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U n i d r o i t

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 MILAN
FROM 24 TO 26 JANUARY 1985

(prepared by the Secretariat of Unidroit)

Rome, June 1985

1. At the invitation of the President of Unidroit, the Informal Working Group on the progressive codification of international trade law held its fifth meeting in Milan, at the Law Faculty of the Catholic University "S. Cuore", from 24 to 26 January 1985. The meeting was attended by Professors M. Bianca (Institute of Private Law of the University of Rome), V. Drobnič (Max-Planck-Institut, Hamburg), M. Fontaine (Centre de droit des obligations de Louvain-la-Neuve), Mrs. Ch. de Lamberterie (Institut de droit comparé de Paris) (representing Professor Tallon), O. Lando (Institute of European Market Law, Copenhagen), D. Maskow (Institut für Rechtsvergleichung, Potsdam-Babelsberg), J. Rajski (Institute of Comparative Civil Law of the University of Warsaw), T. Wade (Asser Institute, The Hague) and Mr Duan Wei (Ministry of Foreign Economic Relations and Trade, Beijing). The meeting was also attended by Professor C. Castronovo (Institute of Private Law of the Catholic University of Milan). The Secretariat of Unidroit was represented by Professor M.J. Bonell who took the chair and by Mrs F. Mestre who acted as Secretary to the Group.

2. In opening the session Professor Bonell expressed the Institute's gratitude to all the participants for having accepted the invitation to attend the meeting and in particular he welcomed Mr. Duan Wei who was present for the first time. So far the Group had been lacking an adequate representation of lawyers from developing countries. The fact that up from now an expert from the People's Republic of China was among its members was of the greatest importance. First because Mr. Duan's participation was made possible by a grant from the Chinese authorities who thereby demonstrated their great interest in the project of elaborating uniform rules on international commercial contracts; secondly because the deliberations of the Group could not but be substantially enriched by the contribution of a representative of a country whose experiences and needs in the field of international trade law were so different from those of the industrialised nations both in the East and in the West.

3. On the agenda of the meeting was the examination of the preliminary draft chapter on performance prepared, together with brief explanatory notes, by Professors Fontaine and Rajski.

In introducing their paper the two rapporteurs indicated that the draft had been prepared following the basic criteria set forth in the preparatory document which was submitted to the Group at its previous session held in Rome in November 1983 (Unidroit 1983, Study L - Doc. 28); at the same time due consideration had been given to the comments and suggestions made on that occasion by the rest of the Group.

All members of the Group expressed their deep appreciation for the most valuable work accomplished by the two rapporteurs.

In the context of the general discussion on the draft the question was first of all raised as to whether the future chapter on performance should provide a detailed regulation of all the different aspects which might be of interest in practice or rather contain only a few basic principles, leaving it judges or arbitrators to develop from them the appropriate solution in each specific case. While some of the members expressed their preference for one approach or the other, the majority of the Group felt that the two alternatives could hardly be considered as mutually exclusive and should rather be combined in a pragmatic and flexible manner: in other words, if in general the rules should be as concise and clear as possible so as to be easily understandable by the international business community to which they are mainly directed, there might be particular issues which would need to be regulated in a more analytical way.

As to the substance of the draft it was observed that some of its provisions, while being appropriate in the context of a sales contract, would not at all or only to a certain extent fit into a different context, e.g. where the contract comprised the provision of services. It was furthermore pointed out that some of the issues which were dealt with in the present draft were of dubious importance, at least from the viewpoint of international trade practice, whereas others, so far neglected, ought definitely to be covered by the future Rules: reference was made, inter alia, to the object of the contract (question of the determination of the price in the absence of any express provision to be found in the contract itself; tolerances in the quantity and/or quality of the goods delivered or services actually performed), the precise manner of performance and the possibility of substitutive performance, the relationship between the different acts of performance (question of mutual dependence between the delivery of the goods or performance of the services by one of the parties and the payment of the price by the other), etc.

