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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

REPORT ON THE MEETING HELD IN ROME
FROM 20 TO 23 MAY 1987

(prepared by the Secretariat of Unidroit)

Rome, July 1987

1. At the invitation of the President of Unidroit, the Working group for the preparation of principles for international commercial contracts held its ninth meeting in Rome, at the headquarters of the International Institute for the Unification of Private Law, from 20 to 23 May 1987. The meeting was attended by Professor P.-A. Crépeau (Québec Research Centre of Private and Comparative Law, McGill University, Montréal), Professor U. Drob-nig (Max-Planck-Institut, Hamburg), Professor M. Fontaine (Centre de droit des obligations, Université Catholique de Louvain), Professor M.P. Furmston (Bristol University), 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 Recher-ches Juridiques Comparatives, Ivry) and by Mr Wang Zhenpu (Minis-try of Foreign Economic Relations and Trade, Beijing). The meeting was also attended by Mr Piero Bernardini, Member of the Executive Board of ENI (Ente Nazionale Idrocarburi, Rome. Profes-sor E.A. Farnsworth was unable to attend for reasons of health. The Unidroit Secretariat was represented by Professor M.J. Bonell who took the chair and by Ms L. Peters who acted as Secretary to the Group.

2. Opening the meeting, the Secretary-General of Unidroit, Mr Malcolm Evans welcomed Professor Michael P. Furmston, Pro-Vice-Chancellor of Bristol University, who was participating in the work of the group for the first time. Professor Furmston was, he stated, a well-known expert in the field of contract law. He had for several years edited the classic Cheshire and Fifoot's "Law of Contract", of which he was now co-author. His presence would without doubt enrich the group, and it was hoped that he would be prepared to participate actively in the future work on the project

Mr Evans drew the attention of the members of the working group to the consolidated text of the principles elaborated so far, which the Secretariat had prepared on the basis of the drafts discussed by the working group (Study L - Doc. 40). One of the merits of having consolidated the texts of the existing draft chapters was that of giving a clear indication of the fairly advanced stage which the project had reached.

3. The group then proceeded to an examination of the first item on the agenda, the revised draft rules on performance in general, prepared by Professors Fontaine, Maskow and Rajski (Study L - Doc.39). Introducing the draft rules, Professor Fon-taine stated that the revised draft rules before the group were the consolidated result of the preceding discussions on Chapter 5 (Performance) and on what had been Chapter 4 (Public Permission Requirements). Articles 1-19 belonged to the first of these chapters, whereas Articles 20-22 belonged to the second. Al-though they had been placed in the order indicated, this order was open to modification. The texts of Articles 1, 2, 3, 5, 6(1), 7, 8(1) and (3), 10, 12, 13 and 14 were essentially those

adopted at the preceding meeting at which they had been discussed, which had been held at Potsdam. As regards some of them, however, the Rapporteurs themselves entertained certain doubts. Articles 4, 11 and 15 were new, and the texts of Articles 6 and 8, although not totally new, did to a certain extent go beyond the decisions taken at Potsdam. Articles 16-19 had not been discussed at Potsdam for lack of time. Professor Fontaine suggested that Articles 1-4 were, perhaps, best examined together as they had developed out of the same original article. Of these, Article 1 enunciated a broad principle, Article 2 considered the obligations involving a duty of care (*obligation de moyens*), Article 3 the obligations involving a duty to achieve a specific result (*obligation de résultat*) while Article 4 attempted to provide criteria to distinguish between these two different kinds of obligations where it was not clear from the contract that the obligation was either the one or the other. This distinction between an "*obligation de moyens*" and an "*obligation de résultat*" had been introduced into the draft after the discussion at Potsdam on which occasion it had been considered to be a distinction which, although not familiar to a number of legal systems, was both interesting and useful.

4. With reference to Article 1, the present wording was considered to be an improvement upon the previous formulation which referred to the "nature and economic purpose" of the obligations.

Doubts were, however, expressed as to the utility of a provision which simply stated that "The parties shall perform their obligations as expressly or impliedly required by the contract". It was argued that in this way the article did nothing more than state the obvious. To this it was objected that there was no reason for the Rules not to express principles which are widely accepted. Furthermore, it might be useful for those jurisdictions where contracts are interpreted very narrowly to give a hint that other elements have to be taken into account beyond the express terms of the contract.

The question was raised whether this article, instead of simply referring to "... obligations as ... impliedly required by the contract", should not expressly indicate the sources of the implied contractual terms as, for example, does Article 1135 of the French Civil Code does, and this all the more so since the present chapter on interpretation was apparently based on a narrow concept of interpretation, insofar as emphasis was placed on the criteria for solving possible ambiguities, not on the criteria for filling lacunae. To this it was objected that it was precisely the purpose of the articles on interpretation to determine the precise content of the contract, and therefore also to establish which terms have to be considered to be implied. If those articles in their present form did not sufficiently cover this aspect, they should be amended accordingly: the present provision should on the contrary remain unchanged.

In consideration of the fact that the group was not divided on the merits of the question, but only as to the approach to be followed - the point being whether the criteria for the determination of the implied terms should be rendered explicit here or elsewhere, it was finally decided to come back to the question after the chapter on interpretation had been reconsidered.

5. With reference to Articles 2 and 3, an extensive discussion took place as to the actual existence of a distinction between an "obligation de moyens" and an "obligation de résultat". Even in France, where the distinction originated, there was a tendency to move away from such a sharp distinction. This was also due to the fact that it had not been possible to arrive at a precise definition of the two kinds of obligations. There were many borderline cases, and a clear-cut distinction such as the one envisaged could constitute an over-simplification. An obligation might even be mixed, that is, have certain elements which could be classified as "obligations de résultat" along with other elements which could instead be classified as "obligations de moyens". It was pointed out, however, that in such cases it was rather a question of the component parts of the contract. In fact, a contract may impose on one and the same party both "obligations de moyens" and "obligations de résultat". The example was given of a dental prothesis : as far as its installation was concerned the dentist's obligation was "de moyens", whereas for the durability of the materials used his obligation was "de résultat". After all, the terminology used, i.e. "To the extent that", indicated a certain flexibility, so that too sharp a distinction was consequently not made.

The question was also raised as to whether a third type of obligation which is normally associated with the "obligation de moyens" and the "obligation de résultat", should not be expressly mentioned in the draft, namely warranty. To the consideration that a warranty may be considered to be a special case of "obligation de résultat", the only peculiarity of which is that of rendering the party liable for its breach irrespective of the event being imputable to him, it was objected that a clear distinction should be drawn between the substantive content of the contract, between what the parties undertake to do - they undertake to do something with diligence, to do something with a view to producing a specific result, or to do something and warrant its performance - and the defence for non-performance.

The overwhelming majority of the group was, however, of the opinion that the distinction between "obligations de moyens" and "obligations de résultat" as provided for in the draft was useful, first of all because it drew the attention of the parties to the existence of different kinds of contractual engagements and to the necessity of specifying in their agreement which kind of engagement is envisaged in each single case. Furthermore, the distinction could also prove useful for judges and arbitrators, who, in the absence of a clear language in the contract, are called upon to determine the exact nature of the duties of the parties.

The question was then raised as to why Article 2 refers to "reasonable" persons, whereas Article 3 refers to the quality "usually" achieved. It was answered that the two cases were in fact quite different: in the case of the duty of care reasonable behaviour was the only yardstick possible, whereas for the duty to achieve a specific result the best criterion was the quality usually achieved, which in effect meant the quality which should usually be achieved. In other words, a party may not raise the defence that his work was no worse than that of others. It was considered that this should be clearly brought out in the comments, where it should also be stated that judges and arbitrators may well raise the standards of performance when they are low.

Lastly, it was decided to replace the word "activities" by "circumstances" in Article 2 and "obliged" by "expected" in both Article 2 and Article 3.

6. The group then considered Article 4, which listed criteria for determining whether an obligation of a party involves a duty of care in the performance of an activity or an obligation to achieve a specific result. The need for such a provision was queried, as it appeared to be an attempt to give rules of interpretation, thereby duplicating what already existed elsewhere. The majority did not, however, support this view; the discussion on Articles 2 and 3 had clearly shown the difficulty of distinguishing the two types of obligations and, therefore, the great need of establishing criteria on which to rely for that purpose. A certain number of changes were, however, suggested.

