessemontet wondered whether the case where a third person assumes one party's obligations was one of the exceptions referred to in paragraph 7 of the Commentary.

375. Fontaine confirmed and announced that this would be indicated in the Comments.

376. Bonell thought that in so doing the Comments should also refer to Articles 9.2.1 et seq. dealing with transfer of obligations.

377. With respect to Article 1.2 Fontaine recalled that the presumption it laid down had been generally accepted by the Group on the assumption that the Principles were dealing with commercial contracts.

378. Crépeau raised two questions of terminology. First of all he thought one should distinguish between obligation and liability, as the latter arose only where the former was not fulfilled, and therefore suggested replacing the words “jointly and severally liable” with the words “jointly and severally bound”. Secondly he wondered whether the word “deemed” implied an absolute presumption and should therefore be replaced by “presumed” which implied a rebuttable presumption.

379. Gabriel and Furmston agreed with Crépeau that “liable” and “bound” were two different notions and that thought should be given to replacing the former in the draft.

380. Goode thought that one possibility would be to say “shall be deemed to be under a joint and several duty” or “under a joint and several duty to perform” but one could also simply use the word “bound”.

381. Bonell noted that both PECL and the DCFR used “bound”.

382. Fontaine agreed with the proposal to replace “liable” with “bound” and suggested replacing in the title “liability” with “obligations”.

383. With respect to Crépeau’s second point Furmston agreed that “deemed” should be replaced with “presumed” since “deemed” had somewhat special connotations since it is used to consider or assume that a thing has the attributes or qualities of something else. After all also the title used the notion of presumption.

384. In introducing Article 1.3 Fontaine pointed out that it laid down the effects of joint and several obligations as to the relationship between the obligee and the obligors.

385. Finn thought that to speak of “several obligors” was a tautology and that it was sufficient to speak of “obligors”.

386. Goode wondered whether it would be useful to say in the second line “from any one or more of them” in order to avoid the implication that the obligee could require the performance only from one of the obligors and not also from more than one of them.

387. Fauvarque-Cosson wondered what the distinction between “the whole performance” and “full performance” was.

388. Fontaine agreed with Goode’s suggestion. As to Fauvarque-Cosson’s remark he was not opposed to using in both places either “the whole” or “full”.

389. Bonell noted that in the DCFR the corresponding provision read “... may require performance from any of them until full performance has been received”.

390. It was agreed to use the same language in Article 1.3.

391. Crépeau asked whether “liable” would be replaced by “bound”.

392. Bonell confirmed.

393. Passing on to Article 1.4 Fontaine pointed out that this was the first provision dealing with defences and laid down the general rule.

394. Fauvarque-Cosson wondered whether there was a difference between “personal” and “purely personal” defences.

395. Fontaine said there was not and offered to delete “purely” in the second part of the provision.

396. It was so agreed.

397. With respect to Article 1.5 Fontaine recalled that originally the provision had also referred to merger of obligations – *confusion* – between one of the obligors and the obligee but since the Principles do not have rules on merger of obligations, it had been deleted. He would mention the situation in the Comments and explain it.

398. Uchida wondered whether one joint and several obligor could invoke the other co-obligors’ right of set-off as the provision was silent on this matter.

399. Fontaine drew attention to Article 1.4 which expressly addresses the issue.

400. Finn asked why Article 1.5 also mentioned set-off by the obligee. He could not think of a case where an obligee would raise a set-off against an obligor.

401. Goode pointed out that the whole article dealt with cases where one of the obligors dropped out of the picture. This could occur because one of the obligors asserts a right of set-off against the obligee but also the other way around, i.e because one of the obligors sues the obligee on another undertaking and the obligee asserts a right of set-off.

402. In introducing Article 1.6 and Article 1.7, Fontaine recalled that the issues of release and settlement were the subject of a particularly lengthy discussion at previous sessions. Contrary to the approach taken in PECL (Article 10:108), the Group thought that the two cases should be distinguished and subject to different rules. With respect to release Article 1.6 provided for three variants: release of one obligor fully releases all the others; release of one obligor releases the other for the share of the released obligor; release of one obligor has no effects on the others’ obligations. Supposing an obligee has three obligors A, B and C who are jointly and severally bound for 300 and their respective shares are one hundred each. So A, B and C owe 300 jointly and severally to X but the internal shares are one hundred each. According to Variant 1 – which is the solution adopted in the French and Belgian codes - if X discharges A, also B and C are discharged unless it reserves its rights against B and C each of which would still be jointly and severally bound for 200 (300 less 100). According to Variant 2 – which was the solution adopted in PECL and the DCFR - B and C would be discharged for the share of A (100) and remain jointly and severally bound for 200. According to Variant 3 – which is inspired by the Dutch civil code - B and C would still be jointly and severally bound for 300. All three variants were of course mere default rules which did not prevent the parties from providing otherwise.

403. Bonell asked Fontaine which variant he preferred.

404. Fontaine expressed a slight preference for Variant 2 because it was adopted in PECL and the DCFR.

405. Widmer agreed.

406. Also Goode was in favour of Variant 2 since in Variant 3 the risk of insolvency of the released obligor fell on the other obligors.

407. Gama was also in favour of Variant 2 because it provided a more equitable solution than Variant 3 which aggravates the position of the remaining obligors, and at the same time, contrary to Variant 1, also provided an incentive for release.

408. Gabriel, recalling that all three variants had been adopted in one or another State of the Union, expressed his preference for Variant 2 which he considered the better rule. In any case in his view the really important issue in commercial life was not release but settlement which was dealt with in Article 1.7.

409. Fauvarque-Cosson found Variant 1 more in line with the philosophy underlying “joint and several” obligations. If the obligee may require the whole performance from any of the obligors it was logical that also the release of one of the joint and several obligors discharges all the others.

410. Uchida was in favour of Variant 3 because under Variant 3 the obligee, if it so wanted, could still get the result provided for in Variants 1 and 2 while under Variant 1 and 2 the obligee could not achieve the result of Variant 3.

411. Komarov supported Variant 2 but found the formula “unless the obligee intends to release them totally” very unclear. Should such an intention be express or could it also be an implied intention?

412. Dessemontet too found the reference to a different intention in paragraph 1 of Variant 2 too vague and wondered whether one should not say something like “having served notice to the effect that”.

413. Finn suggested deleting these words thereby prompting the obligee to express clearly any intention to derogate from the rule laid down in paragraph 1.

414. Goode agreed.

415. Bonell, noting that there was a clear majority for Variant 2, asked Fontaine whether he would agree to delete the last sentence in paragraph 1.

416. Fontaine confirmed.

417. Bonell stated that the Group had decided in favour of Variant 2 with the deletion of the last sentence in paragraph 1.

418. In introducing Article 1.7 Fontaine recalled that PECL and the DCFR submit settlement to the same rules provided for release (see Articles 10:108 PECL and Article III.-4:109 DCFR). Such approach had been rejected by the Group on the ground that settlement was different from release: by granting a settlement reducing the share of one obligor, the obligee has accepted to waive its claim for the full amount of the settling obligor’s share so that it would be unfair that the other obligors would remain bound to pay that amount as part of the joint and several obligation. By stating that in case of settlement the other obligors’ joint and several obligations are reduced by the full initial amount of the settling obligor’s share and that the other obligors have no more contributory claim against the

settling obligor, Article 1.7 was the adaptation to settlement of Variant 2 of Article 1.6 concerning release.

419. Finn found it odd to talk about settlement of a matter that relates to the internal relations of the parties. As far as the obligee is concerned the obligors have no shares but are liable for the whole amount which in the example given was 300. In practice the obligee will sue one of the obligors for the whole amount and if it turned out to be convenient for the obligee, it might decide to settle for say 50%, i.e. for 150.

420. Goode thought this might be a drafting point and that one could replace in the opening sentence of Article 1.7 the words “reducing the share of one obligor” with “reducing the liability of one obligor”. As to the substance of the Article he thought that it was perfectly in line with Variant 2 of Article 1.6 in so far as it first stated the effect of one obligor’s settlement on the other obligors vis-à-vis the obligee and then excluded any contributory claim by the other obligors vis-à-vis the settling obligor.

