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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 MEETING HELD IN ROME

FROM 7 to 9 NOVEMBER 1983

(prepared by the Secretariat of UNIDROIT)

Rome, December 1983

1. At the invitation of the President of Unidroit, the Informal Working Group on the progressive codification of international trade law held its fourth meeting in Rome at the headquarters of the Institute from 7 to 9 November 1983. The meeting was attended by Professor Drobnič (Max-Planck Institut Hamburg), Mr Duchek (Vienna), Professor Fontaine (Centre de droit des obligations de Louvain-la-Neuve), Mr Hartkamp (The Hague) Professor Lando (Institute of European Market Law at the Copenhagen School of Economics), Professor Maskow (Institut für Rechtsvergleichung of Potsdam-Babelsberg), Professor Rajski (Institute of Comparative Civil Law of the University of Warsaw), Professor Tallon (Service des Recherches Juridiques Comparatives of Ivry) and Professor Wade (Asser Institute of the Hague). The Secretariat of Unidroit was represented by Professor Bonell who took the chair and by Mr Mengin, who acted as Secretary to the Group.

2. In addressing a warm welcome to all participants, the President of the Institute, M. Mario Matteucci thanked them for having accepted the invitation to attend the meeting and stressed the great satisfaction of the Institute at having been able to associate such a large number of highly qualified specialists in the field of comparative and private international trade law. While recalling the nature and function of the Working Group - it is composed of those members of the Study Group who have declared their willingness actively to cooperate in the preparatory work and the elaboration of the various sections of the future Code and is convened whenever the necessity arises for each rapporteur to submit his study for a first exchange of views - the President welcomed in particular Mr Duchek and Mr Hartkamp, who were present for the first time having recently indicated their interest in being associated in the future work of the Group. Given their great experience and outstanding capacity in drafting national rules in the field of international trade law, their presence could not but make a most valuable contribution to the work of the Group as a whole.

3. The first item on the Agenda was the consideration of the draft rules on public prohibitions and permission requirements with special reference to the revised draft Chapter III-Section 2, UNIDROIT 1983, Study L - Doc. 30, and to the comments made by the Governing Council of UNIDROIT at its 62nd session, UNIDROIT 1983, C.D. 62nd session, p. 8 et seq.

4. In introducing the discussion, Professor Bonell briefly recalled the history of this section. The decision to deal with the problem of public prohibitions and permission requirements relating to international trade contracts in the framework of the chapter on validity dated back to

the Copenhagen meeting of the Group in 1960 (UNIDROIT 1960 P.C. - Misc. 2, p. 5 et seq.), where the task of carrying out the necessary preparatory work was unanimously conferred on Professor Maskow.

At the Hamburg meeting of 1981, the Group was seized of a very exhaustive comparative study and a tentative draft which in substance met with the approval of the other members of the Group. A revised version of the draft, together with an explanatory report was then submitted to the enlarged Study Group at its 2nd session in Rome, 1982. Although at that occasion some of the members of the Study Group expressed serious reservations as to the underlying philosophy, the over whelming majority considered the draft to be an extremely valuable basis for further discussion and recommended to the Working Group that it pursue the work and that it attempt to elaborate at its future sessions a definite version of the draft. At its last session in Louvain-la-Neuve in 1983, the Working Group spent a whole day discussing a revised version of the draft prepared by Professor Maskow and reached a large measure of agreement on the amendments, mainly of a drafting nature, which still remained to be made. Due to lack of time, the results of the Louvain-la-Neuve meeting could only be reported orally to the Governing Council at its 62nd session which took place a few weeks afterwards. At that session, while reiterating, not only to Professor Maskow but also to the other members of the Working Group their deep appreciation for the generous assistance they had provided to the Institute on the project of the progressive codification, some members expressed a number of strong reservations against the very philosophy underlying the draft section 2 of Chapter III (UNIDROIT 1983, C.D. 62nd session, p. 8 et seq.), and asked the Group to reconsider its previous position in the light of these objections.

