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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 IVRY-SUR-SEINE FROM 24 TO 27 NOVEMBER 1986

(prepared by the Secretariat of Unidroit)

Rome, February 1987

1. At the invitation of the President of Unidroit, the Working Group for the Preparation of Principles for International Commercial Contracts held its eighth meeting in Ivry-sur-Seine, at the Institut de Recherches Juridiques Comparatives of the Centre National de la Recherche Scientifique, from 24 to 27 November 1986. The meeting was attended by Professor P.-A. Crépeau (Québec Research Centre of Private and Comparative Law, McGill University, Montréal), Professor U. Drobnig (Max-Planck-Institut, Hamburg), Professor A. Farnsworth (Columbia University Law School, New York), Professor M. Fontaine (Centre de Droit des Obligations, Université Catholique de Louvain), Mr A.S. Hartkamp (Ministry of Justice, The Hague), Professor O. Lando (Institute of European Market Law, Copenhagen), Professor D. Maskow (Institut für Rechtsvergleichung, Potsdam-Babelsberg), Professor J. Rajski (University of Warsaw), Professor D. Tallon (Institut de Recherches Juridiques Comparatives, Ivry) and by Mr Wang Zhenpu (Ministry of Foreign Economic Relations and Trade, Beijing). 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 Mme I. de Lamberterie, Institut de Recherches Juridiques Comparatives, Ivry, and by Professor C. Samson, Université Laval, Québec.

2. Welcoming the participants to the meeting Professor Bonell first of all, on the behalf of both Unidroit and of the participants in the Working Group, thanked the Centre de Recherches Juridiques Comparatives for its hospitality and for its assistance in preparing the meeting. He then introduced Professor Paul-André Crépeau who participated in the work of the Group for the first time. Professor Crépeau was, he stated, well-known to the majority, if not to all, of the participants, not only in his capacity as Director of the Québec Research Centre of Private and Comparative Law of McGill University, Montréal, but also as the Chairman of the committee set up to draft the new Québec Civil Code. In view of his experience in a legal system such as that of Canada, obliged to reconcile the common law tradition prevailing in the English speaking provinces and the civil law tradition proper to Québec, Professor Crépeau was an ideal member for the Group.

3. The meeting had on its agenda the examination of the draft rules prepared by Professor Tallon on damages and exemption clauses intended to be part of Chapter 6 on Non-Performance (Study L - Doc. 36).

4. Introducing the draft, Professor Tallon stated that he had tried to combine the needs of international trade practice with the wide variety of solutions existing in the different national legal systems. There were legal systems with rather general rules, whereas in other legal systems (such as the English one) the powers of the judge to allow damages

were regulated in great detail. The draft before the group attempted a compromise between these two approaches by giving judges a certain leeway but not complete discretion.

Before proceeding to an article by article examination the Group discussed some general questions such as the coordination between the present section on damages and other sections of the chapter on non-performance (termination, remedies in general etc.) and the relationship between damages in contract and damages in tort. As to the first question it was felt to be premature to take any final decision as the preparation of the other sections was still to be completed. As to the second point it was true that there were systems with the same rules for both kinds of damages, while others, e.g. the English one, provided separate rules for the two and in still others, e.g. the French one, the rules, though formally separate, more or less coincided in substance. While agreeing on the basic approach followed by the draft, i.e. to have a separate set of rules on damages in contract, the Group expressed the desire that the content of the different provisions should reflect, whenever possible, principles common to both damages in contract and damages in tort, so as to avoid different results being reached depending on whether the aggrieved party sued in contract or in tort.

5. A number of points were raised in relation to Article 1. With reference to paragraph 1 it was pointed out that so far the rules contained no provision on exemptions from liability for failure to perform. A final decision as to whether the present formula "imputable au débiteur" ("for which the defaulting party is liable") should be maintained could only be taken after the precise wording of such a provision on exemptions had been examined. In any event, in the English text the word "breach" should be replaced by "non-performance" as it is well known that the former conveyed the idea of "inexécution imputable".

