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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

REPORT ON THE MEETING HELD IN POTSDAM-BABELSBERG

FROM 28 TO 30 NOVEMBER 1985

(prepared by the Secretariat of Unidroit)

Rome, February 1986

1.- At the invitation of the President of Unidroit the Working Group for the elaboration of principles for international commercial contracts held its sixth meeting in Potsdam-Babelsberg, at the Akademie für Staats- und Rechtswissenschaft of the German Democratic Republic, from 28 to 30 November 1985. The meeting was attended by Professors A. Farnsworth (Columbia University, New York; Member of the Governing Council of Unidroit) and M. Fontaine (Centre de droit des obligations de Louvain-la-Neuve), Mrs. Ch. de Lamberterie (Institut de droit comparé de Paris) (representing Professor D. Tallon), Professors A. Hartkamp (Ministry of Justice, The Hague; Member of the Governing Council of Unidroit), 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) and Mr Wang Zhenpu (Ministry of Foreign Economic Relations and Trade, Beijing). The last part of the meeting was also attended by Professor F. Enderlein, Director of the Institut für Rechtsvergleichung, Potsdam-Babelsberg (Member of the Governing Council). 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 thanked all the participants for having accepted the invitation to attend the meeting and in particular he welcomed Professor Farnsworth and Mr. Wang, who were present for the first time. So far the Group had been lacking an expert from the United States. The fact that Professor Farnsworth had agreed to be associated with the work of the Group was of the greatest importance. First, on account of his former capacity as Rapporteur to the second edition of the American Restatement of Contracts Professor Farnsworth was particularly qualified to bring to the attention of the other members of the Group the most recent developments in the field of contract law within the United States. Secondly, because the presence, in addition to that of Mr. Hartkamp, of another member of the Governing Council of Unidroit could not but increase the prestige of the Working Group and further strengthen the link between the two bodies. As to Mr Wang, he too had very wide experience in the field of international trade law as was demonstrated by his active participation in the work of other international organisations such as UNCITRAL and the Hague Conference on Private International Law. Furthermore, it was very important to have a representative of a country, such as the People's Republic of China, whose experience 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.- Professor Bonell then informed the Working Group that at its last session, held in Rome in May 1985 the Governing Council had discussed at length the merits of the project on the progressive codification of international trade law in general and at the same time proceeded to a closer examination of the first four draft chapters so far prepared by the Working Group. With a view to facilitating the task of the Council, the Secretariat had prepared a document aiming at illustrating in more detail the purposes underlying the project as well as at providing an overall view of the present state of work and formulating some suggestions as to the possible future development of the project (Unidroit 1985, C.D. 64 - Doc. 6). After an extensive debate which permitted a clarification of several aspects of the project which had in the past sometimes given rise to misunderstanding, the Council ultimately decided that the project should be given the highest priority within the Work Programme of the Institute for the next three years. This would imply, among other things, that the frequency of the meetings of the Working Group should be increased so as to have in the future, if possible, two sessions a year instead of one. With respect to the draft chapters so far prepared a number of observations concerning both their content and their formal presentation were made. All the comments and suggestions would be submitted to the Working Group in order to enable it to take them into account when proceeding to the final reading of the drafts. The Council finally recommended changing the title of the project so as no longer to speak of a "progressive codification of international trade law" but rather of the elaboration of "Principles for international commercial contracts": this in order to make it clear that what at least for the time being was intended was not the elaboration of provisions of a binding nature, but rules of a purely private character which because of their persuasive value, would be used by arbitrators when called upon to decide disputes concerning international trade relationships.

4.- The first point on the agenda was the examination of the revised draft chapter 5 on performance as prepared by Professors Fontaine and Rajski following the discussions at the last meeting of the Working Group in Milan in January 1985 (Unidroit 1985, Study L - Doc. 34).

