UNIDROIT 1986
P.C. - Misc. 9
(English only)

U n i d r o i t

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 ROME FROM 14 TO 17 APRIL 1986

(prepared by the Secretariat of UNIDROIT)

Rome, April 1986

1. At the invitation of the President of Unidroit, the Working Group for the Preparation of Principles for International Commercial Contracts held its seventh meeting in Rome at the headquarters of the Institute from 14 to 17 April 1986. The meeting was attended by Professor C.M. Bianca (Rome), Professor U. Drobnig (Max-Planck-Institut, Hamburg), Professor A. Farnsworth (Columbia University Law School, New York), Mr Hartkamp (Ministry of Justice, The Hague), Professor O. Lando (Institute of European Market Law, Copenhagen), Professor D. Maskow (Institut für Rechtsvergleichung, Potsdam-Babelsberg), Professor D. Tallon (Institut de Recherches Juridiques Comparatives, Ivry), Mr Wang Z. (Ministry of Foreign Economic Relations and Trade, Beijing) and by Ms I. Corbisier representing Professor M. Fontaine (Centre de Droit des Obligations de Louvain-la-Neuve). The Secretariat of Unidroit was represented by Professor M.J. Bonell who took the chair and by Ms L. Peters who acted as Secretary to the Group. The meeting was also attended by Mr P. Pfund, Assistant Legal Adviser for Private International Law, U.S. Department of State, Washington, and by Professor C. Samson, Université Laval, Québec.

2. In addressing a warm welcome to all participants, the President of the Institute, Professor R. Monaco, 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.

For his part the Secretary General, Mr M. Evans, first of all expressed his pleasure at being able to attend the meeting and at being able to follow the work more closely. Mr Evans then recalled the discussion which had taken place in relation to this project at the last session of the Governing Council of the Institute, held from 9 to 11 April 1986. The Governing Council had at that session reiterated that it considered the project to be a priority item for the coming triennium, and had expressed the desire to see the work of the Group completed, as far as the drafting of the articles was concerned, within this time-scale. As to the explanatory notes which should accompany the text, it considered that it would be sufficient if a provisional version were to be prepared within the same period of time. The definitive version of those notes would certainly require further consideration. While fully appreciating the most valuable contributions the members of the Group had made to the work conducted so far, as well as the fact that further progress of the work on the project would largely depend upon their continued efforts, the Secretary-General stated that the Institute intended to ensure that also in the future the meetings of the Group would be held at the rhythm decided by the Governing Council at its 64th session, subject to compatibility with the financial resources available.

3. The Group then proceeded to an examination of the first point on the agenda, the draft articles prepared by Professor U. Drobnig on performance in natura, (in UNIDROIT 1986, Study L - Doc. 35), intended to be one of the sections of the proposed chapter on non-performance.

Introducing his draft, Professor Drobnig stated that difficulties arose in particular because, where performance in natura is concerned, the common law and civil law systems have principles of opposite tendency as their points of departure. According to the "pacta sunt servanda" principle favoured in civil law systems, any promise is enforceable; the common law on the other hand, originally essentially limited remedies to damages. Only later did equity attenuate this principle by granting specific performance where the claim for damages was not satisfactory enough for the obligee when performance was not made (e.g. where performance relates to real estate or specific goods). In practice, however, the differences between the systems were not so pronounced. In commercial practice in civil law systems the obligee does not always insist upon specific performance for reasons of time: it is a procedure which takes too long for his needs. Where performance is promised for generic goods it is often more convenient to buy substitute goods on the open market than to claim specific performance, and then to claim damages subsequently. Thus, in practice the results are similar to those achieved in common law systems. The Rapporteur therefore considered it worthwhile to attempt to arrive at a compromise solution in this draft. He estimated that this would, however, be more difficult than it appeared, as had been evidenced in previous attempts made in sales law where essentially civil law solutions, with reservations for the "lex fori", had been adopted (see, for example, Art. 28 of the Vienna Sales Convention).