4. The Group then proceeded to an analysis of the individual articles of the draft.

With respect to Article 1 objections were raised above all to the use of the terms "debtor" and "creditor": since according to the current terminology of the Common law systems they only relate to monetary obligations, whereas the present provision (as well as most of the following provisions of the draft) were intended to apply to any kind of contractual obligation, it was decided to replace, whenever appropriate, the misleading terms of "debtor" and "creditor" by the more neutral term of "a party" (or "parties").

In paragraph 1 it was suggested to delete the reference to the "economic purpose" so as to avoid the impression that in addition to the economic purpose of the contract as a whole there could be envisaged distinct and possibly conflicting purposes of each of the parties obligations. The new wording of the paragraph would read as follows: "The parties must perform their obligations in accordance with the contents of the obligations and in a manner corresponding to their nature".

Lengthy discussion took place in respect of paragraph 2, whose purpose was to make it clear that each party is under a duty not only to fulfil his own obligation, but also to cooperate with the other party in the fulfilment of that other party's obligation, i.e. to do whatever might be necessary according to the circumstances of each case in order to enable that party to perform. According to some members of the Group the very substance of the provision was questionable, since such a duty of active cooperation could only be admitted in a limited number of contracts (e.g. long term contracts for the construction of industrial plant; contracts for industrial cooperation; joint-ventures; etc.) and even there its exact nature and extent depended on the terms of each individual agreement between the parties. Others objected that in any event the proposed provision simply expressed a particular aspect of the general duty of the parties to observe the principle of good faith in the performance of the contract as stated in Article X which was included in the introductory chapter of the Rules, and therefore could easily be deleted without any change in substance. Those who spoke in favour of the provision insisted on the important role which the duty of active cooperation between the parties in the fulfilment of their respective obligations plays in international trade practice, and pointed out that by explicitly enunciating such a duty the Rules would be in line with the most recent and advanced tendencies of national legislation and case law. It was finally decided to maintain the paragraph, but to redraft it as follows: "Each party is bound to cooperate with the other party when such cooperation is necessary for the performance of that party's obligation". It was also suggested that in the explanatory notes it should be made clear that this special duty is to be considered as an application of the general principle of good faith in the performance of the contract.

5. As to Article 2 the view was expressed that the provision contained therein was a mere repetition of the general principle of good faith (cf. Article X) and should therefore be deleted. Other members raised the question of the relationship between the rule laid down in the present article and the principles which would be adopted in the chapter on non performance of contracts. Indeed, if in this latter context the objective approach were to be adopted, i.e. the remedies for breach of contract were granted, in principle, irrespectative of whether or not the non performing party was in fault, it could be argued that the present article would become meaningless or at least that its scope of application would be considerably

reduced. The Group eventually decided to maintain the provision, but to make it clear in the text that it was intended to apply only to cases where a party undertakes to provide a service or to carry out a certain activity ("obligations de moyens"), and not also to cases where on the contrary the party is under or duty to achieve a given result ("obligations de résultat"). The proposed text would read as follows: "Unless a party is obliged to achieve a specific result, he is obliged to observe the reasonable diligence required in activities of the type involved in the particular trade concerned". It was furthermore suggested placing the provision immediately before Article 6.

6. In respect of Article 6 two main objections were raised. The first concerned the criteria presently foreseen for the determination of the standard of quality to be met by generic goods not better defined by the contract. It has been pointed out that, except for the relatively rare cases where there exist for particular kinds of goods internationally agreed quality standards, a recourse to "the international customs established in a given branch of international trade" could hardly be considered a satisfactory solution. As to the further criterion of the "average quality as established in the state of / the performing party's / place of business", it was felt that, instead of simply providing for a conflict of laws-rule, there should be indicated one or more substantive criteria. The second kind of objections referred to the scope of the provision, at present restricted to the problem of the quality of the goods. It was pointed out that the questions of the quantity of the goods to be delivered and, in cases when the contract implies the provision of a service intended to lead to a specific technical result, of evaluating such result were equally important in international trade practice, and should therefore also be dealt with in the Rules. It was decided to deal with the quality and the quantity of the goods in one and the same article, and that in substance the new provision should to the largest possible extent follow the criteria set forth in Article 35 of the Vienna Sales Convention. The question of the technical results should be the subject of a separate article to be formulated in a manner which made it clear that its scope was quite different from that of Article 2.