First of all it was suggested that the beginning of the provision should be modified from "In determining whether an obligation of a party...." to "In determining the extent to which an obligation of a party....", in consideration of the existence of obligations of a mixed nature. After all, Articles 2 and 3 already used similar language. It was also felt that it should be made clear that the list of criteria in the provision was by no means exhaustive: it merely furnished an indication of the circumstances which could be relevant in making the desired distinction. It was therefore suggested that "the following circumstances may be significant" be changed to "regard shall be had, among others, to the following circumstances".

With reference to the first of the criteria listed ("the wording of the contract") (lit.(a)), it was argued that it might be redundant as it was both self-evident and already contained in other provisions. According to the majority, however, the criterion of the wording of the contract, although already implicitly resulting from the general rules on interpretation, was too important not to be expressly stated in the context of the present article. Perhaps the language could be changed. What was actually meant was "the way in which the obligation is described in the contract".

As regards lit. (b), the suggestion was made that instead of referring to the "price", more general language should be used,

since there were contracts (e.g. joint ventures) where in exchange of the performance by one party there is not the payment of a price, but another non-monetary performance so that the decisive element is the value of each of those performances. Furthermore, it was argued that the decisive criterion was not necessarily whether the price was high or low, but whether the payment of the price depended on the result of the performance, whether it was bound to a specific time or depended on any other condition. The qualification which had been added in square brackets was therefore felt to be necessary. In view of the above considerations, it was decided that Article 4(b) be amended to speak of "the contractual price and other terms of the contract" and that the comments should mention the examples given. The comments should further clarify that among the "other terms of the contract" penalty clauses or hardship clauses may also be particularly significant, since the fact that they have been stipulated with respect to a particular obligation is an indication of how the parties intended to allocate the risk of proper performance of that obligation.

With reference to lit. (c), considering that the French term for "uncertainty" would presumably be "aléa", which includes the concept of risk, it was suggested that the English text should also include the same concept by referring to "the degree of certainty or of risk normally involved in the performance of the obligation". The consideration was advanced that it would be preferable to speak of "degree of certainty" rather than of "degree of uncertainty". Furthermore, what was meant was the degree of certainty involved "in achieving" rather than "in trying to achieve", and, lastly, more than "promised" the result was "expected".

As far as concerned the criterion under lit.(d), which was placed in square brackets because it could be considered to be already included under lit.(c), it was felt that it represented a useful addition and should therefore be retained.

Ultimately, it was decided to amend Article 4 to read as follows:

"In determining the extent to which an obligation of a party involves a duty of care in the performance of an activity or an obligation to achieve a specific result, regard shall be had, among others, to the following circumstances:

- (a) the way in which the obligation is expressed [indicated] in the contract;
- (b) the contractual price and other terms of the contract;
- (c) the degree of certainty normally involved in achieving the expected result;
- (d) the other party's ability to influence the performance of the obligation".

7. Turning to Article 5, the text of which had been approved at Potsdam, the observation was made that the underlying idea of "moralizing" the contractual relationships was, perhaps, not adequately expressed in the text of the provision. It referred

only to a duty to cooperate when such cooperation "may reasonably be expected". A comparison was made with the corresponding provision of the draft Principles of European Contract Law which provided for a duty to cooperate in order to give efficacy to the contract. In view of the importance of certain contracts, such as offshore construction contracts, for which this "moralization" was of consequence, it was suggested that equally strong wording should be used here. According to the majority of the group, however, the practical effects of the two provisions would not greatly differ and it was decided to leave the text of the article as it stood.

8. Introducing Article 6, the Rapporteurs stated that the first paragraph of the provision had been unanimously adopted in Potsdam. Two variants were given for paragraph 2. Although the second of these had received more support in Potsdam, the Rapporteurs themselves preferred the first.

Article 6 in its present form dealt with two different questions: paragraph 1 concerned the question of whether a party, instead of performing the whole at one time, may choose to perform one part at a time, whereas paragraph 2 addressed the quite different question of whether a party who at the date of maturity of his obligation can perform only part of it, is entitled to offer such a partial performance or whether, in such a case, the other party may refuse partial performance, thus putting the first party in breach for the whole performance.

The fact that the two questions were dealt with in one and the same article and that that article had as sole title "Partial performance" gave rise to some confusion. Once it was established that paragraph 1 was dealing only with the possibility of performance by instalments, as opposed to performance redereed at one time, the question which remained to be settled was that of cases where the contract provided that an obligation the whole of which which could be performed at one time was to be performed within a certain period of time, (e.g. the first quarter of the year). Some members of the group considered that as paragraph 1 was phrased the debtor, irrespective of whether he decides to perform on the very last day or at any time before that date, would have to perform the whole at one time. Others on the contrary were of the opinion that if a period of time had been agreed within which performance had to be made, the debtor was within that period, free to perform bit by bit. This might, however, give rise to absurd situations where, for example, something which could be delivered at once was delivered piecemeal for no justifiable reason. The view was expressed that a way of avoiding this was to follow the original model of the provision (§ 233 Restatement on Contracts, Second) by adding to the present text "unless the circumstances indicate otherwise".

With respect to paragraph 2, the fact that in the present wording of the provision it is not made clear that it refers only to a performance which is due gave rise to a certain confusion in so far as it was questioned whether the provision covered also

the case where a party offers part of the performance at any time before the date of maturity. It was pointed out that the provision was dealing only with partial performance, i.e. the case where only a part of the performance is offered at the date of maturity of the obligation; on the contrary the case referred to was clearly a case of earlier performance covered by Article 8.

With respect to the two variants contained in paragraph 2, variant (1) was considered to be preferable. Indeed, although there was agreement that a creditor should as a rule not be allowed to refuse a partial payment, it was pointed out that there might be cases where, on the contrary, the creditor has a legitimate interest not to accept the tender of part of the price. Reference was made in particular to a creditor who has reason to believe that the debtor will not fulfil his obligation and therefore should be allowed either to ask the debtor for the payment of the entire price, or to terminate the contract. The group then discussed the question of burden of proof in relation to the present provision. It was pointed out that it should be up to the party tendering the partial performance to prove that its refusal would be contrary to good faith. In order to make this clear, it was decided to reformulate the provision in a positive way so as to read: "A party may refuse partial performance unless given the circumstances it would be contrary to good faith to do so". It was further decided not to refer here to "good faith", which represented a general principle underlying the Rules as a whole, but rather to use the formula "unless he has no legitimate interest to do so". It was finally agreed to replace the term "party" by the term "obligee" so as to make it clear that the provision only deals with the case of the entitled party facing an offer of partial performance by the obliged party and not with the case of the entitled party requesting partial performance from the obliged party.

With reference to paragraph 3 the question of damages arose. It was suggested that the provision presupposed that partial performance was a breach of contract, in which case it would be clear that apart from the additional expenses damages could also be claimed, although at that point the additional expenses were part of the damages. The risk was therefore that language such as that used in the provision could give the impression that it was only possible to request additional expenses and not the damages exceeding the additional expenses. Opinions were divided on this point, one view being that the effect of the provision was to renounce damages exceeding additional expenses, another that there was no such renunciation, as it was and remained a breach situation even if it was no longer a question of a 100% breach, but of, for example, a 50% breach where the obligee accepts a 50% performance. The breach remained for the other 50%, and consequently the mechanism also remained for this 50%. It was stressed that the additional expenses referred to the part received, whereas the damages referred to the part not received. It was considered that this was not clearly expressed in the present text which should in consequence be amended in order to make this clear. Furthermore, examples illustrating this point

should also be given in the comments.

The group finally decided to separate the paragraphs of the present Article 6. Paragraph 1 should become the new Article 6, with the title "Performance at one time and in instalments". At the end of the article the wording "unless the circumstances indicate otherwise" should be added, so as to cover all the different cases referred to in the course of the discussion. The whole provision should be placed within square brackets, as a final decision concerning it and its utility - apparently in practice the exceptions to the rule contained in this provision occur more frequently than the rule itself - was to be taken at a later stage. Paragraphs 2 and 3 should form the two paragraphs of a new Article 6 bis, with the title "Partial performance".

9. With reference to Article 7, it was observed that it had literally been taken from Article 33 of CISG, and that it embodied well established and universally recognized principles. It was consequently adopted as it stood.