In the present draft, Articles 1 and 2 contain the guiding principles, to wit, the case of monetary obligations where specific performance is always admitted (Art. 1), and that of non-monetary obligations where specific performance is the rule, but for which five exceptions have been indicated, specifying when specific performance may not be claimed (Art. 2). Article 3 deals with the case where there has been some performance but it is defective. Also in this case the obligee is entitled to ask for specific performance, subject to the conditions specified in Articles 1 and 2. Article 4 provides for judicial penalty, which originated in French law and was subsequently taken up by the Benelux countries. The judicial penalty is intended to secure compliance with a court order for performance in natura. The penalty itself would, according to this article, be paid to the creditor unless the "lex fori" provided otherwise. Article 5 concerns other remedies to which recourse may be had when a judicial decision or an arbitral award is not enforceable. Closing his statement, the Rapporteur finally recalled that the whole draft

is, in fact, inspired by a similar draft prepared by the Commission on European Contract Law established within the EEC, the members of which do not represent their States of origin, but are instead academics acting in their personal capacity.

While expressing, also on behalf of the other members of the Group, gratitude to Professor Drobnig both for the preparation of the draft and for the presentation thereof, Professor Bonell welcomed the informal cooperation with the EEC Group chaired by Professor Lando. A similar group has also been established by CMEA member States. Although the geo-political scope of the efforts of these two groups is different from that of the Unidroit project, it would be useful for each group to have the possibility to examine the work of the others. In particular, the Rapporteurs preparing a draft should contact their colleagues in the other groups in relation to the work they are undertaking. The extent to which they take the work of the other groups into account would be left to their discretion. As a rule, however, everyone should be aware of the parallel existing between the different projects, and should avoid different solutions unless there are stringent reasons therefor.

With reference to the content of Professor Drobnig's draft, the chairman informed the Group that Professor A. Diamond, in his capacity as a member of the Unidroit Governing Council, had presented written remarks of a general character on the draft. The first of these remarks concerned the very title of the Section, which he suggested should be replaced by "Specific Performance". The second, instead, regarded the terms "obligor" and "obligee". Professor Diamond considered that these terms are liable to be misunderstood, as they are not commonly used in English terminology, and when they are used they are at times used differently from the way they are employed in this draft. Instead, he suggested the more generic terms "party under an obligation" and "party entitled to benefit from an obligation".

Professor Diamond's doubts were echoed by some members of the Group. It was in the end agreed to change the title to "Specific Performance", as it is the term most commonly used. Consequently, where "performance in natura" is mentioned in the draft, "specific performance" should be substituted for these words. It was further agreed to substitute "the party who owes an obligation" and "the other party" for "obligor" and "obligee", whenever possible.

The Group then proceeded to consider Article 1, "Performance of monetary obligation". One member expressed doubts on the inclusion of a provision dealing with the performance of monetary obligations in a Section on performance in natura, as this was not in the civil law tradition. Other

members considered the article to be superfluous, as its content was obvious. Reference was further made to a specific question which has given rise to difficulties, among others, in the United States, namely whether a judgment for payment in, for example, Italian lire is enforceable as such or only in the comparable value in U.S. dollars. It was suggested that if the money of the account was foreign, then the first thing to be determined would be whether the debtor could pay in the national currency. This point is, however, dealt with in Article 6(1) of the Chapter on performance. On the other hand it was pointed out that it is precisely in cases where according to these rules the debtor is obliged to pay in foreign currency that the question arises as to whether the creditors may obtain a judgment to this effect. Considering the points that had arisen during the discussion the Group decided to examine the contents of Article 2 before determining the final fate of Article 1.

The discussion on Article 2, "Performance of Non-monetary Obligation", opened with an examination of the meaning of the words "may demand performance" contained in Art. 2(1). Opinions were divided as to whether or not "demand" included both demand from the other party and going to Court. One opinion was that as presently phrased the article suggested a sequence of events which could be expressed by a sentence such as "may demand performance and if he does not get it may go to Court". This sequence of events is even obligatory in certain legal systems, in the sense that there are specific consequences if it is not respected. In Scandinavian law, for example, if a party goes to Court without first giving the other party notice and the Court finds that the situation does not require such haste, then he will not be awarded costs or reduced costs. The Rapporteur stated that no such sequence was intended; in fact, in most legal systems no such sequence exists. In order to avoid doubts as to the meaning of the article, it was suggested that "demand" be changed to "require". An additional reason for this was that in common law "demand" would indicate that a Court was not involved. It was, however, agreed that the explanatory notes should mention the above described Scandinavian case of a party not being awarded costs or reduced costs if he has recourse to Court unnecessarily. Furthermore, a discussion ensued as to the terms "may" and "cannot" in Article 2(1) and 2(2) respectively, with the suggestion they be uniformed. The solution finally adopted was to combine Article 2(1) and the first sentence of Article 2(2) into one sentence introducing the exceptions listed in points (a) to (c) of Art. 2(2). The formula accepted was:

> "If a party who owes an obligation other than one to pay money does not perform, the other party may require performance unless ...."

