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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

OF

THE MEETING HELD IN ROME

FROM 6 TO 10 JUNE 1988

(prepared by the Secretariat of Unidroit)

Rome, November 1988

I. INTRODUCTION

The tenth meeting of the **Working Group for the preparation of Principles for International Commercial Contracts** met at the headquarters of the International Institute for the Unification of Private Law from 6 to 10 June 1988. A list of participants is annexed to these Summary Records.

After a word of welcome from the President of Unidroit, Professor Riccardo Monaco, and of the Secretary-General of the Institute, Mr Malcolm Evans, the Group proceeded to discuss a series of preliminary, general questions.

II. GENERAL DISCUSSION

Bonell introduced the documents submitted to the Group for consideration. These were the **revised draft chapters on formation** (Study L - Doc. 41) and **interpretation** (Study L - Doc. 42). The draft principles of these two chapters had been provided with an explanatory report with a specific structure; both structure and content of the explanatory reports were clearly also open for observations and discussion. As he was the author of the documents under consideration, he stated that he preferred to step aside and suggested that Crépeau take the Chair for this meeting, which he did.

Drobnig questioned the structure of the chapter. For example, he considered that Art. 1(1) dealt with the process of formation and that Art. 1(2) had little to do with formation as it referred to termination and thus should be in the chapter on formal validity, or even in a separate chapter containing only this provision. Bonell reminded the group that it had earlier decided to place Art. 1 in this chapter. If, however, the Group was prepared to reopen the discussion on this point, then whether or not it might most suitably be place in the chapter on general provisions, which was intended to precede the chapter on formation, might be considered. Farnsworth added that, in view of the success of the Vienna Sales Convention, it would be appropriate to place the provisions of these principles which corresponded to those in CISG in the same place as in CISG.

Date-Bah found Art. 13(1) anomalous, as it appeared to be addressed to the parties and not to judges and arbitrators as the other provisions. Rajski found the location of Art. 14 to be problematic, as it dealt not only with formation but also with precontractual duties, for which reason its location in the middle of the chapter should be reconsidered. Furthermore, he had doubts on the advisability of beginning a chapter on formation with an article concerning requirements

as to form.

Maskow found the examples good, but stated that he would welcome if they could be taken from actually decided cases, possibly arbitration cases. If they were, then this should be clearly indicated. Furthermore, he suggested that it would be better always to use the same denominations of the parties, e.g. always Buyer and Seller and not Importer and Exporter unless this was a decisive factor in the illustration. Farnsworth added that he felt that the illustrations were longer and more confusing than necessary, and suggested that it would be best to have two contrasting cases where the same party is, e.g. bound and not bound by the agreement.

Lando, who also considered that it would be good to use real cases, suggested that the United States Restatement, Second, on Contracts, in which about 50% of the illustrations were taken from decided cases, be taken as a model. Farnsworth also agreed on the use of decided cases and stressed the importance of indicating the source of inspiration for such illustrations.

As regarded the utilisation of decided cases in the illustrations, Bonell stated that illustrations were, in fact, inspired by decided cases, but as a rule he had decided otherwise: it really was not that easy to find national cases to illustrate specific points and the risk existed that for purely contingent reasons one might end up by privileging those legal systems the court decisions of which were more readily available and/or more analytically drafted.

Another question raised concerned the status of the explanatory report. Rajski considered that the comments finally adopted by the Working Group should have the same value, or status, as any other comments by non-members of the Group; to him, the writing of the comments was a supplementary task: what was important was the rules themselves. Furmston, on the other hand, felt that the comments were of considerable importance, not the least because in the course of its deliberations the Working Group often decided to make something clear in the comments. This meant that if the explanatory report was to have only a semi-official or non-official status, then it might be necessary to alter the text of the provisions. Farnsworth also considered the comments to be very important, and added that they would require some sort of general approval. Drobnig stated that the text of the Principles and the comments belong together and Bonell confirmed that the Principles were not intended to be published separately, but always in conjunction with the explanatory report.

III. EXAMINATION OF THE REVISED DRAFT AND EXPLANATORY REPORT ON FORMATION

Article 1

Drobnig had doubts on the opening proviso of Art. 1(1): "Unless the applicable law /or these Principles/ otherwise provide/s/", which he found introduced an element of uncertainty. The proviso made an implied reference to conflict of law rules on form, and he wondered whether this really was necessary - CISG had no such proviso. Why, he asked, should part of the authority of these rules be given up and reference be made to some legal systems?

Bonell reminded the group that at the beginningthis provision did not have the "unless" proviso, but that the first reaction to this had been that it was unrealistic: everyone knew that whatever the parties decided according to the principles would be replaced by the applicable law. He was impressed by Drobnig's argument of the value of the principles being reduced by the proviso placing them at a lower level than mandatory State laws, and thought that this could open a general discussion on the precise scope and nature of the rules. So far the basic understanding had been that the draft rules were not intended to be a binding instrument replacing existing national laws; it was hoped that they would become a kind of "restatement", and that as such they could be chosen as the applicable law - within the limits of the mandatory provisions applicable in each single case. It should not be overlooked that what were being dealt with here were contracts in general, that it was not a question of a particular kind of contract for which one legal system might require the written form while another did not; what had to be taken into account was that according to the applicable law a particular formal requirement might be provided for certain kinds of contracts.

Drobnig observed that mandatory provisions of national law might relate also to any other provisions, not only to the form of a contract: it was a general problem which concerned the nature and limits of these provisions. He suggested that the presently blank provision on the autonomy of the parties in the chapter on general provisions might contain the qualification "within the limits of applicable national law". Furmston agreed with Drobnig that the relationship between these rules and the mandatory rules of whatever system the contract is governed by is a question which ought to be discussed under the general provisions. Wang pointed out that Art. 11 CISG contained a reservation clause which had been the result of a compromise between different legal systems. If the proviso in Art. 1(1) were deleted, it would create difficulties for some legal systems as the paragraph did not contain any reservation clause. Lando agreed with Drobnig, stating that as these rules were addressed to legislators and were also intended to be used by arbitrators when these found themselves having to seek guidance in the

general principles of law the phrase was superfluous. Maskow instead reitterated that it would be unrealistic to omit the proviso; it was necessary, he stated, to allow the applicable law to prescribe the form of a contract because so many different contracts were being dealt with. He considered that the omission of the proviso would deprive the rules of much influence with the international community. The only amendment he would propose was that of adding "or relevant international conventions" before "otherwise provide". Date-Bah had no objection to the proviso being moved to the general provisions, although he felt that the draft should make it clear that form is only one of the things which can be regulated by mandatory national laws. He considered it to be utopian to try to deny the rules of the national legal systems in these principles; it would be unacceptable to countries such as his own to claim that these principles form a system in themselves, although the incorporation of the Principles into the national legal system to assist in interpretation might be accepted. Farnsworth agreed that it would be a better solution if this question were dealt with in the general provisions. A general statement that "these principles do not require writing" could be made.

Drobnig stated that the proposed solution of moving the proviso to the general provisions could be an acceptable compromise and could take care of the concern of the socialist countries for which it was of particular importance. Such a general provision would then be a general reservation covering all the chapters of the Principles, the most suitable place for which would probably be Art. 2, on the autonomy of the parties, and which could be couched in the following terms: "Parties to contracts can agree on the application of these Principles unless the applicable law provides otherwise". Rajski felt that it was premature to decide this question as the character of the general provisions had not yet been established. Drobnig pointed out that as the proviso stands, there is no indication that the rules concerned must be mandatory, and he therefore suggested that this should be clearly indicated in the rule. Bonell suggested that not all mandatory provisions of domestic laws were intended, but that those which could be covered were possibly the internationally mandatory provisions, i.e. those that States claim should be applied whatever the applicable law. Farnsworth considered this to be a different problem.

The proposal that the "unless" proviso be deleted in Art. 1(1) and that in its place a provision with the same import, but including only mandatory provisions, be included in the chapter on general provisions, details to be settled when the general provisions were discussed, was adopted by 7 votes for, 1 against and 1 abstention.

Furmston suggested, and others agreed, that a more elegant formulation of the remaining part of Art. 1(1) would be the following:

> "Nothing in these Principles requires a contract to be concluded in or evidenced by writing".

Drobnig next queried the omission of the second sentence of Art. 11 CISG ("It may be proved by any means, including witnesses") in the drafting of this provision. He felt it to be a supplemental rule which was desirable as well as being necessary for quite a number of legal systems. Bonell explained that it had been omitted because it was felt that it introduced elements of procedural law, which were outside the scope of these Principles. Tallon pointed out that closely connected with this was the question of oral evidence, which in French law is not admitted if the contract is in writing ("prouver contre l'écrit"). A similar rule was the "parol evidence rule" of common law countries. Here this problem was not taken care of, unless it could be considered to be implicit. Crépeau considered that if this were included the result would be the putting together of rules relating to different issues, in this case formation and proof or evidence, but Tallon felt that it might be both a rule of validity and a rule of proof. Bonell suggested that Tallon's point was taken care of, albeit for a special situation, by Art. 18, and especially by Art. 3 of the chapter on interpretation in which reference is made to "all relevant circumstances". He felt that the parol evidence rule and the similar civil law rules relate more to the interpretation of contracts. Lando agreed with the opinion first referred to by Bonell of the provision introducing procedural law, for which reason he felt that the sentence should not be included. Drobnig drew the attention of the Group to the Rome Convention on the Law Applicable to Contractual Obligations which gives up the traditional view that evidence belongs to procedural law: with this convention as precedent he felt that the sentence might well be included here. Farnsworth stated that he believed that the proposition mentioned by Tallon was probably the most important question which could be dealt with by these Principles - 90% of the arbitration cases he had been involved with involved this question. He therefore both favoured the inclusion of the sentence as suggested by Drobnig and suggested that the question of the parol evidence rule also be dealt with.

Drobnig's proposal to add the sentence:

"It may be proved by any means, including witnesses"

was adopted by 5 votes for, 1 against and 5 abstentions.

Introducing a short discussion on the principle involved in the parol evidence rule, Farnsworth stated that although in the United States there had been a lot of criticism of this rule, there was agreement that no parol evidence should be admitted if the parties indicate by their writing that they wish it to be the complete and exclusive statement of their agreement. Crépeau wondered whether such a formulation expressed the rule as French law knows it, i.e. a written contract cannot be contradicted by oral evidence. Farnsworth did not think so, although he stated that this rule could be triggered by a clause which is commonly used in international agreements, i.e. the so-called "merger clause". Furmston pointed out that such clauses were

common clauses also in English domestic agreements, and Maskow confirmed that they were common in international contracts, although he felt that their inclusion here could lead to ambiguity. A disadvantage with such clauses was that they could be interpreted in such a way as to exlude preliminary documents which were often needed for the interpretation of the contract. Furthermore they can only refer to the time of the making of the contract; they cannot exclude any further developments of the contract, and this could be misleading. The problem Tallon had pointed out he considered to refer mainly to the question of how an oral agreement can be evidenced. It was clear that the words "any means" contained in the second sentence of Art. 1(1) which had just been adopted permitted the use of witnesses (as, indeed, was specifically stated) to prove that such an oral agreement existed. The next step was to see if such an agreement would be binding.

Lando considered that any rules which barred parties from agreeing, even orally, on something they had not inserted into their agreement might lead to fraud and hardship - an example of this was the English Statute of Frauds which had provoked more frauds than it had prevented. He considered that even where a clause requiring writing was inserted into an agreement parties should in urgent cases be allowed to agree orally to disregard the clause: any problems could be taken care of by national rules of evidence. Furthermore, experience in arbitration showed that if it can be proved that the parties agreed to disregard the written contract, then this should be admitted. He could see considerable difficulties for a rule such as the one proposed by Farnsworth.

Drobnig stated that contractual merger clauses were useful, but wondered what would be achieved by stating that they are valid. His understanding was that the principle of party autonomy was being proceeded from, which meant that the parties were able to derogate from these Principles or make any other agreement which of course would be valid; it was thus not necessary to say so.

Farnsworth instead stated that in the United States such an agreement would not be valid, indeed, the UCC had a specific provision stating that a no oral modification clause is effective (see § 2-202). He stressed that no oral modification clauses were very important in, e.g. construction and service contracts: where there was competitive bidding contractors always bid low on the assumption that they would later be able to say that they would be able to do a better job if they were paid more. No oral modification clauses were therefore important to control general contractors and any document stating what Lando had put forward would be opposed by many organised groups. Anything subsequent to the conclusion of the contract was not excluded by the merger clause. As to the problem of interpretation, he made reference to Art. 3 of the chapter on interpretation according to which "all relevant circumstances" were to be considered, and for which the merger clause would not work. The elements of a draft provision would therefore be that if the parties have agreed that the writing shall be

complete and exclusive evidence of their agreement, then prior negotiations are excluded with an exception for interpretation. The commentary could explain that the provision is a positive validation of a clause which is common in international agreements and which does not have negative implications with respect to what might otherwise be the rule in the absence of the clause.

In a vote on the substance of Farnsworth's proposal to insert a provision on merger clauses the proposal was accepted by 7 votes for and 4 against. Farnsworth was asked to prepare a version for submission to the Group.

The proposal submitted by Farnsworth read as follows:

> "A contract in writing which contains a provision indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing".

Bonell wondered whether it really was necessary to include the second sentence of the proposal as the problem would be dealt with in the context of the chapter on interpretation. Furthermore the first sentence was clear in that it stated "contradicted or supplemented", which was certainly not interpretation. Drobnig stated that experience from some countries indicated that either contractual or statutory merger clauses gave rise to the problem of whether or not recourse could be had to earlier negotiation for interpretation, and that as this problem had arisen it had been felt necessary to clarify the question; he felt that it was not taken care of in the chapter on interpretation.

Lando expressed a certain scepticism as courts, particularly in the United States, were very clever in interpreting a contract to mean exactly the opposite to what it says, and courts should not be encouraged to do so. Hartkamp could see no difference between "supplementing" and "interpreting" and really did not like the rule at all: in the Netherlands there was a great hosility to such clauses which were evaded as much as possible.

Farnsworth's proposal was finally adopted by 6 votes forand 5 against. As there for the moment was no indication of where it should be placed, unless and until the drafting committee made a suggestion it could be an additional paragraph of Art. 1. The question of the placing of Art. 1 as a whole had already been raised, but had not been decided. Considering that the contract was already made, Maskow suggested that the provision be placed towards the end of the chapter.

As concerned Art. 1(2), Lando, referring also to the comments he had submitted in writing, expressed his scepticism for the provision. He stated that the first sentence was not in accordance with Scandinavian

and German law, and contradicted the informality of para. 1. Furthermore the provision contained two rules - one contradicting the other - the scope of which was unclear. It was not easy to determine when there has been reliance - courts, he stated, would tend to find reliance whenever they wanted to disregard a contract provision requiring any modification or termination by agreement to be in writing. He therefore proposed that Art. 1(2) be deleted.

Date-Bah stated that he was happy with the provision as it stood, as it was a manifestation of pacta sunt servanda and it was only good sense to give effect to the intention of the parties; it was only where this could lead to anomalous results that the qualification contained in the paragraph would come into effect. Maskow felt that the existing text went in the direction Lando wanted. In fact, if it were deleted, in Socialist countries it would not be possible to amend contracts orally. The provision as it stood allowed the modification of contracts in certain, limited, circumstances. Farnsworth instead pointed out that the effect of a deletion would be exactly the opposite in the United States, for which reason it was necessary to state what was wanted.

Bonell instead asked Lando how para. 1 alone could lead to the same result as paras. 1 and 2 together, when the contract itself lays down a voluntary requirement as to form; then the rule cannot but be that the agreement must be observed - pacta sunt servanda. The situation Lando had in mind was that of two consecutive oral agreements, the first being to modify the form requirement clause, the second being an oral agreement to modify the contract. Maskow considered that in order to preclude a party from insisting on the written form the conduct of the parties ought to involve several oral alterations: one single oral act would not be sufficient.

Drobnig felt that following the principle of party autonomy the parties ought to be just as free to modify such a clause as to insert it in the first place. If it could be proved that the parties have a clear understanding of what they are doing, then they should be allowed to honour this oral agreement. He favoured the amendment and considered that it could be set out in the comments that para. 1 has this implication for a subsequent modification or termination of the contract.

Put to a vote, Lando's proposal to delete Art. 1(2) was rejected by 7 votes against and 3 votes for. Thereafter it was decided to vote for Art. 1(2) as it stood, the result being 8 votes for and 3 abstentions.

Crépeau wondered whether Art. 1 allowed the parties to insert a clause into the contract to the effect that "this contract will not come into existence until it has been signed by both parties". Bonell considered that this was an Art. 12 situation, i.e. that it referred to

a condition which had to be fulfilled for there to be a contract. The formality would then be one of the specific terms. Drobnig instead considered that it would not come under Art. 12, as traditionally the concept of "term" related to contents and not to formality. In practice the situation was often different, as parties frequently agree that a contract should be in writing and then never put it in writing. The question was then whether there was a contract or not. If a regulation of this situation was felt to be needed, then it would have to be regulated specially; it would, he considered, definitely not come under Art. 1. Farnsworth agreed that the problem was not properly dealt with in Art. 1(2) and that it was not literally covered by Art. 12, although he was not so sure that it could not be dealt with by some modification or related provision. He felt that this was better discussed in connection with Art. 12, with which Furmston and Tallon agreed.

Specifically with reference to the comments, Maskow suggested that the phrase "thanks to modern means of communication, most transactions are concluded at great speed and without any particular formalities" at the end of (a) be deleted, as writing was a formality and the majority of contracts were in writing; the phrase would thus not correspond to reality. Furthermore, considering also that the external economic laws of the socialist countries often require the written form, he suggested that the comments give a hint that this could be a requirement of the applicable law, but that the applicable law according to these rules would be different from the applicable law according to the rules of private international law.

Article 2

Opening the discussion on Article 2(1), Drobnig stated that, in the light of illustration 1, he wondered whether the rule was a sensible one. What would the situation be if more than one addressee accepted the offer? If, for example, there were ten firm offers then the offeror would be liable for breach of contract for nine contracts. As concerns the offers to the public, Drobnig felt that the public would consider such offers as binding and the chances were that also the courts would regard them as firm, binding offers - anything else would not be acceptable at the present day. If there was a limited supply of whatever the offer referred to the rule should be reversed and offers should be invited. If the rule was meant to have the effect of illustration 1 it would have to be amended.

Lando agreed, stating that illustration 3 gave rise to the same problem: what would happen when the proposal was made to a group where only a limited number can get the contract? Date-Bah considered that this was a matter of interpretation of the offer, of how it was worded. Admittedly the offeror could lay himself open to this type of liability, depending on how he phrased his offer, but it was also possible that the first person who accepts terminates for the others. Furmston pointed out

that according to English law illustrations 1 and 3 were not offers. Farnsworth stated that he preferred illustrations 2 and 3 to 1 which would be governed by CISG in the USA, and which did not add much to 2 and 3.

Crépeau stated that the number of people to which it was made was irrelevant to the concept of an offer, which could be defined as a firm proposal made by one party to another with a view to entering into a contract and containing the essential elements of the contract to be entered into.

Bonell made the consideration that the most critical observations appeared to be made with reference to para. 2 (offers to the public). This was interesting as the original proposal had been to adopt the opposite rule, i.e. that offers to the public be considered offers and not invitations to make offers, which in actual fact corresponded to the provisions of the Italian Civil Code. In view of the strong tendency to the contrary the CISG solution had been adopted. He considered that this was one case where any departure from the CISG model should be carefully considered as it might engender confusion.

Furmston wondered whether it was necessary to have the same rule for sales of goods and other contracts as there was a difference between sales contracts and other contracts: it was difficult to imagine it being possible to offer goods to the whole world. Maskow stated he was satisfied with the provision as it stood, and also Farnsworth was not unhappy with the text, although he had problems with the illustrations. Date-Bah expressed his surprise at the discussion, because his recollection of the discussions at Vienna was that the provision had been introduced because the civilians had problems with the notion of offers made to the world, with which instead the common lawyers were acquainted.