10. Introducing Article 8 the Rapporteur stated that it was a compromise formula which attempted to reconcile extreme solutions. Paragraph 1 was a general rule which was in conformity with Article 52 of CISG, and was justified by the fact that performance is usually scheduled so as to suit the obligee's activities, and earlier performance may cause him additional expense. Any such additional expense should be borne by the performing party. If there was no additional expense, then the creditor may not refuse the earlier performance in accordance with paragraph 2. The Rapporteur suggested that the wording of paragraph 2 could be modified in order to harmonise it with the provision on partial performance so as to read : "The other party may not, however, refuse an earlier performance unless he has a legitimate interest in doing so".

Paragraph 1 did not give rise to any problems, and was consequently accepted as it stood.

The attention of the group turned to paragraph 3. The discussion opened with a query as to the meaning of the expression "render an earlier performance in exchange" contained in the paragraph, which could be understood as referring to counter-performance. It was confirmed that counter-performance was effectively included within this expression which, however, also included other performances, such as giving instructions to permit a performance, which strictly speaking was not a case of counter-performance. The formula "render his own performance earlier" was preferred by some members of the group. A comparison was made with the corresponding provision of the draft Principles on European Contract Law which, in s.1.112(2), stated that "A party's acceptance of an earlier performance does not affect the fixed time for the performance of his own obligation". It was suggested that the EEC formulation might be followed in this draft, although the view was also expressed that it was more rigid than the formulation contained in the present draft.

The question was raised whether another type of obligation might be considered as being included within this terminology, namely obligations where the parties have a duty to perform simultaneously. For such obligations the counter-performance constitutes a security for the performance, and a provision such as the one envisaged, whichever formula were adopted, could be unjust. The duty of simultaneity should over-ride Article 8(3) : if there were a duty to exchange performances simultaneously then this persisted even in cases of earlier performance. If a party accepted earlier performance, then he should perform in turn. If the party making the counter-performance was not able to do so earlier, then he would have the right to refuse the earlier performance, as he had a legitimate interest in refusing. Furthermore, he had the possibility to refuse this earlier performance. It was, however, pointed out that in accordance with paragraph 2, if a party wanted to refuse earlier performance he would ultimately have to show that his interests would be prejudiced, that he would suffer serious inconvenience.

This solution was contested on the ground that it would be wrong to put the burden of proof on the party who receives the earlier performance, as it is in the interest of the obligor to perform earlier. The obligee's obligations should not be increased. The starting point should be the expectations of the parties, who have determined that performance is to take place on a fixed date. The acceptance of an earlier performance by the obligee is thus an exceptional situation, and he should not be obliged to perform in return unless there is negotiation.

This examination of the possible effects of the provision brought up the question of the relationship between Article 8(3) and Article 9(1). It was considered that the main rule was contained in Article 9(1) and that Article 8(3) only made it clear that the rule does not apply. Article 9(1) lays down the main rule which is that of the simultaneity of performances whereas Article 8(3) deals with the situation where, in the absence of agreement between the parties earlier performance is imposed upon the obligee, and simply states that the mere acceptance of the earlier performance does not oblige the obligee to perform in turn. It was considered that attention should be drawn in the comments to the fact that cases where the obligor informs the obligee well in advance that he can perform earlier, and the obligee accepts this earlier performance, amount to a revision of the contract and consequently do not fall under paragraphs 2 and 3.

In consideration of the difficulties raised by Article 8(3) it was suggested that the paragraph be deleted. The consequence of such a deletion would be to return to the general rule that where the parties have fixed a time for the performance of the contract and one of them accepts earlier performance on the part of the other, his acceptance does not change his part of the bargain, as the contract stated that he was to perform only at a specific time. This would follow from Article 9(1) which includes the phrase "unless the circumstances", including the terms of the

contract, "indicate otherwise". If, on the other hand, there is no contractual agreement as to the specific time for performance, then, according to Article 9(1), if the performances can be rendered simultaneously they are due simultaneously. It was felt that this distinction between date-fixed and contingency-fixed performance should be clearly brought out in the comments.

At the end of the discussion there were thus two alternatives. The first was to delete Article 8(3) on the assumption that the effect of this deletion would be as described above. The second was to ensure that the intentions of the group were made clear by a formulation such as that of s.1.112(2) of the EEC draft. It was suggested that if this second alternative were adopted then it would be necessary to add the time "determinable from the contract" and to explain in the comments what was intended by "fixed", as a distinction should be made between the time fixed by the calendar and the time fixed depending on the other party's performance. It was felt that in the EEC formula the "fixed time" was only the first of these cases, i.e. a time which is independent of the other party's performance.

Ultimately it was decided to adopt s.1.112(2) of the draft Principles on European Contract Law, qualifying the term "fixed". The new Article 8(3) would therefore read as follows: "A party's acceptance of an earlier performance does not affect the time for the performance of his own obligation if it has been fixed irrespective of the performance of the other party's obligation".

Turning to paragraph 2, the consideration was first of all advanced that the reference to good faith should be changed to a reference to legitimate interest, as had been done in Article 6, and secondly that the drafting of the provision ought to be phrased in the affirmative.

Some dissatisfaction was expressed with both paragraphs 1 and 2, as the first stated that a party was not allowed to make an earlier performance, which technically was a breach, whereas the second stated that this earlier performance could not be refused if there was no legitimate interest, which was the same as saying that the breach was remedied. The result was, if not a certain ambiguity, at least unnecessary repetition. A suggestion to delete paragraph 1 so as to avoid this repetition was not adopted as it was felt that expression should be given to the rule that the creditor may not be compelled to receive payment earlier than fixed in the contract, except where he has no legitimate interest in refusing it.

It was eventually decided to adopt a new paragraph 2 along the lines indicated above, to read as follows: "A party may refuse an earlier performance unless he has no legitimate interest to do so".

With reference to paragraph 4, the suggestion that it assumes that earlier performance is necessarily a breach was refuted by the fact that the paragraph refers to additional ex-

penses which are independent of breach. The view was expressed that it would be helpful if the comments could contain a reference to the distinction between damages and additional expenses, which had, in fact, already been made in the previous meeting held in Potsdam. No further observations being made, paragraph 4 was accepted as it stood.

11. With reference to Article 9, paragraph 1, opinions were divided as to the utility of the provision. It was a rule which might have sense for sales contracts, but which had little relevance to other contracts. Furthermore, it was a statement of the obvious which could be dispensed with. It was consequently suggested that the provision be deleted. On the other hand, the reflection was made that the rule might not be so obvious to the whole world, and that it could, therefore, be helpful to spell it out. The way of expressing the rule was, however, queried. If it was agreed that the main rule was that of the simultaneity of performance, unless the terms of the contract required otherwise, then the consideration was advanced that it would be simpler to state that "the performance of the obligations is to be simultaneous unless the parties have agreed otherwise". It would then no longer be necessary to retain paragraph 2.

A discussion on the meaning of the word "simultaneously" indicated that opinions differed quite considerably on this point. A basic test could, however, be considered to be the actual exchange of performances. A conclusion which could be drawn from this consideration was that there were basically only two types of simultaneous contracts, i.e. sale and barter. In fact, in international trade a true simultaneous exchange of performances hardly exists any longer, as payment is normally made by instruments such as letters of credit and bills of exchange. Thus the problem, rather than being one of simultaneity, was more one of the order of performance. If one considered the order of performance, then there were so many different situations that it would be difficult to establish a general rule - all the different situations would have to be analyzed, which would mean adding an indefinite number of paragraphs to the article. Furthermore, no distinction was made in paragraph 1 between contracts which in the French terminology are known as "contrats à exécution successive" and "contrats à exécution instantanée", which could create confusion.

In view of the difficulties in drafting a provision which could adequately accommodate the objections raised, the majority of the members of the group considered that Article 9(1) should be deleted. This meant that paragraph 2, which was closely connected with paragraph 1 and which had already been placed in square brackets, was also deleted.

Ultimately, it was thus decided to delete the whole of Article 9. It was, however, felt that the question should be reconsidered when examining the chapter on non-performance, the general provisions of which were intended to include also a provision on the right to withhold performance.

12. Introducing Article 10, the Rapporteur stated that it had been inspired by Article 55 of CISG. The present text of paragraph 1 had been adopted at Potsdam. Paragraph 2 attempted to find a neutral formula without any implied burden of proof. A question which had been raised at Potsdam, and which could be considered here, was whether the provision on price determination should not be broadened to include other contractual terms which were not determinable from the contract.