7. As to Article 3 the question was raised as to whether the problem of partial performance should not be treated differently depending on the monetary or non-monetary character of the obligation: in fact, while the rule according to which partial performance is not admissible is quite

reasonable in cases of a non-monetary obligation, for monetary obligations it would seem preferable to adopt the opposite solution. In this respect attention was drawn, inter alia, to the Geneva Uniform Laws on bills of exchange and cheques, which expressly provide for the possibility of a partial payment of the sum due under one of these instruments. It was therefore suggested to include two separate provisions, one of which dealing with non-monetary obligations and the other with monetary obligations, and to indicate different solutions for the two cases. According to other members of the Group, however, this proposal was scarcely acceptable, since there might be cases where a party should be bound to accept partial performance even of a non-monetary obligation, and cases where the refusal of a partial payment would be justified. In these circumstances it would be preferable to establish as a general rule the inadmissibility of partial performance, but at the same time to make it clear that the opposite solution might be adopted if the nature of the obligation in question in a given case so required. The view was expressed that in any event attention should be paid to the effects which the acceptance of a partial performance would have on the duty to effect a reciprocal performance. It was also noted that there existed a close interrelationship between the question as to whether or not partial performances is admissible and the problem of the substantial or not substantial nature of a breach of contract. This particular issue should however be adequately dealt with only after the completion of the chapter on non-performance.

8. With respect to Articles 4 and 5 the Group was of the opinion that the issues regulated therein (cases where a party has to perform personally; payment by a third party not authorised by the debtor) should be dealt with in another part of the draft or may be in a separate chapter of the Rules together with other problems closely related to them, such as the assignment of the contract, sub-contracting, substitution in performance, etc.

9. The provision laid shown in Article 7 gave raise to lengthy discussion. It was noted that it touched upon two different questions, namely that of the determination of the amount due under a monetary obligation and that of the currency in which the sum of money has to be paid. As to the first question some members of the Group, though recognising that the nominalistic principle is adopted in most, if not all existing national laws, wondered whether it was necessary to State it expressly in the Rules, and this all the more so, since it was not yet clear what

would be the relationship between this principle and the provision contemplated on the adaptation of contracts in cases of hardship. On the contrary, what was needed was a provision, so far missing in the draft, dealing with the case where the parties have not expressly fixed the price in their contract. In this respect reference was made, inter alia, to Article 55 of the Vienna Sales Convention. It should however be considered whether in addition to the sole objective criterion provided for in that article ("the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned") one might not foresee other criteria, such as the price generally charged by the party selling the goods or offering the service or, if the goods or services in question were of a special nature, the price as indicated in each single case by the same party, subject to the possibility of its revision by a third person, if it appeared to be unreasonably high. As to the problem of the currency of payment it was suggested that the draft should contain a provision dealing not only with the case where the contract is silent on this point, but also with the question as to whether any agreement between the parties as to the currency in which payment is to be made has an exclusive character.

As a result of the discussion it was decided to ask the rapporteurs to prepare a first draft of the two envisaged provisions on the determination of the price and on the currency of payment; the provision presently contained in Article 7 should be put between square brackets after the deletion of the last four words.