5. The discussion began with the statements of the two members who were for the first time participating in the work of the Group. In particular one of them expressed his firm opposition to the underlying policy of the present draft section 2 of Chapter III. Admittedly, the problem of the relevance of public prohibitions and permission requirements of States the law of which is neither the lex fori nor the lex contractus is nowadays a problem of increasing importance in the context of international trade contracts wherever concluded and whatever the nationality of the parties. This also explains the great interest which both theoreticians and practitioners all over the world show in it and its possible solution. For the time being at least however the problem seemed to be one which should not be dealt with at a legislative level but better be left to the discretion of the courts. The present draft was moreover hardly acceptable even when compared with other similar drafts so far elaborated at national or at international level. As a matter of fact, all of them simply stated that under specific circumstances, mandatory

rules of a third country may be taken into account whereas the present draft went much further by providing that the same rules must be applied and so, as the case may be, lead to the invalidity of the contract. This latter solution was unacceptable not only because it would in practice deny any discretion to the courts but also and more generally because the fact of recognizing a public prohibition or a permission requirement of a State, given its connection with the question of sovereignty of States, should be limited to the extent that such sovereignty objectively reaches, (e.g. nationalization or expropriation within this State) and not where there is some other link which might be of a quite arbitrary nature between the enacting State and the contract. The other speaker also favoured a more flexible approach to the problem. While accepting the idea of including a specific rule dealing with the problem in the proposed Code, he suggested that following the solution adopted for example by Article 7 of the ECE Convention on the law applicable to contractual obligations of 1980, judges or arbitrators should be given wider discretion in deciding whether or not to apply in each single case the public prohibitions or permission requirements of a third country. If such a change were adopted, one might even question whether it was still justified to exclude from the scope of the rules the mandatory provisions of a purely private law nature.

6. The other members of the Group first of all felt it necessary to explain the reasons which have led them to agree on the present solution. In particular, it was stated that the fact that the problem of the relevance of mandatory rules of a third country is far from being settled in a uniform way at an international level should not represent an obstacle to the inclusion in the Code of a clear rule in this respect. On the contrary, since the problem as such cannot be ignored and is at present solved in a different way in the various jurisdictions, the effect of such a rule in the proposed Code could only be to reduce existing uncertainties. As to the argument that the present draft restricted too much the discretion of the court, attention was drawn to the fact that the application of the general rule laid down in Article 2 (1) of the draft was subject to three kinds of limits or conditions. Taken as a whole, the provision therefore appeared much less new than had been suggested. As a matter of fact, the kinds of public prohibitions and permission requirements of foreign States which under such a provision would in practice be applied to a single contract were not very different from those which are already according to current court practice given effect in some way or another. Finally, as to the objection that the future Code should not deal at all with private international law aspects, this clearly involved a policy decision which lay outside the competence of the Group. One might however argue that the provision under consideration could hardly be seen as a conflicts of law rule strictu sensu, but rather as a "scope rule", i.e. a rule aiming at determining the exact ex-

tent to which existing public prohibitions or permission requirements may affect the validity of a given contract.

7. Given the divergent views expressed both within the Group and in the Governing Council, the Group unanimously agreed that in its further discussions it should proceed on the assumption that two alternative solutions could be envisaged. On the one hand, an ambitious approach more or less along the lines of the present draft; on the other hand, a less ambitious approach in the sense that the problem of the relevance of foreign mandatory provisions should not be dealt with as such and therefore left to the existing rules and criteria of each lex fori, while section 2 of Chapter III should only deal with the effects on the single contract of public prohibitions and permission requirements once their relevance had been established according to the applicable national laws. With this decision in mind, the Group then proceeded to a detailed examination of the revised draft section 2 (as to be found in UNIDROIT 1983, Study L- Doc. 30), with a view to preparing a new draft embodying both kinds of solutions and thus permitting the Governing Council to express its preference for one or the other. The Group was also seized of two working papers submitted by Professor Wade and by Professor Rajski and intended to provide useful suggestions as to possible amendments to be made in the original draft as regards both drafting and substance.

8. An extremely detailed discussion took place on Articles 1 and 2 of the draft.

The purpose of Article 1 is to define public prohibitions and permission requirements falling within the scope of the uniform rules, whereas Article 2 is intended to lay down the criteria on the basis of which it should be decided whether or not legal provisions of the kind defined in Article 1 have to be applied in a given case.

Initially two different positions were adopted. On the one hand it was felt that it was useful, if not necessary, to have two different articles, the one defining the precise nature of the provisions envisaged and the other determining the exact scope of their application in a given case; this all the more since it should be made clear right from the beginning that only so-called "public" prohibitions and permission requirements are to be taken into consideration, which may affect the validity or the effectiveness of a contract, and that such prohibitions or permission requirements must result from generally accessible rules of law. On the other hand, the opinion was expressed that for the sake of having as concise and clear a text as possible, it would be better to try and combine the two articles into one single one, embodying both the definition and the operative rule: in this context a proposal was made to use instead of the concepts of "public prohibitions" and "public permission

requirements" which are rather unconventional and far from being universally understood in the same sense, the concept of "economic legislation" which, though perhaps of a more generic nature, would at least in practice better reflect the kinds of provisions envisaged (price regulations, anti-trust rules, currency regulations, import or export licences, anti-boycott regulations).