According to the Rapporteur the purpose of paragraph 2 was twofold: firstly to establish the criteria of directness, and secondly to illustrate the possible different kinds of non-performance. With respect to this latter point the question was raised as to whether the present list should be understood as including also the failure to fulfil accessory duties ("Nebenpflichten"): according to the prevailing view this was the case and it was decided to mention this expressly in the comments.

Still with reference to paragraph 2, the Group extensively discussed the concept of directness contained in it. Some members considerd it to be self-evident - if there was a causal link between the non-performance and the loss it was obvious that it was "direct". The word "directly" could thus be omitted as it was superfluous. Furthermore, it

was a term which could cause confusion as this concept was not familiar to all legal systems. It was recalled that, in the United States for example, "direct" could mean that loss of profit was excluded from the damages. Moreover, since the expression "loss or injury" as employed in the text could also be understood as excluding loss of profit, which instead appeared to be included in the draft (cf. Art. 4), the possibility of either combining the two provisions, or of moving them together, was suggested.

Another suggestion was to place the rules on directness and foreseeability together. It was, however, objected that everything depended on whether or not directness and foreseeability were considered to be two different conditions for claiming damages. In common law, for example, foreseeability was a test for directness.

In the end it was decided to shorten Article 1 to only one paragraph containing a general statement including a reference to exonerating circumstances ("Any non-performance gives the aggrieved party a right to damages (the damage award may be either exclusive or in conjunction with other remedies) except where the non-performance is excused under Article [...]"). The definition of the possible cases of non-performance and the relationship between the various remedies should instead be dealt with in the introductory section of the chapter on non-performance.

The question was raised of the conclusions which may be drawn from the wording of Article 1 as regards the burden of proof. There was general agreement that it should be for the plaintiff to prove the non-performance and for the defendant to demonstrate the existence of possible exempting events. The wish was expressed that the text of the article should be phrased in a manner which would make this clear.

6. In introducing Article 2 the Rapporteur pointed out that the provision contained therein was intended to be a compromise solution between those legal systems, e.g. the French one, where a formal notice requirement ("mise en demeure") was a prerequisite for damages, and those where there was no such requirement. Indeed, it was suggested not to require such formal notice in cases where either the contract provides for a fixed date for performance or where it is certain that the contract will not be performed, or where its performance will no longer benefit the aggrieved party.

The view was expressed that in its present form the article appeared to mix two different questions, i.e. when the right to damages accrues and what formalities, if any, have to be observed before this right

may be exercised. Since the first question is already covered by Article 1, the present article should indicate clearly that it is concerned only with the second question, which is closely connected with the further question of when interest begins to run.

The Group then discussed whether to limit the notice requirement to damages or to extend it also to some or all other remedies for non-performance. It was decided to follow the first approach and to restrict the cases where notice is required to those of delay in the performance of obligations where the date for performance has neither been fixed in the contract nor is determinable from the contract. Attention was drawn to Article 8 of the draft chapter on performance dealing with such cases, and the Rapporteur was asked to align the wording of the present article with the formula used in that article.

7. Introducing Article 3 on nominal damages, the Rapporteur stated that it had been included in order to meet the needs of the common law systems, in which nominal damages are awarded either when the breach causes no loss or when it is impossible to prove their amount (e.g. in cases of libel and slander).

The view was expressed that actions for nominal damages were of no practical interest for international commercial contracts. Even in cases of libel and slander what was perhaps of the greatest importance financially was the awarding of costs, and this was particularly the case in arbitration where winning or losing normally influenced the awarding of costs.

Furthermore, the relationship between this article and Article 4, paragraph 2, where non-pecuniary damages are included under actual loss, was considered. This inclusion of non-pecuniary damages would justify the existence of a rule on nominal damages, unless the reference in Article 4 was intended to be limited to purely commercial damages.

Finally, it was pointed out that the present article could contradict Article 5 where certainty of damage is required. On the other hand it was argued that the same Article 5 also referred to future damage and to loss of chance in so far as they will probably occur, which are both cases where the precise amount of loss, if not even its existence, is uncertain. The view as expressed that the Principles should contain a provision empowering the judge or arbitrator to determine in such cases the damages ex aequo et bono, i.e. with a fair estimate, in the light of the proof offered by the parties. However, since this proposal concerned a problem different from that dealt with in the present article, it was decided to come back to it in connection with the discussion on Article 5.

