



Principles of International Commercial Contracts
Working Group on Long-Term Contracts
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REPORT

(prepared by the UNIDROIT Secretariat)

Item 1 on the Draft Agenda: Opening of the meeting

1. The *Working Group on Long-Term Contracts* set up for the purpose of formulating proposals for possible amendments and additions to the black-letter rules and comments of the *UNIDROIT Principles of International Commercial Contracts 2010*, with a view to covering the special needs of long-term contracts, met in Rome, at the seat of UNIDROIT, from 19 to 22 January 2015. Back-ground document for the discussions of the Group was the position paper prepared by Mr Michael Joachim Bonell, Emeritus Professor at the University of Rome I and consultant to UNIDROIT, (see document Study L – Doc. 126). A list of participants is attached to this Report as Annex 1.

2. **Mr José Angelo Estrella Faria**, Secretary-General of UNIDROIT, opened the meeting. He welcomed the participants, especially those who participated for the first time. He stressed the importance of the Principles, which most recently had been cited as a source of inspiration for the parts devoted to contract law of the new Argentinian Civil Code. He recalled that the remit of the Working Group was to see what additions or modifications were necessary, not to embark on a complete and extensive review of the volume. The Governing Council expected the work to be substantially completed at the present session and any refining to be done at a clean-up meeting, which it was expected would be held in the autumn.

3. **Mr Bonell** also welcomed participants, to whom he conveyed the regrets of Mr Paul Finn, who was unable to attend as he had to undergo surgery. He had however sent comments, which were before the Group in document Study L – LTC WP 1. Comments submitted by Mr Marcel Fontaine, a member of the Working Groups that had prepared the three editions of the UNIDROIT Principles who was not in a position to join the present Working Group, were contained in Study L – LTC WP 2. Finally, Mr François Dessemontet, who was to have participated in the meeting, was also unable to attend.

Item 2 on the Draft Agenda: Adoption of the agenda and organisation of the meeting

4. The Draft Agenda (Study L – LTC – Misc. 2) was adopted as submitted.
5. As regarded the organisation of the meeting, **Mr Bonell** proposed the discussion focus on the questions he had identified in his Position Paper. The Group agreed.

Item 3 on the Agenda: Examination of the Position Paper prepared by Professor Michael Joachim Bonell (UNIDROIT 2014, Study L - Doc. 126)

6. Introducing document 126, **Mr Bonell** recalled that the intention was to see to what extent the present text of the UNIDROIT Principles on International Commercial Contracts provided for long-term contracts. A number of the existing provisions did cover also long-term contracts, such as Article 2.1.14 on open terms and Articles 6.2.2 and 6.2.3 on hardship which were intended to cover supervening events that modified the equilibrium of the contract. There were however a number of issues that were not taken into account and it was to examine these that the Governing Council of UNIDROIT had decided that a restricted Working Group should be convened. The Position Paper he had prepared contained fairly detailed questions, as he had felt it to be easier to delete than to add.

(a) *The Notion of Long-Term Contracts*

7. **Mr Bonell** observed that although the Principles did take long-term contracts into consideration, they were never defined. A possibility was therefore to include a definition or short description in Article 1.11, which already contained three such definitions or descriptions relating to other terms, and then in the comments to refer to all the black-letter rules and comments that explicitly or impliedly addressed long-term contracts. Such an approach would permit to highlight the fact that the new edition of the Principles gave due consideration to the special needs of long-term contracts and to provide from the outset an overview of where this had been done.

8. In the course of the discussion, several members of the Group observed that it was not clear what was covered by the term “long-term contract”. **Mr Wallace** identified three different types of contract (long-term contracts such as, for example, a loan agreement for a duration of twenty years; a long-term franchise agreement, which was a relational contract; and complex contracts which might include linked contracts). **Sir Vivian Ramsey** observed that either the negotiations or the performance might be conducted over a long period of time. **Ms Chappuis** pointed out that the comments to the articles that dealt with restitution already contained a definition of sorts, as did Comment 5 to Article 6.2.2 which dealt with hardship. Furthermore, from the point of view of the translation into other languages the term “long-term contract” was not the most felicitous, as it was very confusing. **Ms Cordero-Moss** wondered if only contracts with a high degree of cooperation between the parties were considered, or if the duration of the contract was the deciding factor. **Mr Zimmermann** observed that codifications did not normally define the term “long-term contract”, even if they dealt with such contracts. In Germany the definition of the term had been left to case law. He suggested that instead of starting with the definition, it might be better to start with the identification of the issues that should be dealt with before a definition were attempted. **Mr Cohen** agreed, asking what the scope of the work was and if they could reduce it to a word or phrase that was then defined. As yet they did not know if a single concept animated all the rules, it was therefore better to come back to the question of the definition and to start with the identification of the issues.

9. This proposal was accepted by the Group.

(b) *Contracts with Open Terms*

10. **Mr Zimmermann** introduced the issue of contracts with open terms. He recalled that in the past focus had been on contracts that were performed immediately. The articles relevant in this case were Article 2.1.14, which dealt with all open terms and which referred to long-term contracts in Comment 1, and Article 5.1.7, which dealt specifically with price determination. It might be asked whether two rules really were necessary. He saw an inconsistency between Article 2.1.14(2), in which the third person “*does not*” determine the term, and Article 5.1.7, in which a third person “*cannot or will not*” determine the price. He asked what was intended and wondered if there was a difference between the expressions. He pointed out that in practice other terms were just as important as the price and he therefore suggested broadening the scope of Article 5.1.7 so that it did not deal only with price determination. Lastly, he asked what would happen if the determination of the open term were not reasonable.

11. **Mr Bonell** pointed out that the main purpose of Article 2.1.14 was not to determine open terms, but to make it clear that even if terms had been deliberately left open and these terms had to be determined at a later stage by negotiations between the parties, this did not prevent the contract from being concluded. **Mr Cohen** agreed, adding that Article 5.1.7 assumed the existence of a contract. As the two articles answered different questions, it was better to keep them separate. **Mr Bonell** suggested Article 5.1.7 be amended to read “price or any other term”. This was agreed by the Group.

12. **Mr Seppälä** drew the attention of the Group to Question 3 in document 126 which referred to Comment 1 to Article 7.3.6, which gave a turnkey contract as an example of contracts to be performed at one time. He found this reference confusing. There was no clear definition of turnkey contracts, which might indeed be completed in stages. **Mr Wallace** wondered if what was meant by “performance” was sufficiently understood in the Principles. In turnkey contracts the period of performance was not short, as the period building up to the turning of the key was long. **Mr Bonell** suggested that what was meant was the activity necessary to fulfil the obligation. In turnkey contracts by nature the performance lasted over a period of time, whereas the key was handed over at one time. **Sir Vivian Ramsey** pointed out that there were turnkey contracts that were not complex and suggested that the reference to turnkey contracts in Comment 1 to Article 7.3.6 be deleted. This was agreed by the Group.

13. **Ms Cordero Moss** raised the issue of “subject to contract” clauses which were often inserted by the parties as the final clause of a contract. Parties often conducted negotiations in stages and agreed on parts of the relationship as they went along. These agreements would look like contracts but then a final clause would be inserted stating that the agreements depended on final approval. Parties often had legitimate reasons for adopting this procedure: they wanted to register their agreement on certain issues but wanted also to maintain their freedom to decide whether or not it would come into force. **Mr Seppälä** commented that “subject to contract” clauses were not clear. It was a nightmare if the parties did not make their intentions clear as regarded whether or not the agreement was binding. Normally one of the parties wanted it to be binding but not used against it. **Mr Bonell** recalled that some of these issues were already addressed in Comment 2 to Article 2.1.2, Comment 2 to Article 2.1.13 and Comment 5 to Article 5.3.1.

14. **Sir Vivian Ramsey** pointed out that what they were dealing with was a gap in the contract terms and that they needed to deal with the case where the parties had not agreed anything. **Mr Zimmermann** noted that a third case should be dealt with by Article 2.1.14, i.e. that of the open term being determined by one of the parties, not by a third person or by agreement between the parties. The Group agreed to add in Article 2.1.14 a new phrase to paragraph (1), as well as to paragraph (2) as a new lit. (c), to reflect this. In addition, **Mr Zimmermann** suggested that the Comments to Article 2.1.14 and those to an extended Article 5.1.7 should be better linked. **Mr**

Cohen observed that when Article 2.1.14 was broadened, it would not be necessary to cover all that was covered by Chapter 5.

15. As regarded the issue of terminology, **Mr Zimmermann** came back to the question of the preferable terminology, whether it should be “does not” determine or “cannot or will not”. **Mr Bonell** observed that the difference was not intentional and was the result of the two Rapporteurs being different. **Mr Cohen** expressed a preference for “does not” because the question was “did it happen” and the answer was no, whatever the reason. **Sir Vivian** agreed: “does not” appeared to be most applicable to when the result was not achieved. The question of the terminology used in the French version was raised, whether or not it would be possible to use the terminology “does not” consistently also in other languages. **The Secretary-General** indicated that the use of the terminology in the French version was similar to the English. The Group decided to adopt “does not” and to change the terminology when other alternatives were used (“cannot or will not”).

16. **The Secretary-General** suggested that it would be better to amend Comment 3 to Article 2.1.14 by replacing “nominated” by “appointed”. Furthermore, if the terminology “does not” were adopted, also the comments to Article 5.1.7 would have to be amended.

17. **Ms van Lith** referred to the determination by a third person, or expert, which could be an expert determination administered by an institution. She wondered how this should be taken into account in the context of the determination not being made and if the determination was unreasonable. **Mr Bonell** suggested that Comment 3 to Article 2.1.14 might take care of those situations.

18. **Ms Cordero-Moss** suggested that it would be useful if there were a comment somewhere specifying what the relationship between the contract and the Principles was, stating that the parties may agree on different mechanisms to determine open terms.

19. **Mr Gélinas** wondered if the points raised concerned long-term contracts or were intended to improve upon the Principles in general. He observed that when long-term contracts were negotiated, the negotiators would take great care in the drafting to make sure that all eventualities were covered. **Mr Zimmermann** indicated that it was in particular in long-term contracts that terms were left open, whereas **Mr Seppälä** suggested that because they were dealing with a long-term contract, the lawyers would leave fewer issues open.

20. **Mr Bonell** agreed that the provisions in Article 2.1.14 and 5.1.7 were not exclusive to long-term contracts but became particularly relevant in the context of such contracts. This was already hinted at in Comment 2 to Article 2.1.14. He suggested developing Comment 2 and to advise parties to such contracts to resolve the issues or, if not, to make appropriate provision to cope with such situations.

21. **Mr Wallace** wondered what the implications of the agreed modification would be for normal contracts. **Mr Bonell** did not think there would be any problem, as the addition to the black-letter rule was merely the addition of the possibility of the determination being conducted by one of the parties. Comment 3 should be more elaborate with respect to long-term contracts. It could be stated that for long-term contracts it was particularly important for the parties themselves to determine the missing terms instead of relying on gap-filling mechanisms. **Mr Zimmermann** stated that the comments should advise the parties to make provision also for the eventuality that the party or third person did not make the determination. If they did not do so, they should make reference to the implied terms under Article 5.1.7. **The Secretary-General** confirmed that the change in the black-letter rule in Article 2.1.14 would apply to all contracts, not only long-term contracts.

22. Turning to the question of the standards to be followed, **Mr Bonell** asked the members of the Group if they thought that the standards to be followed when a missing term had to be determined should be addressed in the black-letter rules or in the comments, or possibly not at all.

23. **Mr Zimmermann** observed that if Article 5.1.7 were extended to cover also other terms and not only price determination terms, the next question would be what the standards to make the determination would be. He felt it to be correct to deal with this question in Chapter 5, as it concerned the contents of the contract. **Sir Vivian** suggested that both Article 5.1.6 and Article 5.1.7 should be looked at as there might be parallels between the two as Article 5.1.6 dealt with the determination of the quality of the performance. Thereafter he suggested looking at other potential terms that commonly needed to be filled to see to what extent such rules were applicable to long-term contracts.

24. **Mr Wallace** wondered what the connection of these provisions was with the adaptation of the contract. **Mr Bonell** pointed out that these were gap-filling provisions and did not concern the adaptation of the contract. He recalled that in many cases parties did not deliberately leave terms open, but if they did so, it was because they were not in a position to anticipate what the term should contain.

25. **Sir Vivian** wondered what terms in addition to price and quality were important. One was time, for which there was Article 6.1.1. **Mr Zimmermann** pointed out that Article 2.1.14 contained a rule which stated that the parties might make a contract deliberately leaving terms open (such as time of performance, place of performance, etc.) and the reader would want to know what happened if this mechanism failed. The rule in Article 5.1.7 stated what happened if the other person did not determine the price. The question that immediately came to mind was what would happen if the other party did not supply that term. Then clearly Article 5.1.7(2) and (3) did not apply only to price. It was essential, in terms of the integrity of the entire document, that there be a rule that applied when Article 2.1.14 failed.