Of the exceptions listed in Article 2(2), paragraphs (a) and (b)

concern, respectively, the "impossibilium nulla est obligatio" generally, and an extension of the doctrine of impossibility, i.e. economic impossibility, an unreasonable effort or expense as opposed to physical impossibility. It was submitted that the two paragraphs might be combined as their purpose appeared to be the same. Another view was that under (a) the impossibility becomes relevant irrespective of whether or not it was caused by the party's behaviour, whereas in cases under (b) it might become necessary to take into consideration the possible fault of the non-performing party. It was decided to keep (a) and (b) separate, to change the wording in (b) to read:

"the performance is unreasonably burdensome or expensive",

and to explain in the commentary the importance which the fault element may assume in the determination of the unreasonableness of the efforts or expenses.

Article 2(2)(c) is intended to cut off the remedy of specific performance whenever there exists another solution which is perfectly satisfactory commercially, such as the possibility of obtaining a substitute performance from another source. According to one view (c) should be merged with (b) in order to make it clear that in its application also the interest of the non-performing party should be taken into consideration. This suggestion was, however, opposed by those who felt that, in the cases presently covered by (c), the position of the non-performing party would be unduly aggravated. As to the precise meaning of the term "reasonably" in (c), reference was made to the case of a buyer of a developing country who has already paid the price in foreign currency. Although the same goods might easily be obtainable on the same foreign market, (c) should not be understood in the sense that such a buyer is obliged to deprive himself a second time of foreign currency in order to obtain the substitute goods. It was agreed that the comments should clarify the fact that "reasonably" is not synonymous with "easily", and should expressly mention the example given.

With respect to Article 2(2)(d) the question was raised as to the precise meaning of the words "the performance consists in the provision of services or work of a personal character". It was stated that it intended to refer to performance by individuals such as, for example, lawyers, surgeons and even engineers. In this respect it was, however, pointed out that even this kind of services or work is increasingly offered by enterprises. What is decisive is not with whom the contract was entered into, but who has to perform it. Only if the contract expressly provides for the services or work of a particular person, and this in view of the special competence of that person (e.g. the design of a building by a famous architect) or the unique character of the activity requested (e.g. a concert directed by von Karajan or a tennis tournament with Ivan Lendl), should it apply.

As a consequnce, the first part of the sentence composing (d) was modified to read as follows:

"the performance consists in an activity of a personal character".

Some members of the Group considered that the scope of the provision should be limited as much as possible, so as to exclude services which had become more entrepreneurial in character, and the performance of which should, therefore, be enforceable. With reference to the definition of "personal", it was suggested that this could best be done in the commentary. It was pointed out that in most jurisdictions there is a tendency to narrow the application of the exception contained in (d). In the end it was decided that if this last fact were stressed in the commentary, then the Group could live with the formulation as it stood. As to the second part of the sentence ("performance /.../ depends upon a personal relationship"), it was stated that this clause was intended to cover the cases where the relationship between the contracting parties involves close personal contacts. For instance, an agreement to enter into a partnership may in most cases not be enforceable because of the personal element present in a partnership, at least where it is restricted to a few members. According to the prevailing view, however, this situation was already covered by the first part of Art. 2(2)(d). It was therefore agreed to drop the last clause of Art. 2(2)(d). Before proceeding to the examination of the next sub-paragraph, one member of the Group raised the question as to whether it might not be appropriate to insert before Art. 2(2)(e) a provision similar to that of §366 of the American Restatement (Second) on Contracts, which indicates that a promise will not be enforced if the character and magnitude of the performance would impose on the Court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial. Against such a proposal it was pointed out that at least in civil law systems courts do not have a duty to supervise permanently the execution of the performance they have ordered; the problem referred to in § 366 of the Restatement seems, therefore, to be rather peculiar to courts operating in common law systems. Since it was not desirable to adopt specific rules for specific courts, the Group finally agreed not to introduce any new provision, but instead to make reference in the commentary to the possibility that in some legal systems such an additional ground for refusing specific performance might exist.