421. Brödermann supported the rule and its underlying principle that a settlement with one co-obligor should not put the other co-obligors in a position different from that in which they would be if the settling obligor had paid the full debt and there was no partial release.

422. Bonell found it somewhat difficult to follow the discussion. He would have thought Article 1.7 somehow paralleled Article 1.6 in so far as it addressed settlement between the obligee and one of the obligors concerning that obligor’s share. But now Finn made the example of a settlement for the whole amount of the joint and several obligation. He asked Fontaine whether this latter situation was also covered by the proposed provision.

423. Fontaine confirmed that when drafting the provision he was thinking only of the first situation mentioned by Bonell.

424. Brödermann supported the provision as it stood and gave the following example: A from country A and B from country B are joint and several obligors towards X for an amount of 100 out of a service or delivery contract. B is close to bankruptcy and wants to settle with all his obligees, but the only way to get its production company running or to get another investor to put its money into it was to offer to pay each of the obligees 10% of their claims. This would mean that with respect to the joint and several obligation of 100, B would pay 10. However if B settles for this amount with X, it wants to avoid the risk that later A would be able to take more money from it and this was achieved by the rule laid down in Article 1.7.

425. Fontaine mentioned that a recent decision of the Swiss Federal Tribunal of February 2007, brought to his attention by Chappuis, dealt with a similar case: one of the obligors which went bankrupt had a settlement with the obligee and the issue was whether the obligations of the other obligors would be increased by the unpaid amount and whether they would then have a recourse against the settling obligor thereby depriving the latter of the benefit of the settlement.

426. Goode, like Finn, thought that it was the second type of situation which in practice was most frequent. Indeed when one speaks of settlement between the obligee and one of the joint and several obligors one may assume that it relates to the full amount of the obligation because by definition the obligee is entitled to claim from each obligor the full amount. This being so he agreed with Finn that the word “share” was causing the problem because it referred to a situation that was not going to be the typical case. What was needed

was a rule dealing with the reduction of the full amount of an obligor's liability as well as with the consequences of that vis-à-vis the other obligors.

427. Hartkamp noted that it was precisely to avoid all these problems that the Dutch Civil Code took the position that was in Variant 3, i.e. that the obligee has nothing to do with the internal relationships between all the obligors. The obligee has only to do with each obligor separately.

428. Date-Bah, like Finn and Goode, felt that the situation envisaged by Article 1.7 was not necessarily very illustrative of joint and several liability.

429. Gabriel, though admitting that in case of a joint and several liability everybody's share by definition is 100%, recalled that in his country courts nevertheless normally assumed that if there are several obligors each one has a pro rata obligation, e.g. if there are three obligors each is going to pay a third.

430. According to Goode the notion of "share" was used in two different senses. In the opening phrase of Article 1.7, it could not but refer to the total amount of the joint and several obligation since this was the amount which the obligee could claim from any single obligor, while in the sentence under lit. a) reference was definitely made to the shares as between the obligors. He suggested no longer using the word "share" in the opening phrase.

431. Fontaine pointed out that when drafting Article 1.6 and Article 1.7 he had thought of situations where the obligee was aware of the share of the obligor with which it was dealing and it was releasing or settling with the obligor for that share. In this context he drew attention to paragraph 34 of his Commentary where he had expressed the opinion that in cases where the settlement concerned the whole obligation the settlement could only be effective vis-à-vis the obligors which have agreed to it – for an express provision to this effect he referred to Article 1304 of the Italian Civil Code - but since this was only too obvious he did not think that it deserved a special rule.

432. Goode insisted: if there were three obligors jointly and severally liable for 100, the obligee will negotiate a settlement with one of them necessarily for the whole amount of the obligation and not only for one third. A settlement only reducing the share of one obligor was a quite unrealistic example.

433. Furmston wondered whether it was intended to impose any limitation on what the parties could agree? In his view there was no policy reason for restricting the parties' ability to agree whatever they liked. The obligee's objective was clearly to get as much money out of one obligor as possible without impairing its claim against the other two. Why should the obligee not be allowed to do that if it made its position clear.

434. Hartkamp thought that a default rule could only be envisaged with respect to the two parties negotiating the settlement, while as soon as one touches upon the relationships between one of these two and the other obligors, then a substantive rule was necessary. This was precisely Brödermann's point: in his case the settling obligor wanted to get rid not only of its debt vis-à-vis the obligee but to have at the same time a release in the internal relationship with the other obligor. And here lay the problem.

435. Furmston insisted: in the case of three obligors jointly and severally liable for 300, if the obligee was negotiating with one of the obligors and came to the conclusion that it was not going to be able to get out of that obligor more than 50, why should the obligee

not be permitted to take 50 against the promise not to sue that obligor in the future? As long as the obligee did not make any statements about whether the debt had been extinguished, why should the settlement with the first obligor prevent the obligee from seeking to collect the outstanding 250 from the other two.

436. Brödermann thought that here the principle of freedom of contract clearly interacted with the principle of good faith. If the obligee and the first obligor settled for 50 instead of 100 the obligee should not be entitled to get from the other two obligors 250 because this would mean that the latter, because of the settlement, were put in a worse position than they were in before the settlement. In the example he gave X settled with A for 10 out of 100 and accepted that B's obligation was reduced to 50 because this was A's initial share.

437. Finn proposed amending the opening sentence of Article 1.7 so as to read: "If the obligee enters into a settlement with an obligor on its obligation which is for an amount less than that obligor's share of its obligation as between the obligors, (a); (b)".

438. Fauvarque-Cosson pointed out that they were clearly discussing two different situations and Fontaine had already offered to deal with them separately. The first situation was that envisaged by Article 1.7 and the second situation was that described by Finn which should be addressed in a new provision. With respect to the situation envisaged by Article 1.7, she wondered whether it should not be spelt out that in order to reach the solution therein provided for there must be a waiver by the obligee of the other obligors' joint and several liability.

439. In trying to sum up the discussion Bonell said there seemed to be general agreement on the fact that Article 1.7 did not cover the so-called Finn situation, i.e. a settlement between the obligee and one obligor on the whole amount of the joint and several obligation. With respect to this situation the Rapporteur had pointed out that the rule should be that such a settlement can only be effective vis-à-vis the other obligors if they agree. He wondered whether the Group shared this view.

440. Goode objected and pointed out that if the obligee could grant an entire release of one obligor from the whole obligation without the consent of the other obligors, then the same obligee should clearly also be entitled to negotiate a settlement for the whole obligation with one obligor without affecting its rights against the other obligors. As to Article 1.7, it dealt with the fairly exceptional situation where the obligee grants a settlement reducing the liability of one obligor to an amount below that obligor's share of its obligation as between the obligors, and with respect to this situation he supported present Article 1.7 with the amendment suggested by Finn.

441. In the light of the discussion which he thought quite difficult to follow, Hartkamp wondered whether it would not be preferable not to deal with settlement at all in this chapter.

442. Bonell, noting that Article 1.7 had met with sufficient support subject to the amendment suggested by Finn, wondered whether Fontaine was prepared to redraft the provision along the lines suggested by Finn.

443. Fontaine promised that he would give serious consideration to the matter.

444. Asked by Bonell to move on in presenting his draft, Fontaine drew the Group's attention to the question as to whether to envisage a separate rule on waiver of joint and several liability. For the reasons laid down in paragraphs 38-41, he personally thought that no such provision should be included in the draft.

445. Noting that nobody spoke in favour of such a provision Bonell concluded that the Group agreed with the Rapporteur's conclusion.

446. Moving on to Article 1.8 and Article 1.9, Fontaine noted that also these two provisions concerned defences or similar problems. Article 1.8 on the effect of the expiration of the limitation period of the obligee's right against one joint and several obligor provided that it did not affect the obligee's right vis-à-vis the other obligors nor the latter's rights of recourse. This corresponded to the solution adopted in both PECL and DCFR. Also Article 1.9 on the effect of judgments had its counterpart in those latter instruments.

447. Noting that nobody objected, Bonell concluded that the two articles had been carried.

448. Fauvarque-Cosson wondered whether Article 1.8 should not also address the effects of the interaction and suspension of the limitation period.