In the context of the general discussion on the draft the Group was informed that it had been circulated among the academic circles in the United States and that the comments so far received were not too favourable. The objections raised concerned first of all the structure of the draft. It was felt that many of the topics which were presently dealt with "seem more the kind of favourite issues of European Civil Law conceptualists, rather than the problems business people and their lawyers must wrestle with". At least for an American

reader it was somewhat surprising not to find in the context of rules on performance any reference to the question of interpretation of contract terms agreed upon by the parties or to other issues, such as the effect of performance, non-performance and prospective non-performance, the standards to be used in determining whether a failure to perform is material, etc. Other remarks related to the way in which the individual provisions were drafted. They appeared to be a curious mix of general and particular provisions. The disparity might partly be explained as an attempt, in some articles, to specify particulars of performance not addressed in the agreement of the parties (so-called suppletive or "gap-filling provisions"), whereas other articles were intended to impose obligations that cannot be varied by agreement. If this was the case, the different functions of the draft provisions should be more clearly stated, e.g. by signalling a provision of the former type by introducing it with the expression, "unless otherwise agreed ...". Moreover it was argued that it was indispensable to provide each provision with explanatory notes: after all arbitrators and counselling practitioners, to whom the rules were mainly directed, were in most cases interested not so much in abstract provisions as such but rather in the accompanying comment which indicated the particular factual situations envisaged and explained the various options which in theory exist in handling them.

In reply to these criticisms the Rapporteurs first of all fully agreed as to the necessity of adding explanatory notes to each single provision of the draft; the fact that they were so far missing was only due to a certain shortage of time in the preparation of the revised version of the draft and to the consideration that it was preferable to wait until the Group had had an opportunity to express its opinion on the proposed provisions as such. As to the drafting style it might well be that it followed more closely the continental tradition and therefore differed from the much more analytical way of phrasing legal provisions typical, for instance, of the American Restatement and the Uniform Commercial Code. The suggestion more to indicate clearly provisions which were intended to be of a merely suppletive character would, where appropriate, be taken into due consideration: it should however be borne in mind that, instead of spelling out each single time that the rules laid down were subject to an agreement to the contrary by the parties, one could think of achieving the same result by stating somewhere in the introductory chapter which of the provisions might be derogated from by the parties and which might not.

Finally, as far as the selection of the issues dealt with in the draft was concerned, it was pointed out that it had to be seen in the context of the overall structure of the project. Indeed, the question of how to construe the terms of the contract was already extensively dealt with in chapter 2, specifically devoted to interpretation. A number of other issues to which reference was made as a possible object of the chapter on performance were expected to be regulated in the chapter on non-performance to be prepared by other members of the Group. Admittedly the proposed structure of the draft chapter on performance reflected the systematic order which is most commonly to be found in continental codifications. While welcoming any suggestions as to possible changes in the approach so far adopted the Rapporteurs expressed their conviction that a final decision as to the content of the two chapters on performance and non-performance should be delayed until the work on the latter chapter would have reached a sufficiently advanced stage.

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

In introducing the draft the rapporteurs pointed out that Articles 1 to 3 were clearly interrelated and should therefore be discussed together, specially since the draft itself contained an alternative suggestion to replace the three provisions by a single article. Of the two options the former basically reflected the results of the discussions at the previous session of the Group. The Rapporteurs themselves however expressed their concern that this approach was too detailed. Therefore they provided, as an alternative, a new text of Article 1 drafted in more general terms so as to cover also the present subject matter of Articles 2 and 3. Initially several members of the Group expressed their preference for this second solution. As to the actual proposed wording of the new Article 1 it was however argued that the reference to "the nature (and economic purpose) of the obligations" should be deleted. First, because the actual meaning of these concepts was not at all clear nor was there any indication of the criteria to be applied for the determination of their meaning in a particular case; second, because the provision could be understood in the sense that if the nature and/or economic purpose of the obligation changed after the conclusion of the contract, the parties were no longer bound to perform. Other members on the contrary expressed their preference for retaining the three separate articles. In their view this was necessary in order