Farnsworth did not consider it to be necessary to have two paragraphs; he suggested that if the offeror in a case such as Drobnig was referrring to added the words "subject to prior sale" to his communication (for the common law it would not be an offer) he would only be bound by one acceptance. The sales situation was, however, already governed by CISG; the substantial problem for service contracts concerned what happened in connection with auctions for services, bidding contracts, where there was no offer as there was no indication of any intention to be bound.

Maskow had strong hestitations as to whether offers to the public should be considered binding: if an offer is made to the public it is most likely that it is impossible to satisfy all acceptances, and there should therefore be a certain assumption in favour of such a document not being an offer. There must, he stated, be a certain freedom for a person making an add not to be bound by all acceptances.

Bonell stated that in Italian law offers to the public are as a rule considered to be veritable offers, provided that they are sufficiently definite, e.g. that they define the quantity available. At times, such as in the sale of a library, "first come, first served" was an implied condition. Farnsworth stated that in the common law "first come, first served" would not be read into the offer, even if this were the case in French and Italian law. What was important was, however what the situation was in the bidding case, as here what was under discussion was not the sale of 100,000 shirts or of a library. In the common law the invitation to place bids would not be considered an offer. Crépeau pointed out that the case Farnsworth was referring to was an invitation to treat, an "appel d'offre", and not an offer; it does not come under Art. 2 as it lacks one of the essential features of an offer, which is the price. If the communication stated "lowest bid accepted" it would be an offer as it would be sufficiently specific, but not because it was addressed to one or ten specific persons. He therefore proposed that the reference to a proposal being "addressed to one or more specific persons" be deleted.

Bonell considered that a consequence of the proposal to delete the reference to specific addressees would be that the definiteness of the offer and the intention to be bound would be the tests to determine whether a proposal to conclude a contract was an offer or not. It was, he stated, almost impossible to find more definite criteria for this - ULIS referred to "all relevant circumstances". Date-Bah stated that if the basic concept such as illustrated by Crépeau were acceptable to the civilians, then it was acceptable also to common lawyers. Lando also considered that Crépeau's proposal was good, and that it could be put in the comments that the circumstances indicate whether there is a firm offer or not. Farnsworth agreed with Crépeau's suggestion as regarded the text, although he felt that it placed an enormous burden on the person who was writing the comments, as apparently in some civil law systems a bidding case would not be considered an offer; this meant that there would have to be two different explanations as regards bids leading to the same result.

It was felt that the deletion of Art. 2(2) was a logical consequence of Crépeau's proposal to delete the reference to one or more specific persons; the deletion of both was therefore voted at the same time, the result being 9 for and 2 against. Maskow, however, reserved the right to propose a new para. 2 in future, as under certain circumstances a proposal may have the characteristic features of an offer but still not be an offer.

As far as the comments were concerned, it was agreed that substantial redrafting would be necessary, although Bonell pointed out that in substance there had been no great changes. Furmston reitterated the need to avoid sales examples, but Drobnig pointed out that it was unlikely that all States of the world would become parties to CISG, which meant that there would still be sales contracts with non-member

States. He thus considered that a certain number of sales examples would be in place. Bonell suggested that sales transactions not covered by CISG could be used (e.g. illustration 5).

Article 3

Opening the discussion on Article 3, Crépeau raised the question of the meaning of the word "reaches", which had been discussed at great length during the revision of the Québec Civil Code. Maskow queried the very need to have the article in view of the fact that the whole system had changed with the modification of Art. 2. What, he asked, was the meaning of "reaches" when public offers were being considered, and how could these be withdrawn? Bonell felt that the proper place to discuss this question would be Art. 4, as it states that "an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance", which would indicate that there might here be a necessity to specify that in the case of a veritable offer to the public it would be sufficient for the offeror to publish the revocation of the offer in the same way as the offer itself. Art. 3, he considered, dealt with something both logically and legally different, i.e. the basic principle was that an offer becomes effective when it reaches the offeree; it thus followed that until it reaches the offeree, the offer is ineffective legally speaking and the offeror remains the master of his "offer", i.e. he can do what he pleases with it. Drobnig suggested that how Art. 3 applies to offers to the public might be mentioned in the comments; it would be sufficient to say that an offer to the public reaches the public if it is made public, and that until it is made public it can be revoked.

Art. 3 was adopted as it stood by 9 votes for and 1 abstention.

New article on negotiations in bad faith

As regards the comments to the article, Farnsworth stated that, rather than in the comments to Art. 3, it would be useful under Art. 4 to have a statement to the effect that the subject of the breaking off of negotiations should be dealt with under the provision on good faith, with a cross reference to Chapter I, Art. 3. Bonell instead considered that it would be useful at least to hint at the problem also under Art. 3, considering in particular modern negotiations which often take place round a table, with no definite offers and acceptances, but rather with a kind of "circular" offer and acceptance. Under Art. 4 it would be too late to draw the parties' attention to this question. Furthermore the consequences could be different: once an offer has reached an offeree it may or may not be revocable, so it is no longer a question of "breaking off". If the offeror revokes despite the fact that in accordance with Art. 4(2) he would not be able to do so, the consequence is that there is a contract notwithstanding the revocation; if he breakes off

negotiations before the offer reaches the offeree and this is contrary to good faith, although there is no contract, liability for negative interest, or reliance interest, could become relevant.

Lando stated that Arts. 3 and 4 deal with the traditional conclusion of contracts, whereas the model illustrated by Bonell in comment (c) was completely different. To cater for this situation he had, in his written comments, proposed a draft rule, which could cover also letters of intent, dealing with damages for the breaking off of negotiations:

> "If, when entering into negotiations for the conclusion of a contract a party knows or ought to know that the negotiations will cause the other party to incur expenses or to lose gains, the first party will be liable to the other party for the said expenses and losses, if the first party omits to conclude a contract, and it is shown that
> (1) the first party was never willing or able to conclude the contract, or
> (2) he did not inform the other party immediately when he knew or ought to have known that he did not intend or was unable to conclude the contract, or
> (3) otherwise broke off negotiations in bad faith."

Tallon reasoned along the same lines, stating that while he agreed with Lando on the substance of comment (c), he felt it was in the wrong place as it was not a question of offer but rather of negotiation. He felt that there should be a rule on this. Rajski agreed that it was necessary to think of the precontractual stage of negotiations, and also saw the link with Art. 14 as a part of the duty of confidentiality was precontractual. Maskow considered that the question of negotiations raised two points: firstly, that of precontractual obligations, for which he favoured a solution along the lines indicated by Lando and felt that it should not be a question only for the comments; secondly, that of whether the parties were bound to proposals they make during negotiations - the Algerian Civil Code had a special provision on this (see Art. 64). On the contrary, Date-Bah considered that comment (c) was best moved from the comments on Art. 3 to those on Art. 4, as precontractual obligations have to start from a clear point, and the time the offer is made would be such a clear point.

Furmston stated that this problem could actually arise before anyone has made an offer, and in fact commonly does do so. In England this was the case with house purchase contracts where the first person who completes the contract gets the contract (the so-called "contract race" situation). In such a case there is no offer and acceptance.

Tallon considered the possibility of having a general article on the duties of the parties during negotiations, including such matters as confidentiality, the problem of information in general, culpa in

contrahendo and withdrawal. A possibility was to have an article on the good faith principle which first stated that it applied during the negotiation period, and then gave examples.

Maskow agreed with Tallon that expenses, losses and damages should not be mentioned expressly, that a general obligation of the contracting parties should instead be provided for and reference be made to the chapter on non-performance. Some conditions, such as "ought to have known" were too hard; the rule must be more flexible in order to cover also normal parallel negotiations, which are costly and obviously cannot be prohibited by these principles - preparation bids were costly, he stated, and should not be hampered by the threat of damages.

Bonell stated that the inclusion of a special provision on the precontractual situation in the section on damages could be envisaged, but his own preference lay with an explicit statement on the recoverable losses in the provision laying down the duties of the parties during negotiations. Rajski agreed, but felt that this introduced difficulties as to the placing of the provision: it could hardly be placed in the chapter on formation as it dealt with damages and with the stage preceding the formation of the contract. The ideal solution would be to have the provision either separated from the chapter on formation or at its very beginning.

Wang raised the point of the role of competition in the negotiation of international commercial contracts in connection with the breaking off of negotiations in bad faith. He stressed the importance of guaranteeing the competitiveness of different partners. Date-Bah also stressed the need to retain the ability for robust competition.

Farnsworth expressed a certain difficulty with the fact that what was referred to was the breaking off of negotiations, as most cases concerned negotiating in bad faith, and in fact he would consider the examples given by Lando as examples of negotiating in bad faith: it was first and foremost the inducement to negotiate on false pretences which was done in bad faith. Having said that, he agreed that the two categories given by Lando would cover most cases. Admittedly, there was a recent Dutch case where the court had come to the decision that after a certain point you cannot break off negotiations, which came very close to saying that you must continue, but this was undoubtedly an unusual decision.

Drobnig had reservations as regards any rule on this point, as he could see that there might be cases of abuse of rights. He thought the point raised by Wang was an important one, as a party who negotiates must be free to break off negotiations - this was a principle which should be spellt out, with the criteria given in the proposal being set out as highly qualified exceptions.

Farnsworth also suggested using paras. 1 and 2 of Lando's draft as illustrations of negotiations in bad faith. He illustrated his point by referring to a Swiss case: the manager of a branch of a Swiss bank had negotiated an agreement alone; at the end of 6 months he disclosed that he could not sign the agreement himself, that the head office of the bank must do so, and the head office refused to do so. The court stated that the bank manager had negotiated in bad faith, and estimated that four months had been lost. In this case it had been relatively easy to estimate how much money had been lost, but in most cases it was not possible to prove lost gains. Farnsworth therefore suggested that nothing be said of the breaking off of negotiations, nor of lost gain; terminology such as negative interest could be used.

Wang wondered how bad faith in negotiations could be defined, and Date-Bah stated that it was part of the skill of the market place to be able to tell who is not serious. He felt that a more general doctrine such as the one suggested was likely to lead to uncertainty.

According to Bonell what was at stake was not so much the breaking off of negotiations as the negotiations themselves being conducted in bad faith. He suggested that the whole approach be reconsidered, and the basic question of the admissibility of parallel negotiations be addressed. As the general feeling was that in principle they were admissible, this should be stated, with the proviso that if a party knows that he does not intend or that he is unable to conclude the contract then he should be prevented from negotiating. Lando pointed out that it was not only a question of parallel negotiations; there might be other negotiations. Basically, what he wanted to see was a provision stating a general liability for continuing negotiations in bad faith illustarted by two examples.

Drobnig considered that such a provision would not be acceptable without a reference to competition, nor would it be acceptable if lost gains were included in the second part of the rule - this would decidedly go too far. Date-Bah also felt that damages should be limited to reliance interest only.

Three draft provisions on negotiations in bad faith were ultimately proposed, one by Wang and Maskow, a second by Drobnig and a third by Farnsworth, Furmston and Lando.

Maskow's and Wang's proposal which was formulated as follows:

> "Taking into consideration the principle of fair competition, negotiations shall be conducted in good faith, otherwise the party who is responsible for breaking off the negotiations shall be liable for expenses incurred to the other party."

Maskow stated that the basic idea behind it was similar to that contained in the two other proposals. A further characteristic feature

was that it referred only to expenses. Furthermore it only spoke of "good faith" without making any attempt to define it.

The proposal of Farnsworth, Furmston and Lando (FFL) read as follows:

"Negotiations in bad faith

(1) A party is not liable for failure to reach an agreement.
(2) However, a party who has negotiated in bad faith is liable for the losses caused to the other party.
(3) A party negotiates in bad faith if he enters into or continues negotiations knowing that he is not able or willing to make an agreement with the other party."

The article started off by stating a general rule which was then qualified by examples of negotiating in bad faith - clearly a court would not be prevented from developing what was stated in the provision.

Crépeau wondered whether "if he enters into or continues negotiations" were only to be illustrations of negotiating in bad faith, or whether they were to be the only two instances of negotiating in bad faith. If they were intended as illustrations, he suggested that "among other things" be added. Rajski agreed, suggesting "in particular". Furmston confirmed that they were only intended to be illustrations, although Lando added that he could not think of any other instances. Tallon therupon suggested the feeding of wrong information to the other party during negotiations, and Bonell suggested the non-disclosure of reasons for invalidity of the contract.

Wang stated that he was not in favour of a definition of bad faith. There were, he said, many speculative factors in international trade - often a party did not know whether or not he would be able to make the agreement. Furthermore, a party might initially be willing to conclude a contract, and still later on break off negotiations; e.g. A negotiates with B, C comes along with a lower price and A thereupon begins negotiating with C. The more they negotiate, the more problems come up, with the result that in the end C's offer turns out to be less advantageous than B's. Should A then be liable for breaking off negotiations with C? And what if A discovers that C is nothing more than a so-called post-box company? He suggested that it would be better simply to refer to the "party who is responsible for breaking off" negotiations, which might be either party. He also suggested that it would be better if only expenses were dealt with.

Date-Bah suggested that the opening words of para. 1 of the FFL proposal be amended to read "conformably with the parties' right to negotiate freely", which would incorporate the Wang/Maskow proposal. He considered para. 3 to be good as it stood.

Bonell stated that he would welcome a qualification along the

lines of free competition or of the Date-Bah formula. He was impressed by the argument put forward by Wang, who evidently was thinking of a very broad concept of bad faith in negotiations. He found Wang to be correct to warn the Group from entering into details, as once such details were entered into, then why should not other instances of precontractual liability be considered, such as inducing in error, misrepresentation, in order to waste the other party's time and to cause him expenses, or the duty of confidentiality. He suggested that para. 3 of the FFL proposal could possibly be amended to read: "if, among other things", then with other instances in line with Wang's suggestions taken into consideration.

Drobnig's proposal read as follows:

> "(1) A party who has negotiated in bad faith by entering into or continuing negotiations although knowing that he is not able or willing to conclude a contract with the other party is liable to that party.
> (2) The other party is to be reimbused for the expenses it has incurred due to the first party's misconduct. The provisions of Chapter VI Arts. 23 and 24 are applicable."

Introducing his proposal, Drobnig stated that it did not contain a general principle on the freedom of negotiating, which he did not consider to be necessary, although he would be willing to have it expressed as in the FFL proposal. Para. 1 of his proposal attempted to state in a shorter form what paras. 2 and 3 of the FFL stated. His proposal deviated from the FFL proposal in that it limited reimbursement to the expenses caused the injured party. Another deviation was his addition of the words "due to the first party's misconduct", in consideration of those cases where both parties entered into negotiations able and willing to conclude a contract, but later could not do so. In such cases the claim for compensation could only relate to the second phase of the negotiations, i.e. after it became clear that the party could not enter into the contract. He had also inserted a reference to the mitigation of damages (Chapter VI, Arts. 23 and 24), so that any contributory negligence could be taken into consideration.

Tallon questioned the authority of the principles to deal with questions outside the contract. They could give guidelines to determine what good faith is, but they could not give rules on compensation as that was tortious liability and the power of the judges to award compensation could not be limited. To Bonell's objection that the application of the principles, whatever their ultimate format, should not be made dependant on the existence of a valid contract, he stated that here it was not a question of a contract being valid or invalid, but of there being no contract at all.

Drobnig reflected that the point raised by Tallon could be raised as regards the whole of the chapter on formation, as formation

came before the conclusion of the contract. One basis for the application of the principles was the agreement of the parties, but it was not the only basis. He also felt it could be a general model for arbitrators. Rajski agreed, stating that he had to admit that in the precontractual field the lex mercatoria had achieved certain solutions, for which reason he supported the inclusion of provisions relating thereto.

Hartkamp stated that the focus should be on what was important, i.e. the breaking off of negotiations. If this were done it was easy to imagine that also losses would have to be paid, including the reliance interest. He was opposed to restricting the damages to expenses. He felt that there was not much difference between lucrum cessans and expenses, as the negative interest could mean that a person is allowed to claim damages because he did not make it in time to conclude a contract with someone else, in which case also the loss would have to be paid, so why not include also the positive interest?

Lando agreed with Hartkamp as regards losses. There were, he said, a variety of different situations: first that of the expenses caused, which all agreed should be compensated; then there was the question of the losses a party suffers as a result of a deal he could have made and did not (which should not be compensated for); and thirdly, there were losses caused as a result of the business a party could have made in the time he negotiated the contract, which, again, should be compensated for. He himself had also first focused on the breaking off of negotiations, but had been convinced by the arguments put forward by Farnsworth in particular, that it was more a matter of negotiating in bad faith. He was in doubt as to the exact meaning of the principle of fair competition, so he was hesitant as regards the Wang/Maskow proposal. As regarded Date-Bah's suggestion to begin para. 1 with the words "conformably with the parties' right to negotiate freely", he stated that it was quite true, but that it might not be necessary. An attempt had been made to accommodate the concerns expressed by stating in para. 1 that "a party is not liable for failure to reach an agreement". He found that an extension of the list of examples would be difficult to draft, and that therefore only the two most important cases should be included. He expressed his willingness to add "among other things" or "in particular" after "if" in para. 3.

On the question of damages, Maskow considered it advisable not to extend the provision too much as it was a novelty at international level. The presupposition, he stated, was rather vague: a party negotiates in bad faith, and this finally leads to a disruption of negotiations. It practice it was difficult to find out whether this was the case. The uncertainty would become even greater if a party were to be allowed to claim damages, because in most cases the damages would be fictitious, it being difficult to make an assessment by rational means. He therefore felt that the possibility of recovery should be restricted to those factors which cause costs and which are overseeable, i.e.

expenses.

Bonell instead felt that it would be meaningless to restrict damages to expenses, because the most harmful situations were those where the party in bad faith would negotiate in such a way as to make the expenses small and the losses great. Furthermore, it should be kept in mind that mitigation rules could also be considered applicable. Thus, he favoured the proposition as it stood, with the addition "in particular".

Hartkamp stated that he could see no difference between computing damages when negotiations were broken off one day before the conclusion of the contract or for non-performance one day after the conclusion of the contract. Three of four cases had been decided in the Netherlands, and they all focused on the breaking off of negotiations.

Farnsworth considered that if only expenses were allowed, not only would it cause difficulties for the courts, but many lawyers would not bother to take the time to mitigate such a small sum. He considered it to be right to indicate other restrictions on speculative damages, but if compensation for lost opportunity were not allowed where there was convincing proof, the only recovery making it worthwhile to bring a claim under this provision would be denied.

In an orientative vote of preference as regards which proposal should be the basis for discussion and decision, the proposal presented by Farnsworth, Furmston and Lando was adopted by 10 votes for.

Following Date-Bah's proposal to add "Conformably with the parties'right to negotiate freely" to the beginning of para. 1, the Group adopted the following formula by 10 votes for, 1 against and 2 abstentions:

> "A party is free to negotiate and is not liable for failure to reach an agreement".

Hartkamp next suggested that the words "or broken off negotiations in bad faith" be inserted after "negotiated" in para.2. The proposal was adopted by 8 votes for, 2 against and 2 abstentions.

The amendment Maskow had suggested of referring to the "expenses" caused to the other party instead of speaking of "losses" was rejected by 8 votes against, 4 votes for and 1 abstention.

The amended paragraph 2 was then voted upon as a whole, and was adopted by 8 votes for, 3 against and 1 abstention.

In view of the amendments made to para. 2, Farnsworth suggested that the beginning of para. 3 be modified to read:

"It is bad faith, in particular, for a party to enter into or continue negotiations /.../".

The proposal was adopted by 8 votes for, 2 against and 3 abstentions.

The Group then voted on the article as a whole, as modified by the previous votations, which at this point read:

"(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party who has negotiated or broken off negotiations in bad faith is liable for the losses caused to the other party.
(3) It is bad faith, in particular, for a party to enter into or continue negotiations knowing that he is not able or willing to make an agreement with the other party."

The article was adopted by 8 votes for, 1 against and 3 abstentions.