449. Bonell noted that indeed the two issues were addressed in the corresponding provision of the Italian Civil Code (Article 1310).

450. Fontaine confirmed that also the Belgian Civil Code adopted a similar approach and announced that if the Group so wished he could prepare a draft rule to this effect.

451. It was so agreed.

452. Fontaine then drew attention to paragraphs 46 and 47 of his Commentary in which he had explained the reasons why he thought it not advisable to deal with either the death of an obligor or the winding up or splitting of a company.

453. Again the Group agreed with the Rapporteur's conclusion.

454. Passing on to Article 1.10, Fontaine explained that it dealt with the internal relationship between the jointly and severally bound obligors and that it corresponded in substance to Article 10:105 PECL and Article III.-4:106(1) DCFR.

455. Gabriel suggested that the Comments to Articles 106 and 107 should contain a reference to Article 1.10.

456. Fauvarque-Cosson asked whether the word "liable" in the two articles would be replaced by "bound".

457. Fontaine confirmed.

458. Bonell thought that the use of the word "liability" might be justified in the context of Article 1.9.

459. Komarov supported the rule in the context of monetary obligations but wondered whether in case of non-monetary obligations it was appropriate to adopt as a default rule the rule that it should be performed in equal parts.

460. Fontaine pointed out that in some cases, e.g. an obligation to deliver a certain quantity of wheat, the rule was appropriate but he agreed with Komarov that in other instances it was not, in which case the exception “unless the circumstances indicate otherwise” would come into play.

461. Goode thought that at the end of the day non-monetary liabilities would anyway get converted into monetary liabilities. In other words one of the obligors will perform the whole obligation and then claim compensation from the others.

462. Fontaine drew attention to paragraph 50 of his Commentary dealing with another situation which would fall under the proviso “unless the circumstances indicate otherwise”, i.e. the case where a person had accepted to become jointly and severally bound with another not because it had itself an interest in the obligation but in order to provide security for the “main” obligor’s obligation. He announced that he would give further thought to this situation and possibly include a special rule on it in the revised draft.

463. With respect to Article 1.11, Fontaine pointed out that it laid down a generally accepted rule.

464. Goode suggested replacing here also the formula “from any of the other obligors” with “from all or any of the other obligors”.

465. Passing on to Article 1.12, Fontaine pointed out that it laid down a rule which had its corresponding provision in Articles 10:106(2) PECL and III.–4:107(2) DCFR and had not given rise to much discussion at the Group’s session last year.

466. Date-Bah questioned what was meant by “actions”.

467. Fontaine said he had taken it from both PECL and the DCFR and confessed that he himself was not so sure why the two instruments used that term.

468. In view of the fact that nobody expressed support for referring in the provision also to “actions”, it was decided to delete the reference.

469. Goode wondered whether the provision would apply also where the full obligation has not yet been discharged. If so he would have problems with the provision.

470. Dessemontet had the same reservation as Goode. In other words he too felt that according to the well known principle *nemo subrogat contra se* it should be made clear that the transfer of the security rights from the obligee to the paying obligor should occur only where the whole amount has been paid.

471. Hartkamp recalled that at least in the German and the Dutch codes the principle *nemo subrogat contra se* has been replaced by the more flexible rule according to which in the case that the original obligee has not yet been paid in full then the subrogation works *pro parte* of the claims.

472. Fontaine felt that the question should not be dealt with in the black letter rules but that it would be sufficient to explain in the Comments that of course if the obligee has been only paid in part it retains its rights for the unpaid part.

473. Goode objected that at least in English law there could be no subrogation at all until the obligation has been fulfilled in its entirety.

474. Garro asked Goode whether he did not think that the other solution was commercially more practical. Supposing a security interest on an asset is valued at 100 and the obligor has paid 30, why should that obligor not be subrogated in the obligee's security interest up to 30% of the asset?

475. Goode reiterated that in his view the obligee should retain the entire security until it has received full payment of the secured obligation.

476. Hartkamp objected that if the obligee has received partial payment, there was no reason why it should retain the security right for the whole lot.

477. Furmston agreed with Goode and recalled that this was exactly what happens in case of a mortgage on a house where the obligor pays every month thereby reducing its debt, but the security remains exactly the same, the reason being that the value of the house may vary in the course of time to the detriment of the obligee.

478. Finn agreed with Goode and Furmston. In his view too the solution suggested by the Rapporteur and others seemed to impose an obligation on the obligee which may indeed raise questions of evaluation of the security.

479. Bonell asked Goode what he actually suggested with respect to Article 1.12. Did he propose deleting the whole article?

480. Goode said that he would not go that far but simply wanted to delete the words "including accessory securities".

481. Furmston hesitated to follow Goode's proposal since he wondered what would be left of the provision if the reference to security rights were to be deleted.

482. Dessemontet, on the contrary, preferred to keep the provision as it stood but to make it clear that it would not apply whenever in a given case it would ultimately be detrimental to the obligee.

483. Finn wondered whether there was any objection to put the words "when the obligee has been paid in full" at the beginning of Article 1.12.

484. Gabriel in principle agreed with Finn's proposal but preferred more flexible language stating, for instance, that the rule laid down in Article 1.12 applied only to the extent that the obligee is not harmed.

485. Hartkamp pointed out that the solution he and others proposed would in no case harm the obligee.

486. Goode and Date-Bah thought that Gabriel's formula was too vague in view of the fact that in practice only at the time the assets were realised one knew whether there was a prejudice or not.

487. Fontaine first of all expressed his surprise to hear such a heated debate over a provision which was not only contained in both PECL and the DCFR but had not given rise to much controversy within the Group at its session last year. On the other hand he thought that the discussion had shown that the provision needed amending and he had a slight preference for Finn's proposal since Gabriel's formula could give rise to considerable uncertainty particularly in doubtful cases.

488. Dessemontet felt that by restricting the operation of the provision to cases where the obligation has been paid 100% its scope was extremely limited since in practice payment of only part of the amount due was the rule. He therefore still preferred Gabriel's formula.

489. Widmer suggested a third formulation which had been adopted in both PECL (Article 10:106(2)) and the DCFR (Article III.-4:107(2)) stating that a joint and several obligor who has paid more than its share may also exercise the obligee's rights including accessory securities "subject to any prior right and interest of the creditor".

490. Crépeau and Garro supported this proposal.

491. Finn no longer insisted on his original proposal and was prepared to support Gabriel's formula.

492. Goode proposed that the Rapporteur prepare for the Group's next session draft provisions reflecting all the solutions that had been suggested, i.e. to limit the operation of the provision to the case where the obligation has been paid in full, to make it subject to any prior right and interest of the obligee, to make it subject to the condition that it does not harm the obligee, and finally not to have any provision at all.

493. Bonell thought it only too fair in addition to propose keeping the provision as it stood since there had been also though only silent support for it.

494. Fontaine agreed.

495. In introducing Article 1.13 Fontaine recalled that the provision, inspired by Article 10/11(4) of the OHADA draft, itself inspired by Article 1539 of the Quebec Civil Code, had not met with any criticism at the Group's last session.

496. Bonell, noting that there were no objections to the provision, declared it adopted by the Group.

497. Passing on to Article 1.14 Fontaine pointed out that the principle therein laid down was generally accepted at domestic level.

498. Fauvarque-Cosson suggested not using the notion of insolvency in the title: after all the text quite rightly used a wider, more generic formula taking into account that the provision could well come into play also in other situations of inability to recover the contribution from another joint and several obligor, i.e. where that obligor simply disappears or has its assets concentrated in a country where it was practically impossible to sue it.

499. Furmston agreed.

500. Gabriel on the contrary favoured amending the text so as to restrict the scope of the provision to insolvency. In its present wording the provision could well overlap with Article 1.8 of the draft because the expiration of the limitation period was yet another instance where the paying obligor could not recover contribution from another obligor.

501. Fauvarque-Cosson recalled that also the *Avant-projet Català* referred only to insolvability.

502. Goode and Chappuis supported the text as it stood and suggested replacing in the title the word “insolvency” with “inability to recover”.