It was recalled that a provision already existed covering cases where the parties have left a term to be agreed upon later, or to be determined later, namely Article 14 of the chapter on formation, although it was suggested that it did not cover cases where the terms are to be determined by one of the parties or as a result of outside factors. These were cases which were of importance in practice, as terms such as the price are often not fixed by the parties, although they make provision for their determination. When such a future determination is not made, or is not made in conformity with the canons of reasonableness, Article 10 is of no use. Considering that such cases occur with reference to price fixing, the conclusion was that Article 10(1) solved even the price determination question only to a limited extent.

A comparison was made with the corresponding provision of the draft Principles of European Contract Law, s.1.105(1) of which stated that where the contract does not determine the price or the method for determining it, the parties are deemed to have agreed on a reasonable price. A suggestion to replace Article 10(1) by this formulation, or one to the same effect, was objected to. First of all it was contended that although it was true that only very rarely do parties to a sales contract not determine a price, this happens much more often in the context of contracts of service. While the EEC formulation could cover the sales situation adequately, contracts of service would not be included. For these Article 10(1) in its present form offered two important criteria for determining the price, namely the price generally charged, i.e. the market price, and the professional standards ("... under comparable circumstances in the trade concerned").

Queries were raised by the assumption underlying the first of these two criteria, i.e. that the market price was the reasonable price, as this might, in fact not be the case. It was, however, pointed out that any clause determining the price would be subject to the rules on abusive clauses or unconscionability. Furthermore, the principles contained a general provision on fair dealing in Article 3 of Chapter I (General Provisions), and a provision on gross disparity in Article 7 of Chapter IV (Mistake, Fraud, Threat and Gross Disparity) which could also be of relevance.

In relation to paragraph 2 queries were raised both as to the determination of the reasonableness of the price, and as to the advisability of admitting that the contract price could be

determined by only one of the parties.

As regards the second of these two points, it was suggested that determination of the price by one only of the parties was contrary to the general principles of contract law, according to which the terms of the contract should be agreed by the parties, it being pointed out that in French law the provision would be considered to be void if the price had been fixed by one party. To this it was objected that it was the most realistic solution as it is often only the performing party who can correctly evaluate his performance. Some control would of course be necessary to avoid abuses.

The question of the person on whom the burden of proof lies as far as the reasonableness of the price goes, was considered to have been left hazy by the wording of the provision. Two opposite views were taken, the one that it is the party who fixes the price who has to prove that it is reasonable, the other that it is the party who questions the price who has to prove that it is unreasonable.

In the end it was decided that the intended contents of paragraph 2 could best be covered by the addition of the words "... or, where no such price is available, to a reasonable price" at the end of paragraph 1. Paragraph 2 was consequently deleted.

The group then discussed the addition of provisions along the lines of s.1.105 paragraphs 2, 3 and 4 of the draft Principles of European Contract Law to Article 10. Opinions were divided with reference to the first of these, which stated that "Where the price or any other contractual term is to be determined by one party whose determination is grossly unreasonable, then notwithstanding any provision to the contrary, a reasonable price or other term shall be substituted". One view was that such a provision could lead to controversy, whereas the opposite view, was that for cases where a party imposed unreasonable terms some procedure had to be found to return to the norm of the reasonable price, and for such cases a provision along the lines of s.1.105(2) would answer.

As regards s.1.105(3), which established that where the price or any contractual term is to be fixed by a third party, and he cannot or will not do so, the parties are deemed to have empowered the court to appoint another person to fix the term, the first question raised was why the case of the third party taking a grossly unreasonable decision was excluded. It was pointed out that this was a different question as it concerned a response on the part of the parties. It was, however, considered that the test of reasonableness ought to be the same for unreasonable decisions taken by third parties as for those taken by one of the parties to the contract. It was therefore suggested that "or a third party" should be added in paragraph 2, although the view was also taken that two different questions would then be mixed up in the same paragraph.

It was ultimately decided that it was premature to attempt to reach any definite view as to the desirability of adding provisions along the lines of s.1.105(2), (3) and (4) to Article 10. The Rapporteurs were requested to prepare a draft of such provisions so as to permit the group to take a decision at a future stage.

13. Introducing Article 11, the Rapporteur stated that the point of departure for paragraph 1 was that if the place of performance is neither fixed nor determinable from the contract, then different rules should be applied depending on the nature of the obligation. Consequently paragraph 1(a) provided that performance of a monetary obligation should take place at the creditor's place of business at the time of the conclusion of the contract, whereas paragraph 1(b) provided that any other obligation should be performed at the place of business of the performing party at the time of the conclusion of the contract. Paragraph 2 dealt with the moving of the place of performance, and paragraph 3 with the question of who should bear the additional expenses caused by such a move.

In connection with paragraph 1 the question was raised of whether in the case of a sales contract concluded at the seller's place of business and concerning goods coming from a third country, the goods would, in the absence of a contractually agreed place of performance, have to be delivered at the seller's place of business rather than at the buyer's. Opinions were divided on this point, one view being that the product would indeed have to be delivered at the seller's place of business, another being that this would not be the case, although the transportation costs would normally be calculated as if the seller's place of business were the place of performance. At any rate, it was observed that the provision would in practice apply only very rarely, since, at least with respect to the main obligation, the parties would usually determine expressly the place of performance. Subsidiary or accessory obligations would thus be practically the only ones to which the provision would apply.

No substantial objections having been raised as regards paragraph 1, it was decided to leave the paragraph as it stood for the time being.

With regard to paragraph 2, the consideration was advanced that in its present form it was concerned not so much with clarifying what happens if the entitled party moves his place of business, as with making clear that he was permitted to do so, which could have been taken for granted.

In consideration of the fact that the provision had real importance only for monetary obligations, a suggestion was made to restrict it to this type of obligation, as does Article 57 of CISG. The example was given of the draft new Civil Code of the Netherlands, which restricts a similar provision to cases where performance should be made at the creditor's place of business, allowing the creditor to designate other places for performance,

subject to the right of the debtor to perform at his own place of business if the performance at the creditor's new place of business would be more onerous for him (cf. Article 6.1.6.11). On the other hand it was pointed out that there were yet other cases where such a provision could be of importance, namely in the case of counter-trade contracts, where a party accepts as payment for his goods or services goods which are of no interest to him, and for which he has to find a third party who wishes to buy them. In such cases he would wish to instruct the party delivering the goods to deliver them directly to the third party. In view of the considerable importance of this type of transaction in the present foreign trade practice of many countries, it was argued that a flexible formula should be found to enable parties to go through such complicated business transactions.

It was noted that what was of interest was not so much the changing of the place of business, as the changing of the place of performance - the latter did not necessarily follow from the former - particularly where monetary transactions are concerned, factoring being a case in point. It would therefore be more interesting to have a rule covering not only changes in the place of performance incidental to changes in the place of business of the creditor, but also cases where the creditor, or his successor, wishes to indicate another place of payment. Furthermore, the position of both creditor and debtor should be considered, the same rule applying to both.

In view of the difficulties raised by the provision, the drafting of which had been abandoned both in ULIS and in CISG as well as in the draft Principles of European Contract Law, it was suggested that paragraphs 2 and 3 be deleted. Another suggestion was to separate paragraphs 2 and 3 from paragraph 1, in view of the fact that as drafted paragraph 2 could apply to situations not governed by paragraph 1, and to combine paragraphs 2 and 3 in one provision, stating simply that whoever changes the place of performance must pay the additional expenses.

In view of the diverging opinions as to the scope of paragraph 2, the rapporteurs were requested to draft two alternatives, the first along the lines of Article 57 of CISG for monetary obligations only, the second of a wider scope of application referring to the creditor being entitled to change the place of payment. It was further decided to place both alternatives in square brackets. Paragraph 3 raised no objections in the course of the discussion.

14. Introducing Article 12, the Rapporteur recalled that it was one of the articles adopted at Potsdam. Furthermore, it was the only provision of the draft to which no objections had been raised by the experts and financial institutions which had been consulted in the preparation of the draft.

It was observed that the provision contained in paragraph 1 was a suppletive rule, which was to apply when the contract was silent as to the account to which payment should be made : the

main rule was that contained in Article 11(1)(a) to which Article 12(1) was an exception. The example was given of several accounts being listed on the letter-head of the creditor. If no provision had been made regarding which one of them should be used, then the debtor should be able to use whichever one he preferred.