to preserve the distinction between two different kinds of obligations which may arise from a contract, i.e. an obligation to provide services or to carry out a certain activity ("obligation de moyens") and an obligation to achieve a given result ("obligation de résultat"). Although such a distinction is not emphasized in all legal systems, its presence in the draft would show from the outset that the degree of diligence of a party may vary considerably according to the kind of obligation incurred. Eventually this latter view prevailed, and the Group agreed on a new version of the first three articles which reads as follows: "The parties shall perform their obligations as expressly or impliedly required by the contract" (Article 1); "To the extent that an obligation of a party involves a duty of care in the performance of an activity, the party is obliged to observe the diligence observed by reasonable persons of the same kind in activities of the same type" (Article 2); "To the extent that an obligation of a party involves a duty to achieve a specific result the party is obliged to achieve a result of the quality usually achieved under obligations of the same type" (Article 3). As to the question of how to establish whether a given obligation falls within the first or the second category, it was pointed out that no definite criteria existed. After all, an obligation initially considered to be an obligation de moyens may well, at a later time, because of technological progress or changing attitudes, be regarded as an obligation de resultat. However, a suggestion was made to provide some indications in the draft as to the most significant factors for distinguishing between the two type of obligations. Reference was made, among others, to the price (in particular the way in which it is calculated), to warranties expressly stipulated, and to the other party's possibility for influencing the performance. It was decided to ask the Rapporteurs to prepare a new article whose opening phrase would read "In determining whether an obligation of a party involves a duty of care in the performance of an activity or a duty to achieve a specific result the following circumstances may be significant ...", and which would then provide a more detailed list of major distinguishing elements.

The Group then examined the special provision contained in paragraph 2 of Article 1. The question was raised whether it was appropriate to limit the duty of cooperation only to those cases where such cooperation was "necessary" for the performance of the other party's obligation. Indeed it was argued that the formula could be construed in the sense that what is ultimately required by a party is not merely to hinder the other party's performance (e.g. a party, after contracting for the immediate delivery of a certain amount of oil, buys all the available oil on the spot market). Against the simple deletion of the "necessity" criterion it was however pointed out that this would unduly

broaden the scope of the duty of cooperation. The Group eventually agreed to rephrase the provision so as to read as follows: "Each party shall cooperate with the other party when such cooperation may reasonably be expected for the performance of that party's obligation". The explanatory notes would clarify that, although the duty not to hinder the other party's performance is the main concern of the provision, there may be cases requiring a more active cooperation.

With respect to Article 4 it was pointed out that the precise scope of the provision contained therein is far from being clear. Does it refer to the case where a party, at the date of maturity of his obligation, performs only part of it, or is it intended to deal with the quite different question of whether a party, instead of giving his whole performance at one time may choose to perform one part at a time? If the answer were in the first sense, some members of the Group felt that the provision could hardly be accepted in its present form. To leave it to the discretion of a party whether to refuse or to accept a "partial performance" by the other party, would not only introduce a great amount of uncertainty, but also seemed inconsistent with the general principle laid down in Article 1. An offer to perform only a part of the obligation at the date of maturity clearly represented a case of non-performance, and the different questions which it raised (determination of the substantial or non-substantial nature of the breach; remedies which in each case are available to the party not in default; etc.) should better be dealt with in the chapter on non-performance. On the other hand, the present chapter would be the proper place to deal with the different questions concerning the possibility of rendering the performance in instalments. Reference was made to § 233 (1) of the American Restatement (Second) on Contracts ("Where performances are to be exchanged under an exchange of promises, and the whole of one party's performance can be rendered at one time, it is due at one time, unless the language or the circumstances indicate the contrary"), and it was suggested that a similar rule be included in the draft. This proposal was eventually accepted by the Group, and it was decided to adopt a new provision reading as follows: "If the whole of one party's performance can be rendered at one time, it is due at one time, unless the circumstances indicate otherwise". On the other hand, not all the members agreed that the present chapter ought not to contain a provision of the kind presently to be found in Article 4. It is true that, as a rule, if a party at the date of maturity of his obligation offers to perform only a part of it, the other party may