26. **Mr Cohen** indicated that the relationship between Articles 2.1.14, 5.1.7, 4.8 and 5.1.2 was complicated. Article 2.1.14 said that there could be a contract even if terms had deliberately been left open. There were at least two provisions that dealt with operation, including Articles 4.8 and 5.1.7. However, Article 2.1.14 also dealt with the establishing of a mechanism for finding a term. Article 5.1.7 gave an answer for the failure of the mechanism in Article 2.1.14, but only with respect to price, the question was if it was necessary for other terms. He felt that they should only address problems that they knew existed. **Sir Vivian** observed that Article 5.1.7(1) considered when there was an absence of price. As regarded paragraph (2), under which one of the parties had to determine the price, he stated that he would look to Article 4.8 as well as Article 5.1.7 to find the implied term to deal with failure in that case. He found it difficult to specify what other terms should be covered by Article 5.1.7, as they were covered by the other provisions.

27. **The Secretary-General** observed that the recent comments had identified a structural problem as regarded Article 5.1.7: paragraphs (1) and (4) dealt with the substance of the contract, whereas paragraphs (2) and (3) dealt with procedure. The answer as regarded a failed procedure was to be found in Article 4.8. The place to address a failure of the Article 2.1.14 procedure was not Article 5.1.7. If the intention was to address it here, then paragraphs (2) and (3) should be deleted, as suggested by Question 6 of document 126.

28. **Mr Zimmermann** wondered why there was a special provision on price determination. **Mr Bonell** recalled that price had been a controversial issue at the diplomatic Conference that had adopted the *United Nations Convention on Contracts for the International Sale of Goods (CISG)*, the conclusion being that it was an important issue. **Mr Galizzi** stated that he found a special provision on price to be useful, as important arbitration cases often related to issues regarding price.

29. Different views were expressed on the proposal to broaden Article 5.1.7 to include also other terms and not only price determination. **Mr Zimmermann** was in favour and pointed out that a number of national legal systems, such as the Austrian, Dutch, French, German and Italian, as well as the *Principles of European Contract Law*, had general rules stating what should be done with respect to missing terms. It would be wise to extend Article 5.1.7 as otherwise there was a risk that parties would not think of Article 4.8. **Mr Wallace** agreed with Mr Zimmermann. **Sir Vivian** suggested that it was necessary to identify the terms that could also be covered by a broadened Article 5.1.7. The link between the various articles was not clear: there was no link between Articles 2.1.4 and 5.1.6, while Article 4.8 only in Comment 2 indicated that there were other gap-filling provisions. **Mr Cohen** indicated that Comment 2 to Article 4.8 provided the basis for not going to the general gap-filling rules but to the criteria in Article 4.8. He wondered to what extent the relationship between the articles might be explained in the comments and if it could be done without touching the black-letter rules, which he suggested it would be better to touch as little as possible. **Ms Chappuis** agreed that the black-letter rules should be touched as little as possible. If they were modified, the equilibrium between the provisions might change.

30. The question of the hierarchy of the provisions was also raised. **Mr Bonell** suggested that the hierarchy went in the order contract – contract interpretation – Article 4.8, and only if it was not possible to find an answer under Article 4.8 as the intention of the parties was too uncertain, would the gap-filling provisions, of which Article 5.1.7 was one, be resorted to. **Mr Zimmermann** instead felt that Article 5.1.7 should have precedence over Article 4.8, as it was a *lex specialis* which dealt with a specific case, whereas Article 4.8 was a general provision. It was decided that four members of the Group (Messrs Cohen, Zimmermann, Bonell and Sir Vivian Ramsey), would meet to discuss the relationship between Articles 2.1.14, 4.8 and 5.1.7 together with the respective comments and report back to the Working Group in Plenary.

31. Following the meeting of the four members of the Group, **Mr Bonell** reported to Plenary that Sir Vivian Ramsey would prepare draft amendments to the comments of Articles 2.1.14, 4.8, 5.1.2 and 5.1.7 to take account in particular of long-term contracts.¹ He urged the members of the Group to share their practical experience of cases encountered and whenever appropriate to submit examples taken from practice to the Secretariat so that these examples could be worked into the comments, new or amended as the case may be.

32. **Mr Zimmermann** raised a further point as regarded Article 5.1.7(3), which it had been decided should use the words “does not” instead of “cannot or will not” (“Where the price is to be fixed by a third person, and that person cannot or will not do so, the price shall be a reasonable

¹ Later in the week Sir Vivian Ramsey prepared a draft for a new Comment 3 to Article 2.1.14 which read as follows: “3. [title unchanged] If the parties are unable to reach agreement on the open terms or, if applicable, the third person or one of the parties does not determine them, the question arises as to whether or not the contract comes to an end. According to paragraph (2) of this Article the existence of the contract is not affected ‘provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties’. The alternative means of supplying the missing term will generally be by the application of the “gap-filling” provisions in Articles 5.1.2, 5.1.6, 5.1.7, 6.1.1, 6.1.6, 6.1.7 or 6.1.10 where those provisions can appropriately supply the relevant term. There may be cases, particularly in the case of [long term contracts], where those provisions will not be appropriate even if they cover the subject matter of the missing term. In such cases, the alternative means of supplying the term will be by the application of Article 4.8 leading to the missing term being supplied under Article 5.1.2. In some cases where the parties have agreed to defer the determination of the missing term to a third person to be appointed by a named institution or person, the third person will determine the missing term. If the appointed third person does not determine the term, the named institution or person may, depending on the parties’ agreement, appoint a new third person who is then able to supply the missing term. The cases in which it will be necessary to appoint a new third person are likely to be quite rare in practice. Few problems should arise as long as the term to be implemented is of minor importance. If, on the other hand, the term in question is essential to the type of transaction concerned, there must be clear evidence of the intention of the parties to uphold the contract: among the factors to be taken into account in this connection are whether the term in question relates to items which by their very nature can be determined only at a later stage, whether the agreement has already been partially executed, etc. [Illustration 2 unchanged]”

price”): what would the situation be if the price determined by the third person was completely unreasonable? Paragraph (2) related to the case where a price had to be determined by one of the parties, in which case if the price determined was manifestly unreasonable, a reasonable price would replace it. He suggested that it would be out of line with general practice if a third person was at liberty to decide without a similar safeguard. **Mr Wallace** agreed with Mr Zimmermann and suggested that the wording “manifestly unreasonable” be used also for these cases. **Sir Vivian** suggested that if a standard was to be applied to a third party determination, “manifestly unreasonable” was a standard which had meaning and could be applied. If Article 5.1.7(2) or (3) said nothing about the standard to which a third person had to comply, then the other parts of the Article had to be resorted to. He wondered whether they were in a position to promulgate a standard here.

33. **Mr Cohen** admitted that there was an asymmetry, but observed that in the case where a term had to be determined by one of the parties, the safeguards might result from the fact that the parties were naturally adversaries. He wondered whether the distinction should be kept. **Mr Seppälä** agreed that where the determination was made by one of the parties, there was a greater need for protection than if the determination was made by a third person. He also pointed out that it was necessary to recognise that the determination was presumed to be reasonable in the case of third party determination. If the reasonableness of the third party determination could be questioned, that might create an extra round of trouble. In some limited cases the determination could be overturned for fraud, but otherwise the parties were stuck with the determination. **Ms Perales Viscasillas** indicated that the third person determination could already according to the present text be challenged in cases of fraud, gross disparity or threat (see Comment 3 to Article 5.1.7). **Ms van Lith** stated that the ICC had on purpose not included an escape clause for such cases as that would open the door to challenges.

34. As a compromise solution, **Mr Cohen** suggested a sentence be added to Comment 3 that this provision did not address the circumstances in which it might be set aside, merely recognising that it could be. **The Secretary-General** suggested adding to the Comments language such as “and makes determination in violation of the rules that govern the proceeding”. **Mr Zimmermann** suggested adding to the Comment that “the parties are free to fix a standard by which the third party must comply and, if he does not, then the parties can challenge that determination”.

35. **Mr Zimmermann** referred to his comment on the fact that the Principles “are silent on what is to happen if the third person is not required to determine a term of the contract but to assess certain facts which, for lack of experience, the parties cannot assess themselves” (see Annex I to document 126). He suggested it would be good to clarify this point, either in the black-letter rules or in the comments. The question was what standard should be advised. **Mr Bonell** proposed that an addition be made to the last sentence of Comment 3 on page 158 of the Principles to the effect that the parties may wish to fix different standards depending on whether the task was to determine facts or terms. This proposal was accepted by the Group.

36. **The Secretary-General** wondered what the relationship would be between what the parties agreed and whatever the professional expert was to do and how this was rendered in a neutral manner. **Mr Zimmermann** thought that in the comments they should flag that they had thought about this situation and that they advised the parties to fix the standard. **Mr Wallace** pointed out that an expert might be under ethical duties and this should be noted in a footnote.

(c) *Agreements to Negotiate in Good Faith*

37. **Mr Bonell** recalled that Article 2.1.15 related to negotiations in bad faith. The question he had asked (Question 10) was whether a new Comment 4 should be added to the comments, dealing with the situation where the parties had provided in their contract for a duty to

(re)negotiate in good faith. Should the parties be advised to add some criteria in order to conform to that commitment to negotiate in good faith?

38. **Mr Seppälä** stated that he would hesitate to make such an addition. He asked what “negotiating in good faith” meant and gave the example of a construction contract when the parties had entered into a preliminary contract to negotiate in good faith but one of the parties was totally hopeless at negotiating a complex contract, even if he was in good faith, indeed both parties were in good faith. **Mr Zimmermann** wondered if the parties should indicate what they meant by such a clause when they agreed on one and suggested that it would be very difficult to lay down general rules. **Ms Cordero Moss** illustrated her experience with contracts in which the parties had defined the content of the duty to negotiate in good faith. They had done this by regulating in the contract the procedure to be followed in the negotiations. She suggested that the comments could say that it would be useful for the contract to describe the procedure to be followed to comply with a duty to negotiate in good faith. **Sir Vivian** referred to a similar case in which a timetable had been set out as an example of what a good faith negotiation would be. There had been an argument on whether the timetable applied, whether it was evidence or conclusive proof of the failure of the good faith negotiations. He indicated that he hesitated to advise parties to agree to a timetable. He added that English lawyers had limitations on the extent to which they thought good faith was a binding obligation. **Mr Emery** recalled that the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (1987) had language on goal-oriented definitions of good faith. **Mr Cohen** suggested that the comments could say that a duty to negotiate in good faith meant that the parties had the intention to conclude an agreement and could add that the parties might wish to further define what that meant.

39. **Mr Zimmermann** suggested they stick by what was already in the Principles, starting with Article 2.1.15 which dealt with negotiations in bad faith. To negotiate in good faith meant that one must negotiate seriously. Reference could be made to Article 1.8 relating to inconsistent behaviour and to Article 1.9 stating that it would be against the principle of good faith if parties departed from practices established between them and applicable trade usages. As regarded remedies, guidance was already available as document 126 suggested that *all* remedies for breach of contract should be available (see paragraph 18), but he wondered if “all remedies” was not going too far. **The Secretary-General** indicated that he had difficulty in accepting all the items in the list in paragraph 18 of document 126. **Mr Cohen** observed that they were perilously close to taking a contract interpretation problem and making it into a different problem. What they were doing, was interpreting the parties’ agreement by asking what the parties had meant, what else beyond that did not live up to the parties’ self-proclaimed commitment to negotiate in good faith. He wondered if “all remedies” should not be replaced by “all *appropriate* remedies”. **Mr Bonell** observed that contract practice showed that an agreement to negotiate in good faith in reality was an agreement to use best efforts. Article 5.1.4 had quite a precise definition of best efforts. Perhaps the terminology to use was “best efforts”.

40. **Mr Seppälä** referred to Comment 2 to Article 2.1.14, which in paragraph 2 spoke of liability for negotiating in bad faith. He stated that the impression was that all the remedies listed in the previous paragraph could be applicable, but not lost profits for a contract that had never been entered into. **Mr Gélinas** stated that while the black-letter rule was fine, Comment 1 to Article 2.1.15 limited what was in the rule by specifying “with a view to concluding a contract”, whereas often it was necessary to re-negotiate in the course of the performance of the contract, for example in the case of a distribution agreement. If the list were opened up, it would therefore apply to performance. **Mr Bonell** indicated that Comment 1 to Article 2.1.15 had nothing to do with what they had been discussing, it was the basic rule that parties were free to enter into a contract to the extent that they wanted. **Mr Zimmermann** wondered why in Comment 2 to Article 2.1.15 (paragraph 3) it was required that the parties agree “expressly” on a duty to negotiate in good faith. The expression “expressly” was open to many interpretations. **Mr Cohen** wondered if

what was intended was “actually”. In the end, the Group decided to delete the word “expressly” as it created confusion.