Attention was drawn to the fact that the creditor may have bank accounts in different countries of the world, and that in such a case currency restriction problems may arise. According to one view the provision should be restricted to the accounts the creditor has in the country of his place of business. Another suggestion was that possibly just because of currency restrictions the provision should on the contrary also include the accounts the creditor may possibly hold at the debtor's place of business. To this it was however objected that the creditor might have difficulties in bringing the money out of the country of the debtor's place of business - precisely because of the currency restrictions.

No clear majority emerging for either solution of maintaining the rule as it is, or of restricting it to the accounts the creditor has in the country of his own or the debtor's place of business, it was decided to maintain the rule as it stood, with the added qualification that the accounts must be indicated.

As regards paragraph 2, the observation was made that although it was not an exhaustive answer to the problem addressed (the completion of a payment by transfer) it gave an indication of where to find the answer in each case, i.e. in the banking practice of the country concerned.

The exact meaning of the word "effective" was queried. It was suggested that what was intended should be clearly explained in the comments, also in view of the fact that banking practices varied considerably from country to country.

A problem which could arise with the adoption of such a criterion was constituted by those cases where the payment becomes effective several months after the transfer has been made. Strictly speaking the debtor is in such a situation in breach, which might not always be a satisfactory solution.

It was finally decided to leave paragraph 2 as it stood.

15. In connection with Article 13, paragraph 1, the question was raised of whether circular cheques (banker's drafts) were included within the term "similar instrument". This was not considered to be the case, as they do not instruct to bank to pay, but are instead a promise made by the bank to pay.

The view was expressed that banker's drafts should be included, and that the creditor should be entitled to refuse them too : this because they were ultimately like a guarantee, only an additional obligation by another person which did not release the

primary obligor. It was, however, observed that it would be contrary to current practice in many parts of the world (e.g. in the USA and Canada) to allow the creditor to refuse the payment through banker's drafts.

Another suggestion made was to broaden the scope of the provision so as to include other instruments such as bills of exchange. As to bills of exchange in particular it was felt that they should be dealt with in one way or another.

It was recalled that the previous draft contained a reference to bills of exchange, but that the group had decided on its deletion on the ground that functionally speaking bills of exchange and cheques were sometimes the same, although their structure remained different.

A comparison was made with s.1.114 of the draft Principles of European Contract Law, which stated that "Payment of money due may be made in any form used in the ordinary course of business". The advantage of this formulation was considered to be that it permitted payment in accordance with usages, which included both the usages between the parties concerned, and the usages existing between the countries to which the parties belong. Differences of opinion existed as to whether the creditor should be allowed to refuse a normal mode of payment: one view was in the negative, while the other was in the affirmative with the qualification, however, that should the creditor actually refuse, he would then have to grant the debtor more time, in conformity with the principle of good faith. In other words, the proposed mode of payment by the debtor would be a valid tender of payment.

The EEC formulation was considered to be a good one although, in view of the subject-matter dealt with being international contracts, a qualification was felt to be necessary, namely that of the ordinary course of business referred to being that of the creditor's place of business. This would also evidence the relationship with Article 11(1). Indeed, if reference were made to the creditor's place of business then, as according to Article 11(1) payment of a monetary obligation was to take place at the creditor's place of business, the creditor would no longer have any reason to refuse the payment.

It was ultimately decided to replace the present text of Article 13(1) by the text of s.1.114(1) of the draft Principles of European Contract Law. It was further agreed to add a qualification in the form of "at the agreed place of payment".

No substantial objections were raised with reference to paragraph 2. In view of the comparison made with the draft Principles of European Contract Law, the Rapporteurs were requested to examine how the present formulation of s.1.114(2) would need to be improved in order to meet the needs of this group, and to present the results they arrive at at a later stage.

16. Introducing Article 14 paragraph 1, the Rapporteur stated that comments so far received on this provision from experts were none too favourable : in fact, international commercial practice was opposed to the rule laid down therein, and no justification was seen for a departure from that practice.

It was recalled that also in Vienna in the negotiations for the adoption of CISG a similar provision had been rejected because of the interest of countries with weak currencies to receive payment in the agreed currency. After all, if such a rule were adopted then in many cases a debtor from a country with a weak currency might feel tempted to insist on having the place of payment fixed in his country so as to be allowed to pay in his national currency notwithstanding the currency in which the price has been expressed in the contract. It was true that such a rule appeared in the Geneva Uniform Law on Bills of Exchange (cf. Art. 41) : significantly enough, however, the UNCITRAL draft Convention on Bills of Exchange and Promissory Notes no longer contained it (cf. Art. 71).

In favour of the rule contained in paragraph 1, it was pointed out that in several countries it is a principle of public policy that the debtor may pay in the national currency of the place of payment, unless the parties have agreed upon payment being made in a specific currency. A similar provision also existed in the draft Principles of European Contract Law (s. 1:106(2)) and had so far not met with any opposition. It was, however, observed that what worked within a particular system or region such as the EEC would not necessarily function elsewhere.

In view of the opposition to Article 14(1), and of the problems such a provision might cause countries with a weak currency, it was finally decided to delete the paragraph.

With reference to paragraph 2, the rapporteur stated that it had been placed in square brackets as it dealt with non-performance. It should, possibly, be considered together with the provisions on non-performance, particularly as the first paragraph of the article had been deleted.

Reference was made to Article 26 of the chapter on non-performance, which deals with damages for failure to discharge a monetary debt. Although that provision does not treat the impact of non-performance on the currency aspects, it was suggested that loss due to currency fluctuations might be covered by its third paragraph, which states that the aggrieved party may ask for additional damages if he can prove that the non-payment has caused him a greater loss than the amount of interest.

It was finally decided to state in the comments on Article 26(3) of the chapter on non-performance that it covers also the situation dealt with in the present Article 14 paragraph 2. The paragraph was consequently deleted.

17. A first observation regarding Article 15 concerned the scope of the article, as it was queried whether it was possible to state a price in a contract, but to provide no indication of the currency in which this price was to be paid. It was pointed out that the provision was intended to cover cases where the contract simply referred to the "current price" as well as the payment of other kinds of monetary obligations, such as damages, or of the performance of incidental and accessory obligations.

It was pointed out that the problems addressed in this provision were basically two : first of all what currency should be considered to be the currency of the payments and, secondly, what payments were being referred to : apart from the main contractual price there were also the contractual penalties, damages, transportation and insurance, all of which could be expressed in different currencies. The example of the rules applicable within the CMEA was given, according to which the contractual price and penalties are to be paid in convertible roubles, whereas damages, additional expenses and costs are to be paid in the currency in which they occur.

The attention of the group was drawn to Article 29 of the chapter on non-performance relating to damages evaluated in foreign currency, which states that "when an element of the loss consists of an expenditure made in foreign currency, the judge may award damages valued in such currency". Damages having thus already been catered for, only the main payment and the incidental payments had still to be provided for.

It was pointed out that, as Article 14 had been deleted, the provision did not deal with the question of the currency of payment, but only with the currency of account. For this question the existing rule on price determination contained in Article 10 sufficed : the same criteria should be used for the determination of the currency as for the determination of the price. There was thus no need for a separate provision on currency. It was further pointed out that one effect of the deletion of Article 14 was that as a rule payment was to be made in the agreed currency. The logical consequence of this was that where the contract referred only to the "current price", there was an implied agreement on the currency.

Opinions were divided on this point, another view being that there was no such implied agreement. The example was given of a broker buying shares on a foreign stock exchange. One view was that if the contract was silent on the currency, then the price would have to be paid in the currency of the location of the stock exchange, another that the currency could be that of the currency of the country of the person buying shares from the broker. It was, however, pointed out that this would depend on whether or not the broker was acting as an agent. If he was acting as an agent, then the currency would be that of the stock exchange, if, instead, he was buying to resell, then the resale was a domestic transaction and would be paid in the local currency.

It was observed that Article 15 was basically a rule on interpretation, which might offer some guidance when the interpretation of the contract created difficulties. In view of the fact that Article 15 provided a first rule of construction it was decided to keep the article for the time being, without square brackets. It was further decided to clarify the relationship of Article 15 with Article 10, and with Article 29 of the non-performance chapter, in the comments.