10. The Group was informed that owing to lack of time it had not been possible to prepare for this session a draft of Articles 8 and 9 concerning payments made through banking institutions. The intention of the rapporteurs however was to deal within this context in particular with the question of the time at which the payment becomes effective, if (a) the debtor gives an order for the transfer of the funds from his bank account to the creditor's account, or (b) the creditor accepts a bill of exchange or a cheque issued by the debtor (or endorsed by the latter to the creditor's benefit). While there was general agreement that in the case under lit. (b), the payment should be deemed to be effective when the creditor accepted the instrument, subject to the condition that it would be honoured at its date of maturity, a lengthy discussion took place concerning the solution to be adopted in the case under lit. (a). According to one view the payment should be effective when the debtor gives the order to his bank to transfer the funds. According to another view the decisive date should on the contrary be the date when the creditor can actually dispose of the funds: after all,

the bank is acting in the interest of the debtor, who should therefore bear the risk of a possible delay between the time he has given the transfer order and the time the funds are credited to the creditor's account. In this respect it was however noted that in practice it might very well happen that it is not the debtor's but the creditor's bank who causes the delay, so that at least in such an event it would be unfair to hold the debtor responsible for it. The Group eventually decided to postpone any final decision until a later stage and to ask the rapporteurs to study the issue further. It was suggested that in preparing a draft provision to be discussed at the next session, they should take into account not only existing legislative materials, but also the necessary information which they might receive from banking circles as to actual practice in connection with transfer of funds.

11. Article 10, which lays down rules for the determination of the interest rate applicable to monetary obligations, if it has not been expressly fixed in the contract, met with considerable criticism. First of all the question was raised as to whether a provision of this kind was needed at all: after all, it was argued, in practice the agreed price is normally inclusive of interest, which means that, unless it is otherwise expressly stipulated in the contract, no further interest is due. It was furthermore pointed out that the criteria provided for in this article for the determination of the rate of interest payable were in any event too vague. It was therefore decided not to maintain this article in the draft.

12. With respect to Article 11 the view was expressed that the solution contained therein as to the time of performance could hardly be accepted: in fact, it was in practice normally the opposite rule which applied, i.e. in the absence of a different date of performance fixed by, or determinable from, the contract, the parties may perform their obligations immediately after the conclusion of the contract and only if they intend to perform at a later time might they be expected to give notice to that effect. This could be made clear by deleting the last two sentences of the provision and by replacing the last four words of the first sentence by the words "after the conclusion of the contract". In the explanatory notes it should be pointed out that by the provision "If the time of performance is not determinable from the purpose of the contract and the nature of the obligation ..." it was intended to refer to the normal case where the obligation has to be performed immediately after the conclusion of the contract.

The rule laid down in Article 12 was also criticised and the adoption of the opposite principle was favoured. The proposed new text of the article would read as follows: "If the date of performance is fixed by or determinable from the contract, the parties are not entitled to make

an earlier performance". This rule would obviously have to be read in the light of the general principle of good faith, with the consequence that in practice exceptions to it are permitted, whenever a party has no valid reason to object to the earlier performance by the other party.

As to Article 13 it was decided to redraft it as follows: "A party who accepts an earlier performance is not bound to effect a reciprocal performance".

Article 14 was considered to be insufficiently clear as to its exact scope and purpose and its deletion was therefore suggested.

Although recognising the great importance of the question dealt with in Article 15, the Group felt that it was preferable to transfer the provision to the future chapter on non performance.

13. With respect to Articles 16, 17 and 18 dealing with the place of performance it was first of all noted that the proviso in Article 16 ("If the place of performance is not stipulated by the parties or determinable from the purpose of the contract and the nature of the obligation ..") was lacking in Article 17. The suggestion was made either to adopt the same formula in Article 17 or to delete the opening phrase in Article 16 and to try to express the underlying idea in a separate provision which would apply to both the monetary and the non-monetary obligations. As to the substance of Article 17, it was felt preferable to change the criterion laid down therein for the determination of the place of performance and to refer, by analogy to what was already provided for in Article 16 in respect of non-monetary obligations, to the place of business of the creditor at the time when the contract was concluded. It was also noted that no solution was so far provided in the draft for cases where the parties have no place of business at all or where they have several places of business: it was suggested to fill in the gap by including a general provision along the lines of Articles 1 and 10 of the Vienna Sales Convention. As to Article 18, it was pointed out that the creditor may very well have an account in different banks and that the provision should therefore be redrafted so as to make it clear that, unless the creditor has expressly indicated to which account he wants the sum credited, payment may be made to any of the existing accounts.

