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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

INFORMAL WORKING GROUP ON THE PROGRESSIVE CODIFICATION OF INTERNATIONAL TRADE LAW

REPORT ON THE SECOND MEETING HELD IN HAMBURG FROM 23 TO 25 FEBRUARY 1981

(prepared by the Secretariat of UNIDROIT)

Rome, March 1981

1. - The members of the UNIDROIT Study Group on the progressive codification of international trade law who on the occasion of the first session of the Group in September 1979 announced their willingness to cooperate actively with the Secretariat of UNIDROIT in the future work relating to this project, held their second meeting in Hamburg, at the Max Planck Institut für ausländisches und internationales Privatrecht, from 23 to 25 February 1981. The meeting was attended by Dr. DELVAUX of the Centre de droit des obligations of Louvain (representing Professor Fontaine who was prevented from coming to Hamburg), Professor DROBNIG of the Max Planck Institut, Professor LANDO of the Institute of European Market Law at the Copenhagen School of Economics, Professor MASKOW of the Institut für Rechtsvergleichung of Potsdam-Babelsberg, Professor RAJSKI of the Institute of Comparative Civil Law of the University of Warsaw, Professor TALLON of the Service de Recherches Juridiques Comparatives of Ivry, and Professor BONELL, who in his capacity as representative of the Secretariat of UNIDROIT was asked to take the chair.

2. - The first item on the agenda concerned the problem of the validity of international contracts in general which should be the subject of the third chapter of the future Code.

The Chairman informed the members of the Group that, according to the decisions taken at the last meeting in Copenhagen in Spring 1980, two preparatory studies had been prepared: the first, which was conducted by Professor Drobnig and Professor Lando, aimed at the clarification and completion of the existing UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods of 1972 so as to adapt it to the requirements of international commercial contracts in general (UNIDROIT 1980, Study L - Doc. 17); the second, prepared by Professor Maskow and Dr. Andrae, investigated the possibility of dealing in the framework of the future Code also with the problem of illegality of international commercial contracts (UNIDROIT 1980, Study L - Doc. 18). The Group expressed to the authors of these reports its deep appreciation for the excellent work they had accomplished and decided to examine first the proposed rules on the substantive validity of international contracts as contained in the document prepared by Professor Drobnig and Professor Lando, and to discuss afterwards the proposed rules on prohibitions and licence requirements which were attached to the study of Professor Maskow and Dr. Andrae, so as to try and reach agreement on the two texts before submitting them, together with an explanatory report, for final approval by the Study Group.

3. - As to the draft rules prepared by Professor Drobnig and Professor Lando, it was unanimously felt that they represented a considerable improvement on the 1972 UNIDROIT draft uniform rules relating to certain aspects of the validity of international sale contracts, and this not only because of a number of new provisions which had been added in order to cover also important questions such as unequal bargaining power, gross unfairness and the right of adaptation, but also on account of the fact that the remaining part of the draft had been revised in the light of the recent developments in international legislation and case-law.

The Group then proceeded to a careful analysis of the individual articles of the new draft.

With respect to Article 1 ("Definition of mistake"; new), while fully recognising the usefulness of such a provision, some members of the Group expressed some reservations as to the present wording of the article: in particular it was proposed substituting for the opening words "Mistake is an error relating to facts or to law. . ." a formula which could avoid giving the impression of a circular definition.

As to Article 2 ("Mistake"; see Article 6 of the 1972 - Draft), one of the participants was of the opinion that lett. c) should be deleted: this proposal was however rejected both by the authors of the draft and by the other members of the Group on the ground that the basic idea of the draft was precisely to restrict as far as possible the relevance which mistakes made by one of the parties only might have for the validity of international trade contracts. According to another member of the Group, the provision contained in lett. a) should be redrafted so as to make it clear that in order to establish whether in a given case "the contract would not have been concluded on the same terms if the truth had been known" the decisive element should be the real intention of the parties rather than objective criteria: in this respect it was however objected that the reference to the principles of interpretation of the contract as such, which was already contained in lett. a), meant that in practice both the subjective and the objective criteria would have to be given adequate weight.