18. With reference to Article 16, it was noted that the present wording reflected national taxation laws, although the rule had been reversed from what it had previously been, each of the parties having now to pay taxes in his own country, whereas before, if performance were to take place abroad, the performing party had to pay taxes abroad. It was further observed that the provision incorporated a general rule in international trade, but that parties may in any case agree on a different apportionment of taxes.

No objections to the article having been raised, it was decided to adopt the article with only a minor drafting change, i.e. the words "its part of the obligation" were modified to read "his obligations".

19. The discussion on Article 17 opened with a terminological question: the term "appropriation" used in the heading of the article was not considered to correspond to what was meant. The term "imputation" was considered to be more appropriate, and had, in fact been used in paragraph 3. It was in consequence decided to replace "appropriation" by "imputation". It was further suggested that as paragraph 2 was intended to restrict paragraph 1, it should become the second sentence of that paragraph.

The discussion then centred on whether or not imputation by the creditor should be permitted, and on the order of the obligations for which imputation was to be made. The whole idea of an imputation by the creditor was objected to, a preference being voiced in favour of objective criteria. In other words, only the debtor should have the right to make the imputation, and where he did not, the law should do so, by using objective criteria such as the order in which the obligations arose. The creditor should, in other words, have no unilateral right to impute the payments made by the debtor. If the debtor's behaviour could be construed as an acceptance of the creditor's imputation there would be no problems, because then there was no unilateral imputation by the creditor. This rejection of a right to impute the debt on the part of the creditor was not, however, accepted by the majority of the group.

A comparison was made with s.1.116(2) of the draft Principles of European Contract Law, which states that if the performing party does not make a determination, the other party may, within a reasonable time after performance, declare to the performing party to which obligation he imputes the performance. A

certain restriction is added, in that any imputation to : (a) an obligation which is not yet due; (b) is illegal, or (c) is disputed, is declared to be invalid.

In this connection the question arose of what exactly should be considered to be covered by "debt". Article 17(2) specifically mentions only interest, although the view was expressed that expenses should also be included, and that the order in which these different debts should be discharged should be first expenses, second interest and lastly principal.

Doubts were expressed in particular as regards the inclusion of expenses, as a party should be able to state clearly what he is paying, without having a different imputation imposed upon him : there may be cases where the parties have different opinions as to whether or not the debtor has to pay a certain expense. It was, however, pointed out that the provision contained in the EEC draft would exclude the possibility of an imputation being made to such an expense, as it would be considered to be a disputed debt. It was further argued that if expenses were not mentioned, there would be no consequences for the imputations made by the debtor, as the debtor always has an interest in reducing the capital. As, however, the periods of limitation are usually shorter for expenses than for capital there could be consequences for the creditor.

It was noted that the EEC draft refers only to an impossibility on the part of the creditor to make an imputation to a disputed debt, from which it could be inferred that a debtor was free to impute his payment to a disputed debt. This raised the question of the way in which a debt had to be disputed - in England, for example, a creditor could impute a payment made to a debt barred by the Statute of Limitations.

One question raised concerned the right which was given to the debtor unilaterally to impute the payment he makes. The example given was that of a loan. Assuming that both the capital and the interest become due at the same time, there would be a clash of interests : the debtor would have an interest in paying off the capital as the interest would decline, whereas the creditor would have an interest in the debtor paying off the interest due. This reflection was of course based on the assumption that there was no compound interest, in which case it would not matter which were paid off first, capital or interest.

In view of the discussions which had taken place, it was finally decided to replace the text of the present Article 17 by that of a provision along the lines of s.1.116(2) of the draft Principles of European Contract Law, omitting the qualifications listed therein under (a) and (b) as they were implicit. It was furthermore decided to explain in the comments that the term "due" meant "exigible".

20. With reference to Article 18 paragraph 1, the suggestion was made that instead of referring to the creditor's interest,

reference should be made to the debtor's interest. The rule should thus be reversed by stating that in the absence of imputation the payment is imputed to the debt which the debtor has the greatest interest in paying, i.e. to the debt which is the most onerous to him.

This suggestion and the text as drafted in Article 18(1) was compared to the corresponding provision of the draft Principles of European Contract Law (s.1.116), which has in its paragraph 3 a provision covering the whole of Article 18 of the present draft, and which states that in the absence of a determination the performance is imputed to the obligation which satisfies one of the criteria listed and the sequence in which they are listed, beginning with the obligation which is due or is the first to fall due. This rule was, in fact, the same as the rules contained in Article 1193(2) of the Italian Civil Code, in Article 1276 of the French Civil Code, and in Article 253 of Book V of the draft Civil Code of Québec.

In the end it was decided to replace the present Article 18 by a provision along the lines of s.1.116(3) of the draft Principles of European Contract Law. It was also decided to adapt the wording to that of the present Principles, and to keep the same sequence of obligations in the list of criteria.

21. Opinions diverged with reference to the utility of Article 19, one view being that it was impractical and ought therefore to be deleted, another view instead being that it applied to quite frequent cases. The observation was, however, made that the term "accordingly" did not mean "mutatis mutandis" and ought consequently to be changed.

In the end it was decided to redraft Article 19, using the term "imputation" instead of "appropriation", to refer to "performance", rather than to the "payment" of non-monetary obligations, and to use the formula "with appropriate adaptations" instead of the term "accordingly".

22. Articles 20 to 22 had been taken from the former chapter on public permission requirements, following the decision of the Governing Council of Unidroit not to have a separate chapter on this subject, but to consider instead the possibility of including some of the provisions in the chapter on performance. The rules to be included were in particular those dealing with the question of how a party should obtain a public permission, of who has to apply for it, of the kind of duty involved ("obligation de moyens" or "obligation de résultat"), of what the obligations of the applicant party are vis-à-vis the other party (i.e. disclosure requirements), and of what happens if the permission is not granted.

23. With respect to Article 20 a certain discrepancy was noted between its title which referred to "public" permission, and its contents which did not, referring instead to the law of a State requiring permission. It was pointed out that a law or

State may require a variety of different permissions, some of which are in the public interest and some of which are in the private interest; presumably the permissions referred to in Article 20 were those in the public interest, and if so this should be made clear in the text.

It was objected that the question of public or private interest was not dealt with in the article at all and that it concerned the permissions granted by a public authority or, alternatively, a public body.

What exactly was to be included under the term "public" and how this should be expressed were discussed at length. The observation was first of all made that it would be better if no mention of a permission of the State were made, as different countries have different constitutional arrangements. Courts would, for example, not be included in England as they are not part of the government structure of that country. The term "judicial or administrative authority" was, however, not considered to be sufficient, as e.g. banks empowered by governments to give grants under foreign exchange would not be included. A broader terminology should be used, such as "institution exercising public authority", which appeared also in the original draft. In the end it was decided to speak in the text of "public permission", the exact drafting being left to the rapporteurs, and to explain what was intended in the comments.

There was general agreement as to the rule according to which the duty to apply for the permission is placed on the party who has his place of business in the State requiring such permission. Attention was, however, drawn to the fact that there were certain unusual cases where the duty to obtain the permission was reversed. This had been the case in *Pound v. Hardy*, an Appeal case of 1956, which concerned an international sales contract for the export of strategic goods to an East European country. In this particular case the House of Lords had said that it was the buyer who had to obtain the export licence, as it was the buyer who had information as to the purpose for which this strategic material was bought.

With reference to the existence of a permission requirement, the question was raised as to whether the party who would have to request such permission has to inform the other party of the existence of the requirement - Article 21 covered only the duty to inform the other party of the granting or refusal of the permission. One view was that such a duty should be laid down, while according to another opinion such a duty would be too burdensome and not at all necessary, since in practice there are many instances of permission requirements which are hardly more than a formality. It was recalled that the question of a duty to inform of the existence of a public permission requirement had been dealt with in the original draft and that it had subsequently been decided to take into consideration only the permission requirements which resulted from generally accessible rules of law, i.e. from those which were published, with the consequence

that there no longer existed a duty to inform the other party. Reference was also made to the UNCITRAL legal guide on construction contracts, for which it had been decided that each party should take care of permission requirements in his own country, provided the rules therefore are generally accessible. Another view expressed was that it was in fact more a question of validity, as a party who does not inform may be sued for possible misrepresentation or for behaviour not in accordance with good faith.

It was stressed that there were certain cases where information should be given, and that, if it was not deemed necessary to impose an explicit duty in the text, then this should be explained in the comments. If the permission requirement involved a delay with respect to the certainty of the fate of the contract, then information should be given.