Finally, the majority of the Group favoured this second approach.

As to the concepts to be used, it was decided to avoid any reference to prohibitions and permission requirements and also not to speak of economic laws or legislation but to use the word "legislation" alone, it being understood that it should be made clear in the explanatory report that such a term was intended to refer not only to statutory provisions but also to provisions developed by judicial decisions or established by means of governmental orders, provided that they are generally accessible.

The text itself of the article should make it clear that only those legal provisions may fall within the scope of the proposed uniform rules which are directed mainly at ensuring the implementation of a general policy of the enacting State and which do affect the validity of the contract and this in order to exclude those provisions which on the contrary are aimed mainly at justice between the parties and/or those the application of which would simply lead to the substitution of the contractual term as agreed between the parties by a term imposed by law.

As to the criteria on the basis of which to decide whether or not provisions of this kind are given relevance in a given case even if not being part of neither the lex fori nor the lex causae, it was generally felt that the criteria at present laid down in Article 2 of the draft were satisfactory: the only change would be to incorporate them in the same single article, possibly by enumerating them under separate subparagraphs so as to facilitate their immediate comprehension.

The last issue to be solved concerned the formula to be used in order to establish the kind of relevance which has to be given to provisions meeting the requirements laid down in the article. So far, the draft spoke of "application". In this respect the opinion was expressed that a more generic or flexible formula should be used in order not to reduce too much the discretion of the judge or arbitrator in each single case. As a matter of fact, when facing such a kind of mandatory provisions of a third country, the judge or arbitrator might very well decide instead of applying the provision as such, merely to apply its effects as to the fate of the contract and this either by giving the same effects as those established by the foreign law, by giving the effects which his

own law normally attaches to similar provisions or by himself determining the effects to be given in each single case. As a consequence, it might very well be that in practice the result would be the same as if the foreign provision had been directly applied but it could equally be the case that whereas according to the foreign law the contract would be null and void, the decision was in the sense of upholding the contract and of considering the case in terms of impossibility of performance, which might or might not lead to the granting of damages. Although recognizing that by using the formula "effect shall be given to..." this idea would be reflected only to a certain extent, the Group eventually decided to adopt it instead of the former formula of "shall apply". It was however asked that the commentary on the article under consideration specify that the formula used in the text was to be understood not in a strict or technical sense but very broadly so as to cover all the variants referred to above.

9. Article 3 of the draft deals with the question of the allocation between the parties of the duty to apply for a public permission, where such a permission is required, of the precise content of such a duty and of the consequences on the contract if such a permission is not applied for or if such a permission is refused.

Before entering into the discussion of these various aspects, the Group realised that in the light of what had been decided with respect to Articles 1 and 2 it was necessary first to define the scope of the provisions dealing with public permission requirements. In other words, since the new Article 1, which was intended to replace the former Articles 1 and 2, no longer provides a definition of the notion of public permission requirements a provision was needed in order to first to provide such a definition and second to indicate the cases where the following provisions dealing with the allocation between the parties of the duty to apply for a public permission will operate. As to the first aspect, it was decided to maintain the formula presently used in Article 1, paragraph 2 of the draft according to which the uniform rules should deal only with permissions which have to be granted by an institution exercising public authority. As to the second aspect, two cases should be envisaged: one where at the time of the conclusion of the contract, such contract does not take full effect without the permission; the other where irrespective of the fate of the contract according to the law of the State which provides for the permission requirement, its performance is physically impossible without such a permission. According to some members of the Group, the specification "at the time of the conclusion of the contract" should be put between square brackets because one should not preclude the possibility of dealing within this context also with cases of supervening permission requirements.