As far as Article 3 ("Error in transmission"; see Article 7(2) of the 1972 Draft) was concerned, the question was raised of the exact meaning of the expression "statement of intention" used in this provision. The answer given was that the rules laid down in this article, according to which the risk of mistake in the expression or transmission is placed upon the declaring or the sending party, was intended to apply mainly, if not exclusively, to an offer or an acceptance, while with respect to any

declaration or notice which might be made by the parties after the conclusion of their contract, a different solution as far as the risk of mistake in the expression or transmission might be adopted (see, e.g., Article 27 of CISG). This being so, the Group decided to replace the words "a statement of intention" by "a statement made in the course of the formation of a contract".

Article 4 ("Breach remedies preferred"; see Article 9 of the 1972 - Draft) gave rise to the objection that, while a provision according to which a party shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy for breach of contract is quite acceptable as long as it refers to one specific type of contract (e.g. sales contract), difficulties might arise, if one seeks to extend the same rule to contracts in general: in this case, indeed, it would be almost impossible to evaluate in advance all the consequences which might derive from it, given the possible differences between the various types of contracts as far as the remedies for breach are concerned (substantive requirements; time-limits; procedure; etc.).

The Group therefore decided to put the whole article between sqare brackets and to postpone a final decision as to its maintenance or deletion.

With respect to Article 5 ("Fraud"; see Article 10 of the 1972 - Draft), the Group welcomed the amendment introduced by the authors of the draft in the first paragraph, by adding an express reference to the case where the mistake of one party was caused by the other party's intentional silence regarding facts which should have been disclosed. It was however felt advisable to harmonise the wording used in the second sentence of paragraph 1 of the present article with the formula adopted in Article 2 lett. c): the sentence should therefore end with the words "... which according to reasonable standards of fair dealing he should have disclosed". As to the rule laid down in paragraph 2 the Group expressed the opinion that it should be extended to cases of abuse of unequal bargaining power, and it therefore decided to delete the paragraph and to add, in Article 10 of the draft, a new paragraph covering both cases of fraud and of abuse of unequal bargaining power.

Two objections were raised in connection with Article 6 ("Threat"; see Article 11 of the 1972 Draft). The first concerned the amendments introduced by the authors of the draft, according to which a party may avoid the contract when he has been led to conclude it by an injustifiable threat, only if such a threat is "in his judgment" so imminent and serious as to leave him no reasonable alternative. In parti-

cular, it was held that such a reference to the personal opinion or impression of the party would inevitably introduce an element of vagueness and uncertainty: the Group therefore recommended substituting the words "in his judgment" with the formula "having due regard to the circumstances", so as to make it clear that what is decisive is not the subjective conviction of the threatened party, but rather the impression which a reasonable person placed in the same situation could have gained from the behaviour of the other party. The second objection related to the use of the words "unlawful" and "lawful" in the second sentence of the article. It was pointed out that, as the proposed rules are intended to apply at international level, it would prove to be extremely difficult, if not impossible, to determine in a given case which act or omission of the party should be considered to be "lawful" or "unlawful". The suggestion was therefore made rather to use the terms "proper" and "improper", which would have the advantage of avoiding the impression that in applying this provision one has first to determine a given national law in order to evaluate the "lawfulness" or "unlawfulness" of the behaviour of the party. This proposal was accepted, but the Group decided to put the new expression between square brackets in the hope that at a later stage, taking also into account the difficulties of finding a corresponding term in French, a more appropriate expression might be found. The Group furthermore agreed to insert after the word "threat" in the second line of the article the words "from whatever person it emanates", in order to make it clear that unlike the case of fraud, a threat represents a ground for avoidance of the contract irrespective of whether it derives from the contracting party or from a third party, including persons for whom the former is in no way responsible.

Article 7 deals with "Unequal bargaining power" and represents an entirely new provision which has been introduced in the draft in order to regulate these cases, which are far from rare in international trade practice, where one party takes advantage of the dependence, economic distress or urgent needs, or the improvidence or lack of bargaining skill of the other party, to obtain terms which make the contract as a whole unreasonably advantageous for the former and unreasonably disadvantageous for the latter. While expressing their unconditional approval of the substance of the provision which doubtless contributes to filling in an important gap of the 1972 Draft, some of the participants questioned whether the expression "dependence" was intended to cover also the situation where one of the parties occupies a dominant position within the respective market sector and the other party can therefore be considered as "dependent", if not in a strictly