Article 4

Introducing Article 4, Bonell stated that it had been taken literally from CISG. Lando recalled that it had been a very controversial provision in Vienna. He himself did not consider it to be a good principle, as offers should be binding. Even if Art. 4(1) remained as it stood, the qualifications in Art. 4(2)(a) were unclear: "whether by stating a fixed time for acceptance or otherwise" could, in fact, be interpreted by common lawyers to mean that stating a fixed time for acceptance is not per se an indication of irrevocability, whereas civil lawyers may hold the contrary. It was, he stated, important for the parties to know when a contract is made. This article (Art. 16 CISG) had been a stumbling block for the Scandinavian countries in Vienna, and had caused them making a reservation excluding the applicability of the whole of Part II of the Convention. It was possible to do one of two things, he stated, either state clearly that "offers are binding", or stick to para. 1 and make para. 2 a little clearer by, e.g., using a formulation proposed by Eörsi: "if the offer states a fixed time for acceptance or otherwise indicates that it is irrevocable".

Maskow stated that he would regret it if CISG were deviated from - unless there had been new developments since the adoption of CISG which would justify such a deviation. He considered that the authority of these principles was not strong enough to overcome the authority of CISG - most contracts were sales contracts and the practices developed for sales contracts would clearly influence other contracts. He therefore felt that CISG should only be deviated from as regarded what was specific to sales contracts.

Both Wang and Farnsworth agreed with Maskow. Farnsworth stated that in the USA the one major question in relation to the UCC was when is it a sales situation and when is it not. There were important rules in the UCC which could not be extended by analogy to other cases without legislation, and one of these rules was that which was comparable to Art. 4.

Drobnig considered the remarks made on the precedental value of CISG to be important, although he felt that they were too political and too positive, as the result would be to freeze the law as of CISG, which could not be the purpose of their work. Any new developments must be taken into consideration. Furthermore, he felt that if a point was controversial it was good to reopen the debate, as a better insight might be gained from the exercise: the specific value of these principles would be enhanced if they gave new solutions based on better insights and did not just limit themselves to copying CISG.

Bonell not only agreed with the view that this Group should not be bound by the CISG text, but also with the view that new developments should be taken into consideration, and with that of not sticking to purely political solutions which could, perhaps, be reconsidered. However, he wondered whether this really were the case with Art. 4: he did not think that there had actually been any new developments. If the Group did decide to reopen discussion on this point, he stated, a distinction should be made between Lando's two proposals: it was one thing to reopen the question of principle as to whether an offer is to be considered revocable or irrevocable, and quite another to see whether merely the wording of para. 2(a) should be amended.

Date-Bah instead considered Art. 4 to be a compromise carefully constructed at Vienna between those systems which regarded offers as being revocable and those for which they instead were irrevocable. Difficulties would be caused if the mere fixing of time were to be considered as having the implication that an offer was irrevocable.

Farnsworth stated that the ambiguity was voluntary, as in common law it was possible to state a time after which the offer lapses without the offer as a consequence being considered irrevocable during that period. Considering the problems they gave rise to, he proposed to delete the words "whether by stating a fixed time for acceptance or otherwise" in Art. 4(2)(a), leaving the simple condition "if it indicates that it is irrevocable", and then to deal with this question in the commentary, explaining the different understandings of this point in the common law and German legal systems.

Bonell felt attracted to the simplification proposed by Farnsworth, on condition that the comments drew the attention to the underlying problem. To a certain extent it in fact already did so, in that comment (b) stated that "The indication of a fixed time for acceptance by itself may, but need not necessarily, amount to an

implicit indication of an irrevocable offer".

Drobnig stated that the best solution would be to say clearly that the indication of a date would indicate irrevocability until that date arrives, leaving the question of any other indications of irrevocability open.

Furmston raised the question of the meaning of "fixed time": if an offer specifies that it is "irrevocable for thirty days", then it would be irrevocable, but if it merely stated that it "lapses 1 July" then he was not so sure - in the common law it would not be irrevocable. He felt that a presumption was needed in one way or the other in order to operate the rule. He himself favoured the deletion of the phrase as the provision would read better, and the decision would be left to the judges or arbitrators.

Lando remarked that he did not think that his proposal changed so very much; when he had read this article he, as Crépeau, had concluded that the present text stated what he was trying to put in a clearer form in his proposal - it was only after reading the comments, which reflected the history of the provision in CISG, that he began to have doubts. If his proposal were rejected, he would prefer to keep Art. 4(2)(a) as it stood to Farnsworth's version.

Voting on Art. 4 as it stood, the provision was adopted by 7 votes for and 5 against.

Lando next proposed to delete the words "Until a contract is concluded" in Art. 4(1), as he did not find it to be correct in view of the contents of Art. 6(2). Bonell also found the words to be superfluous as they were obvious, and Crépeau stated that he would favour the change as , in the process of determining the sequence of events leading to the conclusion of a contract, Art. 4 occupied an intermediate position.

Drobnig, however, stated that he could not agree to the change as contracts were not only concluded by the dispatch of an acceptance, but also orally by an immediate agreement or by doing an act, and in these cases the time of acceptance of the offer and of the conclusion of the contract may differ from the time indicated here. Farnsworth shared Drobnig's concern and illustrated his point by giving as an example a situation where A orders goods, B ships the goods and mails a letter of acceptance after he has shipped the goods. The act of shipping would itself be sufficient even if the letter arrives late, and the offer cannot be revoked, even if an acceptance has not been dispatched, because the act of shipping the goods amounts to the conclusion of the contract. Saying that the offer may be revoked until the dispatch of the acceptance would amount to saying that the offer may be revoked after the goods have been shipped.

The Group thereupon came to the conclusion that this was the problem that the drafters of CISG had wanted to solve by the addition of the words "until a contract is concluded".

Put to a vote, the proposal to delete the opening words of Art. 4(1) "until a contract is concluded" was rejected by 6 votes against and 5 votes for.

With respect to the comments Lando referred to the sentence "The indication of a fixed time for acceptance by itself may, but need not necessarily, amount to an implicit indication of an irrevocable offer" in comment (b). He felt that the comments should say what was in the text, i.e. that offers were irrevocable.

Date-Bah instead felt that it was not possible to put such a definite statement into the comments as there were two possible views as regarded whether or not the fixing of a time for acceptance made the offer irrevocable. Here there were the same differences as there had been in UNCITRAL, and the comments, reflecting this, gave a certain perspective to the question. Farnsworth agreed, stating that it was not possible to say that it was an irrevocable rule. What could be said, was that in common law countries the phrase "lapses in thirty days" would not be regarded as irrevocable, but that nevertheless in a great part of the commercial world the fixing of a time for acceptance would indicate irrevocability.

Crépeau suggested that the comments should reflect the discussions and any differences of opinion as to the meaning of the text.

Drobnig instead stated that the comments should explain what the text means, and the meaning of Art. 4(2)(a) was clearly that the fixing of a time for acceptance indicated the irrevocability of the offer. He could see no other solution. How the common law merchants interpreted the text was not relevant - here, what was being dealt with was not the common law but the text of these principles. The comments should say that the fixing of a time for acceptance made the offer irrevocable; CISG was different, and the comments should point this out.

Bonell stated that he could see Drobnig's point, but that he would hestitate to deviate from the comments on CISG as the two texts were identical. He felt that it would be a useful exercise for the comments to make clear what "fixed time" meant, as there was a great variety of ways in which the time for acceptance could be fixed. The comments would have to be changed, at the very least so as to incorporate the qualifications suggested by Farnsworth.

Maskow felt that the commentary would be misleading if it followed the direction indicated by Drobnig as, no matter what the commentary said, the provision would be interpreted differently in

different countries, for which reason it was important for the commentary to indicate that it could be understood in different ways. Another argument in favour of this solution was the fact that the commercial world was divided between those that would consider an indication of time to indicate irrevocability, and those that would not; thus, the different possibilities should be taken into consideration.

Furmston stated that he had no objection to the comments stating that the provision was ambiguous. Furthermore, in view of the fact that this text was identical to that of CISG, he did not consider it to be possible for this forum to determine what the provision meant - the same wording could not have two different meanings. Lastly, he had no difficulty in reaching the opposite conclusion to that reached by Crépeau, Drobnig and Lando when reading the text; it was, he stated, quite possible to read the text so as to give no effect to the words within the commas.

In the end, it was agreed that the discussions ought, in some way, to be reflected in the commentary.

Article 5

With reference to Article 5, Drobnig wondered why the provision refered to "any offer" instead of "an offer". A possible explanation, he suggested, might be the fact that even an irrevocable offer becomes void by rejection, and the drafters might have had this in mind when drafting the provision, but as this was clear anyway he could see no need to specify that the provision referred to "any offer". Consequently also comment (c) should be modified to take this amendment into consideration.

Farnsworth compared the text of Art. 5 with Art. 17 of CISG which stated that "An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror". It was presumably to cover the words "even if it is irrevocable", which had been omitted in Art. 5, that the "an" of CISG had been changed to "any".

Drobnig's proposal to change the "any" into "an" was adopted by 10 votes for, with 2 abstentions. It was agreed that comment (c) should be modified.

No other comments were made as regards Art. 5, which was thus considered to be adopted.

Article 6

Opening the discussion on Article 6, Furmston stated that he was not quite clear as to the distinction between "silence or

inactivity" - he would have understood "speach" and "inactivity being contrasted, but he did not understand why one would want to contrast "silence" and "inactivity". Drobnig stated that the two words referred to different modes of acceptance - oral or written or by sending the goods; the term "inactivity" would refer to the latter. Farnsworth suggested a case where A writes to B saying "I will send you the goods, and if you don't send them back you will be taken to agree to buying them". B writes back saying that he does not accept, but does not send the goods back, putting them aside instead. Farnsworth then assumed that this would not amount to an acceptance as B was not silent although he was inactive. Furmston pointed out that in American and English law there were certain circumstances in which doing nothing constituted an acceptance - in the last five years there had been ten cases on this matter in the UK, and it was a hotly debated question.

Crépeau wondered what the situation was as regarded prior negotiations - in Québec, if there had been prior negotiations which had gone a certain way and which could be considered to constitute a usage or a practice, then at the tenth or twentieth order silence could be deemed to be an implied acceptance. Bonell stated that the words "in itself" strove to achieve precisely this result, and maybe comment (c) already expressed this idea with sufficient clarity.

Wang questioned the omission of the words "by performing an act, such as one relating to the dispatch of the goods or payment of the price" from this article, which instead were included in Art. 18(3) CISG. If these words were omitted, he asked, to what kinds of acts would the provision be referring? Bonell stated that the words in CISG had been omitted to accommodate the broader scope of these principles. In the absence of these words, the question arose of whether the performance of a secondary duty could amount to an acceptance. Personally, he felt that it would depend on the practices, on possible courses of dealing, and/or on applicable usages. Why, he asked, should it be excluded that a particular act of performance, even if secondary in nature, could be considered an acceptance in conformity with an established course of dealing?

Lando felt the provision to be unclear, and suggested a phrase such as "performing obligations under the contract", in view of the fact that it was not possible to speak only of the sales situation.

Wang instead suggested the addition of the words "such as one relating to a material term of the offer" after "performing an act" in para. 3. Drobnig asked whether what Wang intended was that the act should relate to an essential term of the contract, which Wang confirmed. Maskow considered Wang's point to be well taken, stating that if CISG were considered, the examples (dispatch of the goods or payment of the price) relate to essential obligations of the parties. In order to reach the same result here the examples given in CISG might not be suitable and something more abstract, such as "such as one relating

to the main/essential obligations of the parties" might be needed. Bonell asked Wang if he agreed that the introduction of a phrase such as the one he had suggested would more or less destroy the whole opening phrase, and then what would the operating conditions of para. 3 be? So far the provision stated "if, by virtue of the offer"; thus, in a situation such as where the offer states that the offeror will consider a certain act to be an acceptance and that the offeree should not bother to send a notice, how would it be possible to have further qualifications? The same would apply to a course of dealing and to usages. Problems could arise as in practice a minor act might be considered an acceptance.

Furmston felt that such a change would deprive the clause of most of its use, as it presently covered the situation where an offer could be accepted by an act which had no relation to the performance of the obligations. He saw no reason why an offer could not be accepted by, for example, the hanging of a flag outside a window.

Wang's proposal to add wording to the effect that the act must relate to an essential term of the offer was rejected by 6 votes against, 2 votes for and 3 abstentions.

Drobnig next proposed that Art. 6(2) be split into two paragraphs. The article would thus contain a first paragraph on the mode of acceptance; a second paragraph containing what presently was the first sentence of para. 2 on the time when an acceptance becomes effective, and a third paragraph with the present second sentence of para. 2 and para. 3, which both concerned the time limit fixed by the offeror. This would make matters clearer also as regarded the cross reference at the end of para. 3, which did not refer to the first sentence of para. 2. Furthermore, Art. 8 dealt with the time fixed for acceptance; thus as the second and third sentences of para. 2, para. 3 and Art. 8 dealt with a special aspect which was distinct from other problems dealt with, they might be considered together. He suggested that the final formulation be left to the drafting committee, and this met with the approval of the other members of the Group.

Lando felt that the reference to an oral offer was strangely hidden at the end of para. 2, and pointed out that in Scandinavian law it was a separate article. He felt it should be placed in a more prominent position, and suggested that the drafting committee consider also this point.

Crépeau felt that also the reference to "silence or inactivity" was strangely hidden at the end of para. 1, and suggested that it could be separated from the rest of the paragraph but that, again, this was a matter which could be looked into by the drafting committee. It was so agreed.

Article 7

Opening the discussion on Article 7, Lando wondered what would happen if, despite the fact that there was a materially different acceptance, which would mean that there was no contract, the party started to perform on the basis of the contract. He felt that the idea was not very clearly expressed by saying that the situation was covered first by Art. 7 and then by Art. 6.

Bonell drew the attention of the Group to two points: firstly, there was the question of the definition of the material character of the alteration, which was one which was raised in the comments under (b), and secondly, there was the question of the precise relationship between Arts. 6 and 7.

Drobnig stated that Arts. 6 and 7 could easily be combined, and that he would think it important that the comments of Art. 7 indicate that in the cases described acceptance can be achieved by performance in accordance with Art. 6.

With respect to Art. 7(3), Bonell wondered whether this were not the time and place to reconsider the whole paragraph, and possibly also to consider deleting it. The crucial issue was when the terms materially alter the offer. He felt that this would depend on the circumstances of each single case. As long as sales contracts were concerned, the price, payment, place and time of performance, the extent of one party's liability to the other or the settlement of disputes were important in the context of each transaction. On the contrary, with respect to contracts in general there was a great variety of possibilities, i.e. some elements might be of greater or lesser importance as the case may be. He himself would prefer the deletion of para. 3, with the result that in some cases the modification of a certain term might be considered a material alteration, whereas in others it might not, or vice-versa.

Rajski supported the deletion of para. 3, and Maskow added that whether a change is material or not does not depend on the subject matter but on the degree to which, in the context of the whole, it differs from the original proposal. As the provision stood, in many cases it would lead to solutions which do not correspond to commercial practice.

Drobnig referred to a case where the buyer had offered payment 30 days after delivery, whereas the seller had requested $^1/_3$ of the payment at once, $^1/_3$ on delivery and the remaining $^1/_3$ 30 days after delivery, and he considered this to be a substantive alteration of the offer. He could not imagine any contract in which an alteration of the terms of payment would not be material. He felt the same to be true of the other examples given in para. 3. He therefore felt that the situation would be less clear if the paragraph were deleted.

Bonell disagreed with Drobnig as the list was not exhaustive and was sales-oriented - this was particularly true as regarded the price: a change in the terms of the payment was not always a material alteration. He felt that para. 2 should stand as it was, whereas para. 3 should be deleted; if it were not, then consideration must be given to the fact that these rules were intended to apply to other contracts, and not to sales contracts, meaning that the list would have to be lengthened. He insisted that everything depended on the circumstances of the case.

Maskow stated that the assumption behind the provision was not that anything was imposed upon the other party, but that the other party had the possibility to reject whatever was modified. In these circumstances it was possible to imagine cases where the modification related to the case but was not important. For example, conditions of payment normally include the documents necessary to get payment; if there is a change in the documents (number of copies, promissory note instead of an insurance certificate, etc.) then this clearly relates to the mode of payment but is not important. Similarly, if an offeree proposes to postpone the time of delivery this would not be important in certain branches.

Date-Bah stated that the meaning of "materially" should be determined in relation to the purpose of the contract. The list given in para. 3 was made for sales, and he felt that it would be dangerous to universalise it to all contracts, and it would therefore be safer not to keep the provision. He considered the list to be somewhat fossilized - the place of performance was only of relative importance where a drawer or an actor was concerned.

Furmston stated that it was important to understand if a change was material or not, as otherwise it was not possible to know what to do; the rule was only useful if it helped to know if a change was material.

Crépeau felt that the sourse of the uncertainty lay in para. 2 which introduced the concept of a material alteration. Bonell disagreed, stating that the exception to the rule of course did introduce an element of uncertainty, but he felt that the risk should be taken, considering what the situation would be without this rule: the slightest change would be considered a counter-offer, and thus if a party wanted to get out of a contract, this would permit him to consider the slightest detail as a counter-offer. Evaluating the two risks, he stated that he would prefer to take the first one.

Wang stressed that the principles were not only intended for professors, lawyers and judges to read, but also for businessmen. As these might not know what "material" meant, he considered that the provision might be useful as it gave an indication of what was material.

Lando referred to what the Americans call "bright-line rules", which make it possible to conclude a contract even though there are material differences between the offer and the acceptance. He felt that one should have bright-line rules when there was doubt as to whether or not a contract had been concluded: when businessmen think they have concluded a contract these principles should give effect to this conviction. The UCC, he stated, had a provision to this effect (see § 2-207(3)). The whole question should, he stated, be reconsidered, as in some legal systems if the acceptance appears to be an acceptance there is a contract even if there is a material change. Furthermore, with reference to para. 2 he raised the question of what the situation would be for cases coming under this provision, and as regarded para. 3 he stated firstly that it should establish rules of presumption, and secondly that choice of law should be added to the list.

Farnsworth was not so sure that it really was such a big problem for sophisticated traders, as in practice, they would object if they were in doubt. He agreed with Maskow and Date-Bah in considering para. 3 rigid: if, e.g. the offer says nothing as regards the time of performance, these rules say that the time should be a reasonable time - if the response to the offer says 60 days, it might be argued that this is a reasonable time, and if it is a reasonable time, then the court could conclude that it was not a material change. He did not feel that para. 3 contributed to clarity, and therefore proposed to delete the paragraph.

Crépeau considered the case where, in the context of Art. 6(2), an offeree sends back what purports to be an acceptance with what he considers to be non-material additions, and the acceptance reaches the offeror who instead believes that the alterations are material. In such cases one would be back under para. 1 and the acceptance would be a counter-offer, and if the offeror says nothing there would be no contract. If, instead, he sends back a reply with different conditions it would be a new counter-offer. There would thus be complete uncertainty as to whether there was a contract or not; furthermore the question of which was the applicable law may be of material significance. The uncertainty would be so great, that he felt that anything to reduce it would be welcome, and para. 3 gave some indication of material elements. Was he to understand, he asked, that this uncertainty was better than the relative certainty of the situation where any modification was a counter-offer?

Bonell stated that he had always understood Arts. 7, 11 and 16 to be three very important provisions for mass transactions. It was not possible, he stated, to continue thinking of traditional offer and acceptance. Mass transactions were very rapid, where no one really cared about the precise content of the offer and of the acceptance, except, e.g., as regarded the price. The utility of Art. 7(2) was for those cases where subsequently a party has an interest in getting out of the contract and therefore invokes the mirror rule. It was an objective

test by which an evaluation had to be made taking into account all the elements of the case. A criterion was needed to create a balance between the parties, and this was furnished by Art. 7(2).

Lando referred to the relationship with Art. 16, saying that in CISG the battle of forms situation was not regulated, whereas these rules had Art. 16. The scope of application of Art. 7 was thus narrower than the corresponding rule in CISG - most conflicting terms were contained in the standard term contracts. He suggested that a reference to Art. 16 be inserted in the cross references.

Referring to the relationship between Art. 7 and Art. 16, Farnsworth gave an example of a trade association of builders, X, and a trade association of owners, Y, each having a system of arbitration with different places and different rules. According to Art. 7, if an offeror sends an offer with the arbitration clause of trade association X and the offeree answers wanting the arbitration clause of trade association Y, there would be no contract as different methods of settlement are provided for and the acceptance therefore contains "material" modifications. If, however, the first party simply specifies that the offer is subject to the general terms of trade association X, which contains an arbitration clause, and the other says that his acceptance is subject to the general terms of trade association Y, then the situation would be governed by Art. 16 and there would be a contract, which he found to be an odd state of affairs.