refuse such a "partial performance" and sue the former for a total failure to perform. There are however cases where such a refusal would not be justified in view of the particular nature of the obligation in question: reference was made to monetary obligations, and it was recalled that both the 1930 Geneva Uniform Law on Bills of Exchange (Art. 39) and the 1931 Geneva Uniform Law on Cheques (Art. 34) expressly state that the holder may not refuse a partial payment of the sum due under one of those instruments. Obviously, also in these cases the party who performs only part of his obligation is a party in breach and the consequences of his failure to perform the remaining part have to be determined according to the general principles laid down in the chapter on non performance. With respect to the portion actually performed, the question was however one of performance, and it seemed advisable therefore to deal with such cases also in the context of the present chapter. It was suggested revising the wording of the provision presently laid down in Article 4, so as to make it sufficiently clear that as a rule a party is not entitled to offer at the date of maturity of his obligation only a partial performance, and that a different solution applies only in exceptional cases to be further specified. Another proposal was to deal with the problem of part performance not in general terms, but only with reference to monetary obligations. The Group ultimately agreed not to take any final decision on the matter for the time being and to ask the Rapporteurs to give it further consideration with a view to elaborating, if possible, the different solutions in more detail.

Since it was felt preferable to change the systematic order of the draft and to deal with the questions of the time and the place of performance immediately after the first four articles which are of a general nature, the Group then proceeded to the examination of Article 8. It was decided to reformulate the provision along the lines of Art. 33 of CISG. The new provision would therefore read as follows: "A party must perform his obligation: (a) if a date is fixed by or determinable from the contract, on that date; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the party himself is to choose a date; or (c) in any other case, within a reasonable time after the conclusion of the contract."

With respect to Article 9 the Group agreed that early performance is as a rule not permitted and should therefore be considered as a case of non-performance. It was equally accepted that certain exceptions might be warranted, but it was felt preferable to refer to that possibility expressly by adding at the end of the provision the wording "unless the



circumstances indicate otherwise". The question was also raised concerning the responsibility for additional expenses to the other party caused by an early performance (e.g. deposit fees for goods discharged at the port of destination; costs for the earlier starting of the work process of a plant). The general view was that a distinction should be made between the case where the early performance represented a breach and where such performance was to be accepted. In the first instance the normal rules on damages apply which obviously will permit inter alia recovery also of those expenses. In the second instance there was a need for a special provision to this effect, and it was suggested formulating it in a separate article in such a manner as to cover also the analogous situation which might arise in the context of part performance.

It was decided to merge Article 10 with Article 9, but to amend its present wording to read as follows: "A party who accepts an early performance is not thereby obliged to render an early performance in exchange".

In this connection the more general question concerning the order of performances was raised. Reference was made to § 234 of the American Restatement (Second) on Contracts which provides two different rules depending on the nature of the performances involved. Indeed, § 234 (1) states that "Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary."; whereas according to § 234 (2) "Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.". The Group decided to adopt a provision along the lines of § 234 (1), which reads as follows: "If the parties' performances can be rendered simultaneously, they are due simultaneously, unless the circumstances indicate otherwise". As to the rule contained in § 234 (2), however, there was some concern about its validity in the framework of those service contracts, such as insurance contracts or leases, where the current practice is to the contrary. However, in favour of including a rule of this kind in the draft, it was pointed out that the rule was not exclusive and would moreover have the merit of drawing the parties' attention to the necessity of a special arrangement in their contract whenever appropriate. The suggested wording of paragraph 2 of the new article was the following: "If the performance of only one party requires a period of time, his performance is due at an

earlier time than the other party, unless the circumstances indicate otherwise". In the absence of agreement, however, it was decided to place the paragraph between square brackets and to postpone the final decision until a later date. Should however the paragraph ultimately be deleted it was suggested replacing in paragraph 1 the opening word "If" by "To the extent that", so as to render the provision more flexible.