14. With respect to Article 19 the view was expressed that the rule laid down thereon was either self-evident or already implicitly contained in the preceding provisions on the place of performance.

In fact, it is quite obvious that each party must bear the costs which he incurs in performing his obligation, and since performance has to take place at a given place, it is normally at this moment that the costs and risks involved pass from one party to the other. The Group therefore decided to delete the provision and to ask the rapporteurs to see whether the underlying principle could not be expressed in a clearer and more appropriate fashion in the framework of Articles 16-18.

As to Article 20 the question was first of all raised as to whether "the taxes and public duties" referred to therein are intended to include both those connected with the conclusion of the contract and those connected with its performance. It was pointed out that, since the former are already dealt with in the chapter on public permission requirements, in the present context only the latter could be meant. It was decided to make this clear in the text by using in the second line the words "connected with the performance of the contract". It was likewise suggested to state in the first line, instead of "has to pay ...", "has to bear the cost of ...", so as to make it clear that the purpose of the provision is to determine which party has ultimately to bear the cost of taxes or other public duties, irrespective of who, according to the relevant fiscal regulation, has actually to pay them to the competent authorities. A lengthy discussion took place on the proposed criteria for the allocation of the kind of costs in question. According to one view the solution at present provided for in the draft should be maintained, since it is the party situated within the State which requires the payment of the taxes, who is in the best position to know their existence and amount in advance; the fact that he should bear their costs, even if they relate to the goods or services delivered by the other party, would simply mean that he would, when stipulating the price, take them into account. According to another view taxes related to the performance of the contract are part of the general costs which a party incurs in the fulfilment of his obligation and as such cannot but be borne by that party, where ever they become due. The Group eventually decided for the time being to adopt this second solution and to redraft the provision as follows: "Each party has to bear the cost of taxes and other public duties connected with the performance of the contract". The article should however be placed between square brackets, so as to indicate that it might be reconsidered at a later stage.

15. With respect to Articles 21 and 22 it was objected that the precise factual situations envisaged by the two provisions were not sufficiently clear. Do they refer only to cases where the person receiving the performance acts as an agent of a party, but lacking the necessary authorisation or acting

on the basis of an apparent authority ? Can a person showing a receipt made out by the party be considered to be the only possible case of an apparent agent ? What about payment to the creditor's bank ? And what about the performance of a monetary or non-monetary obligation to a third person indicated in the contract ? It was suggested that the two articles be redrafted so as to make it clear that they are intended to cover not only cases of a false or of an apparent agent, but also and above all the case where because of the existence of a plurality of possible addressees of the performance there arises a problem of identification of the person or legal entity entitled to receive the payment or to accept the goods or services.

16. As to Articles 23 to 27 it has been suggested to delete the provision presently contained in Article 24 and to insert in the first line of Article 23, after the words "separate debts" the words "which are due". In Article 25 it was felt that the last sentence would be sufficient to express the basic principle underlying the provision. As to the order of presentation of the two articles a suggestion was made to place Article 25 before Article 23. In Article 26 the expression "discharge note" should be replaced by "receipt". As to Article 27 it was decided to speak in the first line, instead of "parties" of "debtor" and to delete the following words "payment is first imputed to whichever debt is due". In redrafting the article attention should also be paid to the relationship between the rules at present laid down therein and the general principle as indicated in Article 25.