legal sense, certainly in economic terms. Since the authors of the draft and the other members agreed that this should be the meaning to be attached to the expression under consideration, it was decided to state it expressly in the explanatory report which will accompany the rules so as to avoid any uncertainty or doubts in this regard. Another member of the Group went even further by suggesting the widening of the scope of the present provision in order to include also those cases where one party, on account of his dominant position on the market, succeeds in obtaining unreasonable advantages even without takening advantage of a supposed inferiority of the other party, and the latter suffers unreasonable disadvantages only in comparison to his competitors, who, in dealing with the former, do indeed obtain better contractual conditions. The majority of the Group was however of the opinion that, since such cases are traditionally dealt with within the framework of competition law, they should not be expressly envisaged by the present rules concerning the substantive validity of individual contracts. Nor was there substantial support for the suggestion made by another participant to substitute in the last line of Article 7 the word "and" by "or" in order to allow the avoidance of the contract not only where the same is as a whole unreasonably advantageous for one party and unreasonably disadvantageous for the other, but also when only one of these two requirements is fulfilled.

As far as Article 8 ("Unconscionability"; new) is concerned, the Group discussed at length both its wording and its substance. With respect to the substance there was general agreement as to the advisability, following the example given by the most recent national legislations (see e.g. Sect. 2.302 of the American U.C.C.; § 33 of the Danish Contract Act of 1975; § 36 of the Swedish Contract Act of 1976; § 9 of the German Law on General Conditions of 1977), of the proposed Code's containing a provision according to which a contract may be set aside if its content is as a whole or in part too harsh or too one-sided in favour of one and to the detriment of the other party. Doubts were however expressed as to whether the present draft was the right place for such a provision: indeed, all the other provisions contained therein refer to cases where, because of certain behaviour by one party, the other party is induced to conclude the contract in terms different from those which would otherwise have been accepted by him, and is therefore entitled to avoid the contract, whereas what is decisive for the purpose of Article 8 is not the behaviour of one of the parties, but the content of the contract as such, so that the proper sanction should be the nullity of the contract to be declared by the judge, rather than the mere possibility of its avoidance on the initiative of the "innocent" party.

Moreover, it was argued that the provision in its present form envisaged a sort of combination of two concepts which, both from a historical and a systematic viewpoint, are different, i.e. the concept of "unconscionability" or of "unfairness" (see e.g. Sect. 2.302 of the American U.C.C. or § 9 of the German Law on General Conditions) on the one hand and that of lesio ultra demidium (see e.g. Art. 1674 of the French Civil Code or Art. 1448 of the Italian Codice Civile). As to the wording of Article 8 the main objection which was raised concerned the use of the concept of "unconscionability": in fact, while recognising that this concept, originally developed in the case-law and the legislation of the United States, is becoming more and more familiar elsewhere, it was argued that it is nevertheless still too closely linked to one particular national system and could therefore give rise to misinterpretation, if adopted at universal level, apart from the extreme difficulty of finding an appropriate translation thereof in other languages. The Group finally decided to keep the provision in its present place, but to introduce some changes in drafting. Thus, since the right to ask for revision or adaptation of an avoidable contract is dealt with in the draft elsewhere in a general fashion, it was decided to delete in the first line of the article the words "or have revised"; furthermore, as to the expressions "unconscionability", "unconscionable disparity" and "unconscionable contract clauses", these should be replaced, respectively, by "gross unfairness", "grossly unfair disparity" and "unfair contract clauses". The Group also agreed that, because of the relative novelty of the provision contained in Article 8 and the consequent risk that in practice it might be given extensive interpretation and application, the explanatory report should make it clear that its scope is rather restricted and that it is intended to apply only to those cases where the respective contract as a whole or its individual terms are, according to generally accepted standards, to be considered as being "grossly unfair".

With respect to Article 9 ("Initial impossibility"; see Article 16 of the 1972 Draft), several members of the Group were of the opinion that the rule laid down in paragraph 1 was not only contrary to a number of national laws, but could give rise to considerable difficulties in practice, especially if it was intended to apply also to cases of legal impossibility of the performance of the contractual obligation. It was therefore decided to put the provision between square brackets. As to the second paragraph, the purpose of which is to make it clear that lack of title does not affect the validity of the contract, but only allows its rescission because of the non-performance of an obligation deriving therefrom, the Group was of the opinion that such a rule

should be maintained; in order to avoid the rather misleading or in any event vague words "assets ... not held by the person disposing of them", it was decided to redraft the provision in the following terms: "The fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates shall not affect the validity of the contract, nor shall it permit its avoidance for mistake". In the event of the Study Group deciding to delete paragraph 1, it was finally suggested that the title of Article 9 should be changed to "Lack of title".