As to whether or not the Principles should deal with nominal damages, the prevailing view was that they should not do so.

8. As to Article 4 the discussion focused on the following points: first, the general principle of the right to complete, or full, compensation, including both the actual loss and the lost gain as stated in the first part of paragraph 1; secondly whether or not the two concepts should be defined and if so whether or not the definitions contained in paragraphs 2 and 3 are satisfactory; thirdly the special problem of non-pecuniary loss referred to in paragraph 2; finally the provisions contained in the last sentence of paragraph 1 ("... taking into account all benefit which the aggrieved party did in fact reap on account of the breach"; "...après déduction des avantages qu'il a pu retirer de cette inexécution") which in some legal systems falls under the law on restitution, whereas in others it is stated as one of the limits to damages.

With respect to the first issue, reference was made to §1-106 of the Uniform Commercial Code, which similarly states that damages are intended to "put /the aggrieved party/ in as good a position as if the other party had fully performed" and that neither consequential or special nor penal damages may be had except as specifically provided in the UCC itself or by other rule of law. It was decided to replace in the text as it stands the word "complete" by the word "full" and to speak, not of "damages suffered", but of "harm sustained".

As to the definitions of the concepts of loss and lost gain, in substance these were considered to be acceptable, except as far as non-pecuniary loss was concerned. The view was however expressed that it may not be necessary to include them in the text, it being sufficient to refer to them in the explanatory notes, and this all the more so as the most important question was that of lost gain which could be more properly dealt with in the context of Article 5.

Non-pecuniary loss was extensively debated. One view was that it was difficult to imagine how physical or emotional distress could apply to commercial transactions between companies, even if the loss of reputation were included under emotional distress. It was also stressed that the majority of legal systems do not recognize the possibility of recovering non-pecuniary damages under a contract, the reason being that non-pecuniary damages are difficult to assess in monetary terms. On the other hand it was pointed out that international commercial contracts are not always concluded by companies: there are other contracts, such as sponsorship agreements with artists or sportmen, in respect of which the question of non-pecuniary damages could well arise in practice.

The Group eventually decided to maintain the rule, but to place it in square brackets, to ask the Rapporteur to find a formulation making the scope of the rule clear and to clarify this even more in the comments.

With respect to the last part of paragraph 1 stating that in assessing the damages recoverable account should be taken of "all benefit which the aggrieved party did in fact reap on account of the breach", the question was raised whether the concept of "benefit" should be understood as covering also the case where, as a result of the non-performance, the aggrieved party receives compensation under an insurance contract or where that same party is able to obtain alternative employment. The general view was, however, that what had been intended as benefits were the savings made as a result of the non-performance of the other party, such as, for example, the money a party has not spent on storage of goods. It was noted that the English formulation of the text was to a large extent taken from Article 6.1.9.5 of the new Dutch Civil Code which, however, has an additional phrase ("in so far as is reasonable") as it covers both contracts and tort. The opinion was expressed that in this respect a distinction between contract and tort must be made. The Group therefore decided to replace the present wording by the formula "taking into account any gain to the aggrieved party resulting from his avoidance of cost or loss", but to leave it open whether to deal with the problem in the context of Article 4 or in the context of Articles 9 and 10 until these latter provisions had been discussed.

9. With respect to Article 5, it was pointed out that the real problem with certainty was that it did not in actual fact mean "certain", but rather "with a reasonable degree of probability". The Group agreed on the proposal to replace the first sentence of the article by the new formula "compensation will be made only for harm that is established with a degree of reasonable probability". The question was raised whether a distinction should be made between the cases where both the existence and the amount of the harm were certain, and those where only the existence but not the amount could be established with a degree of reasonable probability. It was mentioned that, with respect to the latter cases, some legal systems grant the judge the discretionary power to assess the damages recoverable while according to other systems no damages were recoverable. The prevailing view was that the Principles should adopt the first of these solutions. According to some members this would require the addition of a separate provision expressly stating that if the amount of the damages cannot be established the judge may award an estimated amount. Other members felt that this solution was already implicit in the new wording of the opening phrase of Article 5, as the term "degree of reasonable probability" covered both the existence of the harm and the amount. If, however, the wording caused problems in this respect, it was suggested that the general

principle relating to the certainty of the existence and of the amount of the harm be laid down first, the question of future harm and loss of chance being treated next, and that the specific case where the amount of the harm cannot be established with sufficient certainty so that an approximate estimate should be made by the judge or arbitrator be treated last. The Group eventually decided to leave the question open for further consideration at the next reading of the draft.