41. **Mr Bonell** thought that the following conclusions might be drawn from the discussion: first, the idea of providing a list of criteria for the determination of the meaning of negotiating in good faith should be disregarded and instead reference should be made to principles and rules already contained in the Principles, such as the prohibition of inconsistent behaviour (Article 1.8) and the relevance of trade usages; second, the last paragraph of Comment 2 should be amended in the sense that reference should be made to “all appropriate remedies”. **The Secretary-General** wondered whether Article 2.1.15 was the right place for this. He suggested that Article 5.1.4 would be a more appropriate place. As a matter of fact, the obligation to negotiate in good faith, if agreed between the parties, basically was an instance of a duty of best efforts and the comments could mention that such a duty, always provided that parties had so agreed, might arise not only in the course of performance, but also in the formation process and in this respect the comments could contain a reference to Article 2.1.15. **Sir Vivian** expressed some doubts concerning this idea. In his view the only way in which the good faith obligation could be built into Article 5.1.4 was a statement that parties should “act in such a way as would a reasonable person of the same kind in the same circumstances act, if it was acting in good faith” but he wondered what such a statement would add to what was already stated there. **Mr Wallace**, on the contrary, was in favour of the approach suggested by the Secretary-General, and felt that in the context of Article 5.1.4, the reference to good faith could even be deleted as what was important was ultimately the duty to negotiate. **Mr Cohen** was open-minded as to which was the most appropriate place for the envisaged new comments, but pointed out that, should it be Article 5.1.4, there should be a cross-reference to it in Article 2.1.15 as well as in the other articles dealing with a duty to negotiate (e.g. Article 6.2.3, Comment 5). This was agreed.

(d) Contracts with evolving terms

42. **Mr Bonell** stated that the basic idea was that long-term contracts were evolutionary, as there were many things that the parties could not anticipate, with the consequence that in the course of the relationship the contract had to be supplemented or adapted, as otherwise the original contract might turn out to be not so appropriate. This was an issue that had been raised by both Marcel Fontaine and Neil Cohen in their preliminary comments (see document 126, Annex I, p. ii).

43. **Mr Cohen** explained that his comments in Annex I to document 126 contained a list of phenomena that occurred over time in long-term contracts. Some of the issues on the list were already covered by the Principles, but might not be related specifically to long-term contracts in the comments.

44. **Mr Seppälä** observed that the circumstances evolved, but the contract itself was static. **Mr Bonell** illustrated the thinking behind the proposal: evolving terms meant that the parties had stipulated a certain term which subsequently did not satisfy them, so they disregarded the term and behaved differently. The question was therefore if the parties themselves, or even a third person, could state that the contract term stated one thing but that subsequent conduct had altered this term. **Ms Chappuis** stated that subsequent conduct was an important element in interpretation and that the contract could evolve in this way.

45. Turning to Question 11 in document 126, **Ms Chappuis** indicated that she preferred a new paragraph to be added to the comments to Article 4.3. This could be done in the context of the definitional section in Article 1.11 which could make reference to the parts that were particularly relevant for long-term contracts. **Mr Galizzi** stated that in his experience in negotiating oil contracts, the difficult issues were discussed in the last few weeks. He normally included a provision stating that any amendment must be agreed in writing. In the course of the contract,

working together over the years, the two parties might agree in meeting minutes or less formally to do something a certain way, with the consequence that if a dispute arose, there could be a conflict between the contractual provision and the subsequent conduct. He also referred to sitting as an arbitrator when, looking at a contract and the scope of the work to be carried out, if a contractor had not objected contemporaneously to certain work, he would agree that it came within the scope of the work. **Ms Chappuis** gave the example of a non-exclusive distribution contract which the distributor had argued had evolved into an exclusive contract. The original contract had included the usual clauses, including the no oral modification clause and a lot of time had been spent trying to ascertain whether the nature of the contract had changed. In the file, there had been nothing to conclude that the parties had agreed to the evolution of the contract into an exclusive agreement.

46. **Mr Cohen** noted the dogmatic controversy in the United States as to what subsequent conduct meant. In the US there was a lot of opposition to the course of performance having any effect on the contract, so it was a very limited interpretative tool. He noted that in relation to Article 4.3(b) and (c), a comment could be added stating that subsequent conduct was particularly important in long-term contracts, that subsequent practice could show what parties meant under the contract. On the other hand, he noted that there might be a few cases in which the subsequent conduct was so inconsistent with the contract that it might have to be viewed as an amendment. He thought it could be helpful to state this precisely because it had been so controversial.

47. **Mr Wallace** wondered whether the operation of the criteria laid down in Article 4.3(b) and (c) presupposed ambiguous terms or was possible also in cases where there was no ambiguity at all.

48. According to **Ms Chappuis** there was a continuum on the importance of subsequent conduct. If the parties were very precise and checked that all formalities were respected, the subsequent conduct would have less importance. If the parties were less formal, the subsequent conduct would have greater importance. She observed that in international companies, those that performed the contract were not always aware of the subtleties of the contract. She stressed that one should not be dogmatic about this but should take the conduct of the parties after the conclusion of the contract into account whenever appropriate.

49. **Mr Bonell** observed that this raised the question of implied, tacit, modifications and no oral modification clauses which did not prevent the operation of such amendments. **Sir Vivian Ramsey** observed that during construction contracts it might be necessary to, for example, modify the design of the work or the IT, so construction contracts had a mechanism to bring the contract in line with developments. The evolving obligations of time, work, and cost were essential. Under English common law subsequent conduct was not admissible for written contracts, but in civil law cases conduct subsequent to the contract had been helpful. In terms of interpreting the contract, the conduct of the parties during the course of the contract was important evidence of what the contract meant. Furthermore, conduct had a special flavour in long-term contracts. **Ms Cordero Moss** brought up the question of the different persons in the hierarchy of an organisation authorised to accept different terms of modifications thereof. There were mechanisms, such as variation orders. She suggested that when the comments stated that those interpretative tools were important for long-term contracts, they could also say that there might be contracts in which those matters were regulated extensively and that that regulation would prevail.

50. **Mr Cohen** observed that the examples had demonstrated that subsequent conduct came into play in different ways in different systems, including as an interpretative tool and as a method to modify the original agreement. He suggested that it was important to distinguish between the two. As an interpretative tool, one way to phrase the principle was to state that in the course of the parties' performance, their conduct could explain or amplify, but not contradict, the writing. **Mr Galizzi** stated that respect of the formalities was very important in the oil and gas sector. Terms

and conditions were always the same, but the scope of work was going to be modified. In the oil and gas world implied terms were very difficult, because they liked everything to be in writing. He noted that his company had become much more profitable when it had created a team of contract administrators who went through the contracts and would for example say to the negotiators that if they wanted to do something, they had to write a letter and seek a variation order. This procedure gave clarity, by respecting the contract, and avoided ambiguity. The contract administrator was someone who worked in tandem with the project manager. **Mr Seppälä** stressed the importance of contract administrators. He referred to the FIDIC design and building contract guide which contained both a building contract and an operation and maintenance contract which established an auditing committee to monitor developments. **Mr Bonell** referred to the International Trade Centre's model contracts and guides which provided for a contract management committee. There were quite a number of such committees. **Mr Zimmermann** suggested that it would be useful to add that parties might wish to set up a Contracts Management Committee in complex contracts and to say something about what such a committee might have as a role, whether it might be involved in dispute resolution and to what extent it might be involved in establishing facts and contract terms. **Ms van Lith** stressed that it was important to distinguish between an internal contract manager or administrator and a dispute resolution board which was picked by both sides. **Mr Gélinas** commented that a Contract Management Committee should only draw the attention of the parties to the problems and then leave it to the parties to decide how to solve them.

51. **Ms Veneziano** wondered where the question of administrative committees, in relation also to Questions 11 and 13, would be addressed. **Mr Cohen** commented that long explanations were not necessary. As regarded Question 11, a brief paragraph or a few lines would be sufficient, explaining why the criteria were relevant to long-term contracts, some of which involved repeated performance. Two more sentences would be sufficient to explain the limits of interpretation of the Principles.

52. **Mr Bonell** observed that once they had decided that the conduct of the parties subsequent to the conclusion of a long-term contract was relevant, the question arose of the possible interference of this with other principles that had little to do with long-term contracts. The additions/modifications that would be made to the present text of the Principles would have to be made in such a way that it did not create inconsistencies or open other questions.

(e) *Supervening events*

53. Introducing this item, **Mr Bonell** observed that long-term contracts were by nature subject to supervening events. The Principles at present had two supervening events, hardship and *force majeure*. The main purpose of hardship was to provide a mechanism to keep the contract alive on modified terms, whereas *force majeure* was more or less the end of the contract, with the party the cause of the end not being liable. The provisions on hardship appeared to be in line with the needs and expectations of long-term contracts and the interest of those contracts was to keep the contract alive. *Force majeure* was clearly modelled on one-shot contracts and had been taken literally from Article 79 CISG. The question was if that was a satisfactory approach or whether for long-term contracts *force majeure* could be adapted to meet the concern of keeping the contract alive to the greatest extent possible. What should the response of the Principles be if nothing was said in the contract? These concerns were addressed in paragraphs 29 and 30 and Questions 15 to 19 of document 126.

54. **Mr Gélinas** wondered whether fear could constitute *force majeure*. He gave the example of African football league hostages where the question before the Dispute Board had been whether a one-month suspension could constitute *force majeure*. There had not been much precedent regarding *force majeure* in case of fear. The Dispute Board had decided that it had been a case of *force majeure* with losses lying 50/50. **Mr Seppälä** observed that the clauses of the type described in Question 15 were quite common in long-term contracts and stressed that what was not

addressed and needed to be considered was who should bear the cost of the suspended performance. **Mr Galizzi** stated that each party had to bear its own costs in *force majeure*. It was very important to address the cost issue somehow. Also in relation to Questions 18 and 19, he stressed the importance of dispute resolution boards to avoid both litigation and arbitration.

55. **Sir Vivian** stated that in construction contracts *force majeure* was a hiatus in the arrangements of the parties and the question arose whether the impeding event really was *force majeure* or whether it was the fault of somebody. As regarded Question 15, one problem was that at the end of the fixed period of time something had to be done, which forced people to take fixed positions. A “reasonable time” was more difficult as it was uncertain. Sometimes a fixed period of time was good, but there had to be a balance between the two. In Question 16 the duty to make all reasonable efforts to eliminate or overcome the impeding event was there, but it had also to be dealt with under Questions 17 and 18. He felt that Question 15 was as far as it was possible to go, the others were sensible but not sure. **Mr Zimmermann** observed that sometimes it was reasonable to have a fixed period, sometimes a reasonable period, sometimes no period at all. He observed that the existing balance was very much tilted towards the debtor, who was excused by *force majeure*, and wondered whether it would be fair to tilt the balance even more towards the debtor. The most they could do, was point at the various options that were open to the parties. As regarded Question 16, there was *force majeure* only if the parties could not reasonably have avoided or overcome the event: if one of the parties could overcome it, then they were not dealing with *force majeure*. **Sir Vivian** agreed that it was not *force majeure* if it could be overcome by reasonable means. Very often the issue was whether or not the means were reasonable. One had to be careful about saying what parties had to do in given circumstances, as that brought the underlying question of what was *force majeure*.

56. **Mr Seppälä** commented specifically on the questions in document 126: his answer to Question 17 was no, the Principles should not “*suggest that the parties to long-term contracts expressly provide in the contract that in case of force majeure, if the impediment persists even after the expiry of a fixed time limit, the parties shall enter into negotiations in good faith with a view to adapting the terms of the contract so as to permit the continuation of their ongoing relationship*” because there were too many variations. He suggested that the issues that should be considered should be identified. As regarded Question 18, the reference to mediation was too restrictive, they should not be too specific in this regard. Amicable settlement could be promoted, but without recommending any one particular method. As regarded Question 19, it was too specific in recommending a procedure, as it was just one possible procedure. **Mr Cohen** agreed that they needed to be careful about advising parties to agree on something specific, a good adjustment might be to suggest matters they should consider. He thought that the five Questions needed a rationale as to why parties should consider the topic. He suggested introducing them with a paragraph or two explaining how *force majeure* worked in the context of long-term contracts, possibly under Article 7.1.7 with a reference to Article 7.3.1.

57. **Mr Seppälä** observed that he had found no reference in the Principles to Government action. In national laws, for example French law, there were doctrines relating to changes in law such as *fait du prince* or *imprévision* under which such changes in law were covered by hardship. He added that there was a trend towards accepting hardship in national law, indeed, there was a bill before the French Parliament making changes of circumstances (*imprévision*) applicable also in private contracts, not only public contracts. **Mr Gélinas** added that Government action was particularly important in relation to the environmental sustainability of the actions of the companies. **Mr Seppälä** stated that it was possible to have both change in law clauses and change in costs clauses. He gave the example of contracts for building nuclear power plants, in which it was customary to provide that the contractor would be reimbursed for costs due to changes in law, provided the changes were not foreseeable. The contract itself might list what was a foreseeable change. **The Secretary-General** drew the attention of the Group to Article 6.2.2, which contained

the notion of foreseeability. Changes in legislation were to be found on page 214 under (a). He also stated that UNCITRAL's work on infrastructure addressed the question of changes in circumstances.

58. Coming back to Questions 15 to 19, **Mr Bonell** observed that there had been a strong statement that they should not suggest anything to the parties except what was addressed in Question 15. He suggested addressing also the question of costs. **Mr Zimmermann** wondered if they agreed on not recommending that the parties address in the contract the suspension of the obligation of the party affected by *force majeure* in cases of *force majeure* in long-term contracts, or alternatively that they recommend that the parties think about it. **Mr Bonell** observed that in *force majeure* there was no suspension of the contract, there was only a postponement of when the obligation became due and it was not always appropriate to have a fixed period for the suspension. In the debate on the wording to use, **Mr Cohen** suggested "parties sometimes do the following, in particular in complex, long-term contracts, and parties may wish to consider the following...". **The Secretary-General** reminded the Group that to this costs had to be added, as did whether the parties deferred the determination to a particular body.