With respect to Article 10 ("Agents"; see Article 10(1) of the 1972 Draft) the only objection which was raised concerned the use of the expression "agent": indeed, since such an expression has different meanings in the various legal systems and to a certain extent may not even be capable of an appropriate translation into other languages, it was suggested that its use be avoided in this context and that it be replaced by the words "a person acting for the other party". Pursuant to the decision previously taken with respect to the rule laid down in Article 5(2) it was furthermore agreed to change the title of Article 10 to "Third persons" and to add a second paragraph which reads as follows: "Where a fraud or an abuse of unequal bargaining power is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided if the other contracting party knew or ought to have known of the fraud or the abuse".

As to Article 11 ("Confirmation"; new), the authors of the draft submitted two alternative versions, the choice between them depending on the decision which would be taken with respect to Article 13 concerning the requirement of notice to be given by the party seeking the avoidance of the contract: since, in that respect, the Group pronounced itself in favour of the first of the two suggested alternative versions of Article 13, this automatically led to the choice of the first version of Article 11.

Article 12 of the draft also contained two alternative versions: the Group however felt that, since they apparently dealt with two different problems they should not necessarily be considered as mutually exclusive and therefore discussed separately.

Article 12, first alternative ("Counter-offer"; see Article 15 of the 1972 Draft) did not give rise to any substantial objections. The only suggestion which was made was slightly to modify the existing text of the provision so as to make it clear that the co-contractant of the mistaken party is not bound expressly to declare his

willingness to perform the contract as it was understood by the mistaken party but may also show such an intention on his part indirectly, i.e. by beginning to perform his obligations in the corresponding manner. The Group unanimously decided to insert in the second line of paragraph 1, after the words "to perform" the words "or performs" and both in the sixth line of paragraph 1 and in the first line of paragraph 2 after "declaration" the words "or performance". It was furthermore suggested deleting in the third line of paragraph 2 the words "and any other remedy", since, notwithstanding the "counter-offer" of the other party, the mistaken party should not be prevented from seeking compensation for possible damage he might already have suffered.

A particularly lengthy discussion took place with respect to Article 12, second alternative ("Revision of the contract"; new). According to the authors of the draft, this provision which lays down the principle that instead of avoidance the contract may be revised in order to bring it into line with what was understood by a mistaken or misled party or to avoid any unreasonable result, is intended to cover those cases where the contract has already been performed wholly or in part and its avoidance would therefore not meet the interest of the parties. The Group unanimously recognised the utility of having such a rule inserted in the draft; some reservations were however expressed as to the manner in which it had been formulated. Thus, according to some members on the basis of the present text of the article it was not sufficiently clear whether or not the court or the arbitrator had the power to revise or adapt the contract, instead of declaring its avoidance, independently of any explicit request made in this sense by the party. Others felt that since the proposed rule was intended to apply at international level, where the general tendency is to avoid, as far as possible, recourse to the judicial authority of a given State, the procedure of revision should be conceived, not differently from what is already foreseen with respect to the avoidance of the contract, in extra-judicial terms, at least insofar as the parties should be allowed to go before a court only as a last resort, i.e. after having failed to reach an agreement between themselves. After all it was argued, since according to the existing national laws the power of the courts to revise a contract is far from being universally accepted, it was doubtful whether the proposed rule could be expected to change this situation. In any event, the courts or arbitrators should be given more precise indications not only as to the limits or their power of intervention, but also as to the criteria on which they should base their decision in a given case. In

order to meet at least some of these objections, the Group finally agreed to redraft the provision in the following manner: "If in cases covered by Articles [2], 7 and 8, the avoidance of the contract would lead to an undue hardship to one of the parties, the court or arbitrator may, at the request of that party, adapt the contract in order to bring it in accordance with reasonable commercial standards of fair dealing". In this way, it was felt, it would be sufficiently clear that the possibility of an adaptation of the contract is restricted to cases of mistake, abuse of unequal bargaining power and gross unfairness (some members of the Group would have preferred to admit it only in these two latter cases and asked therefore to put the reference to Article 2 between square brackets), that even in these cases the court or arbitrator may intervene only at the request of the party and that adaptation can under no circumstances mean the replacement of the original agreement between the parties by an entirely new contract, but is only admitted to the extent that the original contract is brought into line with "reasonable commemmercial standards of fair dealing". The Group also decided to delete paragraph 2 of the present Article 12, and to change the title of the new Article 13 in "Adaptation of the contract".