503. Perales Viscasillas agreed.

504. Bonell asked Fontaine whether he was prepared to follow the majority view and change the title accordingly.

505. Fontaine agreed.

506. Dessemontet wondered whether “reasonable efforts” covered also a settlement between the two co-obligors. If so one should mention it in the Comments and make sure that there is no inconsistency with Article 1.7.

507. Fontaine agreed.

508. Passing on to Section 2 on Plurality of Obligees, Fontaine recalled the lengthy discussion the Group had at its previous sessions as to whether to follow the approach he had taken, i.e. to treat the provisions on plurality of obligees in the traditional manner as the mirror image of the provisions on plurality of obligors, or to adopt the approach taken by the Dutch Civil Code and supported by Zimmermann on the basis of a recent comparative research project carried out by Dr. Sonja Meier. He was still proposing the first approach, also in view of the fact that Hartkamp had reminded the Group that the alternative approach adopted by the Dutch Civil Code had not proved satisfactory.

509. In introducing Article 2.1 and Article 2.2 Fontaine pointed out that in Article 2.1 the only novelty concerned the addition of the category of “joint claims”, i.e. where the obligor must perform to all obligees together, which the Group so far had not yet discussed. According to recent empirical studies this category of claims was the most frequent in practice - for instance where the obligees open a common account in which the obligor has to pay – and for this reason Article 2.2 provided a presumption in favour of it.

510. Bonell noted that, contrary to the corresponding provision in Article 1.1, in Article 2.1 the most important category of claims was placed at the end of the list rather than at the beginning.

511. Fontaine replied that this was unintentional and announced that he would invert the order.

512. Widmer supported the inclusion of the category of “joint claims” but did not like the way in which the three categories of claims were presented in Article 2.1. Indeed while

the first two were defined from the perspective of the obligees, the third was defined from the perspective of the obligor.

513. Fauvarque-Cosson also raised a drafting point. In the light of the decision taken to replace in Section 1 the word “liable” with “bound”, she wondered whether in Section 2 it was not preferable to replace “claims” with “rights” so that for instance no. 1 would read “the rights are separate when each obligee can only claim its share”.

514. Gabriel agreed.

515. Fontaine said that he would try to redraft the Section along these lines although he was not sure that it would be an easy task.

516. With respect to Article 2.2 Crépeau reminded to replace the words “are deemed” with “are presumed”.

517. Passing on to the subsequent articles, Fontaine recalled that as a consequence of the re-ordering of the list in Article 2.1 the present Articles 2.5 and 2.6 would become Articles 2.3 and 2.4 respectively and the present Articles 2.3 and 2.4 would become Articles 2.5 and 2.6 respectively. However he suggested discussing the articles in their present form.

518. With respect to Article 2.3 Fontaine recalled that there had been general consensus as to its content.

519. Bonell wondered why in paragraph 3 the words “has been sued” were used. Did they mean that legal proceedings had to be commenced – but if this was the case it would be the first time in the Principles that such a condition would be required – or was it sufficient that the obligee claims even only in an informal manner payment by the obligor?

520. Fontaine said that the first meaning was the correct one.

521. Finn wondered whether it was sufficient that a legal proceeding had started or whether a final judgment had to be handed down.

522. Fontaine said that the first meaning was the correct one.

523. Goode suggested making this clear by amending the text so as to read: “when proceedings have been commenced”.

524. Crépeau did not understand the reason why it should not be sufficient that a request for payment be made.

525. Fontaine explained that only the commencement of legal proceedings created a clear cut situation while before that point in time several of the obligees may try to get the performance from the obligor thereby creating a situation of considerable confusion and uncertainty as to the different initiatives taken.

526. Furmston asked whether he was correct in assuming that at the beginning the obligor could pay any one of the obligees and if all of them were asking to be paid, the obligor would have a choice to pay any one of them, while the situation would be different if one of the obligees starts legal proceedings. And what if two of them start legal proceedings at the same time?

527. Fauvarque-Cosson thought the rule useful but in order to make the policy behind it clear suggested starting the provision by setting out the principle so far only implied that the obligor can pay any one of the obligees until legal proceedings have commenced.

528. Crépeau and Gabriel agreed with Fauvarque-Cosson.

529. Zhang asked whether he was right to assume that if A, which owes a sum of money to banks B and C, does not want to pay B but only C, A can no longer pay C once B has commenced legal proceedings against it.

530. Fontaine confirmed that this was the intended result of the rule.

531. Date-Bah too had difficulty in understanding the rationale for the rule. Why should A be prevented from paying C only because B has commenced legal proceedings which after all may well take years before being concluded.

532. According to Garro the rationale of the rule was not so much to protect the joint and several obligees but rather to protect the obligor by making it clear that once one of the obligees has sued it, it has to pay that obligee. He wondered however whether for this purpose commencement of legal proceedings was necessary or whether a formal notification of a request to the obligor would not be sufficient.

533. Gama agreed with Garro.

534. Bonell recalled that in the context of assignment of rights Articles 9.1.10 and 9.1.11 considered sufficient for somewhat similar purposes the receipt of a "notice".

535. Finn thought that the requirement of a law suit was necessary in order to prevent undue temporizing.

536. Also Komarov supported the rule laid down in paragraph 3 and noted that if even after commencement of legal proceedings by one of the obligees the obligor was free to pay to another obligee, the court would have to end the proceedings because the obligation no longer existed while the first obligee would have to bear the costs of the proceedings it had commenced.

537. Fauvarque-Cosson confessed that the more she heard the more she began to doubt the merits of the proposed rule. Indeed since legal proceedings at least in some countries may well take years before coming to a conclusion, one might even think of a collusion between the obligor and the obligee which has commenced proceedings to the effect that the obligor would have to pay the obligation only years later.

538. Hartkamp too was not convinced of the merits of the proposed rule. He failed to understand why despite the fact that all of the obligees have the same position vis-à-vis the obligor, all of a sudden the position of one of them should be promoted just because it had commenced legal proceedings. He suggested deleting paragraph 3 altogether; after all neither PECL nor the DCFR contained a similar rule.

539. Dessemontet, on the contrary, supported the rule as it stood and thought that it was justified in view of a supposed advance consent of the obligees, much like the situation envisaged in Article 9.3.4.

540. Chappuis recalled that Article 150(3) of the Swiss Code of Obligations contained a similar rule but confessed that she had always failed to understand its full implications. Indeed, what precisely was the situation of the obligor after receiving a notice or anything else? Did it have to pay the notifying obligee or did it just lose its right to choose among the several obligees?

541. Goode too expressed increasing scepticism concerning the rule.

542. Furmston agreed and thought that if obligees had been listening to the discussion none of them would ever enter into a joint and several claims situation. He failed to understand why, if one starts with stating that the obligor is entitled to pay any one of the obligees and thereby discharges itself, should any one of the obligees be able to get ahead of the others. If in practice they knew of the proposed rule one may well assume that they would all rush to court one minute after the obligation becomes due.

543. In the light of the discussion, Gabriel too was in favour of deleting Article 2.3(3).

544. Harmathy saw some merit in the proposed provision since there was inevitably a conflict of interest among the several obligees which could only be solved by setting a precise time after which the obligor can no longer choose the obligee to which it wants to pay and this precise moment could only be established by requiring the commencement of legal proceedings.

545. Bonell asked the Rapporteur to comment on the different positions expressed during the discussion.

546. Fontaine first of all thought that by requiring only a notice to the obligor the purpose of the rule would hardly be achieved since such requirement would not provide sufficient certainty as to the precise moment after which the obligor has to pay that particular obligee. On the other hand he was also impressed by the argument that by requiring the commencement of a legal proceeding there was a risk of collusion between the obligor and the obligee suing it. In view of these shortcomings of both approaches he now tended to agree with those who favoured deletion of the provision. In any case he would make it clearer in the text that the obligor has the choice of performing in favour of any of the obligees.

547. Along these lines Fauvarque-Cosson proposed that the words "and the obligor may perform to any of the obligees" be added at the end of paragraph 1.

548. Dessemontet had difficulty in accepting the proposed approach. He made the example of one of the obligees commencing costly arbitration proceedings to receive payment from the obligor, and despite that the obligor paying another obligee. Under the proposed amended Article 2.3 the first obligee would have no way of recovering its costs.