10. As to Article 6, paragraph 1, it was pointed out that its purpose was to break the chain of causality between the non-performance of his obligations by one party, and the harm actually suffered by the other party as a consequence thereof. The discussion focused on two questions, namely to whom the foreseeability test should apply, and which time should be decisive for the foreseeability of the harm. With respect to the first question attention was drawn to the discrepancy in the present text between the French and the English versions: the first referred to "préjudice qui a été prévu ou qui aurait pu l'être", whereas the second referred to "damage which [the party in breach] had reason to foresee". The prevailing view was that though normally both parties should know what the ordinary course of events would be, the decisive test was what the party in breach foresaw or had reason to foresee. In support of this view reference was made to Article 74 of CISG which had adopted this same solution. As to the time element, the majority of the Group was in favour of the solution provided for in the draft, i.e. to refer to the time of the conclusion of the contract. According to one view a different solution, i.e. that of referring to the time of the failure to perform, should be envisaged in case of long-term contracts, in particular when the date on which certain obligations have to be performed is agreed upon by the parties only at a later stage. This proposal was rejected in view of the fact that, also according to the general principle, in such cases the time of foreseeability was not that of the conclusion of the main contract, but that of the agreement on the date of performance. The Group eventually decided to ask the Rapporteur to redraft the paragraph in accordance with the language to be found in the second sentence of Article 74 of CISG.

Turning to Article 6, paragraph 2, the view was expressed that the Romanistic concept of "faute lourde" had no precise equivalent in the common law systems. The term "wilful misconduct" was discussed as a possible equivalent without, however, receiving sufficient support. In particular, the view was expressed that businessmen often calculated how much a breach of the contract would cost them, possible damages included, and where this was economically cheaper for them than to hold on to the contract they would as often as not decide not to perform the contract. At least in the United States judges would not consider such behaviour to be a culpable or wilful breach. This state of affairs should be recognized for

what it is: the economic reality of today. Other members however felt that it was ethically wrong to condone such behaviour: if there was intention or gross negligence on the part of the non-performing party damages should be greater. As a possible compromise it was suggested amending the present text of paragraph 2, in the sense of either speaking of "bad faith" or "lack of good faith", or of stating more generally that the rule laid down in paragraph 1 "shall apply taking into account the manner of the breach".

Reference was also made to section 2.603 of the Draft Principles of European Contact Law which reads as follows:"(1) The defaulting party is liable only for loss which he foresaw or could reasonably have foreseen at the time of the conclusion of the contract would be likely to result from his non-performance. (2) However, where such non-performance was deliberate or reckless, the defaulting party may in the discretion of the Court be held liable instead for loss which he foresaw or could reasonably have foreseen at the time of his non-performance, where this is greater than the loss for which he would be liable under paragraph 1).".

A certain preference for the latter provision was expressed, although some opposition was also voiced, one member considering the inclusion of recklessness to go too far. A problem with such a provision was that in every single case the claimant would argue that paragraph 2 applied, whereas every defendant would instead argue that it was the general rule as contained in paragraph 1 that applied. Such a situation would penalise the unsuspecting.

In the end it was decided that the same wording of section 2.603 of the Draft Principles of European Contract Law should be adopted here, subject to the possible replacement of the terms "deliberate or reckless".

11. Introducing Articles 7, 8A and 8B, the Rapporteur stated that Article 7 embodies the principle that the burden of proof was on the aggrieved party who may utilize any means, subject to Articles 8A, 8B and 12, to make his point; that Article 8A dealt with cases of cover, any damage additional to the cover having to be proved; and that Article 8B referred to the market price, which it defined in paragraphs 2 and 3.