With respect to Article 13 ("Avoidance"; see Article 12 of the 1972 Draft) the authors of the draft presented two alternative versions, which differed insofar as according to the first an express notice of avoidance was required in all instances of defective consent, whereas according to the second such a requirement was necessary only in case of mistake and unconscionability and in cases of fraud, threat or abuse of unequal bargaining power not exercised by, and unknown to, the other party. For the sake of clarity and legal security in international trade practice, the majority of the Group was of the opinion that the first solution was preferable, but at the same time it agreed on the necessity of interpreting the provision in the light of the general principle of good faith to be laid down in the preliminary chapter of the Code: this would mean that, whenever it was the other party who had committed a fraud, made a threat or abused an unequal bargaining power, the fact that the innocent party did not give an express notice of avoidance within a reasonable time should not automatically deprive him from exercising his rights in this respect.

Article 14 ("Time limit"; see Article 13 of the 1972 Draft) deals with two different questions: paragraph 1 lays down the rule according to which in case of mistake the notice of avoidance shall only be effective if it reaches the other party within a reasonable time,

whereas paragraph 2 fixes the time-limit of the right of asking for avoidance in all the different cases of defective consent. While generally agreeing on the substance of the provision, the Group decided however to replace the present paragraph 1 of Article 14 by paragraph 2 of Article 13 with the result that Article 13 should remain with its present paragraph 1 only, whereas Article 14 would be composed of the present paragraph 2 of Article 13 and the present paragraph 2 of Article 14. The Group then proceeded to an exhaustive discussion of a proposal submitted by one of tis members according to which a new Article 14 a should be inserted in the draft, the content of which was the following: "(1) If the party against whom avoidance is sought wants to contest it, he must do so within a reasonable time. If he fails to contest it within this period, he loses his right to contest it. (2) If he contests it, the party having the right of avoidance may enforce it at the competent court or arbitration tribunal only within a reasonable time after receiving notice of contestation". The purpose of such a provision, which in substance corresponds to the rule adopted in paragraph 2 of Article 14 of the German Democratic Republic Law on International Commercial Contracts, would be to oblige the party, against whom avoidance is sought, to object, if he wants to do so, as quickly as possible, and thus to prevent him from raising his objections for speculative reasons only at a later stage, when the innocent party was already of the belief that the contract had been avoided. While fully recognising the merits of such a proposal, the majority of the Group was however of the opinion that it could hardly be accepted. In particular, it was argued that the duty to reply as soon as possible to a notice of avoidance follows from the general principle of good faith and fair dealing in international commercial transactions, whereas by laying down a specific rule of the kind contained in the first paragraph of the proposed new article one could not exclude the risk that in practice one party might abuse it, i.e. by giving a notice of avoidance to the other party without any good reason, in the hope that the latter, just because of the fact that such a demand was completely unfounded, would not object to it within a reasonable time.

With respect to Article 15 ("Retroactive effect of avoidance"; see Article 14 (1) of the 1972 Draft) it was decided that since the two paragraphs apparently deal with two different questions, they should be placed in two separate articles. The first of them shouldbbear the title "Partial avoidance" and contain the provision at present laid down in paragraph 2 of Article 15. The second article ("Retroactive effect of avoidance") would on the contrary read as follows: "Avoidance shall take effect retroactively, subject to any rights of third parties".

No objections were raised with respect to Article 16 ("Restitution"; see Article 14 (2) of the 1972 Draft), whereas considerable attention was paid to the various questions dealt with in Article 17 ("Damages"; see Article 14 (3) of the 1972 Draft). As far as paragraph 1 was concerned the Group was generally agreed as to the advisability of conferring upon the innocent party a right to call for damages not only in addition to, but also instead of, avoidance, provided of course that the other party was in fault. Doubts were however expressed as to the use of the term "negligently", and as to whether a reference should not be made also to the case of gross unfairness. It was therefore decided to strike out the word "negligently" and to insert instead of it in the third line, after the word "if" the words "by his fault"; to add at the end of the paragraph the words "or cause a grossly unfair disparity as provided by Article 8". It was also felt necessary to insert in the third line after the word "avoidance" the words "or adaptation". With respect to paragraph 2, attention was drawn to the fact that the reference, in the third line, to "the party who has avoided the contract" was inappropriate, since according to the general rule laid down in paragraph 1 the same party could also have decided not to ask for avoidance of the contract: it was therefore decided to delete these words and to speak in a more generic way of "the mistaken party". As to the two alternative versions of paragraph 3, the Group unanimously expressed its preference for the first one and suggested redrafting it in the following way "Damages are governed by Chapter X of the Rules", it being understood that Chapter X is intended to be the chapter of the Code in which damages will be dealt with in a general and more detailed fashion.