549. Finn recalled that under the Principles there was a presumption in favour of joint rights, so that whenever several obligees choose a different regime such as that of joint and several rights, they must be prepared to accept the consequences of their choice. There was no reason whatsoever why the Principles should protect them from possible risks they may run under the particular regime chosen.

550. Goode agreed and suggested that the Comments explain that situations of conflicting initiatives by the obligees should be solved in accordance with the applicable rules of procedure.

551. Also Date-Bah was in favour of deleting paragraph 3 and thought that the problem of costs of legal proceedings commenced by one of the obligees and subsequently prematurely stopped because of the payment by the obligor to another obligee could be taken care of by an appropriate cost allocation.

552. Hartkamp felt that one would obviously expect an obligee intending to commence arbitration proceedings to consult with the other obligees beforehand in order to establish a common course of action and avoid unnecessary costs.

553. According to Garro the main purpose of paragraph 3 was to bring about certainty in the relationship between the obligees and the obligor. For this reason he was still in favour of the provision.

554. Bonell noted that, although a significant minority supported paragraph 3, the majority including the Rapporteur himself was in favour of deleting the paragraph.

555. It was so decided.

556. Passing on to Article 2.4 Fontaine recalled that the article corresponded basically to Article 10:205 PECL and had met with general support at the Group's session last year. However, in view of the fact that in the section on plurality of obligors there will be a new provision on settlement the reference to Article 1.7 in paragraph 3 might have to be reconsidered.

557. Zhang questioned the exact meaning of paragraph 2. He made the example of an obligor owing 300 to two joint and several obligees. If one of the obligees asks the obligor to pay 150 telling the obligor that it would be released for the remaining 150, what was exactly meant by stating that such release has no effect on the other obligees? Why should the obligor still be bound to the other obligee for the total amount?

558. Fontaine pointed out that the rule referred only to the case of a total release granted by one of the obligees and was not concerned with either partial release or settlement.

559. Goode agreed and found the rule perfectly logical. To admit that one obligee could release the obligor for the entire obligation would be unacceptable because it would mean that one obligee may unilaterally act to the detriment of the other obligees.

560. Fauvarque-Cosson wondered whether what was meant could not be made clearer by stating that a release granted to the obligor by one of the obligees extinguishes the claim or the obligation for that obligee only.

561. Goode saw some merit in this proposal.

562. Furmston felt that the matter was more complicated. He made the example of two obligees, who always act together, advancing the obligor £200. If one of the obligees tells the obligor that if it gives a lecture in Rome its obligation would be extinguished, a rule according to which if the obligor actually gives the lecture this would be effective to

extinguish the obligation as against both obligees would make perfect sense, but this was not the rule proposed in paragraph 3. Indeed, in his view at least, according to paragraph 3 as presently worded, the release granted by one of the obligees has no effect on the other obligees even where the releasing obligee declares that the obligor is released against all the obligees.

563. Fontaine confirmed.

564. Chappuis wondered whether it would clarify matters if the word “full” or “total” was added to the word “release”.

565. Fontaine thought the rule would be the same for partial release. Supposing one of the co-obligees tells the obligor that instead of 300 it only owes 200 to all the co-obligees, this would have no affect against the other obligees.

566. Hartkamp agreed with Fontaine and found that precisely for this reason it was conceptually very difficult to make a distinction between cases of partial release and cases of settlement and that as a consequence one should not treat as proposed now the settlement cases and the release cases in a different way.

567. Fontaine again recalled that the reference in paragraph 3 to Article 1.7 had still to be discussed when the new version of Article 1.7 was on the table and for that reason proposed postponing also any final decision on paragraph 2 until the same time where it could well be that the release cases could be dealt with in one and the same manner as the settlement cases.

568. Goode confessed that he was a bit lost. He had thought paragraph 2 dealt only with cases of full release and if this was so the rule made perfect sense. If however, as suggested by the Rapporteur himself, paragraph 2 equally applied to partial release, he agreed with Zhang and Hartkamp that one should reconsider the different treatment of the release cases and the settlement cases.

569. In closing the discussion Bonell suggested following the Rapporteur’s proposal to postpone a final decision on paragraph 2 and on the reference to Article 1.7 in paragraph 3 until the new version of that article has been adopted.

570. It was so agreed.

571. Passing on to Articles 2.5 and 2.6 which would eventually become Articles 2.3 and 2.4, Fontaine pointed out that contrary to the rules adopted in PECL (Article 10:201(3)) and the DCFR (Article III.-4:202(3)) according to which any obligee can require performance for the benefit of all of them, Article 2.5 provides that joint obligees have to sue – or maybe better said: have to claim performance - together unless the circumstances indicate otherwise.

572. Widmer wondered whether, in view of the definition provided in Article 2.1, the provision was needed at all.

573. Zhang questioned the meaning of “together”: was it intended to mean that the three obligees have to go to court together or can one of them act on behalf of the others?

574. Fontaine agreed that in practice it might well be that one obligee may have authority to act on behalf of the others but to this effect a special agreement was necessary in the absence of which the rule was that all the obligees have to act together.

575. Finn suggested mentioning in the Comments as examples of situations in which “the circumstances of the case indicate otherwise” also the case where it was just not possible to sue together, e.g. because one of the obligees could not be traced, a company is in administration, etc.

576. Fontaine agreed to give such examples in the Comments.

577. Uchida thought that where the co-obligees grant one of them the authority to sue on behalf of all of them legally speaking they were still suing together. He therefore questioned the need for the additional words “unless the circumstances of the case indicate otherwise”.

578. Bonell recalled Finn’s examples which in his view would anyhow justify the additional wording.

579. According to Gama the question of how and with what effects to confer an authority on one of the obligees to sue on behalf of all of them could only be answered in the light of the applicable rules of civil procedure. He also, like Widmer, felt that there was a sort of overlapping between Article 2.5 and the definition in Article 2.1.

580. Goode disagreed on this last remark since Article 2.1(3) simply says that performance must be given in favour of all obligees, whereas Article 2.5 is concerned with the question of how the claim is initiated. In other words what is intended is to make it clear that one obligee cannot claim full performance on behalf of all the obligees.

581. Widmer recalled that he had already proposed to change the definition in Article 2.1(3) so as to align it with the first and the second definitions. If this were to be done Article 2.1(3) would literally correspond to Article 2.5, unless of course the final wording “unless the circumstances of the case indicate otherwise” is kept in the latter.

582. Chappuis was not convinced that the present rule was the correct one and in this respect she referred to the cases indicated by Finn where the rule may lead to a deadlock. Moreover she wondered whether a rule of the kind of Article III.-4:205 DCFR dealing with the case where one of the obligees refuses to accept or is unable to receive was not needed in the Principles as well.

583. Replying to Widmer, Fontaine thought that for pedagogical reasons it was preferable to have the definition and the effects of joint claims spelt out in two separate provisions, all the more so since the latter provision contains some further qualifications not included in the former. On the contrary he agreed with Uchida’s remarks concerning the conferment of authority on one of the obligees and announced that he would provide other examples of situations where “the circumstances of the case indicate otherwise”. Finally, in reply to Chappuis, he admitted that he had not yet given sufficient thought to the advisability of including in the draft a rule of the kind contained in Article III.-4:205 DCFR and wondered what the Group’s views were.

584. Finn confessed that he had increasing sympathy for Chappuis’s point that the default rule as presently provided in Article 2.5 was not necessarily appropriate, particularly

if one thought that in an international setting the several obligees may well be situated far away from each other.

585. Bonell asked Fontaine to comment on Finn's intervention.

586. Fontaine stated that he was absolutely open-minded since in his view there was no great difference between the two default rules provided that they included the additional language "unless the circumstances of the case indicate otherwise".

587. According to Date-Bah it all depended on what the main concern of the provision was. In other words, if it was intended to make sure that there was sufficient prior consultation between the several obligees before action is taken by one of them, the rule should remain as it stands.