In view of the arguments put forward in the discussion, it was decided to stress in the comments that the party who has to apply for permission should inform the other party of the existence of such requirements whenever necessary.

With reference to paragraph 2, the observation was made that it adopted the same solution as had been adopted for the provision on taxes. No objections were raised, and the provision was consequently retained as it stood.

24. Turning to Article 21, the question was raised of whether any distinction was intended between the terms "without undue delay" and "with due diligence". It was observed that while paragraph 1 contained both expressions, paragraph 2 contained only the first one. A certain difference was considered to exist, in that one focused on time ("without undue delay"), and the other on mode ("with due diligence"), which would involve, e.g. submitting the necessary documents, filling out the necessary forms and paying the necessary expenses. The reason paragraph 2 only contained the former was, it was submitted, that no particular diligence was required simply to inform the other party of the granting or refusal of the permission. It was observed that it was not necessary always to repeat the term "due diligence", which could be considered to be implicit. As the general feeling was that the reference to "undue delay" would be sufficient, it was decided to delete the reference to "with due diligence" in paragraph 1.

With reference to paragraph 2, the question was first of all raised whether it was justified in all cases to impose on the applicant party a duty to inform the other party of the granting or refusal of the permission. It was suggested that it could be explained in the comments that if the permission required is one which is necessary for the validity of the contract as such, or the granting of which is highly discretionary, then an ad hoc notification is required; on the contrary, whenever the granting of the permission is a matter of course, a specific notification would not be necessary, and the performance itself would be

considered an implicit notification.

Opinions were, however, divided as to whether the performance itself could be considered a notification. One view was that the formalities required for the export or import of goods are often done at the customs, when the orders have already been sent from one bank to the other, and that the arrival of the goods would therefore constitute the notification. Another view was that the arrival of the goods was too late a point in time to constitute a notification: if the seller has to deliver first, cash against documents, then the seller needs to know that the other party is able to pay; thus, the time for the receipt of the money is too late for him to receive the information that the permission required has effectively been granted.

Given the conflicting views on the necessity of the notice requirement as provided in Article 21(2), a possible compromise was suggested in the sense that a "duty of information exists if it is relevant for the conduct of the other party to be informed", which could cover both those situations where a notification was essential, and those where it would only be a useless burden imposed upon the applicant party. In the end this compromise formula was adopted, the exact wording being left to the rapporteur.

25. With reference to Article 22, the question was raised of whether it was possible to terminate an invalid contract. The consideration was advanced that if a permission were not granted, then in most cases the only effect would be that performance was impossible, and termination would consequently be the proper remedy. It was, however, pointed out that in some cases, according to Article 20 the permission was a condition for the validity of the contract. Thus, if Article 22 were to provide an appropriate sanction from the technical point of view, it should state that when permission is not granted either party may consider the contract to be ineffective if the permission is a condition of validity, or consider it terminated if the permission was a condition for the performance.

The view was also expressed that there was another construction possible, namely that which in Germany is termed "schwebende Unwirksamkeit", i.e. where a contract exists, but has a "pending invalidity". In such cases the contract can be terminated. It was argued that the granting of the permission would have to be considered a suspensive condition. Two different situations should be distinguished: the first was that of the authorities refusing permission, in which case the contract never existed, and the second was the one contemplated in Article 22, i.e. that the party could not obtain the permission within the time agreed, or within a reasonable time if no time had been agreed, in which case the authorities had not refused permission. In this second case the granting of the permission is a suspensive condition for an existing contract which could, therefore, be terminated.

A last point raised concerned a provision contained in the previous draft (cf. Doc.32, Article A, paragraph 2) which stated that "A party shall not be entitled to rely on a permission requirement where he could reasonably be expected to perform the contract by means of performance not subject to such a permission requirement". The provision was intended to cover the case of a party for whom it is impossible to perform from the resources he has in one State, but for whom it is possible to perform from the resources he has in another State. Although the provision had been deleted as superfluous because in the cases envisaged performance was not impossible in the sense of Article 20(1), it was nevertheless felt that the case was important, and it was consequently decided that the comments on Article 20 should illustrate it.

It was finally decided to maintain Article 22 as it stood.

26. The group next considered the order of the articles in this section of the chapter on performance. After a brief discussion the conclusion reached was that the present division into three parts, the first covering the content of the contract, the effects of the contract in general and the duties of the parties (Articles 1 - 5), the second concerning the performance of those duties (Articles 6 - 19), and the third covering permission requirements (Articles 20 - 22) was the best. It was therefore decided to leave the order of the articles as it stood.

27. The group thereupon proceeded to the second item on the agenda, the examination of the revised draft rules on hardship prepared by Professor Maskow (Study 1 - Doc.37). Introducing those provisions, the Rapporteur stated that Article 1 affirmed the duty of a party to fulfil his obligations even if they become more onerous. It was a provision which had been taken from the draft Principles of European Contract Law following a decision of the group to stress that a hardship situation is an exceptional one. This was, however, obvious and could be left out. Article 2 was an operative article which stated what must or may be done when hardship occurs. Article 3 actually described, or defined, the hardship case, and Article 4 attempted to arrive at a system which balances the activities of the parties, and to describe what activities a party may undertake.

28. A general remark made concerned the relationship between the present section on "hardship" and Article 12 of chapter IV, which also dealt with the adaptation of the contract. Since the solution which had been adopted in that article and the solutions in the section under discussion were different, the relationship between the texts should be developed, and the reason for these different situations explained.

29. The group decided to start its discussion on the Section with Article 3, which attempted to define what was intended to be covered by "hardship". The first point raised concerned what was intended in lit.(a) by a "presupposition which is implicit in the very nature of the contract". It was explained that the cases

intended to be covered by this concept were those where even if the contract could be performed, something had happened to make this performance useless. The example was given of a construction contract for a plant for the production of a fertilizer.

Doubts were expressed as regards the term "nature", as situations such as the one described might affect the purpose of the contract rather than its nature. In fact, the wording of Article 3(a) indicated that it covered two main hypotheses, i.e. when the contract becomes substantially more onerous, and where the contract becomes meaningless because the circumstances had changed, both of which really concerned the purpose of the contract and not its nature.

Reference was made to the doctrine of frustration, which an English lawyer would consider to cover the example given. It was, however, pointed out that according to this doctrine frustration ends the contract, whereas the system envisaged in this draft would permit the court to "adjust" the contract.

It was pointed out that the second case envisaged in Article 3 lit.(a), i.e. that of a presupposition which is implicit in the very nature of the contract ceasing to exist, is a situation which is completely different from the first (the fact that a presupposition no longer exists does not necessarily make a contract excessively more onerous) and should therefore be treated separately.

Another view was that "imprévision" and presupposition were two aspects of a similar problem, although the expression "hardship" would seem to refer to "imprévision" for excessive onerosity. However, in international contract practices well-drafted hardship clauses cover both cases. It was thus considered that the two cases should be combined where the party performs an excessively more onerous burden, and where the value of the performance which the other party receives has substantially decreased, and as appropriate a formula as possible should be adopted to cover them both. It was recalled that in the Federal Republic of Germany a change in the presupposition is only taken care of if it has a substantial effect on one of the parties. To achieve this result it would be necessary to insert a substantive criterion into the provision to the effect that not only has the purpose of the contract been affected, but one party must also have suffered substantive damage or disadvantage. The only criterion which could be used is the same as that for excessive onerosity, as in both cases the circumstances have changed without the knowledge of the parties. In essence the two situations were the same and they should therefore be treated in the same way. The presupposition condition could thus be omitted.

The outcome of the discussion was that there was substantial agreement on what should, and on what should not, be covered by the provision. It was also clear that the present wording gave rise to difficulties and ran the risk of giving rise to misunder-

standing. Two alternative formulations were put forward for consideration by the group. The first of these was s.1-104(1) and (2) of the draft Principles of European Contract Law, which states that :

"(1) A party is bound to fulfil his obligations even if performance has become more onerous, whether because the cost of performance has increased or the value of the performance he receives has diminished.

(2) If, however, performance of the contract becomes excessively more onerous for one of the parties on account of circumstances arising after the conclusion of the contract of which that party did not assume the risk and which could not reasonably have been taken into account at that time, the parties are bound to enter into negotiations with a view to adapting the contract to the new circumstances or terminating it. (...)"