59. As regarded the issue of suspension, **Mr Seppälä** recalled that in construction contracts the providing of a suspension period was a common solution. **Mr Bonell** pointed out that the black-letter rules of the Principles provided that the party invoking *force majeure* was excused as long as the impediment lasted. **Mr Seppälä** drew attention to the fact that if there was no provision dealing with the situation, it fell under the governing law and its rules on a party being released from a contract. What they were talking about were contract provisions that provided for suspension and costs. **Sir Vivian** stated that their advice was important, as there was a need for guidance on periods of suspension and the bearing of the costs. If the local law were considered, he indicated that he was not sure what the situation would be with regard to England. **Mr Cohen** noted Sir Vivian's comment about uncertainty in domestic law and commented that it was also uncertain in the application of the Principles: Article 7.1.7 was vague and could apply in many different situations. For this reason they might wish to advise parties to address these issues in their contracts. He suggested they might even make the point under Article 7.1.7 that it was much better to plan for the continuation of the relationship. The Secretary-General stated that for this reason he proposed prefacing the sentence with "in the interest of continuing the relationship".

(f) *Cooperation between the parties*

60. Introducing this topic, **Mr Bonell** observed that Article 5.1.3 was very concise and might not address all issues that might arise in the context of long-term contracts. As regarded Question 20, if a party fulfilled this duty of cooperation, he/she might incur costs: who should pay for these? Was that a question that should be addressed? If so, a possible place might be Article 7.4.8(2) which dealt with the mitigation of harm and the entitlement of the aggrieved party to compensation for expenses incurred in the mitigation of harm. Should this question be addressed in the black-letter rules? As indicated in Question 21, the comments to Article 5.1.3 deserved a closer look, as they mixed a huge variety of cases between one-shot and long-term contracts.

61. **Mr Zimmermann** indicated that he could imagine an addition such as the one proposed in Question 20. If they did introduce a rule along the lines of Article 7.4.8(2), the fact that this did not preclude any other remedy should be mentioned. **Mr Seppälä** stated that the reimbursement of expenses was not a good issue for the black-letter rules, but should be dealt with in the comments. He referred to an ICC arbitration case involving the building of a town in Libya where a European contractor had been awarded a contract to build a 3000 house complex and it was a greenfield project, so all the electricity and water projects had to be done. These things had to be executed in a certain sequence, i.e. bringing in water, electricity etc., otherwise the work could conflict. The owner proposed to award the electrical contracts to local contractors and those contractors actually went into default. During the course of the works, there had been no action by the owner to ensure that work did not conflict with each other. The result had been catastrophic losses because the

housing contractors work had been interrupted by the local contractors. In the ICC arbitration, it had been necessary to demonstrate that the owner had had a duty not just to cooperate, but to coordinate the works. Ultimately, the panel had held that, although the contract was silent, the owner should be held to have an affirmative duty to coordinate in an active way and it had been breached in this case. The applicable law, moreover, had been Libyan law, which was silent on this point, but did have the duty of good faith. Under US law, the owner had a duty to act affirmatively because he was in contract with all of the parties and he had the power to coordinate. He had not found similar authority in English law.

62. **Sir Vivian** observed that the duty of cooperation was an inherent part of the employer's obligations under the contract and he therefore did not expect to be paid for it. In English law there were implied terms that the employer should not hinder the contractor's work and payment would not be expected for them, because they were part of the obligations that an employer had to take on as the risk of doing something. It was difficult to make payment part of this, particularly in the construction area, because then the employer could say that he was only going to coordinate if he was paid to do so. It could change the balance of risk under the contract. **Mr Bonell** observed that the general duty of cooperation and the duty of cooperation in the context of the mitigation of harm were different, so it was better not to touch it. **Mr Galizzi** liked the idea of clarifying that coordination/cooperation was very important and suggested it be placed in the comments.

63. **Mr Zimmermann** suggested that there were two situations: one under Article 5.1.3, the second the one envisaged by Sir Vivian. In long-term and complex contracts it might be desirable that, if one party faced difficulties, the other party did more than was reasonable to keep the contract alive in order to allow performance to occur. He suggested that that might be a case where the possibility to recover costs might be desirable. **Mr Seppälä** observed that one party might have a greater interest in saving the contract than the other. In such a case he wondered why compensation should be offered. **Mr Cohen** drew attention to the fact that two issues were involved here. Firstly, as pointed out by Sir Vivian, they were talking about duties and parties did not expect to be compensated for doing their duty. Secondly, there was an obligation to be cooperative. That was different. If a proviso were added saying that if the party went above and beyond the duties as narrowly conceived to keep the contract alive, did that create an area of contract between the parties as well? The fear of uncontrollable expenses could create confusion. He wondered whether there was a way to encourage cooperation that was a bit softer. **Mr Gélinas** referred to a case in which a beet sugar refinery in Spain had to be moved to another country. In the dismantle industry, it was the rule that the deconstruction company mark the pieces, so as to enable the re-construction even by a third party. In the case at hand, the deconstructor, after realising that it would not be entrusted with the re-erection of the refinery, had not made the markings in a proper way, i.e. in a way usable to a third party. The question was therefore whether in carrying out its obligation to deconstruct, the deconstructor had also the duty to properly mark the pieces. **Mr Wallace** suggested that this new type of duty was difficult to pin down, so he suggested building on what already existed. He wondered how it would be possible to specify a legally enforceable duty to co-operate. How was it possible in long-term contracts to specify what the parties had to do? Each arrangement had existing duties. **Sir Vivian** drew the attention of the Group to Illustration 2 to Article 5.1.3 which was a fairly complex one as, not knowing what the obligations of import or export were, the immediate reaction would not be to say that in the sale of a painting the seller had an obligation to help the buyer export it. Depending on the degree to which one went outside the implied terms or understanding of Article 5.1.3, he agreed that it was confused. He also pointed out that in construction contracts very often, when there was a delay it was on the contractor to make up for time. To do this they had to use reasonable endeavours provided that they did not involve unreasonable expenses. **Ms Cordero Moss** observed that there was a line between implied obligations and additional obligations that the parties wanted to exclude, for example by writing an entire agreement clause. For long-term contracts the duration should not be a source of new obligations that otherwise there would not be. She suggested the comments could make it clear that depending on the nature of the contract, there might be a higher or lower degree of cooperation. **The Secretary-General** observed that the contract did not

give rise to any additional obligation, but might give rise to an enhanced duty of cooperation. There was nothing in addition to what would otherwise have been there anyway. He suggested this might be stated in the comments.

64. **Mr Cohen** said that it was very unlikely that a court or arbitral tribunal would say that a party was liable when it had failed to do an affirmative act. The repeated failure to co-operate could provide a justification for termination for cause, that would provide a duty to cooperate that was not tied to any specific event but to a general co-operativeness. With respect to the point about reimbursement, if a duty were recognised, parties would just contract around it. If it were said that courts might award costs, then they could simply indicate the possibility instead of the mandatory nature in every point. If it were possible to say that Article 5.1.3 was not enforceable in every case, it could be helpful. As regarded reimbursement of expenses and the importance of co-operation in long-term contracts, **Mr Gélinas** observed that whenever money was spoken about, it usually meant liability. For this reason he was very reluctant to introduce the notion of reimbursement of expenses. He felt that liability could in no way be an implication. **Mr Zimmermann** observed that the comments under Article 5.1.3 were likely to have to be substantially redrafted. Implied duties were dealt with in Article 5.1.2, Article 5.1.3 went beyond that, so it was misleading to speak of a duty of cooperation. The article did not concern a contractual duty, but something over and above what the Principles normally expected of a party. In Illustration 2, A was expected to do something that it was not expressly bound to do. This jarred with the duty of cooperation. He wondered what the connection between Articles 5.1.2 and 5.1.3 was.

65. **Mr Bonell** concluded that there was general agreement that the black-letter text of Article 5.1.3 should stay as it was, but that the comments would need to be entirely re-written to make a clear distinction between the general duty of cooperation and the special duty in the context of long-term contracts. The illustrations should be changed, as the present ones were misplaced. He asked the members of the Group to make suggestions, as the more there were, the better. **Mr Gélinas** was concerned about the term “duty to co-operate”, as it could be inferred that it was a legal duty that could be breached. He suggested that instead of “duty to co-operate”, “duty of good faith” and implied terms be used. **Mr Cohen** indicated that they were not talking of a specific duty, but rather of a duty of co-operativeness, i.e. the parties in a relationship should be co-operative, it was hard to say that in any given situation a particular response was required. **Sir Vivian** stated that in his experience in most contracts people did not put anything about cooperation, i.e. it was one of those areas where what was an implied term in English law, a duty in the Principles, came in. He thought that in a sense this was a gap-filling provision. The question was if it was always appropriate to have that level of cooperation, i.e. just a reasonable cooperation, or were there some contracts with specific areas where one might have to look at Article 4.8 and/or Article 5.1.2 to decide that there was a greater degree of cooperation. This was the basic duty of cooperation, for which you were not paid, but if you went further, for example, in a particular context (e.g. the other person had to get an export licence), you might as a result of that be entitled to more money because in a sense that was an extra obligation that was implied. **The Secretary-General** wondered how to formulate this. This was not necessarily exclusively related to long-term contracts and simply referring to long-term contracts would not suffice.

66. **Mr Cohen** observed that the analysis of Sir Vivian might help in formulating the introductory language by saying that in the situations that would lead to the application of Article 5.1.3, as opposed to explicit terms of the agreement, as opposed to implied terms under Article 5.1.2 or as opposed to the more targeted intervention of Article 4.8, the probability of applying Article 5.1.3 would be more likely to arise in long-term contracts because of the greater unpredictability of circumstances that might arise because of the length of time, the complexity of operations, changes that occurred over time and as a result, while it was a general principle, there might well be more clauses to apply in ways that were less certain in advance than other provisions

would lead to, and as a result we draw your attention specifically to the application of this in the context of long-term contracts.

67. **Mr Bonell** suggested that long-term contracts should be described in very generic terms in Article 1.11, meaning that in many cases this kind of contract involved also a relationship between the parties and/or a bundle of rights and duties (say complex contracts) and then in each instance one could use the language instead of immediately targeting it, say the more the contract involved a relationship, the more the contract was complex, the more this or other duty applied. The same applied in evolving terms, then again there were long-term contracts, so they had the flag, and could then make the negative example in the comments. **Mr Zimmermann** commented that in re-drafting the comments, it was necessary to think about what types of situation were being dealt with under Article 5.1.3. Duties that were self-evident implied duties under the contract would not fall under Article 5.1.3 (e.g. preparing the house so the repair man could do his work). He asked what Article 5.1.3 was. It asked something of the parties which was not implicit but outside the contract and gave the example of a technician who, asked to carry out repairs at the client's premises, had not taken the necessary tools with him: provided that the client could easily locally find tools equivalent to those forgotten while the technician would have to travel back to his premises, it might be assumed that the client was under a duty to provide the equivalent tools. **Mr Wallace** objected, pointing out that Article 5.1.3 was in his view more or less a specification of Article 5.1.2, while Mr Zimmermann apparently gave Article 5.1.3 an independent role in so far as in his view it imposed an extra duty on the creditor. **The Secretary-General** stated that there seemed to be a large degree of agreement, or at least acceptance in principle, that something stated in paragraphs 34 and 35 of document 126 should go into the comments to Article 5.1.3, bearing in mind that this had to be tied in with a somewhat more sophisticated notion of long-term contract. He suggested the formulation "there are types of contract which may give rise to a reasonably higher level of cooperation".

(g) *Restitution after ending contracts entered into for an indefinite period*

68. Introducing this item, **Mr Bonell** recalled that when Articles 7.3.6 and 7.3.7 had been re-elaborated for the 2010 edition of the Principles, they had overlooked Article 5.1.8 which also dealt with restitution. This was the reason he had drafted Question 22.

69. **Mr Zimmermann** recalled the discussions in the earlier Group and observed that even if the rules on restitution were very much the same, they had decided to split them up. The two main places where there was restitution were after avoidance and termination. In the case of avoidance there was always restitution including restitution for past performances while in the case of termination there was not. Articles 7.3.6 and 7.3.7 dealt with restitution in case of termination for non-performance, the first for contracts to be performed at one time, the second for contracts to be performed over a period of time. Only the latter was relevant for long-term contracts. Article 5.1.8 dealt only with long-term contracts with the consequence that it referred to Article 7.3.7 and there would be no restitution for past performances. **Ms Perales** observed that Article 5.1.8 did not state the consequences of ending contracts for an indefinite period. She wondered whether Article 7.3.5 would apply also in this situation. According to **Mr Bonell** Article 7.3.5 might apply to Article 5.1.8 by analogy. **Ms Perales** suggested reference should be made to the provisions.