The Group finally approved the last provision of the draft - Article 18 ("Mandatory character of the rules"; new) - with the reservation, however, of placing paragraph 2 between square brackets, in order to draw attention to the fact that the rule laid down therein should be revised in the light of what will be the content of the provisions on exemption clauses in general, which are still to be worked out in the framework of the chapter on non-performance.

4. - The Group then proceeded to the examination of the draft rules on "Prohibition and licences requirements" prepared by Professor Maskow and Dr. Andrae of the Babelsberg Institut für Rechtsvergleichung. At the beginning the Chairman and all the other participants expressed to the authors of the draft their great appreciation for the excellent work accomplished: it was pointed out that, notwithstanding the extreme complexity of the various problems which arise in this particular field of

the law of contracts, and the fact that this was the first attempt to deal with them in a general and systematic manner at international level, the draft already provided in its present form an extremely valid basis for discussion; there was no doubt that its inclusion in the proposed Chapter on validity would considerably increase both the scientific value and the practical interest of the future Code.

As to the location of the draft rules under consideration it was suggested dividing the Chapter on validity into two sections, the first of which would contain the rules on the substantive validity of international contracts in general, whereas the second would be devoted to the rules on prohibitions and licences requirements. In this respect the Group also discussed the question of the title to be given to that new section, since it was felt that "Illegality", as suggested by the authors of the draft, was inappropriate because its meaning was too broad: several proposals were made ("Prohibitions"; "Prohibitions and licences requirements"; "Prohibitions and permissions"; etc.), but for the time being no final decision was taken.

In introducing the draft, Professor Maskow drew attention to the fact that it contained two variants: variant 1 aimed at achieving a solution of the various questions connected with prohibitions and licences requirements partly by means of uniform rules of a substantial character, partly by means of conflict of laws-rules, whereas variant 2 only consisted of some basic conflicts rules. The Group unanimously held that, notwithstanding the greater difficulties which it presented, the first approach should be preferred and it therefore decided to concentrate its attention on variant 1.

It then proceeded to an exhaustive discussion of the individual articles of the draft.

With respect to Article a, paragraph 1, some members questioned the precise meaning of the words "general accessible provisions of law". The explanation given in this respect by Professor Maskow was that by such a formula it should be made clear that for the purpose of the present rules only those provisions of law should be taken into consideration, of which both parties can, with the use of ordinary diligence, obtain knowledge before entering into the cotract, whereas provisions to which no sufficient publicity has been given or which by their very nature are intended to be known and applied only within a particular branch of the public administration, are to be excluded from the outset. It was furthermore discussed whether the rule under consideration intended to refer to all kinds of mandatory provisions of the respective national system or whether a distinction should be

drawn between provisions of a public law nature and those of a purely private law character. Indeed, at least according to some of the members of the Group, the inclusion of the latter also could give raise to considerable difficulties in practice, since they might very often be based on very different policy considerations. On the other hand, it was nevertheless pointed out that the same argument could very well be adduced also with respect to the public law provisions, and that in any event it would appear almost impossible to find a clear dividing line between the two categories.

As to paragraph 2, some members of the Group insisted on the necessity of referring also to the cases where, according to the law of the respective State, the contractual terms contrary to the prohibition (e.g. to stipulate a price higher than X) not only are null and void, but are also automatically replaced by terms which are in conformity with the law (e.g. a price of the amount X + 1 is replaced by the price of the amount X). After all, it was argued, since such an automatic amendment of the invalid contractual terms is the necessary consequence of the application of the respective national law, the present rules could hardly seek to separate the two aspects. This view was opposed in particular by Professor Maskow, who reminded the other members of the Group that the authors of the draft had deliberately omitted any explicit reference to the above-mentioned cases, as they felt that it was one thing to provide that, because of a prohibition existing in one of the national laws relating in some way to an international contract, such a contract or one or more of its individual terms should be held null and void, and quite another thing to admit that the parties are in addition obliged to uphold their contractual relationship in terms different from those originally stipulated between them: if the national law in question really provided for an automatic amendment of the invalid contractual terms, it seemed to be more appropriate to leave it to the parties to decide whether to renegotiate their contract accordingly or to free themselves from their original engagement.