Article 7 did not give rise to any lengthy discussion, the main point considered being whether or not it should be deleted, as it could be considered superfluous. The question was raised as to whether infact there existed legal systems with provisions different from that contained in Article 7. The words "any means" was a general rule of freedom of evidence, which, as it brought with it the danger of a contrario solutions

or deductions in other cases, should perhaps be mentioned in other contexts as well. Also for reasons of coherence with other sections it was decided to delete Article 7, but to take its contents into account in the comments on the general rules on evidence.

With reference to Articles 8A and 8B the first point raised was that it was necessary to state clearly that the contract must be avoided before damages may be claimed, as the reference to cover and to the market price in effect presupposes that the contract has already been avoided. Furthermore it was considered that in the cases covered by Article 8B a rebuttal should be possible, i.e., if a party buys cover but claims the market price, the other party should have the possibility to prove that the first party actually paid less, and if he does prove this, then he should pay only the difference between the cover price and the contract price. It should also be considered that it might be more convenient for the aggrieved party to prove the market price and to sue under Article 8B than to show cover, whereas the defendant would sue under Article 8A.

Another question raised was what should be done when the cost of the cover was either more or less than that of what it was intended to substitute; whether or not for such cases there should be a provision or an interlink between the prices. This, however, involved problems of proof. It was considered that a further qualification of the scope of Articles 8A and 8B should be added, so that it would no longer be possible for the parties to play the articles off one against the other. Reference was made to the provision contained in Article 75 of CISG ("[...] if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods [...]") which makes it clear that there were certain conditions for making cover, and for availing oneself of the presumptions of the article. The Group agreed to adopt a similar formula with respect to Article 8A.

In relation to the two alternatives given in Article 8B paragraph 1 concerning the time when the difference in price should be considered, the Rapporteur himself expressed a preference for the date of voluntary payment or of the judgment. Other members considered the date of judgment to be too late, an illustration being oil price fluctuations. It was felt that a time should be chosen when the aggrieved party could have covered. The assumption was that the aggrieved party was supposed to go into the market as soon as, or soon after, the breach had occurred. The date of non-performance might, on the other hand, be too early, although one view was that if the assumption was that the contract was avoided, then the time of the failure to perform was the crucial time, more precisely the time when the contract could have been terminated.

A lengthy discussion took place as to the precise meaning of "market price". First of all, it was argued that the "market price" claimed might in effect not be a fair price. However, in this respect it was felt that the other party could always prove that the market referred to was not the true market, and that this market need therefore not be the one used for reference.

More generally it was pointed out that the very concept of "market price" varied greatly depending upon what kind of economy existed in the country concerned; for example, in a monopoly situation the market price and the current price would coincide. Reference was made to the terminology used in Article 55 CISG, which speaks of "the price generally charged at the time of the conclusion of the contract". The draft could adopt a similar formulation such as "a price generally charged for goods or services rendered or delivered in comparable circumstances in the trade concerned". As to the reference to an "established commodity market" ("marché organisé"), it was objected that prices might be fixed by private organisations, not necessarily by the State. The Group was unable to agree on a different formula and decided to reconsider the matter at a later stage.

12. With respect to Article 9 the question was raised first of all whether the article could be merged with Article 10. However, it was pointed out that despite some similarities the two provisions deal with different factual situations: whereas in the situation envisaged in Article 9 the failure by the aggrieved party to fulfil his own obligations occurs before the non-performance of the other party, the opposite is true for the situation envisaged in Article 10.

It was further questioned whether instead of speaking of "the aggrieved party's failure to fulfil his own obligations", it was not better to use a broader formula so as to cover also the cases where the aggrieved party's act or omission is not a violation of an obligation arising from the contract (cf. eg. Article 1227 of the Italian Civil Code).

A lengthy discussion took place in relation to the question as to whether fault on the part of the aggrieved party should be required, and if the amount by which damages are reduced should be made dependent also on causality. Reference was made to Article 21 of the Chinese Foreign Economic Contract Law ("In case both parties are in breach of the contract, both parties shall bear the relevant losses in accordance with the responsibilities due to them") and to Article 1227, first paragraph, of the Italian Civil Code ("If the creditor's negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it"). It was

agreed to reword the provision so as to make it clear that in the cases envisaged therein the damages have to be reduced, but that the amount of the reduction depends upon the extent to which the acts or omissions of each party have contributed to causing the harm, and on the seriousness of their behaviour.