70. **Sir Vivian** pointed out that Article 5.1.8 did not say "termination" but "ended". He wondered whether there was a difference. **Mr Bonell** explained that "termination" was putting an end for non-performance. **Mr Cohen** observed that the terminology used in the Principles was internally consistent but was not necessarily consistent with all legal systems. He therefore suggested that an explanatory sentence might prevent possible confusion.

71. With reference to Question 22, **Sir Vivian** observed that if a new clause were introduced in Article 5.1.8, the consequences would be those of the termination provisions. **Mr Bonell** wondered

whether a new paragraph should be inserted in Article 5.1.8 to the effect that Articles 7.3.5 to 7.3.7 applied by analogy with appropriate adaptations. **Mr Cohen** observed that the points raised by Sir Vivian emphasized the need for a careful examination of the two alternatives in Question 22. Even those familiar with the terminology might wonder why the rules that applied to someone who had done something wrong were applied in this case, even if the parties had done nothing wrong. **Mr Zimmermann** thought that the easiest way was to say that a contract for an indefinite period might be terminated by either party. **Sir Vivian** observed that with restitution they were looking at only one of the consequences of termination. **Mr Bonell** indicated that if reference was made also to Article 7.3.5, which dealt with the effects of termination in general, then all the effects of termination would be covered, little if anything would be left. In Article 7.3.5 termination would not preclude a claim for damages for non-performance.

72. **Mr Zimmermann** summarised, saying they all agreed that they wanted an addition to the black-letter rules in Article 5.1.8 referring to Articles 7.3.5 and 7.3.7, together with a comment spelling out what that meant. Also, it should be spelt out clearly that “ending a contract” meant “terminating a contract”. He volunteered to draft the new language and comments.

(h) *Implementation by a group of linked contracts*

73. Introducing this item, **Mr Bonell** referred to comments submitted by Mr Marcel Fontaine, which were annexed to document 126, as he had put the subject forward for the consideration of the Group. The question was whether it should be addressed at all, and if so to what extent. Mr Fontaine went further than he had in document 126, but had also admitted firstly, that the issues were of relevance to both long-term and short-term contracts, and secondly, that they would need a more extensive treatment.

74. **Sir Vivian** observed that these issues would probably have to be dealt with under formation, if they were dealt with. He wondered whether it was appropriate to deal with these questions. **Ms Chappuis** stated she did not want this matter to be introduced into the Principles unless there was a very clear definition of what was intended. **Mr Seppälä**, **Mr Gélinas** and **Mr Zimmermann** agreed.

75. The Working Group consequently decided that the implementation of long-term contractual arrangements by a group of linked contracts should not be added to the Principles.

(i) *Termination for Cause*

76. Introducing this issue, **Mr Bonell** recalled that when the Working Group had been preparing the 2010 version of the Principles, Mr François Dessemontet had offered to prepare a draft on termination for cause, but for reasons of time it had not been possible to discuss the draft exhaustively. It had therefore been postponed to a future date, i.e. the present Group. The questions to address were firstly, whether it was a topic that was worth addressing, and secondly, if so, whether they envisaged black-letter rules, gap filling provisions absent a regulation in the contract, or merely comments inviting parties to address the issue.

77. **Mr Wallace** stated that the issue was a gap, so if they were going to treat it, it should be a black-letter rule. He pointed out that it might be applicable also to non-long-term contracts. **Mr Seppälä** observed that the subject was already touched upon in the Principles and Article 7.3.3 regarded termination for anticipatory non-performance. He referred to the development of this issue in French law and in the Middle East, where the intervention of a court was still required. He suggested that a black-letter rule would be good, as there was a gap in the articles. **Ms Chappuis** also favoured a black-letter rule, as she felt that there was a gap and that the Principles did not give sufficient attention to contracts performed over time. She noted that if this were added, then a provision on termination for cause would be needed. She felt that both international and national

examples supported this: the *ICC Model Form of International Sole Distributorship Contract* had clauses for termination for cause (cf. Articles 20.1² and 20.4³), and the private restatement⁴ revision of the Swiss Code of Obligations had evidenced that a provision for termination for cause was needed. It was therefore being inserted.

78. **Sir Vivian** indicated that in the common law they looked at two things: firstly, at termination for default in general law – i.e. where the contract was silent, a default had to be built up which was serious enough either by anticipatory breach or by a breach that had already happened. He observed that it would be good not to need that contrived approach for termination. However, that did leave the question of what the cause was. For example, when a company became insolvent, there could still be a degree of performance. Secondly, there was termination for convenience, which was becoming a much more common ground, not only in public contracts but in private ones as well. He felt that there should be a provision for termination for cause, but they needed to think about the consequences. **Mr Zimmermann** indicated that the corresponding provision in the German *Bürgerliches Gesetzbuch* (BGB – Civil Code) simply codified what had been developed by courts and legal doctrine. He stated that they needed to devote some energy to formulating exactly what “cause” meant, so that it did not undercut other rules, or it might be subject to abuse. **Ms Cordero Moss** observed that often contracts had two different sets of clauses, one for termination by default, the other for events leading to termination, e.g. insolvency or changes in legislation. These two different sets of clauses had different consequences and were negotiated very carefully, on the basis of very precise calculations. If such a rule were to be introduced into the Principles, the differences should be specified, as should the consequences. **Mr Cohen** stated that having a default rule was a good idea if done well, but not good if it became a tool of exploitation. It was a default rule for parties who were not sophisticated enough to think about it, those who were, would specify their own rule or would contract out of this rule. A number of issues had to be considered, starting with the definition of the trigger which could not be vague. They also needed to talk about how the dissolution of the relationship occurred once the statement had been made by one party. Was this something that the other side which would like to remain could contest? What were the consequences, in particular of leaving a relationship mid-stream? Lastly, was there any disincentive for raising the issue – should false raising be penalized?

79. **Mr Galizzi** remarked that he had never seen termination for lack of trust, while they very often had termination for convenience where no cause was necessary. In practice he had never seen termination for cause. **Mr Gélinas** agreed with both Ms Cordero Moss and Mr Galizzi. In actual life people knew what the breaches were likely to be and would therefore list them in the contract. But what if people had not provided for anything? To him, it was a very dangerous course of action to list what would be a fundamental breach as circumstances were always different. He felt that what was already in the provisions gave a good guidance. He stated that he was still waiting to see a commanding reason to have a black-letter rule. When he had seen termination for irreparable breakdown or loss of confidence he had thought that it did happen, but it only

² “Each party may terminate this contract with immediate effect, by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier), in case of a substantial breach by the other party of the obligations arising out of the contract, or in case of exceptional circumstances justifying the earlier termination”.

³ “The parties agree that the following situations shall be *inter alia* considered as exceptional circumstances which justify the earlier termination by the other party: bankruptcy, moratorium, receivership, liquidation or any kind of arrangement between debtor and creditors, or any other circumstances which are likely to affect substantially that party’s ability to carry out its obligations under this contract”.

⁴ HUGUENIN/HILTY, OR CO 2020, Schweizer Obligationenrecht 2020, Zurich, etc. 2013, art. 145: “[1] Ein Dauervertrag kann aus wichtigem Grund fristlos gekündigt werden; als wichtiger Grund gilt jeder Umstand, der die Fortsetzung des Vertrages für den Kündigenden unzumutbar werden lässt. [2] Fehlt ein wichtiger Grund, wird bei einem Dauervertrag vermutet, die Kündigung sei eine ordentliche.” [In English (a little awkward) translation: “[1] A permanent contract may be terminated at any time for good cause; good cause is any circumstance which renders the continuation of the contract unconscionable for the party giving notice. [2] If there is no good cause, it is presumed, that the termination of the permanent contract is an ordinary termination.”].

happened because there had been instances of breach before. In most cases when there was a breakdown, it was always possible to pin it down on something. They were looking at the general concept of breakdown of confidence. **Ms Pérales** stated that a provision in this area was necessary, to tackle the situation where the contract was silent. For example, cases where the parties had thought of a long list of situations in which the contract could be ended, but this did not include just cause.

80. **Mr Bonell** wondered what the relationship would be between such a possible gap-filling rule in the Principles and contractual provisions dealing with similar problems. He suggested it might be a question of interpretation as different conclusions might be arrived at in different situations.

81. **The Secretary-General** observed that looking from the perspective of the acceptability of the Principles, there were still many requests that the provisions on hardship be omitted. *Force majeure* was a well-known concept, hardship was not. As regarded the relationship between a termination clause and termination for default, he did not think that an analogy to *force majeure* clauses and *force majeure* in the applicable law worked. In this case the parties would be excluding it. They needed to address the question of damages.

82. **Ms Chappuis** proposed not to devise incentives for the parties to step out of the contract, but instead to devise the consequences and then to see if they were workable in the Principles. This introduced the concept of unjust termination: where one of the parties wrongfully invoked termination for cause, that party would be held responsible for all costs. **Mr Cohen** agreed with Ms Chappuis and observed that they were crafting a default rule of sorts. In so doing they might want to be mindful of how far they could proceed with what degree of agreement as this depended on what they intended should trigger all this. The phrase “fundamental breakdown of trust” seemed to be too vague: what did it mean? Was the impossibility to work with the other party sufficient to trigger termination without a specific event?

83. **Ms Veneziano** had two questions: firstly, if there was a default provision on termination for just cause and there was a contract enumerating situations for cause (some like breach, others like convenience), she wondered if this had to be construed as a derogation from the new default rule and if so, should it be flagged in the comments? Secondly, if they had to define the meaning of just cause, they needed to have illustrations to point out what really constituted just cause. **Ms Chappuis** stated that the answer to the question when a contractual clause should be considered a derogation to such a provision was not yes or no, it could be a very detailed clause and still not cover what had happened. The only definite answer was that it should be addressed in the comments. **Mr Gélinas** observed that there were really two types of breach, one which was so fundamental that the party was able to terminate without further ado, the other which instead required notice. They had to keep in mind that the two did not have the same consequences. **Mr Seppälä** wondered what more was necessary than tell the parties it might be desirable to identify specific events that might give rise to termination. Termination for convenience was part of the discussion, it was ordinarily seen when one of the parties was strong and was an inherently unfair provision. **Mr Bonell** suggested that what they were discussing was the space in between termination for fundamental breach and termination for convenience but only for relational contracts. **Sir Vivian** indicated that they had to move to the definition and illustration and look at what the consequences were to justify having it as a ground for termination.

84. **Mr Zimmermann** pointed out that if there was no provision along these lines in the Principles, there was a risk that termination for non-performance would become distorted if that was the only way to get out of a contract when upholding a relationship had become completely unacceptable. Secondly, the parties could, of course, agree on a clause in their contract, but that did not mean that the Principles should not have a provision. Asked for the experience of Germany, Mr Zimmermann stated that § 314 of the BGB was in the nature of a restatement of previous case

law and concerned termination for a compelling reason. It was applicable to all long-term contracts. There was a compelling reason if the terminating party, weighing the interests of both parties, could not reasonably be expected to continue. The German formula ("*nicht zugemutet werden kann*") went further than reasonableness, it went in the direction of unacceptable and intolerable. It was neither required, nor sufficient, that the other party had been at fault. If the compelling reason consisted in non-performance, the contract could only be terminated after the expiration of the notice period. This was in order to adjust this rule to the ordinary regime, whereby a special notice period had to be given. There was not as much case law as one might expect. He gave a few possible cases as examples: two parties are in a long-term relationship which involves that they sometimes have to meet; on those occasions one party repeatedly insults the other. This may lead to an irretrievable breakdown of the relationship and to the impossibility to co-operate any further. As second example he gave that of a private contract between an employee and an insurance company that paid him for any day that he was sick. The insurance company could terminate if he collected the payment even though in fact he worked. As third example, a contract had been concluded with a woman who wanted to work as a fitness instructor for one year and turned out to be pregnant. The fourth example was that of a person taking out a life insurance contract, but turning out to be insolvent. The four examples were cases in which termination for cause had been allowed. **Mr Cohen** wondered if the right to get out of the relationship was a right to do so without judicial action. **Mr Zimmermann** confirmed that this was the case.

85. **Mr Bonell** referred to a case adjudicated by Mr Finn: in an international distribution case after a certain period of time the parties had started provoking each other gratuitously, as they had started losing their mutual trust. As a response, a notice of termination had come from the other party. None of the parties could show a fundamental breach and therefore it had become a rather tricky case. Ultimately, the judge had had to invent a type of breach case for termination. If the judge had had gap-filling rules, then it would have been much easier. **Ms Chappuis** stated that Swiss law also knew termination for cause, but only for specific contracts: lease contracts, partnerships. As examples she referred to a loan agreement between several lenders and a borrower all belonging to the same sect, which one of the lenders terminated upon leaving the sect, and the dissolution of a commercial company where the minority complained about the conduct of the majority shareholders. In this latter case the minority shareholders had successfully invoked termination for cause.