With respect to Article 7 the question was first of all raised whether its scope should be broadened so as also to cover non monetary obligations. The Group heard that the question had been extensively discussed by the Commission on European Contract Law, which ultimately adopted a provision on the "Determination of the Terms of the Contract" (§ 1-105 of the Draft Principles on European Contract Law), stating in essence that whenever a term relating to performance - be it the price or any other contractual term - is not determined expressly or impliedly in the contract, the parties are deemed to have agreed to a reasonable term. A similar provision is to be found in § 204 of the American Restatement (Second) on Contracts, with the difference, however, that it confers the power of determining the missing term directly on the courts. Against the proposed broadening of the scope of Article 7 a number of objections were put forward. It was felt that the types of non-monetary obligations were too diverse in nature and that even within a particular category there were too many variants to permit the use of uniform criteria for their determination in the absence of an explicit or implicit indication in the contract. As to the idea of conferring the task of filling in the gaps on courts, it was argued that at an international level this would inevitably lead to much uncertainty, given the considerable variety of standards which might be applied by courts in different countries. The Group ultimately decided for the time being to limit the discussion to the question of determining the price and to ask those members who were in favour of adopting a provision of a more general character to prepare for one of the next sessions a more elaborate proposal. With respect to the present wording of Article 7 it was first of all decided to delete in paragraph 1 the reference to the condition of the valid conclusion of the contract. Furthermore, a suggestion was made to adopt the price generally charged at the time of performance as a criterion instead of that of the time of the conclusion of the contract (cf. § 47 of the GDR Law on International Commercial Contracts). The prevailing view however was against this proposal, since it was felt that the new

criterion could introduce a great amount of uncertainty in cases (e.g. in service contracts) where the performance extends over a long period of time without specific deadlines for payment. After all, the present criterion of the price charged at the time of the conclusion of the contract was not intended to be exclusive, as shown by the words "in the absence of any indication to the contrary". It was agreed to replace in the penultimate line of paragraph 1 the words "for such goods delivered or such services performed" by "for such performances" and to speak in paragraph 2 generally of "the performing party". Finally, the question was raised as to the implications which might be drawn from the proviso at the end of paragraph 2 with respect to the allocation of the burden of proof. There was agreement that the purpose of the paragraph was merely to state that under certain circumstances the price may be determined by the performing party himself and that such a determination is valid as long as it is reasonable, while the problem of who has to prove that this latter condition is or is not fulfilled in a given case should be settled according to the applicable rules on the burden of proof in general. The Group recommended that this should be made clear in the commentary and that perhaps the Rapporteurs might find a more appropriate formula so as to avoid the implication by the text of any interference with the applicable law on this question.

With respect to Article 11, doubts were expressed as to the possibility of adopting the same criterion for the determination of the place of performance of all kinds of non monetary obligations. The place where the obliged party had his place of business at the time of the conclusion of the contract might be adequate for the delivery of goods, although even with respect to this kind of obligation it seemed preferable not to consider it as the exclusive criterion but to provide, as in Art. 31 of CISG, different alternations according to the circumstances of the case. On the contrary, there are services with respect to which the same criteria is either totally unacceptable (e.g. the carriage of goods) or where it applies only to a particular aspect or some of them (e.g. engineering, where the preparatory studies and research work will be carried out at the place of business of the contractor, whereas the perspective plans and other documents are normally delivered at the purchaser's place of business or at the place of the construction of the plant). Notwithstanding these remarks the majority of the Group was of the opinion that the general rule contained in Article 11 could serve a useful purpose and should therefore be maintained

in the draft. It was however decided to add the words "unless the circumstances indicate otherwise" so as to make it even clearer that the place of business of the obliged party is only one of the possible criteria which might be used in determining the place of performance of a given obligation.