Article 2(2)(e) was discussed extensively and various differences among the different legal systems became apparent. These concerned above all the requirement of the obligee to demand performance within a reasonable time after he has, or ought to have, become aware of the non-performance. One opinion was that the obligee was always in a position to demand perfor-

mance. The provision could therefore be deleted or, alternatively, reformulated to read, for example: "the obligee has reason to assume the obligor will not perform and does not require ...", because, when faced with a simple delay, the obligee may always think that sooner or later there will be performance. An additional reason for such an amendment is that, in particular in trade relations with developing countries, too much should not be asked of the party who sticks to the contract in the sense that he takes positive actions to preserve his right. On the other hand the possibility of a certain amount of speculation was mentioned. It was pointed out that the rules should have an educational function. Where there is no delivery and where no action is taken to ensure performance, it can be assumed that neither party wants to stick to the agreement any longer. International trade demands that parties state their positions. Finally, attention was drawn to the legitimate interest of the obligor to know until when he may be requested to perform in natura. It was considered that both ULIS and CISG have rules dealing with this question (cf. Art. 26 ULIS, Arts. 46 and 48 CISG), whereas the present draft does not. It was agreed that the question was an important one which might, however, better be settled in the introductory section dealing with the relations between the different kinds of remedies for non-performance.

With respect to Article 3, it was observed that it was difficult to lay down a rule which would be appropriate both in cases of replacement and of repair, above all where services are concerned. In essence the problem was to see to what extent the exceptions listed in Art. 2(2) can be applied to situations of "repair" and/or "replacement", or alternatively have to be adapted. There was general agreement that adaptations were necessary, in the sense that the executions have to be attenuated, but there were difficulties as to the actual formulation of a general rule to cover these situations. It was therefore decided to leave the provision in the draft, but with the first sentence reformulated as follows:

> "A right to require performance includes in appropriate cases a right to require repair or replacement of a defective performance".

It was further decided to mention in the commentary the problem of the adaptation of the exceptions, expressed in the draft by the word "accordingly". Lastly, it was decided to change the title of the article to "Cure of Defective Performance".

The Group then decided to turn back to Article 1. According to one view it should be kept as it is, possibly with changes similar to those made in Article 2, i.e. "require" instead of "demand". To avoid the problems raised by the terms "obligor" and "obligee", it was suggested a different wording be used, such as "If a party who owes an obligation to pay money does not pay, the party to whom the obligation is owed may require payment".

As concerns the possibility of treating in the context of this article the right to require payment in foreign currency, for cases where this is the substance of the obligation of the debtor, some members of the Group were in favour of so doing, keeping in mind, however, that some of the exceptions provided for in Art. 2(2) would have to be reiterated also for such a right. Other members instead maintained that the obligation to pay in foreign currency no longer constituted a "monetary obligation", and that therefore the right to specific performance would be regulated by the general provision contained in Article 2. At most, it would be a question of seeing if all or only a few of the exceptions specified in Art. 2 are applicable to this particular type of non-monetary obligation. It was decided to leave Art. 1 in its original form for the time being (which in effect means that it is only applicable to obligations to pay in the local currency), and to request the Rapporteur to consider whether the problem of the specific performance of an obligation to pay in a foreign currency can be dealt with in a specific provision to be added as a second paragraph of Art. 1, or by redrafting the present text of Art. 2.

Concerning Article 4, which provides for the possibility of Courts to order a judicial penalty, or "astreinte", in case of non-compliance with its order for specific performance, it was pointed out that conflicts could arise between such a provision and the actual practice of State Courts. Not only could the possibility not be excluded that the State Courts would not apply the provision, but there also was a risk that arbitral awards made in conformity with it might be declared contrary to public policy ("ordre public"). Considering that it was not the purpose of the Principles to propose rules which, if applied by arbitrators, would make the award unenforceable, it was decided to examine more carefully the current law and practice in this respect in the different countries, and to defer the final decision on the article until the Group acquired this further information.