86. **Sir Vivian** gave two examples: in the first, a client employed an architect to build a building and every time a drawing was produced, the client said that it was not really what he wanted. There was nothing wrong with the drawing, but it was not what the client wanted. In the end, the client said that the relationship was not really working out and terminated the contract. Was this a case of termination for cause? In the second case, there was a distributorship agreement between a multinational and a small domestic company with the multinational increasingly overburdening by requesting the domestic company to apply first a 10% cut on retail price, and then 2%, and again to accept to buy a larger quantity of produce for resale: when the domestic company, which for a while accepted these requests to keep the relationship alive, came to the conclusion that their relationship was no longer workable, was that a case for termination for cause? He thought that these cases would come within this type of clause. In the common law one approached this as a way to contrive a breach. In both cases, however, there would be a major dispute and it concerned him as to how to articulate that principle. As a judge, it would be quite difficult to decide what the standard was and how it came up. **Mr Bonell** gave the example of a producer with distributors in some countries and franchisees in others, which at a certain point requested the franchisees to apply a larger discount than that applied by the distributors: was this a sufficient ground for the franchisees to terminate their contracts even if there was no fundamental breach on the part of the producer?

87. **Mr Gélinas**, in the light of the examples given was more inclined to reconsider his initial scepticism regarding termination for just cause. He recalled a contract clause which stated that also repeated small breaches might constitute a case of fundamental breach and pointed out that contracts concluded *intuitu personae* might be particularly subject to termination for just cause.

88. **Mr Cohen** suggested that the conduct that might justify termination for just cause was basically of two categories. The first concerned situations that were one person's fault, or other situations of *sub rosa* implied terms. With respect to this category, they were relaxing a bit the fundamental nature of the breach as a requisite for termination in the context of long-term relationships. The other category could be built on the doctrine of failure of presupposed conditions, which presupposed a certain degree of ability on the part of the parties to work together. If that presupposed condition was not there, then it could fit into the law of conditions and be a building block to construct a more efficient way to do this. For example, two IT engineers decided to join and rented a flat together. One was a morning person and the other an evening person so that there was virtually no time in the day when they would meet and be able to work together. Was the fact that the parties as a result of their different habits were not meshing in the way that had been anticipated a sufficient ground for termination for just cause? **Ms Chappuis** confessed that she had problems with the notion of implied terms and preferred having something explicit and straightforward along the lines of Articles 20.1 and 20.4 of the *ICC Model Form of International Sole Distributorship Contract*.

89. **Sir Vivian** stated that in each of the cases they had been considering it might be possible to craft some implied obligation. Thinking about the wording of the German provision and the facts that they had gone through, it would be "manifestly unreasonable for the terminating party to continue the relationship". Speaking as a judge, that was a comprehensive test that had a degree of subjectivity about it but looked at the objective facts and asked the question whether in those circumstances a contract should be brought to an end. **Mr Zimmermann**, echoing Sir Vivian's formula, suggested the following wording: "There is a compelling reason if, having regard to all the circumstances of the specific case and balancing the interest of both parties, it would be manifestly unreasonable to expect from the terminating party to continue the relationship". **Ms Veneziano** thought that it would be very helpful if the comments contained examples where there were "compelling reasons" for termination (e.g. continuing harassment by one party vis-à-vis the other or a close relative thereof) and where there were no such "compelling reasons" (e.g. personal misbehaviour of minor importance by one party which has nothing to do with the commercial deal).

90. **The Secretary-General** thought that "manifestly unreasonable" captured the German formulation. Mr Zimmermann's suggestion of termination "for compelling reasons" was also much better than "termination for cause" because it made it clear they were talking about an exceptional remedy. He wondered whether it was reasonable to assume that by including a very detailed list of default, the parties were excluding the application of default. He suggested the comments might explain this. **Mr Bonell** agreed that the comments could say that this was not a mandatory provision and that by including an exhaustive list parties might well mean to exclude the application of default. **Mr Cohen** stated that there were three distinct elements that needed to be described in the comments: the compelling reasons, balancing the interests of the parties and the manifest unreasonableness of continuing the relationship (and loss of trust would be one practical example). **Ms Chappuis** observed that if the event invoked fell within the scope of the risk accepted by the party, he/she should not be able to invoke it. She drew attention to Article 6.2.2(d), under which it was a case of hardship if the risk of the event had not been assumed by the disadvantaged party, indicating that what they were discussing would fall under this. **Mr Zimmermann** stressed that they had to be careful not to have conflicting assessments. It could not be an instance in which the parties assigned this risk to one of them under the contract.

91. **Sir Vivian** stated that Ms Chappuis's concern was met by the terminology "manifestly unreasonable". If it was a risk that had been assumed under the contract, it would be difficult to

say that it was manifestly unreasonable to continue the relationship. The test was the circumstances of the case. **Mr Seppälä** drew attention to the fact that the Principles used the terminology “manifestly unreasonable”, but he was not sure that “compelling reasons” was to be found there. **Mr Galizzi** observed that having both “compelling reasons” and “manifestly unreasonable” was too much. Having “manifestly unreasonable” and a balancing of the interests should be sufficient. **Mr Gélinas** wondered how this type of clause would work in practice. It might be tough for judges to evaluate. Who decided that the conditions were fulfilled? **Ms Chappuis** commented that these were not new difficulties, the same problems existed with fundamental breach, in which case there was a judge or arbitrator who had to evaluate whether or not it was a case of fundamental breach.

92. With respect to the consequences of termination, **Mr Zimmermann** suggested breaking this question into two: firstly, the effects in general, and secondly, restitution. As regarded the effects in general, he suggested that the provision in Article 7.3.5 should be adopted with the consequence that under Article 7.3.5(2) the innocent party could claim damages from the party to which the compelling reasons were attributable. **Mr Bonell** wondered whether Article 7.3.5 really did address the most delicate issues. One very important issue was possible damages for having wrongly invoked termination. Moreover, even if the termination was justified, should the terminating party pay some compensation? **Mr Cohen** agreed and observed that Article 7.3.5 was correct but not the whole story. The right they had discussed was a discretionary right, and they might want to give some thought to the consequences that went beyond Article 7.3.5, including responsibility for unwinding the mess that was left. Even if the situation had become intolerable and a party exercised the right to terminate, what followed had to be dealt with, including the reallocation of risks and benefits that came from this point. **Mr Bonell** added that they should also give consideration to the question of whether the termination would take effect immediately or in some cases after a certain time. **Ms Chappuis** commented that they were discussing on the assumption that compelling reasons did exist. In such cases, even if the compelling reasons did exist, what they had done was that the party responsible for the good cause was liable for the damage. Even if it was not a breach, the non-terminating party might be responsible for the situation. In that case, they had thought that a claim for damages should be possible. There was another question to decide, i.e. if there were no compelling reasons, did the notice still produce its effects and put an end to the contract or did it not? The contract came to an end even if there were no compelling reasons. The party not wanting to go on and stepping out of the contract had to pay damages.

93. **Sir Vivian** observed that the first question was that of the notice and what sort of notice had to be given. In general there were two principles: if the situation was irremediable, then notice should be given and the contract would terminate. If it was remediable, then notice should be given but the relationship should continue. If sufficiently compelling reasons existed, then the situation was irremediable. In such cases the notice requirement only existed to give parties an opportunity to work out what was necessary for winding up. He thought that if one took that view the contract had to terminate on notice. The second point he wanted to make was the following: if on termination for fundamental breach, restitution could only be claimed for the period after termination had taken effect (and subject to the right to damages for previous non-performance), and you applied the same rule to termination for compelling reasons, it would mean that the compelling reasons were put on the same level as fundamental breach and this he found difficult to accept. Just think of the example of the architect who might have incurred in considerable expenses in the preparation of the project but would be left in a position where he could not recover anything. He thought that the starting point on restitution would have to be damages for non-performance in the past without restitution for the future. The logic had to be that there was no compensation arising from the fact of termination, because then a legal principle upon which to hang the restitutionary remedy had to be found. If, on analysis, it was found that there was no compelling reason, the party that had terminated the contract wrongfully would be liable for damages for fundamental breach.

94. **Mr Zimmermann** warned that there was a danger of mixing things. He agreed that in these restricted circumstances termination should take effect immediately. As regarded damages, if the breakdown of the relationship was not due to the fault of the other party, the terminating party would not have a right to damages. On the other hand, if it was due to the fault of the other party there could be a claim that survived. The issues should be separated.

95. **Mr Wallace** wondered if there was a general duty to cure, if the duty to mitigate survived here. What happened if the terminating party did it wrongly and what would happen if both parties rushed to the court house to terminate? He asked what the consequences would be for damages, as they might not be the same. **Ms Cordero Moss** gave the example of a case where both parties were complying with their obligations but neither was happy. One decides to terminate, in the absence of a breach. The person who had not terminated would feel entitled to some compensation. She wondered who could claim damages from whom and what damages, considering there had been no breach of contract. She wondered if it was not the party who had suffered the termination who could expect some form of compensation. **Mr Bonell** noted that in this case the termination could not be attributed to either party, with the consequence that no damages were available. It was different in the case referred to by Sir Vivian (see p. 20) of a client employing an architect to produce a building and every time a drawing was produced, saying that it was not really what he wanted. There was nothing wrong with the drawing, but it was not what the client wanted. In the end the client said that this was not really working out and terminated. In this case the architect had not taken the client's requests sufficiently seriously and the breakdown was therefore attributable to the architect. **Sir Vivian** stated supposing Mr Bonell was right and there was an element that the architect should have taken into account, as he saw it, that would give the client an independent right to damages, not because the contract was terminated, but on the basis of that implied term. Was the remedy of damages for fundamental breach available in this case because of that termination? Under English law some damages would be available but not because of the termination. **The Secretary-General** observed that termination for compelling reasons should not be a fall-back for the failure to make out a case of fundamental breach.

96. **Mr Cohen** suggested that there may be reason to add something more in terms of the consequences of termination when no one was at fault. His first reaction was that each walked away, but their costs might not be equal and one party would bear a significantly greater cost than the other. That might be ameliorated by the date of termination. If termination was immediate, that was clearly if something bad had happened and it was not possible to go forward. If it was something that built up over time, it might not need to be terminated immediately. He wondered if, rather than being so certain that if one party gave notice of termination this was effective immediately, they might want to think about alternative ways such as that termination was effective only after a certain period of time to permit winding up and thereby cause the other party less harm.

97. **Mr Zimmermann** suggested that they were discussing two separate points simultaneously. His answer to the parties who walked away depended on the type of restitution they adopted, whether also for past performances or only for future performances. As regarded Mr Cohen's second remark, when the situation was building up, the termination could only be declared when there was a compelling reason. This was why Sir Vivian had said that the party terminating might be well advised to provide notice.

98. **Sir Vivian** observed that the "one notice" route was better here, rather than having a previous notice requirement: if a previous period of notice was given so that both parties could organise themselves, then to some extent both parties were just given another month of potential harm. The difficulty was saying this even in the commentary. He stated that you wanted to move straight to the notice of termination, instead of having the period of notice. **Mr Cohen** stated that the reason he wanted to preserve that point was to remember when discussing wrongful invocation

of this procedure, that if you do it wrongfully, you run the risk of damages. If a party said that this was intolerable, and gave notice to reduce the amount of harm, it should not be used as evidence that it was intolerable. **Sir Vivian** stated that the test was in the circumstances of the case. Evidence was expected that the parties were getting into an intolerable situation, that one of the parties had flagged in advance that this was a problem. It was less credible when a party did something and there was no background to it. **Mr Wallace** indicated that it was not clear to him what the emphasis was. The notice had several purposes. **Mr Bonell** observed that Mr Wallace's comment prompted him to ask for confirmation of their understanding, i.e. there was only one notice. **Mr Zimmermann** wondered whether they also intended to provide that the person entitled to terminate could do so only a reasonable time after having become aware of the breakdown. **Sir Vivian** suggested that this not even be put in the comments, it was difficult in this type of breakdown.

99. Turning to restitution, **Mr Zimmermann** indicated that he was starting to doubt that Article 7.3.7 gave the right answer in all cases. Initially he had thought that Article 7.3.7, which provided that termination operated only for the future, was appropriate also in cases of termination for compelling reasons, the reason being that, like in cases of termination for breach, it could be inconvenient to unravel past performances. Now he had started to doubt this at least with respect to cases in which one party had made considerably more performances than the other party. It was true that in many of these cases this might be handled by a damages claim but the most difficult case was the one in which no party was at fault (e.g. the case of the relationship between a morning person and an evening person). In those cases it would obviously be unjust to leave the parties where they were after termination. In German law the remedy was called *Kündigung* and was only for the future, with no unravelling of what had happened in the past. But the German Federal Supreme Court had found a way to allow looking back, through restitution, if it was easy to unwind past performances. If one party had spent a lot of money or hired office space and the other party had not done as much, you did not want the parties to walk away with one of them losing much, in such cases unwinding might be necessary.

100. **Mr Cohen** pointed out that the rule of Article 7.3.7 worked well in the ordinary cases where the parties had exchanged performances. More difficult were the cases where, in addition to the performances the parties had rendered one to the other, one of the parties had made substantial investments. For example, in a franchise agreement in addition to the franchisee paying the franchise fees to the franchisor and the franchisor letting the franchisee use its name etc., the franchisee had bought furniture etc. from a third party the cost of which he could of course not recover from that third party. **Sir Vivian** suggested that, leaving damages aside entirely, there would have been unequal expenditure and if they were going to unwind that, then they would get into a very complex area. One party might have an imbalance, but notwithstanding that he thought that the rule should be that the loss lied where it fell.