According to Article 12 the place of performance of monetary obligations is, in the absence of any stipulation to the contrary between the parties, the place of business of the creditor at the moment when the contract was concluded. This solution, which reflects the decision taken by the Group at its last meeting in Milan, was criticised by several members on account of the fact that it might be a source of trouble if the creditor changed his place of business after the conclusion of the contract. Other members objected that in such an event also the adoption of the original criterion of the creditor's place of business at the time of payment could give rise to difficulties. Indeed, what if the creditor failed duly to inform the debtor of his move? Who should bear the extra costs the debtor might incur in order to make the payment at the new place of business of the creditor? And what if, due to currency restrictions, the debtor was no longer in a position to transfer the money to the creditor? The Group ultimately decided to maintain the solution presently laid down in Article 12, but to add the usual formula "unless the circumstances indicate otherwise". As to the different problems which might arise in practice in the case of a supervening change in the creditor's place of business, it was recommended that an express reference to them be made in the explanatory notes with an indication that their solution must be found in each single case in the light of the general principles of good faith and the duty of cooperation between the parties in the performance of their respective obligations.

It was finally agreed to merge Articles 11 and 12 into one single article which should read as follows: "Unless the circumstances indicate otherwise, a party is to perform a) a monetary obligation at the creditor's place of business; b) any other obligation at his place of business."

With respect to Article 13, there was general agreement on the provision to be found in paragraph 1. When introducing the provision contained in paragraph 2, the Rapporteurs pointed out the difficulties in establishing the precise moment at which a payment made through a bank is to be deemed to be effective. The solutions adopted

in this respect vary considerably from country to country, and, as shown also by recent studies carried out within UNCITRAL (see in particular the Legal Guide on Electronic Funds Transfer - A/CN. 9/266 of 30 April 1985), they are to a large extent influenced by the particular practices established between the financial institutions of the respective countries and/or by the technical means used for the transfer of the funds (paper-based transfer v. electronic transfer). The proposed rule according to which payment becomes effective upon notice of the transfer to the transferee bank is only one of the possible solutions: it might be the most logical one from a legal point of view, since the transferee bank is to be considered the creditor's agent. While fully appreciating the merits of the proposed solution, the majority of the Group however felt that it would be preferable to adopt a more flexible approach by simply stating that "Payment by way of a transfer becomes effective when the transfer to the creditor's financial institution becomes effective". Admittedly, such a provision offers only an indirect answer to the problem, but it has the advantage of establishing a precise term of reference for the determination, in each case, of the moment at which the payment becomes effective between the debtor and the creditor, without interfering with the different rules and procedures applied by the financial institutions involved in the transfer of the funds.

As to Article 14, it was agreed to delete the reference in paragraph 1 to bills of exchange. Bills of exchange are not necessarily drawn on a bank; moreover, since their use as means of payment is exceptional at international level, they should be permitted only when their use has been expressly stipulated by the parties. On the other hand, as far as concerns cheques or other similar instruments instructing the debtor's financial institution to make payment, the rule should be the inverse in the sense that the debtor may use them as a means of payment, unless the creditor expressly refuses to accept them. Some members even suggested the adoption of a provision similar to that contained in § 249 of the American Restatement (Second) on Contracts, according to which a creditor who refuses to accept such an instrument must grant the debtor a reasonable time extension in order to enable him to procure legal tender. The majority of the Group however preferred not to state expressly such an additional condition: it was argued that it already follows from the general principle of good faith that a creditor who refuses a cheque without any valid reason should at least offer the debtor the possibility of curing his defective performance by making the necessary arrangements for a different mode of payment within a

reasonable time. It was finally agreed to redraft paragraph 1 so as to read as follows: "Payment may be made by a cheque or other similar instruments by which the debtor instructs a financial institution to pay, unless the creditor refuses to accept it". No substantial objections were raised against the provision contained in paragraph 2. Attention was drawn to the fact that there might be cases where payment by cheque is accepted without further conditions, and in this context reference was made in particular to cheques issued directly by the bank (cashiers' cheques; bankers' cheques). In order to take account of such a possibility, it was decided to redraft the provision to read as follows: "Such payment is accepted on condition that the instrument will be honoured by the financial institution, unless the circumstances indicate otherwise". It was furthermore noted that nothing is said as to the moment at which payment by cheque shall be deemed to be effective. It should be the date as from which the sum indicated by the cheque is accredited to the creditor's account but, since this date may vary in different countries (sometimes it is the date of issuance of the cheque, although it may also be the date of the actual payment of the cheque or even a later date, such as the date on which the sum has actually been accredited to the creditor's account), it was decided not to deal with this question, on the understanding that should the creditor dispose of the sum at a later date than that of the maturity of the monetary obligation, then the debtor should be held liable for breach.