Article 5 is intended to treat the relationship between the remedy of specific performance and other remedies for non-performance. More precisely, it should make it clear that if there has been an award of specific performance but it cannot be enforced, then the creditor should not be precluded from pursuing other remedies. The question was raised whether this might not be more effectively treated in an introductory section on remedies. If such an introductory section on remedies were included in the Chapter on non-performance, then Article 5 would become superfluous. In this respect it was pointed out, however, that two aspects had to be distinguished: 1) the consistency among the various remedies, and 2) the possibility of changing the title of the demand. Should both be considered in the introductory section? Not only, but was not the situation where a decision for specific

performance had been rendered which could not be enforced a special situation to be dealt with separately? The Group finally decided to maintain the provision, bearing in mind, however, that the problem is of a wider nature and that it should be addressed. One slight modification was decided in order to make the terms of the article consistent, i.e. it was decided to delete the words "a claim". Furthermore, to make the title of the article consistent with its contents it was decided to change it to "Unenforceable Award or Decision ..."

4. The Group then turned its attention to the next item on the Agenda, the consideration of draft Section (b) of Chapter 6, "Termination for Non-Performance", prepared by Professor Lando (in UNIDROIT 1986, Study L - Doc. 35). Introducing the general outlines of the draft, the Rapporteur pointed out that the draft is based on the following principles: that by non-performance any kind of failure to perform is intended (late performance, when performance never occurs, when it is defective and where there has been a violation of accessory duties); that termination is only possible when the non-performance is fundamental; that there is the remedy of termination irrespective of whether or not the non-performance is imputable to the party in default; that the rules on notice rely on the "status quo" principle (no "ipso facto" termination); that termination does not have retroactive effect.

The Group then proceeded to an article by article examination of the draft. With reference to Article 1, paragraph 1, it was decided to substitute "declare ... terminated" by "terminate". It was felt that it should be made clear elsewhere in the draft, for example in Article 3 or 6, that termination operates only upon a notice given by the party, and that it takes effect from the time that notice becomes effective.

With respect to Article 1, paragraph 2, which lays down the criteria for determining when the non-performance of an obligation is fundamental, the view was expressed that letter (a) in its current phrasing came close to (b) as it refers to the strict compliance with the obligation being "of essence to the contract", meaning in effect that it is "of essence to someone". It was important to see if the contract itself suggests that something in particular constitutes fundamental non-performance. Following these remarks the Group decided to modify Art. 1(2)(a) to read:

"strict compliance with the obligation is of essence under the contract".

There were no objections to letter (b), which corresponds in substance to Art. 25 CISG.

With reference to letter (c), the view was expressed that the limi-

tation to intentional non-performance was not justified. A more general wording was suggested, such as "if the nature of the non-performance gives the aggrieved party reason to believe ...". According to the prevailing view, however, this would widen the rule too much. What is actually meant by the provision in its present form may be illustrated by the following example: agent A who is entitled to reimbursement of his expenses submits false vouchers to B, his principal. Although the amounts claimed are insignificant, B may treat A's behaviour as a fundamental breach and may dismiss A.

With reference to the criteria to determine the fundamental character of the non-performance, the question was also raised whether further criteria along the lines of those contained in § 241 of the American Restatement (Second) on Contracts should not be added to those already contained in Art. 1(2). It was objected that what are being drafted by the Group are guidelines, while in the ultimate analysis the determination of the "fundamental" character of the non-performance is a prerogative of the judge, who considers the matter case by case. This being so, one could even contemplate the adoption of a comprehensive and generic enunciation simply stating that a non-performance is fundamental if, once it has occurred, maintenance of the contract would no longer be justified. The Group finally agreed to combine the two suggested approaches, i.e. to have a first paragraph containing a short and generic statement of the kind just mentioned, and to add a second paragraph stating that "in order to determine ... the following criteria should be taken into account ...", with a list containing what is now in (a), (b) and (c) as well as any additional criteria along the lines of those in § 241 of the American Restatement. The Group did not proceed to an examination of the various criteria which could possibly be added to those already contained in the draft and asked the Rapporteur to prepare a revised text of the provision in the light of the outcome of the discussion.