10. With respect to the question of which of the parties has the duty to apply for the permission, the Group agreed on a general rule according to which it should be the party who has a place of business in the State the law of which requires such a permission. In this respect however, the question was raised of a party not being a businessman and therefore not strictly speaking having a place of business as such but only a residence. It was decided to include a new provision stating that in such a case reference should be made to that party's habitual residence. As to the criteria provided for in the draft in cases where none of the parties has a place of business in the State requiring the permission, it was argued that to refer to the party "who is in a better position" to apply for the permission was too vague a criterion which could only create uncertainties and disputes between the parties. It should therefore be replaced by a more objective criterion such as a reference to the party required to perform the obligation characteristic of the given contract. While agreeing that the first criterion was too vague, the majority of the Group was however reluctant to follow the suggested amendment: with respect to a number of international transactions it is very difficult if not impossible to determine what should be regarded as the characteristic performance. It was therefore decided to adopt only one criterion for the case where none of the parties has a place of business in the enacting State, namely that in such a case the party whose performance requires the permission shall take the necessary measures to obtain it.

11. No objections were raised against the first two rules presently contained in paragraph 2 of Article 3 of the draft. With respect to the duty of the applicant party to inform the other party of the grant or final refusal of the permission without undue delay, it was first of all suggested to delete the word "final" as the principle of good faith requires that even in the case where the permission has been denied by a lower authority, the other party should be informed of it without undue delay since such refusal, even if not final, could imply additional expense and delay. Furthermore, it was decided to single out this rule from the rest of the paragraph and to put it together with the rule presently laid down in Article 4 paragraph 2 of the draft.

12. As to paragraph 3, according to which if the applicant party does not fulfil his obligations the other party is entitled to terminate the contract, attention was drawn to the fact that the time limits provided therein might give rise to difficulties and misunderstanding in practice since they are the same as those foreseen in paragraph 4 as far as the right of termination in case of failure to obtain the permission is concerned. In addition, it was felt that the proper sanction for the party's failure to fulfil his duties should be that generally provided for in cases of non-performance of a contractual obligation. It was therefore decided to delete the paragraph as a whole.

13. With respect to paragraph 4, while agreeing on the substance of the provision, the Group felt it was not advisable to establish for the case where the parties have not themselves agreed on a specific period of time a fixed time limit of six months: since the length of the time limit to be granted clearly depends on the kind of transaction under consideration and on the particular circumstances of each single case, one should simply speak of a "reasonable" period from the conclusion of the contract.

14. The Group decided to delete paragraph 5 for the reasons given in connection with paragraph 3.

15. As to the provision presently contained in paragraph 1 of Article 4, it was decided to delete that also. The assumption was that the rule expressed there was basically self-evident.

16. With respect to Article 5, it was first of all noted that it needed to be rephrased so as to avoid any express reference to public prohibitions or permission requirements. It was suggested to transfer the rule to Article 1 where it should become a new paragraph 2 intended to restrict the operation of the general rule laid down in paragraph 1. Another point which was raised concerned the fact that in its present version the provision only referred to the case where a party can reasonably be expected to perform the contract by a branch operating in a State different from the enacting State. It was argued that these cases also should be covered where a party, though not having a branch outside the enacting State, nevertheless could reasonably be expected to perform the contract e.g. because he disposes of a bank account or of the other necessary means of performance in such a third country. Nor should this be understood as an invitation to act whenever materially possible in violation of public prohibition or permission requirement established by the single States: as a matter of fact, such an escape clause is intended to apply only where the party may "reasonably" be expected to perform.

17. No objections were raised as to the substance of Article 6 of the draft. It was however suggested transferring this rule to Article 1 for the same systematic reasons already mentioned in connection with Article 5. In addition, attention was drawn to the fact that a rule laid down in Article 15 of section 1 of Chapter 3. It was therefore decided not to repeat it in extenso in this particular context but simply to make a reference to the latter article.

18. Having thus finished its first reading of the draft, a small drafting committee was set up, which was composed of Professors Bonell, Drobniq and Wade. It was asked to revise the text in the light of the changes which had been decided and to seek to present the single pro-

visions in such an order so as to render as far as possible independent of each other the provisions concerning the relevance of foreign mandatory rules and the provisions relating to the rights and duties of the parties when their contract is subject to a particular permission requirement.

19. The new draft finally produced by the drafting committee was the following:

Article X

- (1) Effect shall be given to legislation, insofar as it affects the validity of the contract, only if:
 - a) it is directed mainly at ensuring the implementation of a general policy of the enacting State;
 - b) it claims application whatever be the law otherwise governing the contract;
 - c) there is a close and significant connection between the law of the enacting State and the contract;
 - d) it is not contrary to the essential requirements of international trade or the legitimate interests of other States having a close and significant connection with the contract.
- (2) Where the legislation referred to in paragraph 1 only affects individual terms of the contract, Article 15 of Chapter III applies accordingly.
- (3) Notwithstanding paragraph 1, a contract may nevertheless be regarded as valid where a party may reasonably be expected to fulfil the contractual obligation by performance not affected by legislation as referred to in paragraph 1.