13. Article 10 did not give rise to difficulties as to substance. A view was expressed that in the text the reference to a duty to mitigate the harm should be deleted. Reference was made to Book Five, Article 312 of the new draft Civil Code of Québec which states that " a debtor is not responsible for any increased damage if the creditor could have avoided it by reasonable means". Other members recalled Article 76 of CISG which adopted a formula similar to that used in the present text. It was decided to maintain the present text, adding the Québec formula as an alternative, and to take a final decision at a later stage. It was also agreed that the comments should mention the problem of who has to bear the costs of the measures taken in order to mitigate the harm.

14. The Group decided to return to Article 4, paragraph 1, the last part of the second sentence. After a short discussion it was agreed to keep the provision in its present position, and to add the phrase "with the deduction of any cost or loss avoided by the aggrieved party" to the formula adopted above. The whole paragraph would, therefore, read as follows: "The aggrieved party is entitled to full compensation for the harm sustained. This harm includes both any loss which he suffered as a result of the breach and any gain of which he was deprived, with the deduction of any cost or loss avoided by the aggrieved party".

15. With reference to Article 11 the view was expressed that, in the light of the most flexible wording of paragraph 1, paragraph 2 seemed to be unnecessary.

As to paragraph 1 the question of the power of the Court as opposed to the rights of the creditor to obtain redress in one form or another was discussed. Should the court be entitled to increase the amount of redress due to the plaintiff if it considered the sum to be too small? Might it even be possible for the court to redress the loss by a means other than that asked for by the plaintiff? Finally, what precisely was meant by "any other means" as used in the present text?

With respect to the first question, it was recalled that in some legal systems, e.g. the French one, the answer was positive. The prevailing view was, however, in the negative, given the general principle according to which a court cannot go ultra petitum. As to the other questions no definite answers were given in one sense or in the other.

Attention was drawn to the fact that, for instance, in the United States the awarding of damages was the only way of redressing non-pecuniary damage. It was suggested changing the present wording of the paragraph either by positively stating which other remedies could be asked for, or at least by speaking of "damages or other means" instead of "damages or any other means", so as to avoid the impression that there were no limits.

The group decided to leave it to the Rapporteur to redraft the article in the light of the discussion.

16. With respect to Article 12 the discussion focused on which rate of interest should be used. As phrased at present, the legal rate of interest was the basic rate; only where there was no such rate should the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the due place of payment be used. It was pointed out firstly, that as there were countries in which there was no legal rate it might be preferable to refer first to the bank short-term lending rate and then to the legal rate; secondly, there were two different cases which had to be considered: that of payments being made in local currency, and foreign currency payments. These were quite different - if, for example, payment had to be made in U.S. dollars or German marks in Italy, then it would be inappropriate to apply the Italian legal rate. The reference should be to the commercial rate of interest for the currency in which the payment has to be made. Which type of interest rate was finally applied would then depend upon the law of the contract.

In the end it was decided to remove the first clause of paragraph 2, and to refer first to the prime rate and then to the "law of the State of which currency the payment has to be made".

17. With respect to Article 13 a view was expressed that, since it deals mainly with personal injury cases, which were not the subject-matter of the draft, the article was redundant and should be deleted.

The prevailing view was, however, that this was one of those cases where the Principles, instead of merely reflecting well-established rules, could provide a new answer to problems such as the possible payment of damages in instalments and the indexation of those payments, so far rather neglected by existing domestic laws, but far from being unknown in international trade practice.

The first sentence of paragraph 1 was considered to be too vague, and it was therefore decided to delete it. As to the second sentence, it was pointed out that at present in most legal systems the awarding of instalments was virtually unknown. This was true in particular

for the common law systems, although some recent court decisions in the United States, as well as the introduction of statutory provisions to the same effect in single states of both the United States and Australia, show that the traditional attitude may be changing.