With reference to Article 2, the question was raised as to why the article admits the Nachfrist procedure only in cases of delay, and not also in other cases of non-performance. It is true that this is the system accepted in CISG (cf. Art. 49), but contracts for the sale of goods are one thing, service contracts another. For sales contracts it can be considered to be justified to exclude that one party, by fixing a Nachfrist, can transform a case of non-fundamental breach into one of fundamental breach, also with reference to cases of delivery of defective goods. On the other hand, for service contracts it is questionable whether the party asking for the service should in all cases of delay be permitted to transform by means of the Nachfrist procedure a non-fundamental breach into a fundamental one. Reference was made to the case where in a works contract a substantial part of the work has already been done, and the constructor is in delay only with

respect to a small, last portion. In such a case the fixing of a Nachfrist should only have the effect that the non-defaulting party may withhold his performance and after the expiry of the time-limit resort to the different remedies as the case may be. In fact, in practice in such cases payment of the last instalment is deferred or, in cases of definitive refusal, the price is simply reduced (see, for example, Art. 1668 of the Italian Civil Code). In view of these observations, it was agreed that the problem of the Nachfrist procedure should be dealt with in the introductory section dedicated to non-performance in general, and that in this context the right to withhold performance ought also to be provided for. The Rapporteur was furthermore invited to give further consideration to the question as to whether or not the Nachfrist procedure should be limited to cases of delay.

The next article examined was Article 3. The view was expressed that paragraph 1 should be split into two sentences, one stating that termination becomes effective on notice by the parties, the other dealing with the case where notice has been given too late. As far as paragraph 2 is concerned, it was decided to substitute "tendered" by "offered", in order to cover also the case of services. It was further decided to review the order of the single paragraphs so as to follow the systematic order indicated in the explanatory notes which accompany the text (p.6), i.e. first the requirement of notice, then the exceptions to the rule, lastly the time within which the notice must effectively be given, if requested. Finally, attention was drawn to the parallelism existing between the case envisaged in Art. 3(3), and that in Art. 2(2)(e) of Section (a) dealing with specific performance. The Group asked the Rapporteur of that Section to reconsider the wording of Art. 2(2) (e) so as to align it with that of Art. 3(3) of the present section.

With reference to Article 4, it was questioned why the party should lose his right to terminate the contract if he did not do so "within reasonable time". It was observed that a party's right should not be transformed into a duty. After all, it could be argued that there was no interest to act until the time for performance was due, as there was always hope. On the other hand, in the light of the rules imposing upon the aggrieved party the duty to mitigate damages, one may ask why, once it becomes clear that there will be a fundamental non-performance by a party, the other should be permitted to remain an optimist. Moreover, it was asked whether, following the examples of CISG (Art. 71) and of numerous national legislations (cf. Art. 1461 of the Italian Civil Code; § 2-603 UCC; § 251 of the Restatement), the draft could not suitably provide for the right of the party to request adequate guarantees if he had reason to fear that the other party would not perform. The Group requested the Rapporteur to draft a provision along these lines for inclusion in the new version of the draft.

A lengthy discussion on Articles 5, 6, 7 and 8 took place. With reference to Art. 5 it was observed that it is a provision the presence of which may be justified in the case of the sale of goods (cf. Art. 82 CISG), but which, however, raises a number of problems in, for example, construction contracts. Here the aggrieved party-purchaser is no longer in a position to return the materials used by the constructor: must it therefore be concluded that he cannot request termination? Why should not the idea adopted by common law systems and by some civil law systems (see, for example, Art. 1672 of the Italian Civil Code) be accepted, whereby in such a case the aggrieved party does not have to return what he has received in natura, but must instead give a monetary compensation within the limits of the benefits he has received from the work performed?

As regards Art. 6 the basic idea of the prospective effects of termination was accepted. It was, however, proposed to modify the wording of paragraph 1, so as to clarify what is intended by "prospective effects", and how Articles 7 and 8 are exceptions thereto.