588. Dessemontet shared the growing concern against the present default rule. In his view the difference between joint and several creditorship and joint creditorship was something very difficult to explain to most businessmen and yet the draft proposed two entirely different default rules for the two types of co-creditorship. In practice the only relevant example of joint creditorship he could think of was the insurance clubs among maritime insurers.

589. Bonell asked Dessemontet whether he would therefore prefer not to envisage at all a separate category of so-called joint claims.

590. Dessemontet replied that the more he thought about it the more he felt that at least in commercial settings the rule should be that co-obligees be entitled to act individually even though to the benefit of the others and in this respect he gave the example of single shareholders or creditors of a corporation acting on behalf of all that corporation's shareholders and creditors against the directors who have not governed the corporation as they should have: they should be able to file such suits without having to get in advance the approval of all the shareholders and creditors.

591. Garro, noting that both supporters and opponents of the present default rule had invoked commercial practice in support of their arguments, wondered whether they were referring to different experiences and if so precisely what these experiences were.

592. Fontaine recalled the very interesting information about practice the Group had received from Chappuis on other issues and wondered whether a similar enquiry could be undertaken also with respect to the issue at stake. He recommended focussing in particular on trade sectors where plural obligees actually occur, such as bank consortiums, some insurance situations, etc. For the time being he would be prepared to reverse the default rule and state as PECL and DCFR do that any obligee may require performance though only for the benefit of all.

593. Bonell reminded that nobody in the room had greater familiarity with the insurance industry than the Rapporteur himself.

594. Harmathy offered to contact people in the banking and insurance sectors in his country which generally followed internationally established rules and practices.

595. For any inquiry to be successful Chappuis thought it indispensable to formulate precise questions which in her view only the Rapporteur was in a position to do.

596. Fontaine agreed that the questions have to be formulated in an as a-technical, non-conceptualist manner as possible, e.g. when there are several obligees, how does it work? Who can sue? etc.

597. Gabriel thought that one could not exclude that in practice there was no sufficiently established general rules so that one would have to conclude that the Principles should not contain any default rule.

598. With respect to Article 2.6 Fontaine pointed out that it dealt with defences against joint claims and that it provided rules which, due to the very nature of joint claims, were much simpler and stricter than the corresponding rules for joint and several claims.

599. Dessemontet and Fauvarque-Cosson found it rather surprising that, though being in a somewhat weaker position than a joint and several obligee, a joint obligee is not subject to defences concerning the personal relationship between it and the obligor.

600. Fontaine explained that the reason why only defences common to all obligees may be asserted by the obligor was that a joint obligation is by its very nature a common obligation of all the joint obligees.

601. Widmer agreed with Fontaine provided that the announced enquiry amongst practitioners confirmed the presumption laid down in Article 2.2.

602. Zhang repeated with respect to Article 2.6(2) the critical remarks he had already made in connection with Article 2.4(2).

603. Chappuis and Fauvarque-Cosson recalled that also in Article 2.6(2) the language should be amended along the lines decided with respect to Article 2.4(2) so as to read "a release extinguishes the obligation for that obligee only".

604. Hartkamp on the contrary thought that the present language was absolutely correct since if a claim is joint one of the obligees can in no way dispose of the claim whether by release or whatever.

605. Widmer agreed but wondered whether it would not make matters clearer if the rule was expressed the other way around, i.e. that release can be granted to the obligor only by all joint obligees together.

606. Goode, while agreeing in principle with the last two speakers, found it a little strange that an obligee was not free to give up his own rights. One may call it an agreement not to sue instead of release but he saw no reason why an obligee should not be entitled to tell the obligor that it no longer wanted to be considered an obligee and therefore suggested adding at the end of the paragraph "has no effect on the other obligees".

607. Hartkamp objected that this would mean that joint obligations would be treated in the same way as joint and several obligations.

608. Bonell thought that this could be another argument in favour of deleting the whole category of joint obligations.

609. Hartkamp agreed and proposed deleting the category of joint obligations which introduced a form of co-ownership which in his view was out of place in the Principles and after all has proved unsatisfactory in Dutch law.

610. Garro asked Hartkamp to explain more fully what exactly did not work well in Dutch law with respect to joint obligations.

611. Hartkamp pointed out that in practice in large transactions there were bank consortia which wanted to give loans together but at the same time to be flexible, thus permitting individual banks to move in or to walk out all of the time; in addition normally securities are given to the banks but if their joint claims were to be construed in terms of co-ownership it is very difficult to handle the securities properly.

612. Bonell noted that there was increasing scepticism with respect to the category of joint obligations. However he proposed postponing a final decision whether to keep or not the category in the draft until the next session when the Rapporteur may present new draft rules in the light of the information in the meantime collected concerning actual practice.

613. Fontaine agreed on this course of action.

614. Moving on to Article 2.7, Fontaine pointed out that it laid down a generally accepted rule.

615. Goode supported the rule but thought it advisable to have as the opening words “as between themselves” in order to make it clear that the rule relates to the allocation among the obligees and not between the obligees and the obligor.

616. Before closing the discussion Bonell gave the floor to Hartkamp who wanted to comment again on Article 1.12.

617. Hartkamp recalled the debate between himself and Goode concerning the question as to whether subrogation in the security rights should or should not be admitted also in case of partial payment. He had had a chance in the meantime to confer with Goode on the matter and was glad to report that they have come to the conclusion that their differences ultimately depended on a misunderstanding. He gave the example of A, B and C jointly and severally bound vis-à-vis X with A being the true obligor in the internal relationship and B and C being in fact guarantors. Supposing A has given security rights to X and B pays 50% of the obligation, he agreed with Goode that X would retain all its security rights as against A. However, if one month later C pays the remaining 50%, in his view it would be an unsatisfactory result that C, just because it had paid the remaining 50% thereby extinguishing the entire obligation, be subrogated in the entire security right while B would not be subrogated at all. Also according to Goode this would be an unsatisfactory result which in his view could be avoided by subrogating both B and C. However this would not be possible in civil law systems where subrogation operates directly upon payment and cannot take place with retroactive effect, and it was precisely for this reason that he had proposed adopting a rule according to which on their respective partial payments B and C would be subrogated *pro rata parte*. He hoped that the Rapporteur would be able to give a brief explanation in the comments of the different meanings of the concept of subrogation in civil law and common law systems.

618. Fontaine agreed, on the assumption that such explanation would be for the Group, not for the Comments.

V. EXAMINATION OF THE POSITION PAPER WITH DRAFT PROVISIONS ON TERMINATION OF LONG TERM CONTRACTS FOR JUST CAUSE (UNIDROIT 2007 – Study L – Doc. 104)

619. Bonell then called on Dessemontet, Rapporteur on Termination of Long Term Contracts for Just Cause, to present his position paper with draft provisions.

620. In introducing his paper Dessemontet pointed out that the purpose of the paper was to explain the topic of termination of long term contracts whereas the attached draft provisions should be considered as very preliminary and might well for the time being not be discussed at all. The first aspect to be considered was the scope of the envisaged provisions. At stake were long term contracts imposing an obligation to do something positive and not those which entail only a duty to abstain from doing something. Thus they would apply for instance to maintenance contracts, distributorship contracts, the exchange of sensitive information, the opening of the books for checking figures on which royalties must be computed or common efforts of research and development for new products or new processes, but not e.g. to a 99-year lease on fee or a prohibition of competition for 10 years, etc. The contracts in question - known in some legal systems as relational contracts, in others as contracts *intuitu personae* – have in common that they institute a long term relationship of some degree of trust and confidence between the parties, without evidencing all the characteristics of a partnership. The second important aspect concerned the notion of just cause, i.e. the kind of extraordinary situations in which recourse to the drastic remedy of termination would be justified. Looking at Swiss, Scandinavian and German case law and arbitration practice six categories of situations could be identified: first, extraordinary and unforeseen events change the balance of the parties' obligations under the contract (e.g. the merger of one of the parties with a competitor); second, bankruptcy of one of the parties; third, repeated breaches of contract, even if only of minor importance, causing the loss of confidence in the breaching party; fourth, failure to reach the expected results (e.g. research and development operations) but for neither party's fault; fifth, loss of market on account of obsolescence, health or environment concerns, withdrawal of a public authorisation to work the technology, etc.; and finally all other events which affect the trust and confidence necessary for a proper performance by the terminating party. The third and equally important aspect concerned the consequences of the occurrence of such events. Thus, should termination operate immediately or only after a certain period of time? Should the terminating party be under a duty to compensate the other party and if so to what extent?