The second was that of the ICC hardship provision which begins "Should the occurrence of events not contemplated by the parties fundamentally alter the equilibrium of the present contract (...)" . A majority of the members of the group expressed a preference for the equilibrium formula contained in the ICC provision. The EEC formula was considered to be ambiguous, as it could be understood as dealing only with excessive onerosity, whereas the change of equilibrium could be one of the conditions for excessive onerosity - i.e. the onerosity results from the change in economic circumstances. It was suggested that this should be stated explicitly in the text.

In consideration of the preference expressed in the course of the discussion it was decided that lit.(a) should be redrafted using the equilibrium formula, with the further qualification that the fundamental change in circumstances has the effect of placing an excessive burden on one party. It was further decided that the provision should be placed in square brackets for the time being.

Article 3 lit. (b), (c) and (e) were discussed together. The question was raised whether lit.(e) was not, in fact, included under lit.(b) : (e) spoke of "risks taken over", which could be considered to be included in the circumstances "taken into account" in (b). One view was that it was indeed included as a party takes into account also the risks, whereas another view was that in certain contracts a party takes into account any unknown risks, which meant that lit.(e) was not covered by lit.(b), and a third view was that it was implicit that a party would take into account the risks, but that it might avoid misunderstandings if it were stated explicitly.

A question was raised as regards a particular kind of risk, namely inflation : in most contracts the parties assume the risk of modest inflation, but not of high inflation; would this be covered by the provision? One view was that this was implied in lit.(a), as it would be a fundamental change causing an excessive burden, while another view was that it was also covered by lit.(b).

In the end it was decided to maintain the criteria, replacing the words "taken over" by "assumed" in lit.(e).

With reference to lit.(d) the advisability of limiting the scope of application of the section on hardship to long-term contracts was questioned, although admittedly in practice most problems arise with respect to this category of contracts. There were a number of short-term contracts which could equally be affected fundamentally by changing circumstances, not the least because whereas the parties to a long-term contract try to take as much as possible into account, parties to short-term contracts do not. A certain difficulty in defining a long-term contract was also pointed out.

The second element contained in lit.(d), that the performance affected has not yet been rendered, also gave rise to a number of considerations. First of all it brought up the question of the divisibility of performances, which would mean that of a whole only the part which has not yet been rendered should be considered. This might give rise to considerable difficulties as to assessing, e.g. 60% of the performance which was under hardship. Furthermore, how should the effectiveness of the performance be evaluated: should it refer to the whole or only to part of the performance? Secondly, the renegotiation brought about by the hardship should have regard only to the future, although admittedly it was possible to renegotiate also the past, or, should this not be the case, the performance rendered and its value in the new perspective could be considered in the renegotiations. One view was, however, that in the case of construction contracts there comes a point when they become so onerous that they have to be renegotiated, and at that point also the performance already rendered should be renegotiated.

Another point raised concerned the fact that the whole discussion appeared to consider the hardship question as arising from a situation which could be pin-pointed in time, whereas there were situations, such as that of creeping inflation, where it was difficult to identify a specific time for hardship to begin, and where it was therefore not justified to ignore the past.

It was considered that different issues were being mixed. The idea which appeared to be agreeable to all was that the rules should not reopen a situation which was already concluded. It might, therefore, be advisable to state somewhere that an action cannot be brought if performance has been rendered by both parties.

In the end it was decided that lit.(d) should be redrafted, introducing the concept of the non-retroactive effect of the hardship situations.

30. The discussion next turned to Article 2, which, it was stated, was a presupposition of Article 4. The first point raised concerned the phrase "insofar as the contract does not

provide for any other remedy", contained in paragraph 1, which was probably intended to refer to indexation clauses, or even to procedures such as conciliation, but which could also be understood in a different way, i.e. as referring to damages.

Opinions were divided between those who considered the qualification not to be necessary at all, and those who instead considered it to be necessary, as the question was whether the right to request renegotiation should be considered to be exclusive or not; if there was an indexation clause, would the disadvantaged party be able to choose between the indexation clause and the present rules on hardship? It was considered that this possibility of choosing between two remedies should be excluded. Suggestions were made to replace the phrase by formulations such as "unless the contract provides for any other procedure", or "unless the contract provides otherwise". As to the first suggestion it was objected that indexation clauses were not a procedure, whereas against the latter it was argued first of all that if the contract did provide otherwise there was the risk that the disadvantaged party could not invoke hardship at all, and, secondly, that the real question was precisely whether the parties were permitted contractually to exclude the operation of the present rules on hardship. One view was that this should not be permitted, since if something really upsetting happened the contract should be subject to renegotiation. According to another view clauses which specifically excluded hardship should be covered, although it was pointed out that it was one thing to state that one of the parties assumed the risk of all or a certain number of unforeseen circumstances, and another to have a certain indexation mechanism provided for in the contract which later turns out to be no longer workable.

In view of the points raised in the course of the discussion it was finally decided to delete the qualification "insofar as the contract does not provide for any other remedy" contained in paragraph 1. It was further considered that the discussion should be reflected in both the report and the comments.

31. The question of the overlapping of the two concepts "force majeure" and "hardship" was considered in relation to Article 4. It was argued that certain cases, which could fall under force majeure and consequently lead to the termination of the contract, would, if treated as hardship, be subject to renegotiation - a result which could sometimes be rather odd. It was, however, objected that there were basically two alternatives; either to stick to the traditional concept of force majeure, i.e. limiting the exemption cases to absolute material or legal impossibility (which was not the approach followed by the present Rules), or to admit that it was unavoidable that the concepts of force majeure and hardship would overlap.

A discrepancy was noted between paragraph 1, which states that the disadvantaged party is entitled to terminate the contract, and Section 3 (Articles 10 - 14) of the chapter on non-performance. Furthermore, the formulation "entitled to termi-

nate" was queried : in particular the question was raised whether hardship was enough to permit a unilateral declaration of termination, a result which could give rise to objections because in hardship cases a point which was controversial was often whether or not there actually was hardship. It was suggested that a solution might be to state that the disadvantaged party "is entitled to give notice to the other party of his intention to terminate", which would also link this paragraph with paragraph 2.

Attention was drawn to paragraph 3, which caused a problem of coordination with paragraph 1 and the general provisions on termination to be found in the chapter on non-performance, and according to which the contract is terminated by a unilateral declaration. It was stated that under the present draft the system was not that of a unilateral declaration : the idea was to restrict the courts to pressing the parties to reach agreement.

A question was raised as to why s.1.104(4) of the draft Principles of European Contract Law had not been taken as a model for paragraph 3. The explanation given was that its formulation ("If the parties have not entered into negotiations or have not reached agreement within a reasonable period, either party may resort to the court") gave the courts too much discretion. It was, however, pointed out that also in the system adopted here the court would inevitably have to intervene, albeit at a later stage, as there could be disagreement on whether or not there was a hardship situation. A certain preference was expressed for the EEC formulation, as it had a clear machinery of sequence of events, which the present paragraph did not have. The policy adopted in the EEC draft of enabling the court to order the parties to renegotiate was considered to be a practical course, as it could happen that the disadvantaged party did not wish to terminate but rather to renegotiate. A disadvantage of the EEC provision was seen in the fact that it did not allow the non-disadvantaged party to request the court to establish the validity of the proposed termination whereas both parties should have the possibility to go to court.

With reference to paragraph 4 doubts were expressed as to the meaning of the words "as eventually proposed by the non-disadvantaged party". It was suggested replacing the words "pursuant to the terms as eventually proposed" by "in accordance with the terms proposed" or, alternatively, to omit the word "eventually", inserting instead a reference to paragraph 2, in which case the wording would be "pursuant to the terms as proposed by the non-disadvantaged party in accordance with paragraph 2".

32. Turning lastly to Article 1, on the utility of which doubts had been expressed, it was stated that it embodied the principle "pacta sunt servanda" and ought therefore to be kept here, even if it were also stated elsewhere. It was suggested that this principle should be linked with the exception which was currently stated in Article 2(1). As this was acceptable to the majority of the group, it was so decided. The consequence was,

however, that Article 2(2) stood alone; as it dealt with the process of renegotiation it was decided to move it to the beginning of Article 4.

33. The Rapporteur was asked to revise the draft provisions, taking into account the points raised in the course of the debate.