As to Article b it was first of all decided to change its title from "Nullity" to "Prohibitions" (and, accordingly, the title of the following Article c from "Inefficiency" into "Permissions"). It was furthermore suggested to use in lett. a) the concept of "place of business" instead of that of "domicile" and to redraft the last part of lett. b) in the follpwing way: "provided that with this law the contract has a significant connection", so as to bring it in line with the formula adopted by the new EEC Convention on the Law applicable to

contractual obligations of 1980 (Article 7). Still with respect to the provision contained in lett. a) (and the corresponding provision contained in Article c lett. a)) the question was raised whether it should not be made clear that a party with more than one place of business may not rely on any prohibition or permission requirement, if one of his places of business is situated in a State where such a prohibition or permission requirement does not exist. The majority of the Group favoured the inclusion of such a provision, notwithstanding the fears expressed by some members that it could in practice induce the parties to establish their places of business with the sole purpose of escaping from the application of mandatory provisions which States normally impose for the protection of legitimate interests.

With respect to Article c, the Group first discussed the question of the precise moment from which the contract shall be considered to be effective, once the permission has been granted. Was it the moment of the conclusion of the contract or that of the permission? Professor Markow explained that the draft had adopted the second solution, in view of the fact that in practice the problem mainly arises in connection with contracts for the supply or construction of large industrial plant or machinery, where it is quite normal that several months will pass between the time of their conclusion and that of the granting of the required permission. In this respect however other members of the Group pointed out that not only the parties in their contract, but the State authority itself may, when granting the permission, provide otherwise. It was therefore decided to add at the end of paragraph 2 the following words: "unless otherwise agreed between the parties or another date is indicated in the permission". Another point which was raised concerned the relationship between the rule laid down in paragraph 2 and the provisions contained in the following paragraphs of Article c. Indeed, while paragraph 2 states that a contract for which the permission has not yet been granted is to be considered ineffective, there are, according to the following paragraphs, a number of obligations which arise immediately after the conclusion of the contract and which legally bind the parties irrespective of whether at a later stage the permission will be granted or not. The Group acknowledged that there is only an apparent contradiction between the two sets of rules, since it is a well known principle that a contract subject to conditions produces come preliminary effects even before the condition is satisfied (see, e.g., Articles 1356 and 1358 of the Italian Codice civile; the German "doctrine" and case-law speaks of "schwebende Unwirksamkeit" of the contract). It was however felt to be advisable to insert in the Article a new provision which

should make it clear that the general principle laid down in paragraph 2 does not affect the validity of the provisions contained in paragraphs 3 et seq. As to paragraph 4, the Group decided to replace the word "immediately" by the words "without undue delay", and to specify, at least in the explanatory report, that, while the party under consideration is obliged to exhaust all the available administrative remedies against the possible refusal of permission, he is not bound to appeal to the courts. The Group had then to establish the period of time after which, in the absence of a special provision contained in the contract, the other party may withdraw from the contract, if the permission has still to be given. While some of the members favoured a relatively short time-limit (e.g. six months), in order to induce the competent State authorities to take their decision without undue delay, others were of the opinion that it would have been more realistic to foresee a longer period of time (e.g. one year), in particular when considering the extreme complexity of certain kinds of international transactions and the importance, both from an economic and a political viewpoint which they may present for those States which do not always dispose of a sufficiently well equipped public administration. The Group decided to adopt the first proposal, but to put the figure of six months between square brackets, and to postpone the final decision until the necessary information had been obtained by competent bodies or institutions, such as the International Chamber of Commerce. Finally, as to paragraph 7, the provision therein laid down was considered to be superfluous, and it was therefore decided to delete it.

Turning to Article d, the Group first decided to delete lett. b) of paragraph 1 and to redraft lett. a) in the following way: "... their observance is incompatible with the public policy ("ordre public") of the forum". With respect to paragraph 2 Professor Maskow pointed out this provision was intended to cover the cases of international Conventions or Agreements (such as the Bretton-Wood Agreement or GATT), which, instead of themselves providing prohibitions or permission requirements, authorise the national legislators to enact them, if and in so far as they consider it necessary to do so for the protection of their own interests. The Group expressed its agreement with such a provision, provided that it should under no circumstances be invoked in practice so as to enforce other instruments (such as the Code on the Transfer of Technology or the Code on Restrictive Trade Practices) which, though worked out at international level, cannot be considered to be legally binding on the single States.