In considering Articles 7 and 8, first and foremost the word "properly" placed before "rejected" in Art. 7(1) was criticized, as the rule set out in the article ought to be applicable in all cases of "rejection", the well-foundedness of the refusal to accept being relevant only for the purposes of a possible right to compensation for damages. It was further suggested that the order in which the two restitutions ought to be performed should be determined according to the general rules concerning the order of performance, as should the possible right to withhold performance. Lastly, it was proposed to merge the two articles into a single provision formulated along the lines of: "On termination of the contract either party may claim restitution of whatever he has supplied, provided that he concurrently makes restitution of whatever he has received". To this provision could be added: "... or if he cannot make restitution in kind he must make an allowance for what he has received". While agreeing in substance with this last addition (which ultimately would involve the deletion of the rule at present established by Art. 5), some members of the Group raised the question as to whether it would not be preferable to deal with the right to restitution separately from the right to termination, in a separate section or possibly in the section dealing with damages. Objection was made to this last possibility by those who maintain that restitution and damages are two entirely different things both in terms of the conditions on which they may be obtained and of their results. It was decided to defer the decision on this point until the Group has had the possibility to examine the draft rules on damages.

5. The last item on the Agenda was the examination of the draft rules

on hardship prepared by Professor Maskow (Study L - Doc. 24). The Group first of all discussed the desirability of having a special section in the Principles devoted to hardship. Some members expressed their reservations and pointed out that in the absence of a "hardship clause" in each single contract, it was difficult to imagine how the parties could be forced to enter into negotiations with a view to adapting their contract and/or to accept a decision to this effect rendered by a third person (Court or arbitration). What is needed is a sufficiently flexible "force majeure" provision, i.e. one covering also cases of "impracticability", not a separate provision on so-called hardship cases which could hardly be defined in general terms. The majority of the Group, however, was in favour of special rules on hardship, in view of the fact that in some circumstances what is needed is not the termination of the contract, but its adaptation. It was generally agreed that the scope of application of these rules should be rather narrow (ordinary sales contracts should not be covered) and it should be made clear that hardship has nothing to do with the risks normally connected with business operations.

In the course of the discussion reference was made to the Netherlands' new Civil Code, where much debate and many difficulties were occasioned by the article on changed circumstances ("The court may at the suit of one of the parties vary a contract or set it aside in whole or in part on account of unforeseen circumstances which are of such a nature that the other party is not entitled to expect, according to standards of reasonableness and equity, that the contract should be maintained unchanged. The court has the power to allow the demand conditionally"[1]). Reference was also made to the provision contained in Art. 1467 of the Italian Civil Code, which restricts the scope of hardship ("Eccessiva onerosità sopravvenuta") to long-term contracts and gives the aggrieved party the right to ask for termination, but at the same time permits the other party to counter such a request by making a proposal for adaptation with a view to restoring the original balance between the interests of the parties.

The Group decided to discuss first and foremost the concept of hardship as such, i.e. those cases of substantial changes of circumstances which should be taken into account, and to examine thereafter the possible consequnces which can derive therefrom. Point of reference in addition to the preliminary draft prepared by Prof. Maskow, was also § 1.104 ("Change of Circumstances") of the EEC draft.

---

(1) The Netherlands Civil Code Book 6: The Law of Obligations, Chapter 5: Contracts Generally, Section 3: Legal effects of contracts, Art. 11, para. 1.

It was generally felt that it was important to specify, as does paragraph 1 of § 1.104 of the EEC draft, that "If the performance of a contract is rendered more onerous for one of the parties, he is nevertheless bound to fulfil his obligations". This makes it clear that it is not simply a question of changed circumstances, but of an extraordinary change of circumstances leading to imbalance beyond the normal risks of the contract.

As concerns the definition contained in paragraph 2 of § 1.104 the EEC draft, ("If performance of the contract is rendered more onerous in an excessive degree because of circumstances ...") it was primarily pointed out that the formula "more onerous in an excessive degree" raised problems as it was not clear in comparison to what the onerosity was excessive. It was therefore suggested that the wording "substantially more onerous" might be preferable. Of still greater importance was the fact that this formula apparently covered only the cases of a substantial imbalance between the two obligations and not also the other cases in which the purpose of the contract cannot be fulfilled. It is true that with reference to the latter a further distinction must be made between those cases in which a presupposition of one of the two parties for the conclusion of the contract no longer exists, the existence of which the other party was neither aware nor should have been aware (for example, a person buys a flat expecting a job transfer which then does not occur), and those where there is a presupposition which is implicit in the very nature of the contract, and which therefore is of relevance to both parties (for example, a case of transfer of technology which, because of unexpected technological developments soon after the conclusion of the contract becomes outmoded, or the case of a construction contract for a plant to produce a product which is subsequently prohibited). While there was agreement as to the exclusion of the first of these cases from the scope of the proposed provision on hardship, several members of the Group were of the opinion that the second type should be covered.