It was generally felt that the article should make it clear that the possibility of awarding instalments was limited to rather special, though important, cases. If, for example, the judge knows that the defaulting party does not have sufficient money, then he should be able to award instalments. The same can be said for cases when the contract itself provides for instalments, or where future harm is concerned. In addition one could think of the case where the awarding of instalments is expressly requested by either the plaintiff or the defendant, or where the payment of interest is concerned. The Group eventually decided to include the words "in special circumstances" with respect to instalments so as to make it clear that the rule was that a lump sum was awarded, and to replace the last phrase beginning with "and he may fix" with a more neutral formula such as the one contained in Article 11.

As to paragraph 2, there was agreement on the point that if instalments were accepted, then indexation would perforce have to be accepted. There was, in fact, no justification for the lowering in value of the future instalments that would occur without indexation. The paragraph was therefore left as it stood.

18. With respect to Article 14 the discussion mainly concerned paragraph 2 which was considered to be a clear departure from the "once for all and that's it" rule. The result was that if things turned out to be worse than first thought the plaintiff could come back to the defendant's door to ask for more, whereas if things turned out better than expected the defendant had no way of getting back anything. It was considered that paragraph 2 concerned mainly future physical damage, and that as this was not the concern of these Principles the provision was not needed. Consequently the Group decided to delete the paragraph.

In relation to paragraph 1 the time-limit specified, i.e. the date of the final judgment, was queried. A contrast was seen here with Articles 8A and 8B which could, however, be taken care of in the comments. One opinion was that the fact that all events up until the date of judgment had to be taken into account should be made clear in the text, whereas according to the prevailing opinion the text was sufficiently clear as it stood.

19. In relation to Article 15 it was suggested broadening the scope of the article in order to include also 100% awards in foreign currency.

Moreover, the word "expenditure" was questioned, since the necessity of awarding damages in foreign currency arises equally when the aggrieved party does not receive a payment due in foreign currency. It was also suggested, so as to avoid mentioning the judge, that the provision be reworded to read "a party is entitled to claim damages...".

As to the word "foreign", it was objected that its meaning could be doubtful in the event of arbitration. Consequently it was decided to adopt the following wording: "A party is entitled to ask for damages either in the currency of the contract or in the currency in which the damage accrues". A number of problems arising with foreign currency payments were pointed out, such as currency regulations, national legislation prohibiting judgments in foreign currency and exchange problems in general. To take care of this aspect of the question it was suggested adding the words "unless the circumstances, including exchange regulations, indicate otherwise".

20. In the discussion on Article 16 the opinion was expressed that interest should start running the moment damage accrues, although it was pointed out that this could not be the case for instalments, for which the view was expressed that interest should run at every instalment. Furthermore, the opinion was expressed that a certain distinction had to be made for instalments: if the contract itself provided for payment by instalments, then interest was due at every instalment; if, however, it was the judgment which provided for payment in instalments, then interest had to be calculated from the date of the judgment. The opinion was voiced that for cover transactions it was fair to let interest run from the sale. An alternative formulation suggested was "unless otherwise agreed interest accrues on damages only at delay of execution of judgment by the defaulting party". In the end it was decided that the article should be left for the moment, and that further consideration should be given to its formulation.

21. When turning to Articles 17 and 18 the Group discussed in general the relationship between the limitation of liability and penalty clauses dealt with in the draft, and similar clauses known in contract practice, such as "forfeit clauses" (Reuegeld, clause de dédit, caparra penitenziale), i.e. clauses providing for the payment of a certain amount of money in case one of the parties avails himself of the right to withdraw from the contract, and "escalation clauses", i.e. clauses which provide for a proportional increase or decrease in the price to be paid according to the time when the performance is actually made or to the quality of the goods or services rendered. One opinion was that they were one and the same thing, another that they were quite different, while a third saw them as being functionally the same, but conceptually different. It was pointed out that, in the end, all depended upon how the respective clauses were

drafted by the parties to the individual contract: for instance, parties may well intend to limit their liability to a certain amount of money but, in order not to fall under the limits of validity provided for in Article 17, draft it in the form of a penalty clause; similarly, if the sum agreed to by the parties was large, then it was likely that the parties intended such a clause to be a penalty clause, while if the sum was smaller and the clause contained an option, then such a clause was more likely to have been intended as a forfeit clause.