With respect to the relationship between Arts. 7 and 16 Bonell stated that having the two different provisions could only be justified as long as they referred to different fact situations and, although this did not yet clearly follow from the text of Art. 16, these differences depended on the degree to which the parties intentionally availed themselves of their standard terms. As long as the offeree was not only aware of the offeror's standard terms because the offeror had expressly drawn his attention to them, but he in turn had expressly referred to his own terms, then the last-shot doctrine of Art. 7 would apply. The knock-out doctrine adopted in Art. 16 had its merits and should be maintained for cases where the parties had not made any explicit reference each to his own standard terms.

Furmston pointed out that in the UK parties always in the very first clause state that their own terms prevail. As soon as this would not be considered to be sufficient any more, something else would be put above that to reach the same result.

Lando agreed that Arts. 7 and 16 dealt with almost the same subject, and that thus a distinction should be drawn between individual and standard terms. With reference to the illustration given by Farnsworth of the two enterprises, one of which uses the contractor's standard conditions and the other of which uses the owner's, he found the conclusion Farnsworth reached that there would be no contract to be

odd. He would have understood it if the arbitration clause were written down in the individual terms, as this would draw attention to it, which might make it doubtful whether or not there was a contract, but if there was an acceptance, or a purported acceptance, then even if the clause were in the individual terms he would have thought that there should be a contract, whereas he would doubt whether there was a contract in the battle of forms situation. The knock-out doctrine of Art. 16 would not apply to the Farnsworth situation. He felt that the knock-out doctrine should not be the only rule, even if it was often the best. The battle of forms involved two problems: firstly, whether there was a contract despite the battle of forms - and he felt that if the offer looks like an offer and the acceptance purports to be an acceptance, then in the battle of forms situation there should be a contract; secondly, on which terms such a contract was concluded.

At this point Drobnig suggested that the Group proceed on the understanding that Art. 7 be discussed on the presumption that only individually negotiated terms were involved, which, however, did not exclude that when Art. 16 was examined Art. 7(2) could be modified, should the Group desire to do so.

Farnsworth wondered whether the Group was to read into Art. 7 something which would have to be added to the text somewhere, as the provision did not seem to be limited to individually negotiated terms. He would have supposed it to cover the case where there was no arbitration clause in the first communication, whereas in the reply there was - whether expressly stated or contained in the printed form referred to, and then whether you had para. 3 or not would compell the conclusion that there was no contract.

Wang stated that he was not clear as to how acceptances and counter-offers would be distinguished if para. 3 were deleted. Offers, he considered, contained only material terms, with the consequence that any modification of the terms would be material. He felt that para. 3 helped to distinguish the two.

Bonell stated that Wang's concern was of considerable importance, and he wondered whether this concern and the doubts of other members of the Group could not be met by a new text, to the effect that: "additional or different terms are considered to alter the terms of the offer materially if the offeree, by virtue of the offer or the particular circumstances of the case, had no reason to believe that they are acceptable to the offeror" or, alternatively, "... had reason to believe that they are not acceptable to the offeror".

Date-Bah wondered whether such a text would not be too subjective - as the provision stood at the moment it was more objective. Maskow felt that the problem with the proposal was that in certain cases the offeree might be certain that, because of the circumstances of the case, the offeror is forced to accept his additions or modifications

(e.g. where the offeree has a dominant position in the market), and this was a situation which should not be protected.

Farnsworth stated that at times it was material to determine whether a change was material or not, and a number of courts in the USA had used a test similar to that contained in Bonell's proposal.

The proposal to delete Art. 7(3) was adopted by 7 votes for, 4 against and 1 abstention.

As far as the comments were concerned, Drobnig stated that the problem of what is material had to be explained. Furthermore, he hoped that the last sentence of comment (b) ("This is the case whenever the terms in question reflect a course of dealing or a usage and thus, far from adding anything new to the terms of the offer, merely render explicit what is already implicit in both the offer and the acceptance") would be deleted. Maskow also felt that it would no longer be necessary. Bonell, instead, stated that as the article was now without para. 3, he would have thought that it would be necessary to explain what amounted to a material change, and then for this purpose it would be necessary to make use of the text of para. 3 to show the trend in that direction - the last sentence of comment (b) was one test, and he would like it to be there.

Drobnig insisted that it was misleading, that the case envisaged was no change at all as the offer must be interpreted in the light of usages or of practices indicated by the parties: i.e. if the offer says A and usages say B, then the offer would in reality be AB; if the acceptance then indicates AB there is no change at all, rather the acceptance gives expression to the true content of the offer.

Farnsworth agreed with Drobnig on the last sentence. He considered that the comments should emphasise two things: firstly, the surprise element, which was inherent in Bonell's formula, and secondly hardship - if the change is hard on the recipient it is likely to be regarded as being material to the recipient.

Both Wang and Date-Bah felt that a more explicit statement of what was material was needed.

Article 11

In view of their being so closely connected, the Group decided to examine Art. 11, followed by Art. 16, immediately after Art. 7.

With respect to Article 11, Lando stated that there were three main issues involved : first, whether one should have a rule on what the Germans call a "kaufmännisches Bestätigungsschreiben"; secondly, if the answer to the first question was affirmative, whether the rule should be

a contract rule or a presumption rule, i.e. whether the terms in the confirmation letter adding to or modifying the agreement should become a part of the contract (which would not allow the recipient of the confirmation who does not object without delay any possibility to prove the existence of a different agreement), or whether there should be a presumption that the confirmation contains the terms of the agreement; and thirdly, whether the rule should be limited to non-material alterations (in German and Scandinavian law it was not limited to non-material alterations). He himself felt that there should be such a rule, that this rule should be a presumption rule and that it should not be limited to non-material alterations, but should also cover material alterations.

Furmston stated that according to English case law you could not change the terms unilaterally, but if you did it long enough it became a course of dealing. He felt that he could live with the provision if it were limited to non-material alterations. Crépeau suggested that a formulation using the same terminology as Art. 7 might be considered, so as to indicate that there was no substantial difference between the two articles. He suggested a formulation such as: "[...] but which contains additional or different terms which do not materially alter the terms of the offer, then these terms become part of the contract unless the offeror without undue delay objects" which would mean that no reference to Art. 7 was needed and that the provision stood on its own two feet.

Lando elaborated on his proposal not to limit the provision to material alterations, stating that in practice it is often not clear what the terms of the contract are, and that the confirmation clears the air, in which case it would not be possible to say that the alteration is material as the term was unclear in the first place or had not been decided upon.

Bonell urged caution, stating that Art. 11 as it now stood was a novelty as its subject matter was not regulated at all, neither at national nor at international level. Difficulties might therefore be expected in having the rule accepted. He felt that the formulation should be brought closer to that of Art. 7, but that the concept should be maintained as it stood, as it corresponded to international commercial practice. He would hesitate to modify the rule as Lando suggested, as it was a controversial practice.

Maskow also felt that Lando's proposal should not be accepted. He saw no difference between the situation in Art. 7 and that in Art. 11 as they stood now. He did, however, see a difference between the articles when he considered the proposal to make the provision a presumption clause, as in the letter of confirmation case it was possible for there to be differences between the agreement and the letter of confirmation, whereas in the Art. 7 case the offer and acceptance were clear from the beginning. He felt that the matter

should be thought over. Considering the article as a whole, he expressed certain doubts as regarded para. 2, as invoices were made after performance, and in most cases it would then be too late to alter anything. He added that in the German Democratic Republic people were not accustomed to looking at invoices to see if there were changes in the contract conditions.

Bonell pointed out that invoices sent after performance were not supposed to be covered, that para. 2 was intended to be restricted to cases where the invoice in practice fulfills the same task as the letter of confirmation. He explained that while for example in Italy the letter of confirmation as such did not exist although in certain instances invoices fulfilled the same function, in central European business circles quite the opposite was true.

Farnsworth felt that para. 2 could be deleted, as what it said was that an invoice, a proforma invoice in international trade, at times serves as a confirmation. In that connection he had trouble with the words "which is intended to be a written confirmation". He supposed that what the sender had in mind would not make any difference, and the language suggested that if you sent an invoice after the contract, maybe attached to the goods, and then in arbitration swore that you intended it as a confirmation, that might invoke para. 1 - which meant that it was not a good formulation. He did not agree with Lando's proposal, as it gave a lot of options for skilful behaviour by someone who receives an offer and wants a contract on different terms. He felt that Art. 11 should be consistent with Art. 7, so he suggested that para. 2 be deleted, and that an explanation be given in the comments to the effect that the document did not have to say "confirmation" at the top in order to be a confirmation. What was important was not that it was intended to be a confirmation, but that the recipient reasonably understood it to be a confirmation, and maybe some language could be found to express that thought. In answer to Bonell's problem that letters of confirmation were unknown in Italy whereas invoices often fulfilled the same function, he suggested a wording which was parallel to that in Art. 7: "purports to be a confirmation".

Tallon suggested that Arts. 7 and 11 be merged, and a general formula be found along the lines of "whether it is a reply to an offer or something written to confirm", and to have this followed by examples. Crépeau, however, thought that before considering whether or not to merge the two articles the Group should decide what it wanted in Art. 11. He suggested that the formulation closest to that of Art. 7 should be considered first.

Farnsworth suggested a formulation such as:

> "A writing that purports to be a confirmation of a contract that contains additional or different terms which do not materially alter the terms of the contract modifies the

contract unless the recipient without undue delay objects orally to the discrepancy or dispatches a notice to that effect".

Drobnig suggested that the words "including an invoice" might be added to cover the cases referred to by Bonell.

Rajski felt that "writing" was too extensive, as, according to the definition in Chapter I Art. 4, it would include also telegrams and telexes, and he wondered whether the Group wanted to include also these within the scope of the letter of confirmation, as this was not usually the case in business. Bonell in turn wondered whether it would ever be possible to find a clear-cut concept - would, for example, letters transmitted via computer, which did not necessarily have to be recorded, be included? What did the term "document" actually mean nowadays? Only those on paper or also those which were "paper-less"? For those involved with transportation they would certainly also include those which were "paper-less". What was important, he stated, was that the document "purports" to be a confirmation; if a message was given which had the purpose of showing the terms of the oral agreement, then he felt that it should be treated as a confirmation.

Lando stated that there were still many unsolved issues. First of all the Group had decided to discuss Art. 7 on the basis of only individual offers and acceptances, and now the question of whether Art. 11 would apply if the confirmation were made on a standard form would also come up. Furthermore, for the invoice situation the Group had not made up its mind as to whether it should arrive "within a reasonable time". In connection with this he referred to construction contracts, where it could come months or even years after the conclusion of the contract, as invoices were not presented until the money was available and the money was not available until after the contract had been performed by the other party. He felt that the rule should not cover this situation. Another question was whether the rule should apply only to oral negotiations, or also to written correspondence preceeding the conclusion of the contract. The comments indicated that it should be applicable also to written correspondence, in which case he would prefer a rule of presumption, as if the written correspondence intended something different from the letter of confirmation, then the other party should have the right to prove this.

As concerns the invoice situation, Drobnig stressed that the "reasonable time" would refer to the time after the conclusion of the contract, and not to the time after performance.

Bonell stated that he did not have the impression that Art. 7 was definitely limited in scope to individually negotiated or drafted additions or modifications. Arts. 7 and 11 were closely interlinked because of the practical difficulties in drawing a distinct line between the two.

Drobnig stated that he was inclined to agree with Bonell, and that when he had suggested that Art. 7 be discussed as if it applied only to individually negotiated terms, this had been on condition that it were possible to reconsider the provision when standard terms were being considered. Both an acceptance or a letter of confirmation may refer to standard conditions. Where these were printed on the back it was evident that they were part of the contract; it was a frequent case and these rules should apply.

Furmston stated that in a very large number of cases (i.e. except where you had reason to assume, either because of trade usages or of previous dealings, that you are going to contract on the terms of the person who is going to give you a standard contract document - in other words, where the offeror offers to contract on the offeree's terms, such as was the case with railway tickets with the general terms printed on the back) the standard contract document was going to affect material alterations, and it would seem odd to have a rule excluding 80% of the cases. It was well known that the person who actually writes the argreement has a 20% advantage over the other party.

Farnsworth proposed a modified version of the provision. He pointed out that he had used the words "modifies the contract" instead of the paraphrase used in Art. 7(2):

> "A writing, including an invoice, which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract but contains additional or different terms which do not materially alter the terms of the contract modifies the contract, unless the recipient, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect".

Maskow objected that if invoices were mentioned so, too, could other documents be.

Farnsworth agreed that the matter could be dealt with in the comments. He had included the invoice because of the discussion, but personally he would favour dropping it, also because the attention was not primarily directed towards the sale of goods, where first a proforma invoice is sent, followed by a packing invoice, which was a procedure which was not very common for services.

Bonell wondered whether, to a certain extent, the new text did not risk causing uncertainties. He therefore suggested a slightly different formulation such as:

> "Where, within a reasonable time after the conclusion of a contract, one party sends to the other a writing which purports to be a confirmation of the contract but contains additional or different terms, these terms become part of the contract unless

they materially alter the terms of the contract, or the recipient without undue delay objects".

The structure would be that of the old article, whereas from Farnsworth's suggestion he had taken the "writing" formula and the phrase "purports to be a confirmation".

Wang raised the point of what was intended by an invoice, as there were many different kinds of invoice, e.g. invoices as notices of payment, invoices for the application for an import licence and invoices required by letters of credit for the negotiation of payment.

Drobnig stated that the practices Wang had drawn the attention to were common not only to sales contracts but also to other contracts. The question was therefore whether the rule was broad enough, as parties normally concentrate their negotiations on the essential terms of the contract, and not on the more common terms. If a course of dealing existed it was already part of the contract, but if it did not, then the question arose of how to evaluate the fact that a letter of confirmation, which sets out the essential terms without changing them, contains the full contract on points not mentioned in the agreement: arbitration, warranties, time for the making of warranty claims etc. If this rule were adopted, the conclusion would invariably be reached that these are not terms of the contract. They would constitute a counter-offer, which might be accepted later by performance of the contract, but which might also not be accepted. One way out was to imply the willingness of the offeror to contract under the conditions of the offeree (the seller in most cases), but how easily could this actually be implied? He therefore wondered whether the limitation to non-material terms might not be too narrow. As far as the formal presentation was concerned, he had more sympathy for Bonell's version, and deviating from Art. 7(2) would not disturb him - Art. 7(2) could be amended.

Bonell stated that the question of whether or not to restrict the scope of the rule to terms in letters of confirmation which do not materially alter the terms of the contract was an important one. He was grateful to Wang for having drawn attention to the procedure of sending a writing to the other party at a certain stage, laying down a whole series of provisions forming the conditions on which you intend to conclude the contract, and of requiring in this writing, or in a letter, that the conditions be accepted by signature. As long as the acceptance was asked for expressly it would be covered by the traditional offer and acceptance rules, which would mean that no special provision was necessary. The Art. 11 case was, he maintained, different, as it covered cases where, after an oral agreement, a party sends a writing but does not require an acceptance, and the other party remains silent. The question was then what should be done in such a case. Some legal systems did not differentiate between material and non-material modifications or additions, although certain limits did exist; other legal systems instead rejected even the idea of allowing a party to

introduce alterations and modifications. On this point the general reports in the volumes on "Formation of Contracts" edited by Schlesinger indicated that the common core of the legal systems was that silence should only in some cases amount to an acceptance, and that these cases may also be identified with non-material alterations or additions.

Rajski considered Wang's examples to illustrate another way of concluding a contract. He stated that in the USSR letters of confirmation were practically non-existent in international trade, as the procedure was very formalised. He had more sympathy with Bonell's formula.

Considering the observations made, Farnsworth suggested that his proposal could be modified to the effect that the writing containing additional or different terms "modifies the contract unless the additional or different terms materially alter the terms of the contract or the recipient without undue delay [...]". The same, he stated, could be done with Art. 7.

Furmston wondered what would happen if any terms agreed upon were omitted from the confirmatory document. Rajski considered that in such a case there would be two different contracts: the contract would be concluded on the terms which had been agreed by the parties and when a letter of confirmation came confirming only some terms of the contract, all other terms which had been agreed would still be there. Drobnig felt that Furmston's situation would be covered by the words "different terms", as "different" could in his view also mean fewer than those in the original contract. Farnsworth felt it to be a question of interpretation, as in most cases it would be as Rajski suggested, but it was also possible for the omission to mean that a term should be taken out of the contract. Bonell agreed that it was a matter of interpretation, stating that it was a case which arose also when the parties together start to put down their agreement in a formal writing. Furmston suggested that this question could be taken care of by stating that the letter of confirmation was the contract , whereas if it were stated that the letter of confirmation modifies the contract, then this would be open to interpretation. Maskow felt that if a merger clause were in the contract the situation would be clear, whereas if it were not, then in general it was possible to prove that additional clauses existed although they had not been included in the letter of confirmation.

Drobnig felt that it was probably unrealistic for him to expect his proposal to be accepted - he merely wanted to point out that as the rule was presently drafted its application might be rather limited, particularly in all those cases where the letter of confirmation contains general conditions, but also where the entire contract is written out. If the situation were made clear in the comments, he would be satisfied. He would also be grateful if the point raised by Furmston concerning the possibility of an offer being interpreted so as to imply

that the offeror intends to be bound by the general terms of the offeree could be included in the comments.

In the light of the discussions, Farnsworth formulated an amended version of his proposal:

> "A writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract but contains additional or different terms modifies the contract unless the terms materially alter the contract or the recipient without undue delay objects orally to the discrepancy or dispatches a notice to that effect".

Maskow felt that the difference lay in the burden of proof: in the original formula the burden of proof lay on the party who sends the document, and with the "unless" formula it was the other party who had to prove that the alteration was material.

Wang stated that the problem here was that the contract already existed. In some legal systems, if one party requires a sales confirmation to be signed, then the contract would come into existence only at that point, before then it was not a problem of a confirmation or of a modification of a contract. Bonell stated that in the cases Wang was referring to there was as yet no contract, which meant that one could not speak of a modification. The proposed rule was not intended to apply to these cases, as the scope of the provision was limited to those cases where there has been an oral agreement. Wang requested that the comments mention that these cases were not covered by the rule.

Farnsworth felt that it would be useful in connection with this rule, and with Art. 7, to mention that they are subject to the autonomy of the parties and/or to the rule of the offeror being the master of his offer, and that one could, in sending what would otherwise be a confirmation, indicate that it would operate only if signed by the other party. Also worthy of mention was the fact that a case where the parties have a fairly formal initial contract and have provided that no modification is effective unless signed by both parties, could be considered to be outside this rule.

Lando suggested that Farnsworth's proposal be modified to read "If a writing which is sent [...] such terms will become part of the contract". This proposal was adopted by 8 votes for, 2 against and 2 abstentions.

The provision as a whole, as modified by this last amendment, read:

> "If a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a

confirmation of the contract contains additional or different terms, such terms will become part of the contract, unless they materially alter the contract or the recipient, without undue delay, orally objects to the discrepancy or dispatches a notice to that effect".

The provision was adopted by 9 votes for and three abstentions.

As a title, Farnsworth suggested "Writings in confirmation", and this met with the approval of the Group.

With reference to the comments, Lando took it that the rule as now drafted would cover both when the preliminary negotiations leading up to the letter of confirmation were oral and when they were in writing. If previous writings were also covered, the rule could become of some hardship when a party through shere sloppiness forgets something. He wondered whether it were not the case for the comments to specify that the rule also covered previous writings.

Bonell pointed out that the comments already did refer to "informal correspondence". Lando's case would not, however, be covered by this, as in his case there was a writing, something which was sufficiently formalised to bear the signature of one or both parties, and the acceptance of the other party was clear, and there would thus be a conflict between two writings. As regards the sending of a letter purporting to be a confirmation when there already was a writing, he wondered how one could conceive of a document being sent with the intent to confirm a previous agreement if that agreement already appeared in a sufficiently formalised piece of paper.