Article A

The provisions of the following articles apply where /at the time of the conclusion of the contract / the contract does not take full effect or its performance is impossible without the permission of an institution exercising public authority.

Article B

(1) The party who has a place of business in a State the law of which requires such permission shall take the measures necessary to obtain the permission.

(2) Where none of the parties has a place of business in such State, the party whose performance requires permission shall take the necessary measures.

Article C

(1) The party required to take the measures necessary to obtain the permission (the applicant party) shall do so without undue delay and with due diligence. He shall bear any expenses so entailed.

(2) The applicant party shall inform the other party of the grant or refusal of such permission without undue delay. He shall not be entitled to rely in relation to the other party on the full effectiveness of the contract, if he has not informed the other party of the grant of permission.

Article D

Both parties are entitled to terminate the contract if, notwithstanding the fact that the applicant party took all measures required, he failed to

obtain a grant of permission within an agreed period or, where no period has been agreed, within a reasonable period from the conclusion of the contract.

Article E

For the purpose of this section, if a party does not have a place of business, reference is to be made to his habitual residence.

20. When seized of the new text two members of the Group immediately objected that since the scope of Article X on the one hand and of Articles A et seq. on the other was clearly different, the former dealing with the relevance of legislation affecting the validity of the contract and the latter concerning permission requirements, it was necessary to repeat also in the context of this second set of rules the provisions contained in paragraphs 2 and 3 of Article X. It may be that in its present form the draft does not even specify which public permission requirements have to be taken into account in each single case. Yet even assuming that in principle the articles apply with respect to every kind of permission required for the effectiveness of a single contract or for its performance, it should be made clear that at least in the case envisaged by paragraph 3 of Article X, the parties may not rely on such a permission requirement.

21. However, the other members did not share this concern. For them, the relationship between Article X and Articles A et seq. should be understood in the following way. Article X lays down the criteria on the basis of which it can be decided to which mandatory rules, even if belonging to the law of a third country, effect shall be given. The rather vague formula "legislation", in so far as it affects the validity of the contract, has been chosen on purpose so as to cover both foreign prohibition rules and the foreign permission requirements. Articles A et seq. on the contrary do not in principle deal at all with the question of the relevance of the foreign mandatory rules but lay down the rights and duties of the parties in cases where the effectiveness of their contract or its performance is subject to a permission by a public authority. This means that the answer to the question of whether or not effect has to be given to such a permission requirement should equally be found on the basis of the rules and criteria laid down in Article X. Should this article not be maintained, then the same

question would obviously have to be solved according to the applicable national law, including its rules of private international law. The only exception to this general approach, the purpose of which was to render Article X and Articles A et seq. as far as possible independent of each other, was to be found in the reference to the case, where in the absence of the permission, the performance of the contract would be impossible. The reason why such a case has been expressly mentioned in Article A was that a foreign permission requirement, even if according to the criteria of Article X or the applicable national rules of private international law is to be disregarded, cannot but be taken into consideration where without such a permission the performance of the contract would be physically impossible (e.g. a foreign embargo regulation in a case where the goods to be delivered are located in the enacting State).

22. This being so, it was however unanimously felt that the draft needed some changes in the wording used in particular in the opening phrase of paragraph 1 of Article X and in Article A. It was therefore decided to replace the words "does not take full effect" in Article A by a formula which would bring them into line with the formula used in Article X. The new version of Article A should read as follows "The provisions of the following articles apply where /at the time of the conclusion of the contract/ the permission of an institution exercising public authority is required and its absence would wholly or in part affect the validity of the contract or render its performance impossible".

23. According to some members of the Group it was still necessary to make an express reference to the case envisaged in paragraph 3 of Article X. They therefore suggested to add in Article A a new paragraph stating that "A party shall not be entitled to rely on a permission requirement where he could reasonably be expected to perform the contract by means of performance not subject to such a permission requirement". In the opinion of the majority, such an addition was entirely superfluous or at least redundant since a proper interpretation of the rule laid down in paragraph 1, namely where reference is made to a permission the absence of which would render the performance of the contract "impossible", would already lead to the same result. While deciding to take a final decision at a later stage the Group agreed to put the proposed new paragraph between square brackets.