It was suggested that Articles 17 and 18 could perhaps be deleted if there was a general provision in the Principles invalidating grossly unfair or unconscionable contract clauses. Current law in the United States was referred to as an example of this trend. On the other hand, in the United States there seemed to be emerging a new attitude via-à-vis penalty clauses, at least, there was a growing tendency to admit them in the context of international trade relationships .

The Group eventually decided to include specific provisions on limitations of liability and penalty clauses in the present Chapter, and to consider at a later stage whether or not to introduce a general provision on unconscionable contract terms either in the chapter on validity or elsewhere.

22. Turning to a more detailed examination of Article 17, a first objection related to the location of the provision, which was better placed in the general section on non-performance, as both its title and its content went beyond damages, concerning also other remedies.

Reference was then made to the discussion which had already taken place concerning Article 6(2), namely the difficulty of drawing an exact line of demarcation between cases of "reckless" breach and other cases of breach. As far as exemption clauses were concerned, it was suggested drawing a distinction between clauses excluding the liability of a contracting party and those which merely limit such liability. As a matter of fact, in actual commercial practice there were cases, for example in construction contracts, where the limitation to direct damages and the exclusion of consequential damages is quite normal and should be permitted because of the impossibility of compensating the latter in full or of covering them in advance by insurance. It was also pointed out that, again in the area of works contracts, it is quite frequent to stipulate that each of the contracting parties should bear the consequences of any injury to their employees or of any damage to their property whoever has caused it, with the exception of those cases where such injury or damage was caused intentionally ("knock-for-knock" clause). Yet another argument put forward against the present wording of Article 17 was that in any event a distinc-

tion should be made between "obligations de résultat" and "obligations de moyens": indeed, a clause excluding or limiting liability may well be drafted differently depending on whether it relates to the delivery of specific goods or to a service which by its very nature requires the observance of a particular duty of care. For all these reasons the majority of the Group was of the opinion that a more flexible approach should be adopted with respect to exemption clauses. It was suggested that the example be followed of the current way of handling this problem in the common law systems and to make the validity of exemption clauses depend on whether or not they appear to be "unconscionable" or "unreasonable", taking into account the intention of the party in breach, and the nature of the contract and of the obligations. The view was however expressed that the exclusion or limitation of liability for intentional breach should be considered invalid for all cases. As a compromise solution the adoption of the following formula was proposed: "The parties may agree in advance to limit or to exclude their liability for the non-performance of their obligations except where that clause relates to deliberate breach of the contract or is otherwise unconscionable".

23. With respect to Article 18, it was pointed out that in the common law systems penalty clauses were against public policy, and that a similar principle existed also in Belgian law.

A discrepancy between the French and English texts of paragraph 2 was noted, in that the words "normalement" and "actual" did not correspond. Of the two the English text was considered to be preferable. Furthermore, the words "nulle" and "void" were queried, as was whether or not they referred to the whole contract, or whether the actual provision concerned should be "réputée non-écrite".

A suggestion was made to revise paragraph 2 to read "If the agreed amount is manifestly excessive or less with respect to the actual damage, the party may request the arbitral tribunal or court to make a reduction or increase.". In this respect reference was however made to the UNCITRAL "Uniform Rules on contract clauses for an agreed sum due upon failure of performance", where Article 7 states that the obligee may claim damages to the extent of the loss not covered by the agreed sum, if the loss substantially exceeds the agreed sum. In other words, the judge cannot automatically increase the sum; this can only be done at the request of the aggrieved party. The majority favoured the solution contained in the UNCITRAL draft.

Paragraphs 3 and 5 of Article 18 were considered to be unnecessary on the ground that a general principle could easily be applied instead of these paragraphs.

Paragraph 4 was an important link between penalty clauses and exemption clauses. The latter were at times disguised as the former. Moreover, penalty clauses at times do not deal with damages but with other kinds of remedies in case of breach.

Reference was also made to the Draft Principles of European Contract Law which contain a provision (Sec.2.606(3)) stating that "The aggrieved party is not limited to the specified sum where the non-performance of the other party or of persons for whose acts he is responsible is deliberate or reckless." It was suggested that a similar provision also be included in the present draft.

Ultimately, any decision was deferred until the articles had been revised by the Rapporteur in the light of the discussions.