Lando considered this to be possible if one of the parties regretted what they had agreed upon, and Drobnig considered another example to be constituted by telexes, which normally would only refer to the essential terms, the rest of the contract being inserted in a formal writing; these were cases which clearly must be covered. Bonell thought that a telex was obviously not the final form of a contract if it only covered its essential terms, but in practice there might be cases where it was difficult to establish whether the rule applied or not, and certain cases would thus have to be excluded.

Farnsworth stated that, considering those cases where contracts were as elaborate as Wang had suggested, it would be wise to deal with the question in the comments, which could say that a written modification would be required. This would take care of the example Lando had given, which had startled him as he would have thought that it would be bad faith. Lando agreed to have the point taken care of in the comments and covered by the rule on good faith.

Coming back to the parallelism between Arts. 7 and 11, Drobnig felt that it should be established also as regarded formal presentation:

the new formula of Art. 11 had created certain discrepancies with Art. 7(2), and he wanted the balance to be reestablished, as at times it was difficult to establish whether there already was an agreement between the parties, and the writing therefore was a letter of confirmation, or if there was only an offer and a modifying acceptance. To avoid difficulties it was desirable to couch the two rules in the same language. Furthermore, Art. 7(2) was deficient as it put the burden of proof as regarded the alteration of the acceptance on the offeree, and instead it should be on the other party. The comments to Art. 11 should, he stated, point out the parallelism between the two articles, especially as far as the "immateriality" was concerned, and a cross reference to what would be said under Art. 7 on this subject could be made.

Bonell, however, hesitated to adopt a phrasing reading, e.g., "but which contains additional or different terms constitutes an acceptance unless...", which did establish the parallelism, as he felt that it might go too far.

Article 16

Introducing Article 16, Bonell admitted that in many cases the borderline between Arts. 7, 11 and 16 was difficult to establish. Art. 16, however, deviated from the philosophy underlying Arts. 7 and 11. He thought he could see a solution in making it clear that one has to distinguish between different kinds of battle of forms. Art. 16 would not apply as long as the parties insist on the application of their forms. Indeed, in such a case the knock-out doctrine could hardly work, as he had tried to state in comments (a) and (b). In these cases it would be necessary to go back to the general rules on offer and acceptance, and to see how the problem could be solved by applying them, namely, although not exclusively, on the basis of Art.7. On the contrary, Art. 16 and the knock-out doctrine would apply whenever the reference to standard terms was a more or less automatic reference.

Crépeau stated that if this were the case, then the beginning of the article would have to be changed to "subject to Art. 7", to make sure that it applied only in the absence of a case where Art. 7 would operate - "notwithstanding" meant "irrespective of".

Lando suggested a formulation such as "Subject to cases where one or more parties in their individual writings state that they will not deviate from their standard form contracts, then...".

Farnsworth stated that there were two views in the United States as regarded the knock-out doctrine, but it was clear that if a party did not like it he could contract out of it, and the easiest way to contract out of the knock-out rule as provided in Art. 16 was to say that "the Unidroit Principles do not apply", and this gave him cause for concern.

Furmston stated that Art. 16 contained the assumption that one ought to pretend that there was an agreement when in actual fact there was no such thing. The fundamental point was that if both parties say that they only want to contract on their terms and the terms are significantly different, then they have not agreed, and that should be recognised.

Wang stated that in China only one of two situations might arise: either there was a contract or there was no contract. Frequently the parties agree on the material terms and subsequently the Chinese company sends a letter of confirmation with additional provisions; the other party sends his, and so the two letters contain different standard terms. At this point there were normally two solutions: either the parties negotiate and reach a compromise, or they go to court or arbitration, and in this latter case it would be a matter of interpretation. Considering these practical situations he wondered whether the rule would work.

Lando referred to sociological studies conducted in the UK which showed that parties did not consider standard terms as anything of any great importance, that they included standard terms almost automatically and that they would be surprised to find that there was no contract (to which Furmston objected that in his experience, and he had spoken to some 3-4000 businessmen in the UK, they would certainly not be surprised to be told that there was no contract). Lando also referred to a rich German case law on the subject, where the earliest German cases used the last-shot doctrine, which would be the outcome if there was no rule in Art. 16. The German courts had eventually reached the conclusion that the last-shot doctrine could not be relied on, and that it was necessary to be more objective.

Drobnig stated that he wished to confirm that in the German Commercial Service's experience general conditions were used frequently in the conclusion of contracts, but were not taken very seriously - at least not until there was litigation. Businessmen would think that they had a contract and they would be surprised to hear they had none - the situation might, he admitted, be different in other countries. It was implied in Art. 16, he stated, that the two parties had incorporated the terms in the correct way, i.e. as indicated in Art. 15. He wondered what the reference opening Art.16, "Notwithstanding the provisions of the rules governing offer and acceptance", meant - he could understand it in the context of Art. 15, but not in that of Art. 16.

Bonell stated that Art. 16 was intended to be a rule of exception deviating from the result which would be reached on the basis of the general rules on offer and acceptance, according to which there is no contract at all if there is a battle of forms, or from the last-shot doctrine which applies if there has been performance.

Referring first to Furmston's allegation that a fiction had been created in Art. 16, Bonell admitted that it was a fiction, but observed that it was not the first time that a fiction had been used. The proviso at the end of the article should not be overlooked, as what was intended was obviously something quite different from the situation where a party expressly insists on the application of his own standard provisions, which would be outside Art. 16. Problems arise when one of the parties at a later stage tries to make use of, or rather to abuse, the formal discrepancies between the standard provisions. He stated that it was a parallel to the Art. 7 situation. In actual fact, was it possible to make the precise scope of application of the knock-out doctrine clear? He had tried to do so in comment (c), where he stated that the last-shot doctrine "may be appropriate if the parties expressly declare that the adoption of their standard terms is an essential condition for the conclusion of the contract", going on to explain that "The situation is different if they refer to their standard terms more or less automatically", in which case the knock-out doctrine would be applicable.

Lando observed that often a party relies on a contract before performance, e.g. to exclude negotiations with others, and that limiting the rule to cases where performance has commenced would not take these cases into consideration.

Farnsworth considered that the providers of goods or services are more interested in standard forms, because they want to limit consequential damages if they do not perform, and they want to limit liability for, for example, breach of warranty; the problem was what would happen if the recipient of the service did not have a form. For example, in the grain trade the sellers were those who had the forms, as had the providers of construction services. For these cases Art. 16 would not apply, and for it to be applicable the lawyers should advice every recipient of services or buyer of goods to have a standard form. The sellers would then have an interest in saying in every form that these rules do not apply, and the buyers would have an interest in having a form.

Rajski stated that he had great sympathy for Art. 16, which dealt with a question which was very important in international commercial practice - in meetings he had attended it had been apparent that businessmen and lawyers were eager to get some advice on this point.

Date-Bah expressed the concern that the solution as envisaged in Art. 16 might lead to results which neither party expected, as the contract could end up being materially different from what they intended.

Answering a question by Tallon as to what the situation would be if there were no Art. 16, Bonell stated that if Art. 16 were deleted

without it being replaced by another provision on the special case of the battle of forms then, in conformity with the general provisions on offer and acceptance, the result could vary as often there would be no contract - at times this was the case even if there had been performance, as the question then arose of whether the performance amounted to silent acceptance. If performance had begun, then the last-shot doctrine would apply, in which case the contract would have been concluded on the basis of the standard terms sent last.

Furmston wondered whether the problem of the battle of forms really was so important that it would not be sufficient to rely on the ordinary rules. These produced the results that sometimes there was no contract even when there had been performance (which was the result recognised by English law at present), and that in many cases there was no contract until it had been performed as it was the performance itself which amounted to acceptance of the last offer. He was not persuaded that the problem was so important that these ordinary rules ought to be departed from.

Date-Bah gave the example of the parties having two different arbitration clauses, one ICC one ICSID. The question was then, would they fall entirely? When the obligations were construed in the light of the conflict this would need to be clarified. It might be desirable to avoid the application of the last-shot doctrine by neglect, that is, if, e.g. a Chinese corporation makes an order and a German supplier sends the equipment with standard terms and the payment is made, then it was possible that the last terms sent were binding, and this might be an unfair result.

Farnsworth requested the Group first to think of a case where there is no arbitration clause in one party's set of standard forms, whereas there is in the other party's, and then to consider the terminology used in UCC § 2-207(3) - they would notice that the provision referred to the terms on which they agree, not to the conflicting terms. The term "agree" was much narrower, he stated: in the example he had given the terms did not agree, but he could not answer the question as to whether or not they conflicted.

The proposal to delete Art. 16 was rejected by 5 votes against, 2 votes for and 4 abstentions. Thus, the principle embodied in Art. 16 remained, and the Group had to consider the form in which to couch it.

Farnsworth returned to the question of the meaning of "conflicting". Frequently the situation was one where something was contained in one form and not in another, often because a rule of law was being relied on to fill the gap. If it were insisted that the conflict be express, then drafters of forms would be encouraged to make explicit what they would otherwise not need to say, and so to have "missiles" with which to knock-out other people's missiles, which he considered to be an undesirable escalation. He himself would have thought that the

phrase used in § 2-207 UCC was less ambiguous and easier to apply, and that it reached a fairer result for the case where A does not have an arbitration clause because he intends to go to court, whereas B has one as he intends to go to arbitration. In that situation they have not agreed, and it would be unfair to say that the arbitration clause prevails as there is nothing which conflicts with it - which would be the answer under the present draft. He therefore proposed that the wording be changed to:

"shall be considered to have been concluded with terms on which the writings or forms of the parties agree".

Furmston reflected that to get into the battle of forms situation it was sufficient if the standard terms were different; it did not matter that they did not actually conflict.

Lando referred to the concern Date-Bah had expressed as regarded the possibility to reach a conclusion which neither party wished: if A wants ICC arbitration Copenhagen, and B wants ICC arbitration Accra, then there is no agreement and they would have to go to court which it is clear neither wants to do - they both want ICC arbitration, they just have not agreed on where, so the knock-out doctrine cannot be used. He would therefore prefer to qualify the general rule (the knock-out rule), although he had difficulties in knowing exactly how to qualify it.

Maskow reflected that Lando seemed to advocate the lowest common denominator rule, but he himself did not feel that he could advice its adoption in the principles. The fact that certain problems were not solved by a rule was not an argument against it. In the cases referred to by Date-Bah and Lando the question of interpretation would always arise. There were several possible solutions in the arbitration cases - the parties might, for example, agree on a third place, or if one of the parties sent the claim to the ICC then perhaps the ICC itself could find a solution. It was not, he stated, impossible to overcome these problems, although these principles could not be the basis for doing so in every case. The solution proposed by Farnsworth to say "agree" was, he felt, easier - in the Date-Bah/Lando cases it would then be possible to say that the parties had agreed on arbitration. He considered that such a rule would make parties cautious and cause them to negotiate more carefully.

Drobnig reminded the Group that where there is no agreement on the place but the parties have agreed on ICC arbitration, the ICC rules themselves determine where the arbitration is to take place. Where the parties only indicate "arbitration Copenhagen" and "arbitration Accra" there would be problems. It would be possible to say that, in case of dispute, if the parties still want arbitration they can agree on the place, but often they will not agree, which means that they would often have to go to court, and they would go to different courts. These principles, he stated, cannot supply terms where the parties have not

agreed - only the applicable law can do so.

Rajski agreed with Drobnig, stating that the purpose of these rules was to help the parties to maintain the contract if they are willing to do so despite the difficult situation of having conflicting general conditions. He would be glad if they could qualify the rule, although he was afraid that they would be unable to do so. He had sympathy for the positive formula proposed by Farnsworth, preferring it to the negative attitude of the term "conflicting".

Furmston considered that the article as it stood was seriously defective in achieving its aim, as it did not say how you could tell that the parties have reached an agreement. What it did say was that you should forget about the offer and the acceptance, that if you have a situation where the parties refer to different standard conditions the contract shall be considered to have been concluded. How, he asked, did you get from the "different conditions" to "the contract shall be considered to have been concluded"? More was needed for there to be a contract - the UCC provision recognised that there had been an agreement. He felt that some provision along the lines of the one in the UCC should be inserted.

Farnsworth agreed with Furmston that there were a lot of things wrong with this provision. He felt that the agreement test was best and should be used instead of the conflict test. Terminology such as "those terms on which they agree" could be used. This would eliminate 99% of the real cases, another illustration of which was that of the buyer not putting in any express warranties because he relies on the warranties implied by law, and the seller putting in a disclaimer. It would be unfair to say that the buyer has not knocked out the disclaimer because there is no language that conflicts with the disclaimer. Date-Bah supported Farnsworth's notion of "agreement", which meant that in the example he had given there would be agreement on arbitration.

Furmston referred to the practice in the UK whereby the front of the contract has gaps to fill in, and wondered what the situation would be in a case where the seller sends off a quotation with standard terms on the back and special terms on the front, and the buyer sends back the order with different terms on the front - would there then be no contract, and what wording in this article permitted the reaching of that conclusion?

Drobnig stated that this case was one where there was a difference in individually negotiated terms, which meant that it would come under Art. 7(2) or (1). It did not mean that there necessarily was no contract, but that depended on the terms of Art. 7. They had to deal with the fact that contracts had both individually negotiated and standard terms. Art. 16 envisaged only standard terms, but presupposed individually negotiated terms.

Farnsworth stated that if this were the case then the price could be a standard term as the price is the catalogue price for everyone. As regarded the distinction between "printed" and "typed" terms, he questioned the prudence of such a distinction - often the contracts were turned out by computers. Sometimes in these discussions the back of the document was referred to, but then you had something in the front. Were they standard terms, he asked, if they were typed but you could prove that you type the same thing every day for everyone? What was a standard term when this rule was to apply?

Bonell stated that it ultimately did not depend on formal presentation but on content - it was the nature of the provision which was decisive, although whether the terms were printed or not had turned out to be a decisive test in most cases, but this could change as practice developed.

Farnsworth's proposal to refer to the terms on which the parties agree rather than to the terms which conflict, was unanimously adopted.

Drobnig's proposal to delete the opening words "Notwithstanding the provisions of these Rules governing offer and acceptance" was examined next. He made this proposal, Drobnig stated, because he found the words misleading, first of all as Arts. 12 and 15 would have to be applied, and secondly because they were superfluous - it went without saying that the principles must be read as a whole and that a provision (Art. 16) which deviated from any other rule stood on its own two feet.

Farnsworth stated that he would find it difficult to discuss the provision without considering Furmston's point that somewhere there must be an indication that some sort of agreement has been reached. It was not possible to say that a contract must have been reached or this rule would not be needed at all, and that was sufficiently closely connected with Drobnig's proposal for it to be hard to think of one without thinking of the other. The UCC rule would narrow the scope of the provision as here you wanted also the case where there has been performance to be included.

Drobnig considered the UCC rule to be different from Art. 16. Art. 16 concerned a complex contract with individually negotiated terms to which conflicting standard terms had been added; it presupposed that an agreement had been reached on the individually negotiated terms; there could not be a contract just on the general conditions - this would not make sense. In other words, Art. 16 addressed the question of conflicting general terms which have been added to the offer and acceptance.

Farnsworth considered that if you followed the thought and said that only Art. 7 prevented an agreement and that the stumbling block was in the standard terms, then the section that would trigger the reference to Art. 16 would be Art. 7, and then you could add the thought that

there is a difference between what is a standard term and what is not.

Lando considered that it should be brought out that the rule applied as from the exchange of offer and acceptance - it was not possible to wait for performance. The Ontario Law Reform Commission had the formula "Conduct by both parties which assumes the existence of a contract" (4.2(3) Report on Sale of Goods), and this covered also individual terms. If a formulation such as this were adopted also Drobnig's considerations would be taken care of. Drobnig instead felt that this could be dealt with in the comments.

Maskow suggested a formulation such as: "Where both parties have agreed on the individual terms of the contract but both refer to different standard terms". Drobnig had no objection to the insertion of words to this effect, although he did not feel it to be necessary. Bonell favoured Maskow's proposal which, he stated, rendered explicit what was his understanding of the provision. He would, however, prefer a formulation such as that of the UCC: "conduct by both parties which recognizes the existence of the contract". "Conduct", he pointed out, did not necessarily imply performance. A formula such as this could both solve Furmston's problem of the indication of where the agreement is to be found - and the agreement had certainly to be on the individually negotiated terms - and clarify that the knock-out doctrine should not apply where one of the parties, or both of them, "strongly" insists on the application of his own terms.

Rajski found Maskow's formula too broad: what did it mean that both parties agree on individual terms? What terms were being referred to? He found that this could be a source of uncertainty. Maskow, on the other hand, found that Art. 7 made it clear first which individual terms were meant, and secondly whether or not there was a contract. As regarded Bonell's proposal, he was afraid that by using "conduct" Art. 7 might be overridden.

Drobnig's proposal to delete the opening phrase, meaning that, subject to exact formulation, the provision would read: "If both parties agree to individual terms but refer to different standard terms" was unanimously adopted.

Farnsworth stated that there were three points which troubled him. First, what was a standard contract or general term? Secondly, what had been the conclusion of the Group as regarded the sort of requirement of an agreement? If "the contract" was referred to, then the question was which contract, as there was no contract unless the provisions of this article made one. Thirdly, this article, he stated, had a red flag to anyone who was used to having his standard terms prevail, and one way of solving this was to say that these rules did not apply. These rules were not law, so perhaps not incorporating them would be sufficient for this purpose. His question was then if a party could avoid the application of this article by some means less drastic

than that of saying that the rules as a whole do not apply. Did the parties have autonomy? A way for them to avoid the provision would be to say "This offer can only be accepted on its terms including these conditions". He suggested that it might be useful to have language such as "unless the offer indictes that it can be accepted only on its terms", and he thought that if that were said it would take away some of the force of his original objection. The insertion of something making a less drastic negation by those who do not want this particular article possible should be considered.

Lando considered that there were two possibilities: either the party puts into his standard form contract that a modification is only valid if it is signed by him and in writing, or this is put in the individual terms. There were German cases where both parties had inserted this into their standard forms, and the German courts had knocked them out. It must be clarified, he stated, that if something like this were stated in the individual terms this was all right, whereas if it were stated in the standard terms the knock-out doctrine would apply.

As regarded the distinction between standard terms and individual terms, Bonell stated that there might of course be border-line cases where it was difficult or impossible to distinguish between them, but in the great majority of cases it was not too difficult to do so. If the letter or telex sent by one party to the other contains a provision according to which the annexed standard terms are to be considered an essential condition for the conclusion of the contract, it was different from the case where such a provision was just one out of the thirty-odd which composed the unitarian framework of the standard terms themselves.

Furmston warned that if that were the test, Anglo-Americans would place a skull and cross-bones sign on the front of the form saying "Beware! Our terms always prevail!". He could see the force of the argument that it would not be enough for them to state that their terms always apply in minuscule on the back. If you said with sufficient clarity that you will not negotiate on the other party's terms they would respond to the rule and make it sufficiently clear.

According to Drobnig if the proposal referred to the clause and the clause stating "only our standard terms apply and we refuse to accept any other conditions" was in the body of the standard terms, then it would come under Art. 16. To make the exclusion effective, it would be necessary for the exclusion to be spelt out in the individual terms.

Bonell reitterated that in order to get out of Art. 16 an express provision on the essentiality of the conditions for the conclusion of the contract would be required. If it was contained in the standard terms you would come into a vicious circle. If it really was so important the parties had so many means to make it clear from the

beginning and they would normally do so.

Farnsworth felt that it might not be possible to address this question until they knew what the so-called individual terms and the so-called standard terms were, and what the bright-line was between them. He felt that in Bonell's approach there were several, at least two, different ideas involved, which were not consistent with each other. First there was the idea of repetitiveness and the related question of bargaining (do I do this in every transaction and not discuss it with you and then call it standard?); secondly, there was the element of surprise - is this presented in such a way that the other party would be surprised to find out it was part of the contract. Art. 16 would cover mostly the cases with a repetitive element, Art. 17 was directed at surprise and Art. 15 spoke of standard terms, but if you had not referred to them expressly the other party would be surprised to find them.