24. The Group unanimously agreed on two further amendments to be made in Article X. First, it was decided to transfer the qualification

contained in litt. (a) of paragraph 1 in the opening phrase which would therefore read as follows : "Effect shall be given to legislation directed mainly at ensuring the implementation of a general policy of the enacting State, in so far as it affects the validity of the contract, only if : (a) ... (b) ... and (c)". The second amendment concerned the inclusion of a new paragraph 2 according to which "Nothing in paragraph 1 shall limit the application of legal rules of the forum which claim application to the contract". It was admitted that this principle was already implicit in paragraph 1. However, in order to avoid any misunderstanding, it was felt preferable to state it explicitly. As a consequence of the inclusion of this new paragraph, the former paragraphs 2 and 3 will now become respectively paragraphs 3 and 4.

25. The Group finally discussed the appropriate place to put the provisions so far examined. Article X should form a section on its own namely section 2 of Chapter 3 entitled "Public policy legislation". Articles A and the following on the other hand should be included in a separate chapter which for the time being could be Chapter 4, bearing the title "Public permission requirements".

26. The second item on the agenda was the consideration of the draft rules on hardship (UNIDROIT 1983, Study L - Doc. 24).

In view of the lack of time, the Group decided not to enter into a detailed discussion of the draft itself. The Rapporteur, Professor Maskow, informed the other members that he had not yet introduced any modifications in the draft following the Louvain-la-Neuve meeting but that he would in the near future reconsider it, also in the light of the most recent developments in this field and in particular the studies undertaken by the Gesellschaft für Rechtsvergleichung, the results of the recent International Congress on Arbitration and the work in progress in the ICC ad hoc Committee on Hardship Clauses. Attention was also drawn to the last session of the UNCITRAL Working Group on the New International Economic Order where the problem of hardship clauses has been widely debated in the context of international contracts for the construction and erection of large industrial plants and where different opinions as to the advisability of dealing with this subject matter have been expressed. While agreeing that the concern which on that occasion was voiced in particular by the developing countries had to be carefully examined, the Group however stressed the difference which exists between the so-called hardship clauses which the parties might expressly stipulate in their contract and hardship cases which may arise even where the parties have not expressly provided for them in their contractual

arrangements and which at least with respect to particular kinds of contracts would seem to require a treatment different from that provided for the typical cases of "force majeure".

27. The last item on the Agenda concerned the state of work with respect to the proposed Chapter on performance of contracts.

The two rapporteurs, Professor Fontaine and Professor Rajski illustrated the basic criteria which they intended to follow in preparing a preliminary draft of this chapter of the Code and which are to be found in the preparatory note submitted to the Group (UNIDROIT 1983, Etude L - Doc. 28).

From the outset, the necessity was stressed of coordinating as far as possible the work on performance with that on the following chapter on non-performance of contracts. Professors Drobnig, Lando and Tallon, the Rapporteurs for the latter chapter announced that as soon as their work had reached a more advanced stage, they would immediately inform their colleagues Professors Fontaine and Rajski of the progress made.

The Group then paid particular attention to the list of items which according to the Rapporteurs, should be included in the chapter on performance.

On the question of whether or not a provision defining the exact meaning of the principle of good faith in connection with the performance of contracts should be included at the beginning of the chapter, the view was expressed that since in the preliminary chapter of the Code a general clause had already been adopted dealing with the relevance of the principle of good faith in connection not only with the formation and interpretation but also with the performance of contracts, it was at least for the time being not necessary to envisage the inclusion of a similar clause in this particular context.

As to the items listed under the numbers 8, 9, 10; ("imputation des paiements", "preuve des paiements", et "demeure du créancier", it was felt that their importance within the framework of the Code was rather questionable. On the contrary, all the other items of the list were held to be of great interest and the only recommendation which the Group made was that when embarking on these issues, one should try to avoid as far as possible following the traditional concepts and systematic order common to some but not all existing legal systems.

As to the sources to which recourse would be made, the Rapporteurs

agreed that preference should be given to international legal instruments, whether of a legislative or of a purely contractual nature, instead of the existing national codifications. At the same time, attention was drawn to the fact that at least in the various general conditions and standard forms of contract currently used in international trade practice, the problem of performance of the contract was usually not dealt with at all or, if regulated, was considered in a way reflecting the particular aspects of each individual category of transactions and was not therefore capable of being extended to other types of contracts.