101. **Mr Cohen** came back to the no fault scenario where there was nothing that fitted in Article 7.3.5(2), i.e. no damages could be claimed for non-performance because there was no breach on the part of either party. If the nature of the contract was that one person would make a large investment early (e.g. buying equipment) and the other person would incur an equal amount of expense, but much later and termination for compelling reasons happened in between those two investments, this did not fit into the restitution section at all. Was the conclusion then, that if one party walked away, the result was that that one person would be the one to lose? **Mr Bonell** observed that the first party should not get anything from the other, it was at his own risk. **Sir Vivian** gave the example of two parties paying in advance the rent of a combined office for a year each, and observed that Article 7.3.7 was only for what had been received and not for expenses paid to a third person, so there would in this case be no restitution to anyone as the rent had been paid to a third person. It was necessary to investigate this, as he had the impression that it was going to be a major area. As they seemed to be aligning Article 7.3.7 (for fundamental breach) with the way that restitution was assessed in a case of compelling reasons, it did not quite fit into

this spectrum. He indicated that intuitively, he would include advanced payment. **Mr Wallace** stated that this was unjust impoverishment and was unfair. He wondered if something should be done about it. **Mr Zimmermann** pointed out that restitution under Article 7.3.7 was a claim of one party against the other, whereas in the case given by Sir Vivian there had not been any performance to the other party, it had been made to a third person and could therefore not be recovered. **Sir Vivian** stated that the difficulty was the type of relationship that they were breaking down. Partnership expenses would be paid equally. There had to be clarity as to whether or not there was some restitutionary principle. **Mr Bonell** drew the attention of the Group to Article 25⁵ of the *ITC/UNCTAD Model Contract on Contractual Joint Ventures* on the termination of joint ventures, their liquidation and the terminating of all their operations, which gave clear rules with respect to expenses made for the joint venture. **Mr Cohen** suggested saying that Articles 7.3.6 and 7.3.7 did not preclude other possibilities under the applicable law. From Article 7.3.6 the user learnt what restitution was, the rule was in Article 7.3.7 and did not preclude other possibilities. The comments had to make this clear.

102. Opening the discussion on the issue of unlawful, unjustified termination, **Mr Bonell** stated that he presumed that the other party would react to the unjustified termination and the matter would end up before a court. For example, under Italian labour law an unjustified dismissal could be invalidated by a judge. **Mr Zimmermann** observed that if a party terminated without being justified, that in itself did not mean anything, but if the other party suffered damages he/she would have a claim for their recovery. It would be a normal claim for damages for non-performance. He did not think that special rules were necessary, the general rules were sufficient. **Sir Vivian** stated that where there was a breach, possibly a fundamental breach, it was left to the innocent party to determine what he/she would like to do. It was not possible to leave matters in limbo until the judge decided, so often the other party terminated itself. He observed that when a party unlawfully gave the notice to terminate, it was treated as a breach which had brought the contract to an end. The contract came to an end, but in any event the parties were left with their remedies. **Mr Wallace** wondered if the unjustified termination was anticipatory fundamental breach. **The Group** confirmed that this was so. **Ms Chappuis** indicated that this issue was very controversial in Switzerland, where the Italian labour law equivalent applied to lease contracts. She drew attention to Article 20.6 of the *Model Form of International Sole Distributorship Contract*, under which the termination would be effective even if unjustified. It would be an unjustified termination leading to damages. **Sir Vivian** commented that that was the alternative, but in long-term contracts the party that was going to assert that there was no proper reason should be given the choice of declaring that the contract was still alive. If it were terminated, all the remedies might be in damages. An automatic termination took away the possibility of the aggrieved party to choose.

103. **Mr Cohen** felt that Sir Vivian's suggestion to preserve options was a good one. Under Article 7.1.3 the party announced that it was not going to perform: this was an anticipatory

⁵ Article 25 Termination of the Joint Venture

25.1 The Joint Venture is terminated: (a) When its Object is achieved; (b) When the achievement of its Object becomes impossible; or (c) By unanimous decision of the Parties.

{ **Option:** consider adding the following grounds for terminating the Joint Venture: (d) In case of death, withdrawal or bankruptcy of one or several Parties; (e) By expiration of the duration of the Joint Venture; (f) By unilateral termination of the Agreement by one of the Parties [specify the requirements]; (g) By a decision of the Arbitral Tribunal to dissolve the Joint Venture based on just grounds for dissolution. }

25.2 Upon its termination, the Joint Venture shall be liquidated. To this effect the Parties shall take in particular the following steps: (a) Terminating all legal relationships of the Joint Venture with third parties; (b) Selling the assets of the Joint Venture at the best possible price; a Party having a justified interest in the return of a contribution it has made in a form other than cash shall have a right of first refusal to re-acquire this contribution at market value; (c) Settling the debts of the Joint Venture; (d) Where applicable, refunding the loans made by the Parties.

25.3 At the end of the liquidation, any remaining cash surplus shall be distributed to the Parties according to their Shares in the Contributed Assets.

25.4 If the liquidation of the Joint Venture results in outstanding debts owed by the Joint Venture, the Parties shall bear them proportionately to their Shares in the Contributed Assets.

repudiation and that would give the other party the option to terminate. It did not have to, if it wanted to maximize benefits or to give time for cooling down. **Ms Chappuis** expressed her astonishment at the suggestion that if one party declared an unjustified termination, the other party would be able to insist on performance. **The Secretary-General** asked what the likelihood was that the relationship could continue: in his view, to terminate the contract if there were no compelling reasons to do so in itself demonstrated that something was definitely wrong with the relationship. **Sir Vivian** explained that what happened was that one party terminated, the other then had the option to decide if it wanted the termination and in the end the question was resolved by court proceedings. Then the innocent party had the right to demand continued performance to maximise damages. There were cases where keeping the contract alive allowed the parties to maximize the heads of the damages. He gave the real-life example of a construction contract, for which if the contract were kept alive, this would give the contractor a right to permits to operate in the country and that was important for that particular contractor. In that case, if it had been an automatic termination and it had been proved that it was not a proper termination, the innocent party would have suffered an unjustified loss on the ground that to obtain a new permit was very difficult.

104. **Ms Chappuis** stressed that they should decide whether an unjustified termination was effective or not. **Mr Zimmermann** stated that in itself it would not be effective and **the Secretary-General** agreed that it was not an effective termination, and stated that it was a repudiation of the contract and the person claiming the unjustified termination was in breach of contract. Also **Sir Vivian** thought that an unjustified termination would not of itself terminate the contract, but it gave the other party the right to decide. **Mr Cohen** agreed, because it avoided bizarre strategic behaviour. The wrongful exercise of the termination right was a repudiation under Article 7.1.3, which in 99% of cases would lead the party to say that the relationship was over, but in other cases it would not. **Ms Perales** observed that for her this situation was the same as for fundamental breach. It was not covered by the Principles but they were trying to arrive at that solution. **Sir Vivian** stated that if there was termination for fundamental breach, and that was proved to be wrong, unless the other party had treated the wrongful termination as itself a fundamental breach, the contract would continue or, more precisely, the innocent party had the option. For a common lawyer, a fundamental breach of contract had no effect except in damages until a party agreed to accept that or give notice to terminate.

105. **Mr Cohen** pointed out that they were giving the term “termination” two different meanings. He pointed out that whether the contract was terminated was a legal conclusion. In the cases they were thinking of, the party could take action, but the contract could be terminated only by operation of law. If the necessary facts were not there, the contract would not be automatically terminated. The difficulty came when they called the action taken by the party “termination”. It was only the party’s assertion that his/her grounds for termination existed. **The Secretary-General** pointed out more causes for confusion, stating that they had to separate two things: for example, Party A was the distributor and Party B the nasty multinational. A felt harassed and wanted to walk away and gave notice for termination. B wrote back saying that the reasons were not present. Then it went to arbitration and the arbitrator concluded that A was wrong. A’s action was a repudiation of the contract. **Sir Vivian** observed that there were two steps here, firstly, the notice-giving stage and secondly, whether it was correct to have given that notice. What the other party had, was the right to say that that was not correct and that there was no termination, in which case the matter went to court. If there had been no compelling reasons, the matter disappeared. The alternative, which was Ms Chappuis’s question, was if the notice was invalid, it terminated the contract automatically. What that meant in reality was that the scheme of Article 7.3.1 came in automatically, in other words the contract was terminated for fundamental breach and the innocent party was left to the remedies in damages. It would be possible to say this in the black-letter provision. **Mr Bonell** commented that they had clarified that an unlawful attempt to terminate was not an effective termination. **Ms Chappuis** pointed out that between the notice of termination and the time a court decided, interim measures might be taken. **Mr Cohen** observed

that if a person was sent the letter, if it was untrue, it was clearly an anticipatory repudiation. The aggrieved party, if the reasons were untrue, could say that it was a breach and could pick the remedies and that gave him/her the option of what to do.

106. There was agreement that this question belonged in the comments: **Ms Chappuis** stated a comment should be added also to Article 7.3.3, because this would expand the scope of the article. **Mr Zimmermann** did not think that it expanded Article 7.3.3, but rather illustrated the provision. He considered it a straightforward application of the provision. **Sir Vivian** observed that if Articles 7.3.1. and 7.3.3 were considered, the ability to use those provisions depended on there being a fundamental breach. There might be a case where a party used termination for compelling reasons, but for some reason that was not a fundamental breach. His suggestion was that they should refer to Articles 7.3.1 and 7.3.3 in the context of the black-letter article that they were going to add, but not make it sound as if there was going to be a fundamental breach in every single case.

107. **Mr Bonell** concluded that the Group agreed that this question (unjustified termination for compelling reasons) should not be dealt with in the black-letter rules, but in the comments.

108. **Mr Zimmermann** came back to Article 5.1.8 and reiterated his proposal to use the term “termination” also in Article 5.1.8 instead of “come to an end”. **Ms Perales** saw a certain difference between Article 5.1.8 and termination, as in the former there was an absolute right to terminate, which might be for dogmatic reasons. **Mr Bonell** objected that it was not an absolute right because it was necessary to give notice. **Ms Chappuis** suggested that the present Article 5.1.8 and the new provision on termination for compelling reasons be placed together in a separate section under Chapter 5. The provision on compelling reasons should come immediately after the provision on notice a reasonable time in advance. **Mr Bonell** pointed out that termination for compelling reasons was a remedy, whereas Chapter 5 dealt with the content of the contract. **The Secretary-General** suggested Chapter 7 as location of the new provision, as it dealt with non-performance. **Mr Zimmermann** recalled that it had always been the practice in the revised editions of the Principles to find a placing for new materials that upset the existing order as little as possible. He therefore suggested placing the provision in Chapter 6, as a new Section 3 on termination for compelling reasons. The Group agreed.

109. **Mr Seppälä** stated that he was terrified of this clause because it gave a party a way out. It was too vague and would incite him as a practitioner to put in as many specific grounds as possible in the contract. **Mr Bonell** stated that one of the purposes of the rule as a gap-filling rule was to alert parties to the fact that the problem might exist and that if they did not like the gap filling rule, then they should address the problem fully in the contract.

(j) *Post-Contractual Obligations*

110. Introducing this item, **Mr Bonell** drew the attention of the Group to the comments submitted by Mr Fontaine and stressed the importance of this issue, especially for long-term contracts. Article 7.3.5 had only one statement and he wondered whether the comments to that article should not elaborate further. In document 126 he had tried to give some instances of post-contractual obligations.

111. **Sir Vivian** stated that his experience generally was that in a lot of contracts there was a limited reference to some obligations continuing after termination. Generally, when people were drafting contracts, they did not pay much attention to the details. He had had a case where the insurer had used agents to deal with all the insurance claims. The main question had been who would pay for the provision of that information. There had been a clause in the contract regarding the provision of the information, but the question regarded the situation post-termination. Was it part of the existing contract obligation? Or was it a new obligation? What was the scope and extent

of that obligation? In another case, there had been a defence contract that had been terminated and there was a support system and a question arose regarding the payment of the license fees for the licenses that continued.

112. **Ms Chappuis** agreed that usually drafters of contracts and legislation did not think about the life after the end of the contract. She however did not think that it was possible to draft a black-letter rule, as the clauses were so different. For example, in the case of the phone industry, an important duty was to help the client to migrate to a new provider at the end of the contract. This was very important and migration costs were not rightly dealt with in the contract. She also mentioned similar clauses in use in oil industry contracts which **Ms Cordero Moss** confirmed were called “Abandonment Clauses”. **Ms Chappuis** thought that the attention of the drafters of legislation should be drawn to this issue. The last question was where to address this, as it went beyond non-performance. As there was now going to be a new Section 3 to Chapter 6, she suggested to place it in that new section, with cross-references to Articles 5.1.8 and 7.3.5. There were clauses that could continue, including dispute resolution clauses and governing law clauses. She completely agreed that an attempt should be made to identify those that survived. In some situations there might furthermore be some clauses that one wanted to survive but not others. **Mr Seppälä** gave the example of dispute boards that were set up to deal with disputes on a construction site, but if the construction contract had been terminated and the contractor had left the site, there was no longer any need for settlement on site. If contractors left the site and a dispute arose, was it still necessary to go through the dispute board procedure even though no one was on site? **Mr Bonell** suggested and **Mr Seppälä** agreed that the comments should draw the attention of the parties to the fact that the problem existed, but no more.