Maskow stated that there were always cases of doubt, but that the problem was that there must be the possibility to get out of the rule, and this possibility would be for a party to state clearly, at one stage or another, that he did not intend to contract on terms other than his own. This would not, however, mean that every set of general conditions would contain such a clause. What was of the greatest importance to businessmen, he stated, was to make the contract; it was not necessarily to have their own conditions prevail, so he on his part would hesitate to advise a client to insert such a clause in the standard terms. In fact, the risk was that a businessman would end up with no contract if he inserted such a clause in his standard terms. He might be willing to run the risk if he had a dominant position in the market, but if he did not, Maskow was not so sure that he would be willing to run this risk. If he did not have such a clause this rule would prevail.

Lando considered that if it was a party's policy not to accept terms other than his own, then it it should not be necessary for him to type the clause every time, but he felt that it should be conspicuous - with the use of word processors all terms were inserted into the machine and it was not possible to see which terms were individual terms and which were standard terms. He added that in Scandinavian law surprising terms were not valid unless they were in bold-face type. The comments could state that such a clause either had to be in the individual terms or had to be placed conspicuously if it was in the standard terms.

Drobnig did not agree, as if such a rule were accepted you would be starting to make exceptions to the principle contained in Art. 16, according to which everything in printed general conditions comes under Art. 16 - including such a clause. If you started making exceptions, he felt that you would be lost. Even if the exception were a qualified one, such as the requirement of bold type, he would have thought that it would be clearer to leave it under the domain of Art. 16, also because

those who use standard forms containing such a clause do not always take it so seriously, and they insert it more as a precaution - in fact, they often do not even know the content of the standard terms they use as these are often drafted by a federation and the utilizers just take them "en bloc" without examining them in detail. He saw no reason to treat this clause any differently from any other clause in the standard terms.

A need was felt to clarify the terminology used, and thus to turn to Art. 15, but before this was done Maskow pointed to the existence of a third category of contracts which had to be considered which he called "sample contracts", and to the difference between these and general conditions: sample contracts contain certain firm conditions with blank spaces to be filled in individually. It was possible to say that sample contracts had certain standardised conditions. Sample contracts would be general conditions in so far as they were standardised and not in so far as they were individual.

Article 15

Introducing Article 15 which was the first to refer to general conditions or standard terms, Bonell stated that "standard terms" had been inserted as an alternative to general conditions in the course of the preparation of Doc. 41, as the term "general conditions" did not appear to be common in English legal terminology although it was widely used in continental legal terminology. What was intended were terms of a contract which, instead of being negotiated between the parties, were prepared by one of the parties or by a trade association or other organisation, and which were intended to be used in an infinite series of transactions. They occurred in basically two forms: either as a separate document, which was often actually called "general conditions" (c.f. the general conditions prepared by the ECE), and which was referred to in, or even attached to, the letter or whatever was exchanged in the negotiations, or they may appear in so-called standard form contracts ("sample contracts" in Maskow's terminology) either on the reverse or even starting on the front page, in which case they would become the contract document as all that was necessary was to fill in the blank spaces.

Furmston stated that a much wider spectrum was covered than the discussion so far recognised, and illustrated his point by referring to a standard form contract for authors for publishers which he had been asked to draft. When it had later been sent to him he had struck out two of the terms. In other words, these standard form contracts were not always accepted unaltered, although they would always be standard.

Bonell stated that here this would depend, and asked Drobnig what German case law said on this point: to what an extent may a term originally intended as a standard term become an individual term just because the parties deal with that particular term in their

negotiations? He had the impression that the borderline was difficult to draw. Where the adhering party is told "here are the general conditions - read them - do you agree?" it might be possible to construe this as negotiations, but no one would say the term became an individual term.

Maskow stated that in Furmston's case it was uninteresting whether the terms were general conditions or not, because he had struck out two clauses and then signed the contract, which meant that there was a contract and the problem of a battle of forms or similar did not arise.

Farnsworth wondered what "expressly" would mean in a case where blank spaces had to be filled in. A cautious lawyer would be uncertain and would think that anything that was in print was a standard term and would have to be expressly referred to. He knew what it meant with respect to the US textile sales note which was a little book that would be incorporated by reference and he could deal with that. On the contrary he had problems with a form which had blank spaces to fill in: would it be assumed that it was an express reference if you signed at the end?

Bonell considered that in this case it would not be an express reference but an express acceptance. Farnsworth stated that it was not plain to him that by signing on the sixth page you expressly referred to everything in between, but maybe the language used was not apt to express the idea behind the provision: Art. 15(1) stated that the standard terms must be referred to "and accepted", i.e. there had to be both an express reference and an acceptance, meaning that taken literally it gave the wrong answer. Bonell countered that although literally the provision might give the wrong answer, they themselves never would have. Many countries lived with such provisions and so far they had never given rise to any difficulties. The assumption would be that in this case, mutatis mutandis, the reference to the standard terms was obsolete as it was part of the declaration of acceptance. The reference would of course become relevant if the declaration of acceptance and the standard terms were separate documents as in the typical general conditions case.

Lando stated that in the Federal Republic of Germany standard form contracts had two elements: first, the contract in standard forms must have been prepared either by a party or by his organisation, i.e. it must be a one-sided document - the so-called "agreed documents" i.e. those standard forms which had been drafted by both parties together, would not be covered by this; and secondly, it must not be an individually negotiated contract. This was close to the definition Bonell had given, and, although he had doubts on the utility of a definition he wondered whether standard form contracts should not be defined for the purposes of Arts. 15 and 16. The sale of machinery could be covered both by a standard form made by the industry itself,

and by ECE 188 - if one party referred to ECE 188 and the other referred to the other form, and both parties got the document there would be no surprise. He assumed this would be a typical case of battle of forms although one of the documents would not be covered by the above definition, as, according to this definition, a standard form contract was a rather one-sided affair, but maybe it was possible to use it by way of analogy.

Drobnig stated that the examples given by Farnsworth showed that Art. 15 was too narrowly drawn, as it did not take into account standard form contracts but only considered general conditions. In his view, however, even if a standard form contract were signed by a party the rules on general conditions should apply because the need for protection was the same - people just sign, they do not have the time or the intelligence to read two pages of small print. These standard form contracts and general conditions should therefore be treated on the same footing, and it should be made clear in Art. 15, and therefore also in Art. 16, that standard form contracts, even if signed, are under the regime of these two provisions. He did not think that an exception should be made for agreed terms such as those of the ECE, as it would be difficult to do so - particularly in international trade people would not be aware of this distinction and it would not solve the case illustrated by Lando.

Date-Bah stated that Bonell's problem derived from the reference to "incorporating in" a contract. What he was trying to express was a situation where the contents of the standard terms was not an express part of the contract but had to be incorporated into the contract by reference. Drafting could solve this question, but it could not solve what Drobnig described, i.e. that even if you sign a contract with the terms in it there is the possibility of it being surprising.

Farnsworth considered it to be a mistake to use the same words, whether general conditions or standard terms, for a number of different ideas. He was not happy with the term "sample contract", but Maskow had made a contribution by having two different terms for two different thoughts, and whereas the thoughts were important the actual terms used were a drafting matter. For the so-called sample contract the problem was that you might not expect to find what actually is between the beginning which is filled in and the end where you sign. For the document that is completely separate you want to have it clearly said that this separate thing is referred to, although he did not know if you would always need an express reference.

Rajski felt that Maskow was quite right to draw their attention to the different situations. He added that there were also some hybrid or mixed documents which had a sample contract on the front and general conditions on the back. Thus, he agreed that sharp distinctions might be made in theory, unfortunately in practice the most frequent cases were those which were hybrid and far from clearly defined. What was

needed, apart from rules dealing with the clear-cut situations, were solutions also for these far from clear cases.

Bonell stated that he had been impressed to find how divided the common law and the civil law legal systems were, even from a purely linguistic point of view, as regarded this matter. In the civil law systems focus was placed on substance, and therefore the term "general conditions" was normally used with reference to the so-called standard forms of contract which only for certain purposes of limited scope were considered separately. In the common law systems the term "general conditions" was apparently not familiar, whereas the terms "contract forms", "standard forms" and "forms" were used. Thus, it was apparent already from a purely linguistic point of view that in the latter the emphasis was placed on form, with the consequence that the standard form of contract situation formed the centre of attention, while the separate document situation was almost neglected. He had the impression that also the members of the Group during the discussion were not only using different concepts, but by using these different concepts they referred to different situations, i.e. the standard form of contract situation when they used the term "form" and the separate document situation when they used the term "general conditions". What was needed was a generally acceptable terminology, and he wondered whether, ultimately, it really was that difficult to find such a terminology - once it was more or less clear what the discussion was about.

Lando considered essentially two issues to be involved. First and foremost that of what general conditions actually were, secondly whether or not Art. 15 was needed and if so in what form. The issues were linked, but could be addressed separately. The Standard Contracts Act of the Federal Republic of Germany (AGBG) had a definition which he considered to be excellent: "Standard contract conditions are all contract conditions which have been settled in advance for use in a number of contracts and which one party (the user) presents to the other party at the conclusion of a contract. It is irrelevant whether the conditions are set out in a separate document or whether they are contained in the contract document itself, whatever their scope and volume may be, in whatever manner they have been reduced to writing and whatever form the contract takes" (§ 1(1)). The provision continues: "To the extent to which the conditions of a contract have been individually negotiated by the parties, they do not constitute standard contract conditions" (§ 1(2)). He wondered whether such a definition should be accepted either in the text or in the comments. Art. 15(2) should perhaps be deleted, as all the important points were covered in other provisions - notably in Art. 17. The AGBG had a provision similar to Art. 15 in its § 2, which, however, he considered to be the most unclear provision of the whole law, and the Germans had, he stated, the greatest difficulty in explaining why an express acceptance was not always necessary. In consideration of the above he felt that a definition was necessary - either in the text itself or in the comments. He thus proposed that Art. 15 should be deleted.

Farnsworth had understood Art. 15 as giving examples of Art. 17, so, he said, you might want to say in Art. 17 that one way of preventing a term from being surprising was to state expressly that the contract incorporated it. He also wondered whether the difficult problem of defining what a standard term was could not be avoided for the purposes of Art. 17, as he could not see that the words "general conditions" or "standard terms" added anything to the proposition that if a term by virtue of language or presentation was surprising it should have this result. He therefore suggested either to delete Art. 15 or to incorporate it into Art. 17. He would, he said, even go beyond this and say that you did not need to have this difficult vocabulary problem in Art. 17 either. Lando agreed with Farnsworth that Arts. 15 and 17 could be merged, in which case he wondered whether Art. 16, which would then be the only article addressing the question of standard form contracts, should be burdened by a definition.

As regarded the definition of the standard terms, Date-Bah suggested that it be put in the text of Art. 16 rather than in the comments: if Art. 15 were deleted the proper place for the definition was Art. 16. On condition that this were done he would support the deletion of Art. 15.

Drobnig had difficulties in understanding why Art. 15 was drafted separately, as it seemed to be in accordance with general rules on offer and acceptance.

Bonell explained that originally the provision had been broader, in line with a more liberal approach as regarded the incorporation of general conditions not expressly referred to by the parties. This had subsequently been felt to be going too far. The peculiartity of the provision lay in the fact that it was possible, by mere reference, to incorporate into the contractual agreement a text which the other party may perhaps not even have been able to look at, but by which he would be bound if he did not object: all that was necessary to bring a whole text into the agreement was to state that "X conditions apply".

Drobnig wondered whether the same result could not be achieved simply under the general rules on offer and acceptance. Under Arts. 1 and 2, if you refer to something which is not expressed in the document itself, did this not then become part of the offer? Was this doubtful in any legal system?

According to Bonell para. 1 may be considered a special rule covering the case where the standard terms might become part of the contract even without an express reference - e.g. in the case of a document where everything individually negotiated is on the front, maybe also the signature, and the standard terms are on the reverse - as according to Art. 15 an express reference is needed for their incorporation, which might not be the case under the general rules on offer and acceptance. However, he concluded, if the other members of

the Group did not share these reservations he would then also conclude that there was no need for the provision.

Wang wondered whether in fact an agreement on the definition of general conditions had been reached. He made this consideration, he said, because there were many different types of general conditions: first of all those made by national authorities which he assumed were excluded; then those made by institutes, organisations and associations which comprised those which were binding on the companies and those which were merely recommendations to members; finally, those made by individual companies, which were divided into those which were a package deal which could not be amended, and those which could be modified. If the third category were intended, he felt that Art. 15 should be kept, whereas if any other category were intended it was a different matter.

Maskow considered that cases where the standard terms were on the back and no mention of them was made on the front hardly existed, but if so it would be quite clear that general conditions were offered. He himself would not insist on having a reference to the back page on the front page. Bonell considered this to be important as it clearly indicated that the Group was divided, and at that point whether you liked it or not Art. 15(1) clarified matters, with which Rajski agreed.

Furmston stated that hundreds of cases on this point were referred to in English literature. For example, in Swithin there was a railway museum which had railway tickets starting in the 1820's. The earlier tickets had nothing on the front and the conditions on the back, whereas the later tickets had "For conditions see back" on the front, and then the conditions on the back. There had actually been a case in which the court had felt that as the date had been stamped over the phrase on the front the buyer could not be expected to turn the ticket over to read the conditions. Art. 15(1), he stated, was consistent with what was actually done, but the same conclusion could be arrived at through the normal rules on offer and acceptance. In fact, one could say that what was on the back was not part of the offer. He could see no harm in the provision.

Lando raised the point of what the situation would be for individual conditions placed on the back - if conditions placed on the back were held to be part of the contract, this applied to both standard conditions and individual conditions; if they were not part of the contract this again should apply to both.

Date-Bah felt Farnsworth's concern to be formalistic. You would expect to find general conditions on the back of certain documents, so you did not always need an express reference. If, therefore, you removed para. 1 the provision would be less formalistic and you would construe the contract each time. As regarded illustration 3, if it was a usual practice then the general conditions would be incorporated.

Furmston felt that the truth of the matter was that it would all depend on whether or not the court liked the terms on the back. Rajski, however, wondered whether Art. 15(1) really was redundant: an express reference might not always be inferred from the other articles, and also for pedagogical reasons it might be good to keep the provision.

The proposal to delete Art. 15(1) was adopted by 7 votes for, 3 against and 2 abstentions.

Opening the discussion on Art. 15(2), Farnsworth stated that he considered Art. 15(2) to be an illustration of Art. 17 - i.e. if the parties have on previous occasions incorporated the general terms it would seem as if there would be no surprise, but rather a course of dealing or a usage. He wondered whether the rules contained an article on courses of dealing and usages. Bonell informed him that there had been, but that it had been deleted. The inclusion of such a provision along the lines of Art. 9 CISG might, however, be reconsidered.

Drobnig pointed out that such a provision was to be found in Chapter III, Art. 3, but that it did not help in the context of Art. 15, i.e. for the purposes of incorporating general conditions, as it referred to the interpretation of terms once they have become part of the contract and not to cases where it was doubtful whether or not they actually were part of the contract. A separate provision would, he stated, be necessary, whether it was located in Art. 15(2) or in Art. 17 did not matter. If an article along the lines of Art. 9 CISG were considered, that also should go in the interpretation chapter.

Lando supported the inclusion of such an article, although he felt that it would not be easy to draft. He referred to cases which were quite frequent in the building industry, i.e. when individual conditions have been used earlier between the parties or when some individual conditions are in conformity with usages. The question was then whether this rule should apply also to such individual conditions. In other words it was not a special problem for standard conditions. The same reasoning applied to Art. 17.

Bonell considered Lando's observation to be an additional reason to have a provision such as Art. 9 CISG in the interpretation chapter as such a course of dealing would bind the parties directly, without any distinction between individual and standard terms. In this case Art. 15(2) could be considered to be superfluous, although it was not quite the same thing.

Farnsworth stated that it was not clear whether the provision was there to aid the incorporation of standard terms or to prevent it. If it was to aid the incorporation Art. 9 CISG was better, as if there was no such general provision but only a provision saying that the incorporation amounted to a usage or to a course of dealing, the provision could only be interpreted as being much narrower than most

legal systems. If a formula such as CISG were adopted, then Art. 15(2) would not be needed for a positive, aiding effect, and the negative or preventive effect would be accomplished by Art. 17.

Maskow stated that Art. 15 had a certain importance as it covered cases where general conditions become part of the contract even if they have not been referred to by either of the parties. The case where it was the offeror who did not refer to the general conditions would not be covered by the rule contained in Art. 9 CISG. He was doubtful as to whether or not the case where it was the offeree who did not refer to them would be covered by the rule, as it was not that common an assumption that general conditions can become part of a contract when neither party has mentioned them. If such a rule was desired, then it should be expressed by the present rule.

Drobnig could not share this view. If a contract is made on the stock exchange, he said, then noone makes any reference to the usages of the stock exchange, but it is a usage that the rules of the stock exchange apply. Furthermore, if there is a course of dealing between the parties and they have either implicitly or explicitly referred to them and this is considered to have become a course of dealing between the parties, then this would be sufficient, and an Art. 9 CISG-type rule would cover these cases.

Maskow stated that his problem was that the contents of certain general conditions might be a usage, which was different from the case where it is a usage that certain conditions are agreed upon. Following the formula in Art. 9 CISG the "usage" would be that general conditions become part of the contract, which would lead to a second step, i.e. that therefore certain general conditions become part of the contract.

The proposal put forward by Lando to delete Art. 15(2) on the assumption that a provision along the lines of Art. 9 CISG is included in the chapter on interpretation was adopted by 9 votes for, 2 against and 1 abstention.

Drobnig suggested that following the deletion of Art. 15(2) the comments on the other provisions on formation should state explicitly that they also apply to the incorporation of general conditions. This point should also be made in the introduction to Art. 16 as it was the first place in which the general conditions were mentioned.

Turning to the proposal to define standard terms/general conditions, Lando came back to his original proposal to include such a definition in the comments rather than in the actual text of Art. 16. He also suggested that Art. 17 be made applicable to individual terms, which would mean that it would not be necessary to define standard terms for the purposes of Art. 17, although a definition might be needed for Art. 16.

Date-Bah stated that he would prefer to have a definition in the text of Art. 16 rather than in the comments. He suggested that the text of the AGBG could be used as a point of departure for such a definition.

Maskow, however, stated that although he had no objection against the introduction of a definition, he did object to the AGBG being used as it had different aims. It was one thing to define general conditions for the purposes of eliminating abuse, and quite another to do so in order to clarify the question of the battle of forms. A definition specific to these rules was therefore needed, and it should be quite different from that in the AGBG.

Farnsworth made the observation that it seemed as if the term "terms" were used in different senses for different purposes in different articles. Art. 15 had been deleted so there was no problem there. There was a proposal not to use the term in Art. 17; Art. 18 did use it, but it referred to the focus the parties had given to their negotiations, and he knew what more "specific" or more "general" meant, so that would be no problem. Art. 16 was the article for which he would want to understand its sense - i.e. if each one of the two parties refers to standard conditions and these do not agree, this would not necessarily prevent a contract from coming into existence. If this was its sense, it would be a great help if the words "if both parties refer" were changed, as they seemed to mean "if these terms are incorporated only by reference".

Lando wondered what Farnsworth meant by "incorporated only by reference", considering that the standard terms were part of the contract documents. Farnsworth considered that if the terms were in the contract documents they were not incorporated by reference only, they were incorporated because they were part of the contract documents.

Lando said that his understanding had been that Art. 16 should apply whether the terms were referred to or incorporated, as long as it was the intention of the parties that they should become part of the contract. Bonell's understanding of the term "refer" was also different from that of Farnsworth, as he felt it to be a term implying "if both parties make use of or avail themselves of", i.e. employ general conditions in one way or in another. Farnsworth wondered whether this would cover also the case where they were above the signature, which Bonell considered it would, although this was clearly a policy decision.

Farnsworth declared that if he were to present the principles to the American Bar Association Committee and they were to ask what was meant by general conditions/standard terms and he were forced to say that the Group had been unable to produce a definition but had said that everybody understood what was meant, then he felt that there would be a rather negative reaction. Maybe the civil law lawyers of the Group all understood the meaning of the terms used, but at least Furmston, Date-Bah and he himself had great difficulty in understanding what the

others were talking about.