The next point raised concerned the duty of the parties to enter a renegotiation process when faced with hardship. The problem was whether it would be sufficient to establish the principle that the aggrieved party may request a renegotiation, or whether instead it would not be preferable to enter into more details, as paragraphs (2) and (3) of Article a of Professor Maskow's draft do. It was finally decided that a simple statement of the principle would suffice, which would read as follows:

> "The disadvantaged party has to exercise his right to renegotiate without undue delay".

It was felt advisable to specify that in the request for renegotiation, reasons must be given for such a request. The formula of Art. 2 of the ICC model clauses on hardship (Doc. 421) ("The party shall make a request for revision /.../. The request shall indicate the grounds on which it is based") should be taken as a model.

Another question raised related to the procedural aspects of the renegotiations process as treated in Art. b of the preliminary draft prepared by Professor Maskow. The Group was of the opinion that too many details should not be gone into. As to the proposal to fix time-limits within which the parties must enter into renegotiations and come to an agreement, reference was made to the ICC model clauses on hardship which establish 90 days as the time-limit for reaching an agreement. According to one view it was advisable to lay down such time-limits to assist both the parties themselves and the third party in establishing whether or not the situation really was blocked, and also the time for intervention. The prevailing view, however, was that, since the time-limit may, in fact, vary depending upon the different situations, it was preferable to adopt a more flexible approach along the lines of what is stated in para. 4 of § 1.104 of the EEC draft. By stating that the intervention of a third party (i.e. the court) may be requested in cases where either the renegotiations have not commenced or no agreement between the parties has "within a reasonable time" been reached, this provision makes it clear that there is a time-limit for opening the renegotiation process and also one for reaching an agreement, but that its exact determination can only be made in each single case.

As to the most controversial question of a possible Court intervention in cases where the parties do not come to an agreement, the discussion focused on two alternative solutions. The first was the one adopted in the EEC draft, i.e. the Court should be entitled, upon request, either to adapt the contract or to terminate it, or to reject such demands presented by one of the parties and instead invite the parties to resume their negotiations. The other solution discussed was that of Art. 1467 of the Italian Civil Code, which states that the Court instead of terminating the contract, may modify it only if and in so far as the non-aggrieved party has made a proposal to this effect. It was pointed out that the EEC draft's approach was wider, in that it gave the Courts greater powers. For the purposes of this draft, however, the powers given to the Courts in the EEC draft were considered to be too great, as the Principles to be elaborated within Unidroit are intended to be of universal application. It was considered that the Italian system might, therefore, constitute a better solution. In fact, by permitting only the non-aggrieved party to make an offer for a modification of the contract, it provides a guarantee that the aggrieved party will not make a demand which is too biased in his favour. Thus, in the Italian system the deviation from the doctrine of "pacta sunt servanda" is less stringent. The Group was not able to reach an agreement on the issue, and asked the Rapporteur to prepare a new draft rule, bearing in mind the two options which had been discussed.

The last question considered was that of the criteria to be followed by the competent body. In the EEC draft this was dealt with in paragraph 4(a) of § 1.104 (equitable distribution of profits and losses result-

ing from the changes in circumstances between the parties), whereas in the draft prepared by Professor Maskow it was considered in Article b(3) ("Where adaptation is sought commercial custom at the time of renegotiation has to be taken into consideration as well as all circumstances of the contract including the aims pursued by each party to the contract and good faith"). It was pointed out that in actual fact it was very difficult to state what the gains and losses are. On the other hand also the reference to "commercial custom" was criticized because of the difficulties in determining its precise meaning. In consideration of the views expressed in the course of the discussion, it was decided to ask the Rapporteur to prepare a modified version of the provision along the lines of the EEC formula.