Turning then to Article 5 the Group decided to delete it. It was felt that while at a domestic level the adoption of the principle of nominalism may be justified with the desire of each State to show confidence in the stability of its own currency, at an international level not only do no similar policy reasons exist, but it was not clear what would be the relationship between this principle and the provision contemplated on the adaptation of contracts in cases of hardship.

With respect to Article 6 some members expressed strong reservations against the provision laid down in paragraph 1. They argued that a rule according to which the debtor has the choice between the payment in the currency indicated in the contract and the payment in the currency of the place of payment may be acceptable for Western countries, but in the context of East-West and North-South trade relationships such freedom of choice should not be permitted. Creditors from Socialist and most of the developing countries have a legitimate interest to be paid in the

agreed currency, and this not only because their national currency is not always freely convertible at international level, but also in view of the fact that the expected amount of foreign currency may already have been destined by the planning authorities for the import of other goods or services. It was therefore suggested either replacing the provision presently contained in paragraph 2 by the opposite rule according to which a monetary obligation shall be paid in the agreed currency or at least clearly providing that the debtor's freedom of choice only exists in the absence of any indication to the contrary, including currency restrictions in the country where payment has to be made. After a lengthy discussion, and as a compromise solution, the Group decided to redraft the text of the paragraph so as to read as follows: "A monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity, unless the circumstances, including exchange regulations, indicate otherwise".

As to paragraph 2 of Article 6 the view was expressed that, since it contemplated a case of breach by the debtor, the proper place for dealing with it would be the chapter on non performance. Other members objected that, given the close interrelation between the two questions regulated respectively in paragraph 1 and paragraph 2, it would be preferable to deal with them together. It was agreed for the time being to place the provision of paragraph 2 between square brackets and to take a final decision on both its systematic allocation and its content at a later stage. The Group furthermore asked the Rapporteurs to consider the possibility of including in the draft a provision dealing with the case where the contract does not indicate at all in which currency the monetary obligation(s) are to be paid. This may happen, for instance, where the parties have not expressly or impliedly determined the price (cf. Art. 7), or when the contract provides that certain expenses are to be borne by one or the other party without specifying the currency of payment. As a possible solution it was proposed stating that in such cases payment has to be made in the currency usually agreed between parties to contracts of the type involved in the particular trade concerned (see, for a similar rule, § 48 (2) of the GDR Law on International Commercial Contracts).

5. - Before closing the session the Chairman informed the Group of the decision taken by the Governing Council at its 64th session not to have a separate chapter on public permission requirements, but to see whether some of the provisions at present contained in Chapter 4 might not find a more appropriate place in Chapter 5 on performance. Due to lack of time the Group was unable to discuss the question in more detail. It was agreed to ask the Rapporteurs to consider the possibility of including in the present draft some provisions concerning the case where the contract as such and/or the performance of any of its obligations are subject to a permission requirement, and to take into account in this respect, inter alia, the suggestions formulated by the Secretariat in its note (Unidroit 1985 - P.C. Misc. 7, pp. 5-6).

6. - As to future work, it was decided to ask Professors Lando and Drobnig to prepare preliminary draft rules on, respectively, termination of the contract and specific performance, intended to be included, together with the draft rules on damages and exemption clauses already submitted by Professor Tallon, in the proposed chapter on non performance. For systematic reasons the first two drafts will be discussed first, i.e. already at the next meeting of the Group in April 1986, while the following meeting scheduled for November/December 1986 would be devoted entirely to Professor Tallon's draft.