Bonell expressed the fear that the divisions within the Working Group were greater than expected. His understanding, which was shared by many of the participants of the Group, had always been that the battle of forms was a clear situation. The parties discuss two or three points of the contract, and just as a matter of habit, as a normal course of behaviour, include the separate general conditions, or use the usual printed contract form or order form or acknowledgement of order form to put these three or four points in writing, without paying any attention to the content of the full set of general conditions. It had been felt that for such cases it might be a reasonable solution to save the contract and to forget about the conflicting terms. He realised that not only was this not acceptable to the common law colleagues, but they were just not willing to accept the distinction between individual clauses and standard terms, and he therefore wondered whether they would ever be able to find a solution.

Lando felt there to be no need for despair - even if the common law members of the Group had feelings against standard form contracts he was not so sure that this was shared by the whole common law world.

Maskow also felt that there was no need to be so dramatic - Art. 16 was a sufficient reference to general conditions and the comments could explain that these were a separate set of rules attached to other contract documents and the battle of forms referred in particular to such additional documents.

Wang supported having the definition in the article itself and not in the comments, although he admitted that it would be a difficult task to draft a definition which not only lawyers but also businessmen could understand.

Drobnig stated that Art. 16 could not be left without a definition in the text, as it deviated from the general rules on formation and as the conceptions of what general conditions were differed quite strongly. Both Furmston and Rajski insisted on the necessity of having a definition in the text.

As to the criteria for such a possible definition, Tallon suggested repetition and the fact that there was no bargaining and Rajski suggested the settlement in advance of an indefinite number of transactions. Bonell referred to p. 41 of the comments ((a) Contracting on the basis of standard terms), which contained a first attempt at describing the phenomenon, and also to the comments on p. 52 which admittedly, he stated, did not give a clear-cut definition, but which should, at least to a certain extent, give an idea of what they intended.

Lando referred to Farnsworth's book on "Contracts", where he read that "Traditional contract law was designed for a paradigmatic agreement that had been reached by two parties of equal bargaining power by a process of free negotiation. Today, however, in routine transactions the typical agreement consists of a standard printed form that has been prepared by one party and assented to by the other with little or no opportunity for negotiation. Commonplace examples include purchase orders for automobiles, credit card agreements and insurance policies. Sometimes basic terms relating to quality, quantity, and price are negotiable. But the "boilerplate" - the standard terms printed on the form - is not subject to bargain. It must simply be adhered to if the transaction is to go forward" (p. 293-294). At that Farnsworth wondered whether the actual printing of the terms was the test, which Bonell agreed it was in most cases.

Drobnig suggested to proceed from clear cases to less clear cases. A clear case was that of a printed or reproduced document to which reference is being made which is separate from the signed offer of a contract (e.g. a bank account contract will say at the bottom "our general conditions for the banking business are applicable"). Secondly there are the standard form contracts with spaces to fill in. If you assumed that the signature was at the end of the page and the individual terms were filled in, then he would have thought that you would distinguish between the individually negotiated terms of the offer or the contract and the unchanged pre-printed terms. The latter would be general conditions. He was a little in doubt if you signed also under the printed parts, and also on whether by virtue of the offer to negotiate not only the individual terms but also the printed terms are accepted. His assumption was that the signature as such was not sufficient, that the printed, prepared parts of the document would still be general conditions, but views seemed to differ on this. The next case would be where there is an individual contract and it continues on the back with pre-printed conditions, or where there is a standard contract which is signed in which printed conditions follow under the signature and which are not covered by the signature. In his view both these cases - the back side, or everything printed under the signature - would be general conditions. He considered these to be the three major types. There might be more, and in fact another type had already been mentioned, i.e. where the printed or otherwise prefabricated conditions are reproduced in the form of individual terms, on which doubts may also exist.

The proposal to have a definition of the concept of standard term/general conditions in the text of the provision was adopted by 9 votes for, 1 against and 1 abstention.

Farnsworth suggested to use words like "provision" or "language" instead of "terms", so as to get away from the problem of the price which is fixed in advance and not negotiable, to include the notions of being prepared in advance, of being intended for repeated use and of

their being used routinely. The provision of the Restatement on standardised agreements spoke of them being "regularly used to embody agreements of the same type" (R2C § 211(2)).

Bonell wondered whether the words "standard terms" would not be enough - he had always found them used in legal literature. Farnsworth, however, objected that price could be one of these terms, and that it was to avoid this possibility that he had made his suggestion. Tallon pointed out that you might have standard terms with blanks to fill in, for which the question would be were they standard forms or standard terms. A certain confusion might arise. Farnsworth again stressed that in a common lawyer's mind the words would raise the question of whether they meant that they had to be something on the back of the form, whether they had to be an association's standard terms or an individual's standard terms.

Furmston sought confirmation that the definition of standard form contract would be different in Art. 16 and in Art. 17. Lando confirmed that the definition only concerned Art. 16, which, however, Rajski felt would be dangerous - either there should be no definition at all, he stated, or there should be a general definition and Art. 16 should then concern only some specific situation. Tallon also felt that it was not possible to have different definitions for each article - it would be confusing for businessmen.

Furmston felt that Art. 16 treated a special situation, which was where both parties produce standard forms - this was not a problem that occurred anywhere else and the treatment of Art. 16 distinguished between the standard component of the standard form and the bespoken component of the standard form.

Farnsworth introduced the proposal he and Tallon had prepared which read:

> "Standard /general/ terms are provisions prepared in advance for general and repeated use and used without negotiations /meant to be accepted as a whole/".

Maskow wondered at the necessity of including a criterion such as "meant to be accepted as a whole", and Bonell felt this alternative to be dangerous.

Date-Bah considered that parties presented standard terms in the hope that there would not be any negotiations, but if there were, then this should not destroy their character of standard terms.

Rajski also stated that of the two alternatives he would support the first, but that he would prefer Date-Bah's suggestion to stop after "repeated use", as what came after was far from being true - very often although the terms were prepared in advance for general and repeated

use, they were actually used during negotiations; in fact, this was the most frequent case.

Furmston brought up British standard form building contracts which come in a form which requires you to decide which clauses to strike out. Crépeau wondered whether they then did not become individual terms, which Furmston denied, considering that they were all printed. Lando, however, interjected that in the computer world anything could be printed.

Farnsworth felt that the definition of standard terms had one deficiency which should be thought about. This related to what was a common practice in the common law countries, and maybe also in the civil law countries, i.e. that parties doing tailor-made, bespoken transactions get inspiration from something called a form-book - they look in the form-book and then tell the secretary to copy a certain form. That might be the only time that person uses it. He would have thought that that would not be a standard term because lawyers do not have that much creativity and a lot of tailor-made contracts have these terms. This definition might suggest that since the term is used regularly by lots of different people it would be thought to be a standard term, and to avoid this, they would have to insert somewhere "used by a party", and possibly also "in similar transactions". If they said this, the definition might be a little longer, but the form-book case would be eliminated. Farnsworth suggested the following formula for Art. 16:

> "If both parties use standard terms and they reach agreement on all but those terms, the contract shall be considered to have been concluded on the basis of any standard terms on which they have agreed".

Furmston suggested a formulation such as:

> "If the parties, having agreed on certain specific terms, seek to contract on different standard terms, the contract shall be considered to be concluded on the basis of the agreed specific terms and those terms in their standard terms which are common".

Bonell suggested the last part of Furmston's formulation be combined with Farnsworth's formulation, and thus read:

> "If both parties use standard terms and they reach agreement on all but those terms a contract shall be considered to have been concluded on the basis of the agreed terms and any standard terms which are common".

Lando wondered why Farnsworth said "on all but those terms", and suggested simply saying "on other terms", but Farnsworth considered that it would then be necessary to say "all other terms", i.e. "use standard

terms and reach agreement on all other terms", which, however, Lando considered to be too much.

Drobnig presented two new draft Arts. 15 and 16 which read as follows:

Article 15 (new)

(Contracting under standard (general) conditions (terms)

(1) Where one party or both parties use standard (general) conditions (terms) in concluding a contract, the general rules on formation apply, subject to Articles 16 - 18.
(2) Standard (general) conditions (terms) are provisions prepared in advance for repeated use by one party which are not the result of individual negotiation with the other party.

Article 16

(Battle of forms)

If both parties use standard (general) conditions (terms) and they reach agreement except on those conditions (terms), the contract nevertheless comprises, in addition to the agreed terms, also those standard (general) conditions (terms) which are common in substance.

Lando stated first, that he would prefer the use of the words "standard terms", and secondly that he was not happy with the specification "by a party". He felt that there might be difficulties in evidencing that a party alleges that he will not use them again because then he can withdraw them if in a dispute it is the first time he has used them.

Farnsworth felt that the shorter version would be more consistent with the style of the other provisions and, as the principles were not a statute, many of these things could be dealt with in the comments. He did not have a lot of difficulty with the substance, but felt that the formulation suggested by Drobnig might be too long. The words "which are not the result of individual negotiations" he felt to be repetitive - it was understood in the first phrase and to the extent that it was not (the case where the parties sit down and amend the conditions) this could be dealt with in the comments.

Also Lando felt that the idea in Drobnig's proposal could be kept even if the wording were changed to say "standard conditions are provisions prepared in advance for repeated use and which are not the result of individual negotiations". This was the idea; there was no need to introduce the parties.

Bonell stated that the deletion of "general" with respect to the use of the terms depended on the terminology chosen, i.e. standard terms or general conditions. He drew attention to the fact that "repeated use" might also refer to repeated use between the two parties. If they spoke in terms of standard conditions then "for general and repeated use" did not seem to be synonymous. "By one party" he felt to be useful as there were other sorts of compilations of rules which, just because they are not used by only one of the parties, do not fall within this category. They may become standard terms if one of the parties uses them repeatedly and generally in contracts with his clients. As regarded Drobnig's amendment, he wondered whether the wording was correct, as the words "are not the result of" seemed to contradict the first part. What was really meant, was "are not in the single case object of". If it were possible to find a wording expressing this idea, then he saw no reason not to have it.

Farnsworth had the same difficulty with the "result of", as the terms could not be prepared in advance and be "the result of", but they could be prepared in advance and be "used without negotiations", i.e. where the parties argue over the terms but still decide to use them. He would have thought that "used without negotiations with the other party" might avoid that difficulty, and he would have thought that what Drobnig wanted was "prepared in advance for general and repeated use by a party and used without negotiation with the other party".

Drobnig, however, was not happy with this proposal, as if the terms were sent to the other party, then of course the other party was free to comment on them or not to comment on them. Usually they did not comment on them, and would that then be "used without negotiation"? Admittedly, it would not be the result of negotiations, but it was precisely for this reason that he had chosen his formula. Crépeau thereupon suggested a formulation such as "which are not the object of individual negotiations", but Drobnig queried the meaning of "the object": the terms may be the object if they are sent to the other party. The other party has the opportunity to read them and to amend them, to negotiate about them, but usually he does not do so. The mere opportunity to do all this, and the party's inactivity, does not take them out of the general character of general conditions.

Farnsworth pointed out that "used without negotiation" was not the same as "used without the possibility to negotiate". Maskow considered the problem to be the word "used": were the terms actually used without negotiation or were they generally used without negotiation? The differentiation was made in order to make it clear that what was meant was that in the specific case they were used without negotiations. Farnsworth thereupon suggested "which are prepared in advance for repeated use by a party and which are actually used without negotiation with the other party".

The proposal as modified therefore read:

"Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party".

Drobnig declared himself satisfied with this formulation. Furmston stated that it should be made clear in the comments that "used without negotiation" referred only to the standard terms. Farnsworth stated that although he was not worried, Furmston's point was well taken. They were envisaging a situation where there perhaps were negotiations on the price, in which case it might be possible to say that the standard terms were used without negotiation if all that was negotiated was the price. He felt, however, that if there was a comment anyone misreading it would be corrected.

Hartkamp considered another possibility to be where, in negotiations, you incorporate either the general conditions of the seller or the general conditions of the buyer, which was not what Drobnig intended, as he pointed to negotiations on a separate term. However, this was also ambiguous.

The proposal as modified was adopted by 10 votes for, 1 against and 2 abstentions.

Article 16

Returning to Article 16, Farnsworth stated that he would be happy to modify his earlier proposal and submitted a new one which read as follows:

"If both parties use standard terms and they reach agreement except on those terms, a contract is concluded on the basis of any standard terms which are common in addition to the agreed terms".

Bonell suggested maintaining the original order, i.e. "...is concluded, in addition to the agreed terms,on the basis of...", and Drobnig proposed to add "in substance" at the end as otherwise the standard terms would have to be identical literally.

The proposal as modified was adopted unanimously. Art. 16 thus read:

"If both parties use standard terms and they reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and any standard terms which are common in substance".

Returning to his proposal to move the definition to Art. 15, Drobnig stated that this would make the definition cover the articles

following thereupon (subject to review). The main point was that para. 1 intended to express what they had already agreed upon, i.e. that apart from the special provisions of Art. 16 and following the inclusion of general terms into a contract should be governed by the general rules on formation. It had been suggested that businessmen would want to know this explicitly, rather than their having to derive it from the comments. Para. 1 did not purport to do more than give expression to this general idea.

Crépeau and Bonell stated that they would favour the introduction of an article such as this, as it brought to the attention of the reader the fact that general rules on offer and acceptance would apply - except on certain conditions.

Tallon reminded the group of the rules on interpretation, and Lando reflected that maybe also the rules on validity could be covered by this. Bonell disagreed, as what they were addressing was the actual mechanism of incorporation of the terms. Drobnig pointed out that the words "in concluding a contract" should make it clear that they were dealing only with the conclusion of the contract, and would imply that the rules of the other chapters apply - which could be made clear in the comments.

Drobnig's proposal for Art. 15 para. 1 was adopted by 10 votes for, and 3 abstentions, and read:

> "Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Arts. 16-18".

As regarded the place of insertion, Drobnig's proposal of having the substantive rule in Art. 15(1) and the definition (as adopted) in Art. 15(2) was adopted by 12 votes for and 1 abstention.

Date-Bah suggested that the drafting committee could consider whether Arts. 15 and 16 should be merged, and this suggestion was accepted by the Group.

As regarded Art. 16, Farnsworth raised the question of whether or not it continued as the original text, i.e. "unless one party without undue delay informs the other that he does not intend to be bound by the contract". He stated that unless you expect parties to exclude these rules entirely, you need to offer them the possibility of coming out of the rule. He thought this was needed, and also something to take care of the "skull-and-cross-bones" case Furmston had raised of where a party puts in a prominent manner the indication "we do business only on our standard forms". He therefore felt that what was in the original Art. 16 was needed, and even something more: "unless one party clearly /conspicuously/ indicates in advance or later without undue delay informs the other that he does not intend to be bound by the contract".

Bonell favoured Farnsworth's proposal wholeheartedly, which he felt introduced extremely important qualifications. Drobnig, however, wondered whether this would mean that the whole contract would be refused, or only the standard terms. Farnsworth considered that you would have to say that you will only contract on your own terms for you to refuse the whole contract. Drobnig had doubts on the words "by the contract", as he thought that the objection was limited to the other party's general conditions and did not refer to the individually negotiated terms. Farnsworth stated that you had to say something after "does not intend to be bound", as one who puts a skull-and-cross-bones sign in fact says "I intend to be bound if you agree to every one of my standard terms and I do not intend to be bound by a contract that contains only our common standard terms". He felt that what they were saying here, was that a party must clearly indicate that he does not intend to be bound by the contract indicated here.

Tallon raised the point of whether it was actually possible to address both the situation of an advance indication and the situation of a subsequent indication of an intention not to be bound in the same provision, or whether it might not be preferable to have two. Bonell agreed with Tallon, and suggested that para. 1 be left as it stood with the "unless" addition, and then have a para. 2 to the effect that "Paragraph 1 does not apply if one of the parties right from the outset clearly indicates that he does not intend to be bound by any contract if not on the basis...". These were different situations which had different results. Farnsworth suggested saying "such a contract" instead of "the contract", which would be enough to avoid making it a rather heavy section, and which would mean that the idea was in. If they wanted more words, then that could be arranged.

The Group thereupon voted for Art. 16 as modified, which read:

> "If both parties use standard terms and they reach an agreement except on those terms, a contract is concluded on the basis of the agreed terms and any standard terms which are common in substance, unless one party clearly indicates in advance or later, without undue delay, informs the other that he does not intend to be bound by such a contract".

The proposal was adopted by 11 votes for and 2 abstentions. Drobnig, however, felt that it was a long and complicated text, and suggested that Bonell should be asked to prepare a clearer version, perhaps splitting it up into two sentences or paragraphs.

Article 17

Introducing the discussion on Article 17, Bonell stated that so far it had been clear that the scope of the provision was intended to be restricted to provisions contained in standard terms. They might

therefore concentrate on the point of whether the scope should be broadened so as to cover also surprising provisions not contained in standard terms. He pointed out that, following the decisions the Group had taken, the title of the provision should now read "Surprising provisions", and the text should say "No provision contained in standard terms".

Rajski favoured the provision as it stood, in consideration of the requirements of businessmen. Farnsworth, who previously had favoured a broadening, now had second thoughts about the proposal and stated he preferred the provision as it stood. Wang also favoured the text as it stood. Lando consequently withdrew his proposal to broaden the scope of application of Art. 17.

Art. 17 was adopted as it stood by 12 votes.

As regarded the comments, Bonell stated that the point raised by Lando was important, as as soon as attention is drawn to the provision it is no longer surprising, with the result that it would fall outside the provision. This should be considered in the comments.

Article 18

Introducing the discussion on Article 18, Bonell stated that he could see the interlink with the parole evidence rule, as here it was a question of the admissibility of such an individually, orally agreed provision which is not contained in and which contradicts the writing.

Lando felt the rule to be a good one, and stated that he would support it, although he wondered whether it were not a rule of interpretation. In Danish law, he stated, it would be considered a rule of interpretation, and one of the paramount rules of interpretation is that the individual goes before the standardized, so he suggested moving the provision to the chapter on interpretation. He referred to the Restatement, which states that "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated" (§ 203(d)). He understood the last words to cover the situation where the parties refer to an agreement between other parties or between one of the parties and another, and they then add terms to this agreement which are inconsistent with the agreement referred to, and their rule should also take care of this situation. He illustrated the case by giving the example of an agency agreement, where the agent and the principal have made an agreement, the agent then dies and there is a new agent. For the new agency agreement they use the old agreement adding new terms, and there is a conflict between the new agreement and the old agreement. The Restatement takes care of this situation, and so should these rules - he thus proposed to use the actual words of the Restatement.

Crépeau felt that in substance the provisions were quite different, as the Restatement concerned which provision prevailed, whereas the other one was a question of interpretation, of giving judicial power to weigh the provisions. Bonell pointed out that the Group had felt the proper place for the provision to be the chapter on formation, as it had been considered a question of prevalance.

Farnsworth felt Lando's proposal to be attractive, although he felt the proposal to be hard to assess without the text of the chapter on interpretation. He stated that in a sense he would like to move the provision in the hope that it would be drafted as Lando proposed, but again, it was difficult to draft without the whole chapter. Bonell drew their attention to Art. 6 of Doc. 42, the comments to which, under (b) (p. 15) try to read something into the literal meaning of the provision - he had found that he had to give some interest to a provision which appeared to express what was shere common sense.

Lando stated that he was not entirely satisfied - it was an important issue which should not be hidden in the comments to a provision which hardly addressed the issue. He therefore considered that it should be moved to the chapter on interpretation, and that when they reached that chapter the Group should consider what to do about his proposal. At that point also the value of preambles should be considered - more than 50% of international contracts had preambles.

Bonell stated that Art. 18 addressed the issue, i.e. if there was conflict, not unclarity - if one party said A and the other said B then it was a question of which should prevail, and the rule of law was that B should prevail if it was individually negotiated. He did share the view expressed regarding the importance of the issue raised by Lando and Farnsworth, and he wondered whether it would not be possible to keep Art. 18 where it was and to come back to the issue in the context of the chapter on interpretation, maybe together with Art. 6; he was aware that what was said in the comments under (b) was not included in the provision as such and should, perhaps, be settled in the text of the provision.

Drobnig felt that they should first of all decide whether or not Art. 18 should be limited to the conflict between individually negotiated terms and standard terms. If this were the case, then the provision should be left where it was as it was in the context of the rules on general conditions; if this were not the case, then it should be an express rule which should be moved to the chapter on interpretation. He therefore suggested that they first of all vote on the question of the broadening of the provision along the lines suggested by Lando.