As to Article e, the Group unanimously expressed its preference for the second of the two alternative versions foreseen in the draft, since it represented a significant effort to avoid also in this respect any reference to national law. As to the criteria on the basis of which, according to lett. a) and lett. b), it should be decided whether or not the contract shall be uphold without the invalid or ineffective term, it was felt that a more objective text should be adopted: the Group therefore decided to replace the final words "... if it can be assumed that the parties would have concluded the contract also without this term" by the words "if, giving due consideration to all circumstances of the case, it is reasonable to uphold the contract also without this term".

With respect to Article 4, the Group decided on its deletion, since it felt that the provision contained therein referred to a case of fraud and would therefore be nothing more than a duplication of the corresponding rule, although of a general character, already contained in Section I of Chapter III of the Code.

5. - The second item on the agenda concerned the coordination of the work to be carried out by the various members of the Group with respect to the next two chapters of the Code, i.e. that on performance and that on non-performance of international contracts in general.

In introducing the discussion the Chairman first of all welcomed Professor KÖTZ, Co-director of the Max-Planck-Institut of Hamburg, who had announced his intention to join the Group and to cooperate with the other members in their future work on performance and non-performance, and who was therefore invited to attend this part of the meeting. He then briefly recalled the decisions which had already been taken with respect to this item on the agenda at the last meeting of the Group in Copenhagen in 1980: that the problem relating to non-performance should as far as possible be dealt with in close connection with those concerning performance; that, in view of the fact that the future Code is intended to provide a sort of model regulation for international commercial contracts, its provisions should also in this respect be based on current trade practice as reflected in international conventions or in instruments of a purely private character such as general conditions or standard forms of contract, rather than on the principles traditionally adopted by the various national laws; and that in order to provide all the members of the Group with the necessary materials the Secretariat of UNIDROIT should as soon as possible prepare a collection of the most relevant international conventions and contractual forms dealing with the topics under consideration. As far as this last recommendation is concerned, the Secre-

tariat of UNIDROIT, had already prepared, although for technical reasons only in a limited number of copies, a collection of materials, which contained some 40 international conventions and uniform laws, as well as general conditions and standard forms of contract relating to international contracts in general and to the various kinds of contracts of sale, including contracts for the supply and construction of large industrial plant and machinery. In addition, in order to facilitate the analysis of the contents of each of the collected legislative and contractual instruments and to permit, as far as possible, an immediate comparison between the provisions contained therein relating to the different aspects of the general problems of performance and non-performance of the type of contracts concerned, the Secretariat had also prepared synoptical tables of these provisions (UNIDROIT 1980 - Study L - Doc. 19). In thanking the Secretariat of UNIDROIT for these initiatives, the other members of the Group expressed their conviction that both the collected materials and the synoptical tables would prove to be of great assistance in their future work.

As to the distribution of the future work among the various members of the Group, it was decided to proceed in the following way: Professor Fontaine and Professor Rajski should prepare the draft rules on performance of international contracts, Professor Maskow those on the specific question of adaptation of contracts, whereas Professors Drobnig, Kötz, Lando and Tallon would form a separate team entrusted with the preparatory studies and the elaboration of a first draft of the chapter on non-performance of international contracts. The draft rules on performance and on adaptation would be transmitted to the Secretariat of UNIDROIT at the beginning of 1982; by the same date the four members entrusted with the topic of non-performance would be expected to submit the results of their preliminary studies, so as to enable the other members of the Group to take a final decision as to the precise scheme to be adopted in the elaboration of the uniform rules.

Before closing the session the Chairman expressed to all members of the Group the deep appreciation of UNIDROIT for their willingness to cooperate with it in such a substantial manner, and announced that the report of the present session as well as the revised drafts on the substantial validity and the prohibitions and licences requirements of international contracts would be transmitted as soon as possible to the members of the Steering Committee with a request for observations. It was also intended to convene within the first half of next year the enlarged Study Group for its second meeting, which would be devoted to the final examination of the first three Chapters of the Code so far elaborated, i.e. those on formation, interpretation and validity of international contracts in general.