621. Bonell thanked Dessemontet for his enlightening remarks and proposed focusing the discussion on the three main aspects he had indicated, i.e. the kind of contracts involved, the grounds for termination, and the consequences of termination.

622. Fauvarque-Cosson thought that with respect to the first aspect a distinction should be made between long term contracts for an indefinite period of time and contracts in which the parties have specified the duration of their contract. As to the former the problem of termination for just cause did not exist since parties may at any time terminate the contract by giving notice a reasonable time in advance (see Article 5.1.8 of the Principles). As to the latter she agreed that premature termination could be justified in exceptional circumstances but in her opinion in this respect the existing rules on hardship could provide a satisfactory solution. She then questioned the notion of "just cause". More precisely, what was the main criteria for establishing the occurrence of an event justifying termination: was it the extraordinary nature or the loss of confidence or were these two cumulative criteria?

623. Garro posed two questions: first, what was the relationship between the envisaged remedy and the general duty to act in good faith? Would the latter not permit reaching the same results in extreme cases? Second, parties very often include in their contracts provisions specifying cases in which the contract may be terminated even in the absence of breach so that one may argue that if they have not done so, they had good reason for not doing so: why therefore should the Principles step in and provide for such a remedy in the absence of a special contract clause?

624. In reply to Garro's first question Dessemontet made the example of a publisher which was contractually bound to report to the author even trimester the sales figures of the book but which in fact over two or three years for one reason or another underreported such figures by varying degrees none of which however was very large. Clearly, in application of the principle of good faith, none of these events would have justified termination of the contract for breach while these events taken as a whole would prompt the envisaged extraordinary remedy of termination for just cause. As to the objection that parties, if they so wish, are always free to provide for such a remedy in their contract he pointed out that parties cannot anticipate all the occurrences which might seriously undermine their mutual trust and even if they do they may prefer not to mention them in their contract because this would mean that they mistrust one another from the outset.

625. Fontaine first of all recalled that the present provisions on hardship were, like many national laws, restricted to cases of substantial disequilibrium of the contract and wondered whether one might consider broadening their scope so as to include also the kind of situations Dessemontet had referred to, i.e. where the economic purpose of the contract had vanished (e.g. a long term licence contract becoming useless on account of a complete change in technology). In practice parties very often refer in special hardship clauses they include in their contract to similar events so that there might be some merit in taking them into account also in the Principles' provisions on hardship. As to the proposed provisions on termination for just cause he was in principle not against them but recommended utmost prudence in dealing with the topic.

626. Crépeau recalled that back in the 1960s when the new Quebec Civil Code was under preparation it had been suggested that the Code contain a special provision dealing with supervening and unforeseeable change of circumstances but ultimately the proposal was rejected because it was considered to contradict the principle of *pacta sunt servanda*. Surprisingly enough however since then that decision has been increasingly criticised in legal writings openly favouring the granting of a remedy very similar to that proposed by Dessemontet. He himself was quite in favour of Dessemontet's proposal and wondered whether one should not go even further by laying down a general principle according to which in extraordinary and unforeseeable circumstances where the whole purpose of the contract was no longer what the parties had in mind when entering the contract the contract itself could be terminated or alternatively revised.

627. In the light of the last two interventions Bonell wondered whether Dessemontet would like to explain the difference he saw between hardship and the extraordinary events leading to the termination of the contract for just cause.

628. Dessemontet thought that, contrary to the first situation where what was at stake was restoring the original equilibrium between the parties' obligations so as to permit keeping the contract alive, in the kind of situations he was addressing the relationship between the parties was hopelessly ruined. For that reason he hesitated to follow Crépeau's suggestion to extend the scope of the envisaged remedy of termination for just cause to all

contracts: in his view such a radical remedy was justified only with respect to contracts based on the parties' mutual trust and confidence.

629. Schiavoni wondered whether the proposed provisions on termination of long term contracts for just cause would apply also to contracts for construction of a large plant with an estimated duration of 3 to 5 years. His doubts depended on the fact that Dessemontet's proposed definition of long term contracts, i.e. contracts "for the performance of a recurring, positive obligation" (page 4 of Doc. 104) was different from that in Article 6.2.2 on hardship, i.e. contracts "where the performance of at least one party extends over a certain period of time".

630. Dessemontet confirmed that the proposed provisions would not apply to the example given by Schiavoni because there the duration of the contract depended on the nature of the performance, i.e. the construction of the plant, whereas in the contracts he was referring to there were recurring obligations on account of which the outlook of the contract was completely changed.

631. Harmathy thought that it was essential to identify the purpose of the proposed rules. Was it intended to modify the provisions on hardship because too narrow or was there some other purpose? If the purpose was to permit putting an end to the contract whenever, due to a change in the circumstances, the continuation of the contractual relationship for the agreed duration cannot reasonably be expected, then one should go further and see whether there were contracts other than those mentioned which should also be covered by these rules or alternatively whether the scope of the rules should be restricted even further.

632. Kronke reminded that what was proposed here in general has long been generally accepted with respect to employment contracts and partnerships both of which are contracts which give rise to a long term relationship based on the parties' mutual trust. On the occasion of the recent reform of the German Law of Obligations the legislator adopted a new provision (§ 314 BGB) providing for termination of the contract whenever, having regard to all the circumstances of the case and balancing the interests of both parties, the terminating party cannot be reasonably expected to continue the contractual relationship until the end of the agreed duration. The difference between such a rule and those on hardship was very clear, the latter being aimed at keeping the contract alive as far as possible whereas the former simply acknowledging that the contractual relationship has in fact come to an end.

633. Widmer was in favour of having provisions along the lines suggested by Dessemontet but at the same time, like Fontaine, recommended utmost prudence. As to the argument that the same result could be achieved in application of the general principle of good faith he recalled that the Principles were full of other specifications of good faith and the adoption of special provisions had the advantage of further defining their precise scope.

634. Finn agreed that with respect to long term contracts there might be situations where the only reasonable solution was bringing the contract to an end. In his view it was highly recommendable for parties to include in their contracts special clauses identifying such situations but since parties for different reasons often fail to do so he saw also some merit in a default rule in the Principles. However what worried him was that the proposed rule did not provide for curial intervention by a court or an arbitral tribunal because this would inevitably lead to abuses. More in general he reminded that the Principles are intended to be used worldwide with the consequence that what was considered a good cause for termination in one region of the world was not necessarily so in another.

635. Zhang too urged extreme caution in dealing with the topic in order to avoid unnecessary litigation.

636. Goode agreed with Finn and in addition reminded that many of the situations envisaged by Dessemontet were already covered by specific provisions of the Principles. For instance in the case of the continued underreporting of sales figures in his view there was a clear fundamental breach which would entitle the author to terminate the contract under Article 7.3.1. In other instances Article 7.3.4 granting a party who reasonably believes that there will be a fundamental non-performance by the other party the right to demand adequate assurance of due performance may offer an adequate solution. He concluded that if there was going to be a rule on termination for just cause it should be a mere residual rule applying only to cases not already covered by specific rules already contained in the Principles.

637. Chappuis, after having recalled that Swiss law, like German law, has accepted the principle of termination for good cause, reported on the consultation she had with the *Group de travail contrats internationaux* concerning the advisability of having a similar provision in the Principles. First of all it emerged that in practice certain kinds of contracts such as distribution contracts, licensing agreements, joint ventures, consortia, master development agreements, etc. quite often provided for termination in particular circumstances such as insolvency, takeover by a competitor, impossibility to achieve the envisaged purpose, grave and persistent disagreement among the parties, etc. However most of the experts consulted were rather reluctant to have a default rule which they thought could only be drafted in general terms and would therefore be subject to different interpretations in various parts of the world.