113. **Mr Zimmermann** stated that it was not possible to enumerate the situations when there were post-contractual duties and what these were. Whether or not some survived was a question of contract interpretation. He suggested that the right place to put the comment was in Article 7.3.5 because it already had the nicely phrased paragraph 3. He agreed with Ms Chappuis that this was not the only place where this was dealt with, so it would be necessary to insert cross-references to that section from the other sections. He also stated that it was not possible to have a section entitled “Long-term contracts” because then the reader would think that it contained everything that applied to long-term contracts, which was not the case. **Mr Bonell** stated that the comments should indicate that post-termination duties might apply to both one-shot contracts and long-term contracts, something along the lines that it was particularly frequent that this arose in long-term contracts but it was equally the case where parties... etc. etc. **Mr Gélinas** agreed with the idea of drawing the parties’ attention to this and listing some examples. The duty of cooperation during the performance of contracts became even more relevant after termination, because the parties needed to properly wind up or liquidate their businesses. They should also draw attention to sub-contracts which also terminated, to the fact that there might be problems in groups of contracts. **Mr Emery** noted that this topic had been addressed, in a specific context, in the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects*.⁶ He suggested that the language of those provisions might be informative for the Working Group during drafting.

114. **Mr Wallace** wondered if non-compete clauses were post-contractual, as they went on after the termination of the contract. It was now quite common for bilateral investment treaties to have survival clauses. He further observed that in construction contracts one of the obligations of the contractor was to provide spare parts and he wondered whether these were paid for separately and for how long the obligation to provide spare parts lasted beyond the end of the contract. **Mr Seppälä** agreed that it could be a problem, although where he had seen problems was when a

⁶ Model Provisions 47-48, to be found on page 30 of the publication, which was accessible also on the UNCITRAL web site at http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf.

manufacturer discontinued a line. He wondered what the duty of the manufacturer was in such cases vis-à-vis those that were using the old line. **Sir Vivian** commented that if spare parts were commonly available, it would not generally be interpreted as surviving, on the other hand if they were not commonly available, it would be interpreted as surviving as there was nowhere else to obtain them. **Mr Gélinas** commented that if they took the position that the contract was terminated in its main portions, but not necessarily in all its obligations, then that gave the answer as to what price the spare parts would be charged, whether that was the same obligation that kept on living or a new obligation that gave rise to a different price. **Mr Galizzi** observed that the warranty period was a clear obligation that came out after the completion of the contract and this warranty might be both contractual and legislative, in that some countries had warranty periods fixed in the local law, maybe of a much longer period e.g. even ten years. Mr Cohen referred to Article 92 of the Chinese Contract Law⁷ which he found quite appropriate. **Sir Vivian** observed that there were a number of contracts, in particular IT contracts, where, if they came to an end, there was an acceptance that the contractual obligations would have to continue, but a period of run-down was entered into. Another point was that when a contract came to an end, the existing provisions were interpreted to see which of them continued, but as part of that exercise implied terms would have to be looked for. It was not just the existing terms, but the particular terms that came in on termination. **Ms Chappuis** first of all wondered if, when there was a duty concerning spare parts and that duty was breached, the third person would have available all the remedies for non-performance as she would have thought that this was so. Secondly, the comments should recommend parties to include in their contract a clause referring in general to post-contractual obligations along the lines of Article 7.3.5 and then provide a list of specific instances. **Sir Vivian** commented that the question whether all the remedies for non-performance would still be available if there were continuing obligations and a contract were terminated was quite difficult. If there was an obligation to provide spare parts and the other side was to pay for them, what would happen if there was fundamental non-performance of that obligation? Did the provision for termination in the contract apply or that under the applicable law? **Mr Gélinas** wondered if there was a commitment to service the customer for two years the manufacturer would have to give the thirty-days' notice provided for in the contract. **Mr Bonell** observed that the relevant contract provisions would apply and if there was no relevant provision the applicable law would apply. **Sir Vivian** commented that there were quite difficult questions of insurance and of dispute resolution that would be associated with these questions. **Mr Zimmermann** proposed that they just add the comment that there could be duties and obligations that survived, even after the main obligation had been performed, and because they were drawn from the contract, they continued to be governed by the Principles.

115. **Mr Cohen** pointed out that they were talking about two different things: post-contractual obligations and post-termination obligations. What they were talking about would affect where they put it. Termination was a term that was used in the Principles and if it were referred to as an obligation, that would only be triggered post-termination. **Mr Bonell** indicated that although the comments would be placed under Article 7.3.5, reference should be made also to other cases of termination and to cases of a contract coming to its natural end. **Sir Vivian** observed that he had not been able to find within the Principles a definition of the time when the contract came to an end naturally.

116. **Mr Cohen** stated that they had identified two post-termination responsibilities: firstly, by their very nature some obligations continued after the event of termination and these would be obligations under the contract that continued. Secondly, under certain circumstances there were certain duties as part of the winding-up process. The post-termination clean-up might be a separate category.

⁷ "After the termination of rights and obligations under a contract, the parties shall perform the duties of notification, assistance and confidentiality in light of the principle of good faith and in accordance with trade practices".

117. **Mr Mazzone** observed that positive termination obligations in the event of termination on compelling grounds should not be confused with positive termination obligations on any other ground. In particular, termination for compelling reasons should be subject to an implied obligation structurally similar to an express contractual obligation to pay an exit fee as a condition for the exercise of a right of withdrawal. The rationale of this proposed rule was to take care of the equities of the case. The fact that the terminating party was exercising a (supervening) right of exit did not justify either unjust enrichment or infliction of a loss onto the (equally innocent) counterparty without any countervailing duty to equitably share the burden of such loss. Thus, the suggestion was to require, as a legally implied exit fee, the payment by the terminating party (not of damages but) of an equitable indemnity in the nature of a fair share of the counterparty's losses, if any.

(k) *Definition of "Long-Term Contracts"*

118. Opening the discussion on the definition of the notion of "long-term contracts", **Mr Bonell** observed that although the terms "long-term contracts" and "relational contracts" were widely used, there was no commonly accepted definition of either term. Often there was merely an attempt to circumscribe the phenomenon. What mattered was the length of time, but equally their complexity. In addition, in quite a number of cases there was the establishment of a real relationship, of a further network of duties to co-operate in the broad sense to pursue a more or less common purpose. He wondered if the members of the Group agreed that all those aspects were worth highlighting and that therefore those features had to be mentioned in the description, which should be formulated in a manner sufficiently flexible to include both a simple lease contract lasting over a number of years and the much more complex and diversified relational contract.

119. **Sir Vivian** observed that there was a distinction between a simple contract, negotiated simply and performed simply, and a more complex contract that was negotiated over a period of time and performed over a period of time, i.e. relational contracts. He remarked that what they had been dealing with was complexity and that "long-term contracts" was a phrase that did not describe everything. **Mr Zimmermann** recalled that long-term contracts were not defined in the German BGB. He suggested giving some examples and identifying one issue that was common to all of them; in his view the most relevant issue was the length of time. A description in Article 1.11 could say that they had an element of duration in them, that these contracts were not ordinary exchange contracts, often they involved the building up of a relationship, etc. **Mr Seppälä** pointed out that there was a type of contract known as partnering for big projects that had not been discussed. The idea with those contracts was that the parties worked together for a common purpose. **Mr Bonell** recalled that the Italian Civil Code in addition to exchange contracts had a type of contract of continued performance known as "associative contracts" ("*contratti associativi*") where two or more parties agreed to pursue a common purpose, which had a number of relevant consequences.

120. **Mr Bonell** summarised the discussion saying that there seemed to be agreement around the table that a definition was not advisable, nor was it possible. They had spent days discussing many issues that were not well-defined or known and the discussion had led him to the conclusion that some sort of description was necessary. He suggested it should be broad and flexible, placed in Article 1.11, both in the black-letter rule and in the comments, which would offer the possibility of listing all the places where the Principles took the peculiarities of long-term contracts into consideration. **Mr Cohen** stated that in deciding how much description and circumscription should be included, they needed to remember that they had two very different types of audiences. One was judges and arbitrators who determined whether the transaction before them fitted in. The other was parties to the contract. They were not judges and this was important. He expressed the hope that in the description they try, with illustrations, not only to guide judges and arbitrators, but to guide also the parties to the contract to a relatively comfortable understanding of whether

their contract fitted into that concept. **Sir Vivian** pointed out that the definitions in Article 1.11 seemed to refer to the black-letter rules and not to the comments, where most references to long-term contracts would be found. On that basis, it seemed to him that their task was to pull the knowledge and experience of long-term contracts. There were also matters that should properly be added and that might well also apply to short-term contracts. He wondered whether the Preamble to the Principles was not a more suitable location. All legal systems had had to develop their principles to take account of the greater complexity that had come in contractual arrangements. **Ms Perales** thought that it would be useful to draw the attention of the users to the modifications that had been made in the new edition of the Principles. Article 1.11 was one possibility, but she suggested that the Preamble could set forth the distinction between one shot and long-term contracts. As it was, the definitions in Article 1.11 were more in the nature of clarifications. **Mr Gélinas** agreed with Ms Perales. What was necessary was a paragraph explaining why they were saying certain things and the Preamble gave them a place to do that. He proposed a Preamble paragraph that noted a short piece in Article 1.11. **Mr Cohen** indicated that the Preamble was a very good place to proclaim the fact that the Principles were up to date. He did not think that all could be done there, it was not the place to make the description. They could do both: announce in the Preamble and then have a description in Article 1.11.

121. **Mr Mazzone** was not so concerned about a definition, a typological definition was possible. He felt that they should place it where it had the most emphasis. His preference would be for a chapter on long-term contracts. The Principles were a modern instrument and could handle even the most modern complex contracts. He had no objection to placing it in the Preamble, in the definitions, with typological elements. **Sir Vivian** expressed a preference for a self-standing Article 1.13. **Ms Chappuis** stated that they should not be shy of speaking of a real definition for long-term contracts. It was a definition only for the Principles. It was a sort of agreement between the drafters and the readers. As regarded the placing, she stated that she would put the definition in Article 1.11 because that Article was the definition article. It could be in the comments to the Preamble. She suggested that they check all the provisions, but also the comments. **Mr Bonell** suggested that they should bear in mind that there was no contraposition between the two, provided that the definition that appeared in Article 1.11 and that the comments to the Introduction that explained the notion of commercial contracts highlight that these Principles applied also to long-term contracts. He had nothing against repeating it partly throughout the comments. On each occasion the comments should in opening have one or two words explaining long-term contracts, such as highlighting their complexity, duration, relationship, and so on. **Sir Vivian** stated that, on the basis that this revision was going to have looked at long-term contracts, somewhere it should be emphasized that the provisions did not just apply to one shot or one time contracts and the work of the Working Group should also be emphasized. It was going to be hard to create a definition that looked like a definition in Article 1.11. He thought that they should be looking at the possibility of introducing a new article as Article 1.13.

122. **Mr Zimmermann** agreed with Mr Gélinas and Mr Cohen. He felt that inserting this in just one place, either the Preamble or Article 1.11, was not right. If it was just in the Comments it would be too submerged and hidden. It would be nice to have a sentence in the Comments to the Preamble. What it meant could be addressed elsewhere. Article 1.11 did not only have very tight definitions. To that extent the title of the provision “Definitions” required a definition. He had not made up his mind about whether it would be better dealt with in Article 1.11 or a new Article 1.13. Lastly, he pleaded that they change the terminology in Article 7.3.7 (“contract to be performed over a period of time”) to align it with the new terminology. **Mr Galizzi** stated that a new Article 1.13 was better than a single definition. **Mr Gélinas** also favoured a new Article 1.13.

123. In the end, it was decided to postpone the final decision until the Group had seen proposals submitted to it.

Item 4 on the Agenda: Other business

124. **Mr Bonell** informed the members of the Group that there would be a second meeting to finalise the proposed amendments and additions to the black-letter rules and comments to the Principles with a view to their submission to the UNIDROIT Governing council for adoption in 2016. This second and final meeting would be held at the *Max-Planck Institute for Comparative and International Private Law* in Hamburg, at the kind invitation of that Institute which would cover most of the costs associated with the meeting. The most suitable dates for the meeting were the week starting 26 October. This meeting is expected to last up to four days.

125. In preparation for the meeting, the following members of the Group had agreed to prepare draft additions or modifications on the issues discussed:

Notion of “long-term contracts”:	Messrs Cohen and Bonell
Contracts with open terms:	Sir Vivian Ramsey
Agreements to negotiate in good faith:	Mr Neil Cohen
Contracts with evolving terms:	Mr M. Joachim Bonell
Supervening events:	Mr Neil Cohen
Cooperation between the parties:	Mr M. Joachim Bonell
Restitution after ending contracts entered into for an indefinite period:	Mr Reinhard Zimmermann
Termination for Compelling Reasons:	Messrs Zimmermann and Ramsey
Post-contractual obligations:	Ms Christine Chappuis

126. No other questions or points having been raised, **the Secretary-General** thanked the participants for their contribution to the discussion and adjourned the meeting.

ANNEX 1

LIST OF PARTICIPANTS

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