638. Fontaine, referring to Dessemontet's earlier intervention in which he said that the distinction between hardship and the cases addressed in his draft was that the former concerned a loss of balance whereas the latter a loss of trust, thought that the two cases could well be dealt with together as implicitly admitted by Dessemontet himself in his draft Article 6.3.2 lit. a) and lit. b). He therefore wondered whether it might not be advisable to broaden the scope of the existing provisions on hardship so as to cover also cases where the contract has lost its economic purpose without any imbalance and maybe even the cases of loss of trust. At least in practice parties quite often address all these contingencies in one and the same set of contract clauses.

639. Schiavoni thought that the proposed provisions could also apply in cases where the owner enters into a contract with a main contractor which subsequently sub-contracts virtually all its obligations to other companies and the owner all of a sudden realises that the financial solidity of the main contractor is absolutely insufficient.

640. Komarov favoured in principle the rules proposed by Dessemontet but thought that termination for just cause should only be possible by a court decision and not merely by a party's notice. Moreover it should be made clear that the remedy in question was absolutely extraordinary and to this effect it was very important to define as precisely as possible the scope of the proposed provision so as to avoid any risk of abuses by the parties.

641. Bonell thought that Komarov's remarks concerning the purpose of the proposed rules were very important since parties should be alerted from the outset that the remedy of termination for just cause was very exceptional and that it was first of all up to them to agree on even more precise definitions in the contract of the cases in which it applies.

642. Furmston too was in principle in favour of such provisions but urged the Rapporteur to provide more examples of cases which were not already covered by other provisions of the Principles so that the proposed remedy of termination for just cause would apply as a last resort.

643. Hartkamp thought that the provisions as presently drafted were too vague and feared that the scope of application of the envisaged remedy could become too wide. As to the precedents to be found in domestic law he recalled that § 314 BGB was contained in a civil code and therefore had nothing to do with international commercial contracts. He felt that it should be left to the parties to provide for such a remedy in their contract and to define the cases to which it applied. To have a default rule stating that the remedy may be granted whenever the mutual trust between the parties has been lost would not be a good signal to international commercial contract practice.

644. Bonell recalled the ICC International Court of Arbitration case no. 9797 *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Cooperative* of 27 July 2000. The dispute between the two business units had arisen when due to a series of alleged breaches by both parties the very foundation of their cooperation under an all embracing umbrella agreement broke down prompting one business unit to request termination of that agreement for just cause. Even though the agreement contained a number of provisions addressing a wide range of contingencies there was nothing specifically addressing the kind of deadlock that had come about. However in view of the fact that there was clearly no longer any possibility of continuing the relationship between the parties, the arbitral tribunal terminated it. In so doing it relied on a number of provisions contained in the UNIDROIT Principles, in particular on Articles 1.7 and 7.3.1 et seq. but the same result could have been justified in a much more linear and convincing manner if there had been provisions on termination of long term contracts for just cause.

645. Gabriel found Dessemontet's paper of utmost interest but it also showed that the whole concept of termination for just cause was quite familiar especially in civil law systems. He pointed out that on the contrary at least in North America courts were in general very reluctant to grant this remedy and this caused him to fear that if provisions of the kind proposed were to be included in the Principles lawyers in his country would find it difficult to accept the Principles as a whole.

646. Akhlaghi found the whole topic very interesting but pointed out that the notions of long term contracts, of just cause and of change of circumstances have to be further developed and defined.

647. Date-Bah stated that lawyers and merchants in Accra would be amazed if they were told that if they lost trust in their contracting partners they had a remedy to terminate the contract. He would have thought that in such a contingency parties at most would sit down and try to negotiate a re-adjustment of the deal, but not to get termination of the contract.

648. Finn on the contrary noted that for instance in any joint venture if the parties' mutual trust breaks down there is a serious problem. As long as a joint venture company has been set up, the law governing that company normally would provide a remedy for the winding up of the company. He thought that under discussion now was a similar remedy for cases where no company had been set up and he agreed that such a remedy was needed.

649. Fauvarque-Cosson pointed to the French experience where just because the law did not provide for any form of contract revision in case of *imprévision* parties almost regularly stipulate special clauses to this effect in their contract. She thought that even if the result of the Group's discussion was not to have provisions on termination for just cause somewhere in the Comments there should be a statement on the advisability of parties' having in their contracts special clauses to this effect.

650. Bonell observed that the argument could also be the other way round, i.e. that the parties' awareness of the problem would better be achieved by having black letter rules on termination for just cause which parties could then, if they so wished, either exclude, modify or supplement.

651. Kronke agreed.

652. Garro first of all wondered whether with respect to termination for just cause the same approach could be adopted as with respect to hardship, i.e. where right from the outset Article 6.2.1 states "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations *subject* to the following provisions on hardship" thereby highlighting the exceptional nature of the following provisions. He then expressed sympathy for Gabriel's concern that the proposed rules were likely to meet strong opposition in the U.S.A., thereby jeopardising the favourable reception of the Principles as a whole. As to the difference between hardship and the cases being discussed, he wondered whether it was that in the latter unforeseeability was not a requirement. Finally, he thought that the proposed rules should, as the BGB does in § 314, focus on the notion of *Dauerschuldverhältnisse* or recurring obligations to define the scope of application of the rules.

653. Asked by Bonell to respond to the various comments made, Dessemontet first of all thought that the discussion had clearly shown that according to the overwhelming majority of the Group the scope of the proposed rules should be very narrow so as to restrict their application if not even only to specific types of contracts such as distributorship, agency, franchise, joint venture, and the like, certainly only to contracts of a particular nature still to be defined such as *Dauerschuldverhältnisse*, relational contracts, contracts based on mutual trust between the parties, and the like. As to the relationship between the proposed remedy of termination for just cause and hardship, he insisted that while the basic idea of the latter was to restore the original contractual equilibrium, the former was intended to take into account that the contractual relationship had irremediably come to an end. What still had to be further developed and discussed was the relationship between the proposed default rules on termination for just cause and special clauses the parties may have included in their contract to this effect. Such clauses by their very nature would prevail over the provisions in the Principles but it must be borne in mind that contracts are quite often very poorly drafted so they may not always provide a clear solution. Finally, as to the suggestion that the remedy in question be made dependent on a court decision, he thought that one should take into consideration the general remedy system of the Principles: in other words, despite the fact that this runs counter to quite a number of domestic laws, also with respect to termination the Principles do without court intervention. Even more important, termination for just cause would not exclude at all the other party's right to claim damages if appropriate. In any case he was prepared to submit alternative texts to the Group for further discussion: one with and one without obligatory court intervention.

654. In summing up the discussion Bonell noted that there was wide support for asking the Rapporteur to prepare a revised draft in the light of the Group's discussions for

examination at its next session. The scope of the proposed rules should be kept very narrow and as precisely defined as possible.

655. Dessemontet agreed.

656. Widmer asked whether Crépeau's and Fontaine's proposals not to have special provisions on termination for just cause but to broaden the scope of the existing provision on hardship so as to cover also the cases envisaged by the former were no longer on the table.

657. Bonell thought that indeed this approach had not received sufficient support.

658. Hartkamp agreed although he personally would have been strongly in favour of having one of set rules dealing with both types of cases.

659. Bonell, also on behalf of the Group as a whole, thanked Dessemontet for his excellent paper which had permitted the Group to undertake such a constructive and in depth discussion of a topic as complex as termination of long term contracts for just cause.

VI. DATE OF THE GROUP'S NEXT SESSION

660. Bonell announced that the Group's next session would be held in Rome from Monday 25 May until Friday 29 May 2009. The session would be devoted to an in depth examination of the revised draft chapters concerning unwinding of failed contracts, illegality, plurality of obligors and/or obligees, conditional obligations, and termination of long term contracts for just cause. He invited the Rapporteurs to submit their papers in time to permit their circulation among all Members and Observers well in advance of the next session.

661. In closing the session Bonell pointed out that, notwithstanding the extreme complexity of the topics addressed throughout the week, the session had been very successful. He wholeheartedly thanked all the Members and Observers of the Group for their constructive cooperation and outstanding contribution to the discussion and looked forward to welcoming them again in Rome in a year's time.

APPENDIX

**WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3RD)
3rd session, Rome, 26 – 29 May 2008**

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Ms Paula Howarth	Secretary to the Working Group