Rajski pointed out that the proposal was not a mere generalisation of the provision, but a modification. Bonell stressed that it would no longer be an absolute rule, a prevalence rule, but that it

would instead just be a question of evaluation. Lando stated that even if they decided to keep the provision where it was, they were not precluded from addressing the question when discussing the chapter on interpretation. He still felt that the whole question of the weight to give to the different provisions belonged in the chapter on interpretation and not in that on formation where the main issue was is there or is there not a contract. Rajski stated that he was in favour of Art. 18 as it stood and also of its present location. It was a very important issue and a clear solution meeting the requirements of international practice.

The proposal to move Art. 18 was rejected by 8 votes against, 4 in favour and 1 abstention.

Farnsworth thereupon raised the question of whether or not there was anything which was neither a special provision agreed between the parties nor a standard term. If this were so, he suggested leaving this to the comments, but if this were not so, then the phrasing might be misleading as it would suggest that there is something else. If they wanted to say that there was nothing else, then he would suggest wording such as "If there is a conflict between a standard term and another term, the other term prevails", which would eliminate the possibility of something which was neither. Farnsworth stated that he did not know what individual provisions were, they were not defined and they were not used in English or American law. Basically, what he was asking was: is an individual term something which is other than a standard term, or are there standard terms, individual terms and other terms that are neither standard nor individual? Maybe, in the definition, they should say something such as "any term that is not a standard term is an individual term". The language of the provision suggested that they only dealt with the most honourable individually negotiated terms and the most dishonourable standard terms and say nothing about how the in between category should be handled.

Furmston stated that what was being said was clearly wrong, as then there were three categories: individually negotiated terms, standard terms and those in between, e.g. all contracts for the buying and selling of houses in England are made on one or other standard forms commonly used by solicitors. Buyers and sellers of houses only buy and sell a house once in ten years, so these forms were not in any conceivable sense within the definition of standard terms, as they were not produced for the use of either party, but they were not individually negotiated either, as all lawyers get them out of the word processors and tell their secretaries to send them to the other lawyers.

Crépeau stated that what Furmston was referring to would, in his jurisdiction, be called "notarial forms". These are used by notaries when there is a purchase or a sale of a house, and would come within the category of standard terms. Furmston insisted that they were not in the category of standard terms as defined by the Group - they were not

prepared for repeated use by one party because the buyer or seller were not in the business of buying or selling houses and neither of the parties was going to use the form repeatedly. He gave another example in which two people intend to set up a partnership for the selling of icecream. They go to a lawyer for the drawing up of the contract, and the lawyer goes to his form book to produce the contract. In this case it would not be a standard form contract because the two parties have never made a partnership before and do not intend to do so again. Crépeau stated that from his civil law point of view it would be a standard contract because the notary or lawyer was the agent of one of the parties and he takes his forms from the professional body to which he belongs, or the group to which he adheres, and those are special forms which have been prepared. He had no qualms about defining these as standard forms.

Farnsworth stated that the reason he asked whether there were more categories was that if Furmston goes to his solicitor and he goes to his and they then exchange forms as described in Art. 16, it was inconceivable that they had an agreement on the terms which happen to be common in substance. They had defined standard terms for the purposes of Art. 16 in a very different way to what was apparently known in Crépeau's country, and they had to stick to the definition unless they wanted a different one. It was clear that Furmston's case was not a case of a standard form contract, and it was not a case of an individually negotiated agreement, and so he had thought it to be a simple matter of drafting, in that they did not make use of the definition they now had. Now, however, he did not really know whether they were saying that there were three things and they were only dealing with the best and the worst, or that one category was that of standard forms and thet wanted to put them lowest. He thought that the discussion on the conflict, i.e. of the conflict, suggested that they always wanted to put standard terms down and any other terms prevail, in which case that was not what they had said.

Bonell stated that, apart from possible divergencies on the precise qualification of these "in between" cases, in substance, and for the purposes of Art. 18, what mattered was that nobody would answer Furmston's question of whether there were three categories in the affirmative. The basic assumption of Art. 18 was that there were only two kinds of contract provisions - standard terms and all the rest. Since this was the case, he wondered whether it was necessary to clarify their minds right down to the last extreme case as to the general definition of certain cases which might create conflicting views.

Lando and Date-Bah reflected that if Art. 18 were retained here, and if it were limited to Art. 15(2), then there were certain notary documents, as well as certain others where the parties agree to use certain forms which contain possible additional terms, to which this rule would not apply as they would not be standard form contracts - which meant that you had to put a rule in chapter III. You would then

have two rules, one in the chapter on formation and one in the chapter on interpretation dealing with notary documents etc., and the outcome should be the same. In other words, the principle contained in Art. 18 would have to be repeated in the chapter on interpretation for the third category, i.e. for those terms which are neither standard terms as defined in Art. 15(2), nor typically individual terms.

Drobnig felt that the problem faced for the different cases was somewhat similar but the rules were different. Art. 18 gave quite a strict rule, and he would have thought that that was the correct rule in the context of general conditions. The rule envisaged for interpretation, which would probably follow the terminology used in the Restatement ("giving greater weight"), would be appropriate for the other circumstances referred to. Bonell agreed with Drobnig, and stated that he thought it impossible to draw a definite line of distinction between the cases. Also according to Italian case law on contract forms for the letting of apartments (which you can buy in a tabaccheria), if they are used by insurance or real estate companies which let houses on a regular basis, then the forms constitute general conditions; if, on the other hand, an individual once in his life-time uses such a form to buy a house it would not constitute general conditions.

Farnsworth thereupon suggested a formulation such as:

"If there is a conflict between a standard term and another term [which is not a standard term] the other term prevails".

This proposal was accepted by 11 votes for, 1 against and 1 abstention.

Wang wondered about the definition of the "other terms", and Bonell suggested that the comments could take care of that.

Taking a closer look at the comments, Maskow referred to p. 53 where, at the end of the first paragraph, only "reliance" was mentioned, whereas also "conduct" should be mentioned.

Furmston stated that he had a problem. The rule, he stated, was a sensible one, but in England there was a line of cases which said that the rule can be excluded by agreement. This arises in contracts which have a rule on the weight of the documents: this is often the case with construction contracts, some of which list the hierarchy of the documents. The effect of this is that you cannot change the wording of the standard clause without changing the paramount document. Although it is quite clear in common sense terms that parties want to effect a change, courts have consistently held that if they want to effect a change they have to change the top-ranking document concerned.

Bonell pointed out that Art. 18 was to be considered non-mandatory, but that they had decided that, in the context of the chapter on interpretation, what presently was in the comments under (b) on p. 15 of

Doc. 42 could be made clear by a specific provision to be included in the chapter on interpretation.

Article 8

Bonell introduced Article 8 by stating that it was a well-known provision, which had been taken literally from CISG. The solution adopted in the article was one which reflected practice all over the world.

Farnsworth suggested deleting the words "telephone, telex or other" - "by means of instantaneous communication" was quite clear and the words he proposed deleting did not add anything.

Farnsworth's proposal was adopted by 10 votes for, 1 against and 2 abstentions.

Maskow suggested that the cross references should include Art. 16, which stated "indicates in advance or without undue delay" which should also be calculated within such a period of time. Bonell objected that if this were done the list of cross references could become enormous. Tallon felt that as this provision only referred to acceptance the problem was solved. Crépeau suggested, and the rest of the Group agreed, that Bonell examine the section and see if it would be useful to insert the problem of the "undue delay".

Furmston felt the word "included" to be ambiguous. If, he stated, they said that the offer was open for ten days, and within those ten days there was both a Sunday and a bank holiday, should they then simply count through them as long as they were not the last day? Crépeau suggested that the comments could take care of this problem, to which Furmston agreed.

Article 9

Introducing Article 9, Crépeau recalled the earlier discussion which had concerned the question of the difference between "without delay" and "without undue delay". Did they, he asked, need this shorter period or would "undue" be sufficient?

Bonell stated that reflecting on this issue he had come to the conclusion that this differentiation between the periods of time had been done deliberately, as an immediate reaction might be required - something might happen at the last moment which allowed things to be settled.

Article 9 was unanimously adopted as it stood. No remarks were made on the comments.

Article 10

Introducing Article 10, Bonell stated that it was an established rule which had been taken literally from CISG. No observations were made by the members of the Group, neither on the text of the provision, nor on the comments.

Article 10 was unanimously adopted as it stood.

Article 12

Introducing Article 12, Bonell stated that it was intended to deal with a situation which frequently occurs in negotiations, especially when they are inter praesentes and proceed step-by-step, i.e. where a party says "I see we cannot reach an agreement, but be clear that for me this is an essential point". In such a situation the contract is concluded when, and only when, an agreement on this point has been reached, irrespective of whether this point is an essential point or not. In the comments under (c) he had tried to develop the idea, and thought it could be a useful device also for those situations where parties agree in a more or less informal way and then defer their final agreement to a subsequent moment when their agreement has to be formalised. It is often difficult, he stated, to determine whether a contract must be considered to have been concluded already at the earlier stage or only with the formalisation. For obvious reasons this was important, as a party may at this second stage try to introduce something new or, if this formalisation never takes place, the question may arise of whether there is a breach of contract or whether an agreement has simply never been reached.

Lando felt that the title did not reflect the text, and that it would be better to say "Agreement dependent upon specific terms". There was furthermore one point on which he had doubts: if in a standard form contract one party says that he will only deal on his own terms, did this reservation clause have to be in the individual terms or could they also be in the standard terms? He himself would prefer the latter solution of the two.

Bonell stated that his understanding was that as a rule such a clause contained only in the standard terms themselves would not be sufficient to meet the clarity test which they had introduced in Art. 16 ("if one party clearly indicates"). However, he admitted that there may be cases where the most likely conclusion was the opposite one, i.e. along the lines suggested by Lando.

Drobnig disagreed, stating that Art. 16 did not say what Lando and Bonell wanted it to say, and personally he himself would not even wish it to say this. The proposal amounted to cutting into Art. 16, to making an exception to Art. 16, because if that clause of exclusivity

was only in the general conditions, it was a general condition. Indeed, the basis on which they had drawn up Art. 16 was the consideration that the parties, in exchanging their general conditions or referring to them, often do not take them very seriously and this consideration would then apply also to such a clause. The condition of one party saying "our agreement must be reduced to writing" would not be covered by the term "agreement on specific terms". In essence probably the same solution should apply as the one set out in Art. 12. Finally, he felt it to be unnecessary to say "the contract shall be deemed to be concluded", he suggested that they could say "the contract is concluded only when /only if/", he could not see why a fiction was used.

Hartkamp agreed with Drobnig on this last point. In fact, he considered that they could do without the whole article as it was obvious.

Rajski stated that he was in favour of maintaining Art. 12, as it expressly dealt with the other way of concluding contracts than by offer and acceptance. For a variety of reasons he felt it to be very important to have such an article, although he did have certain doubts. He wondered whether businessmen reading the article would be quite well advised as to the measure of agreement which was sufficient for the conclusion of the contract. This article dealt with the frequent case where there was a specific term which had to be agreed upon, and the contract was therefore concluded when agreement had been reached, but what happened when the situation was far from clear, when there was no clear indication of there being a specific term on which one party would like to get agreement? At some point they had to say to the parties that an agreement had been reached: the parties had been negotiating and this was the point at which the Group decided that a contract had been concluded. What could be more explicit was the measure of agreement necessary in order to say that a contract had been concluded. He did not have a specific proposal; some legal systems had a rigid solution according to which agreement must be reached on all terms that had been negotiated between the parties, but he felt that in international business they did not need such a rigid solution. The problem was the degree of flexibility necessary and how to express it. There need not be any disagreement, he stated, but there were cases in which negotiations took a very long time, and nevertheless the contract actually was concluded before the final stage of negotiations; then, at what point in time could you say "here is the contract but you are still invited to negotiate on some points".

Maskow stated that he had more or less the same misgivings as Rajski. For him, the decisive point was when the intention of a party to include a certain clause might have been given up. The article read "in the course of negotiations", but it was normal that in the course of negotiations quite a lot of proposals were made and later dropped in order to reach an agreement. The question might come up of why a certain party no longer insisted - did he really drop his proposal or

did he uphold it? One solution was that adopted by the International Economic Contract Law of the German Democratic Republic (GIW) which stated that the contract "in case of doubt shall be deemed to be concluded" (§ 30(2): "Ein Vertrag ist im Zweifel erst dann zustande gekommen, wenn sich die Partner hinsichtlich aller Punkte geeinigt haben, über die nach dem Willen eines Partners eine Vereinbarung erzielt werden sollte.[...]). Alternatively they could say "to the intention expressed by one of the parties" instead of "in the course of negotiations", "up to the end of negotiations or ..." in order to make it clear that not every motion or proposal made at one stage or other shall have such an importance that it impedes the formation of a contract.

Bonell stated that he could see the problem, but that he would have thought the provision to be satisfactory. What was said here was not what happens when, during the negotiations, a party makes a proposal and no agreement is reached on that proposal; what was said was that "where, in the course of negotiations, a party makes it clear that it considers agreement on a specific term to be a condition, then...". There would always be doubtful cases. The term could be implied by law if it is not agreed, but he would not say that the conclusion of the contract is prevented by that. The situation referred to by Rajski was not the one envisaged in the provision, but he thought that Rajski was raising the point that, apart from the merits of this provision, there are many other problems still left open. He recalled that a previous version of the article said something like "from the beginning" or "from the outset declares", because at that point you either say it at the beginning or to a certain extent you are precluded from placing such a special importance on a particular term, and this would then mean that the general rules on the conclusion of the contract apply, with the result that if there is an agreement which is sufficiently definite to permit that kind of transaction to work properly a contract has been concluded.

Tallon considered that there may be agreement on the specific clause but not on other clauses, so he suggested turning the sentence around to read "the contract cannot be concluded before the parties have reached such an agreement".

Maskow, however, could not see the difference as, he stated, the conclusion of the contract consists in having an agreement on this point - Tallon suggested "the contract cannot be concluded", but if there was agreement then the contract is concluded.

Farnsworth agreed with the substance of Tallon's suggestion, and Wang also declared that, just as he had no difficulty with the text as it stood, he had no difficulty with the text as amended by Tallon.

Drobnig declared that of course every party wishes to have its own conditions accepted, and at the beginning of negotiations everyone

will say that he will negotiate only if his own conditions are accepted, and that otherwise there will be no contract, but in the course of negotiations, particularly of long negotiations, such extreme positions are normally either forgotten or more or less consciously retracted, and he thought that the essence of the proposal was that the fact that a term was essential for a party should be indicated by him at the beginning, but should also have been maintained at the time of the conclusion of the contract.

Lando stated that Hartkamp's suggestion to delete the article was the best. He felt that even if parties at the beginning say that they will only make a contract or reach an agreement on everything, and then in prolonged negotiations they agree to decide later, or during performance, minor terms are at that stage really best covered by the rule in Art. 13.

Bonell disagreed with Lando - of course it might be possible to imagine cases where it would be perfectly correct that a party should no longer be permitted to rely on such a provision in order to deny the conclusion of a contract, merely because at the very beginning of the negotiations he in one way or in another made a certain statement which then constituted "good faith in the formation of the contract". If the statement was made in an off-hand manner, e.g. "by the way, this is a very important point and we really must reach an agreement", after which they go on negotiation, and later on may be even declare the contrary, then it would be a question of interpreting the different statements. He wondered whether by deleting this provision they did not miss a chance to introduce a reminder to the parties which might well be of importance in arms-length negotiations, especially if they took into consideration the possibility of broadening the provision and of making it refer expressly to the documentation issue which the text so far did not address. There was merit in nine cases out of ten: why, he asked, just because it might give rise to difficulties in the remaining one case, should they forget about the other nine? Secondly, he suggested to make it even clearer in the text that it was necessary for the party to insist on his indication - illustration 2 spoke of "repeatedly".

Wang observed that the deletion of the provision was a matter of policy. Many specific matters could be covered by general rules. If the Group wanted to make a general principle which was easier to understand also for businessmen, then he would prefer to have a general principle which was more specific and clearer. For this reason he would prefer to have an article here.

Bonell suggested using the formulation of Art. 16 "Where, according to the intention clearly expressed...", but to Farnsworth the phrase "according to the intention expressed ... the conclusion of the contract is dependent" seemed to be rather strange and awkward. At first he had thought of rewriting it by simply saying "Where one party in the course of negotiations expresses the intention not to conclude a

contract", but some members of the Group appeared to have reservations as regarded a party who expresses this intention and then does not persist in it, and this problem could be solved by saying "Where one of the parties in the course of negotiations insists that a contract not be concluded until there is agreement on the specific terms", which to him would mean that if you said it on Monday but did not seem to care much on Wednesday, then you did not insist. He did not know whether the Group would want to say a contract or the contract: he could see merit in both.

Wang stated that here there must be a rule for the situation that agreement on specific provisions must be reached or there will be no contract. Bonell thought that, as long as both or all interested parties agree on the postponement of the discussion on certain issues it would follow from the general rules on formation that according to those parties there is no contract, that this was actually what they had agreed.

Drobnig stated that the original version of Art. 12 was merely badly expressed, and that the reference to two provisions of the BGB did not conform to the contents of the rule. They meant something quite different, namely that if one party insists - not that its own terms be accepted and that otherwise there will be no contract - but that the parties reach an agreement on a specific topic. He was still not very much in favour as some party might say at the beginning "we must reach an agreement on the way in which payment must be made", and then in the course of negotiations they may either forget it or give it up as they cannot reach an agreement, but that would change the meaning of the whole provision.

Bonell felt that Drobnig was right. He said that he now realised that whereas the word "terms" had so far been taken to mean "clauses", in this provision the Group had used it in the sense of "issues", which meant that Drobnig's interpretation was correct. If it had been incorrectly expressed, then the formulation had to be changed. Farnsworth thereupon suggested that it might be better to use "matters" rather than "terms".

Furmston proclaimed himself to be totally mystified by the whole discussion on this article, as to what it would mean in any of the forms so far suggested. He had a question on illustration 2: did the phrase "P, after having reached agreement on all essential terms" mean that if P and A sign a contract containing all the essential terms, but make no mention of the cost of the advertising campaign, there would be no contract? Bonell stated that it would not mean this.

Furmston brought up the case of the parties not having signed the contract, but simply having had negotiations which have reached the stage at which the matters which are commonly expected to be agreed have been agreed, but there has been no agreement as to the costs of the

advertising campaign. Then they did not need Art. 12 to tell them that there was no contract, as that was basic offer and acceptance. Bonell questioned this conclusion, giving by way of example the case of a party saying "by the way, let's not forget who is to bear the cost of the publicity" - it is a minor point, the party is not making any offer whatsoever, he is just drawing attention to the fact that this is a point to which he attaches great importance, and that it is one on which they must agree, after which they go on negotiating. This would not necessarily follow from the offer and acceptance situation. Furmston, however, thought that they had to give some explanation of why they needed a special rule to deal with this.

Bonell recalled that the Group had at a previous stage been pretty much convinced by the necessity of having a provision of the kind contained in Art. 12, and expressed his surprise at the fairly negative comments the same article had so far received this time. As regarded the distinction between the essential and the non-essential terms of the contract - which Furmston claimed was unknown to him - he asked Furmston how he would answer the general question "when is a contract concluded? The distinction between essentialia and non-essentialia meant that the contract was concluded as soon as there was agreement on the essential terms or, if he preferred to reason in traditional concepts of acceptance, an offer is sufficiently definite if it contains the essential terms (which obviously may vary depending on the kind of transaction). These, he stated, were the basic concepts which helped them to decide (a) if an offer was sufficiently definite to be an offer, and therefore to lead to a contract if the other party simply says "I accept"; (b) in the case of an inter praesentes negotiation when a contract shall be deemed to be concluded. As he had tried to explain in illustration 1, in the publicity question (which per se was definitely not an essential term of an agency agreement) if none of the parties raised the issue during negotiations he thought that on the basis of the general rules the contract was concluded even if nothing had been said on this. The term (in the sense of provision) would then be implied, as Furmston indicated, by fact, usage or by law. The situation Art. 12 addressed was that in illustration 2, i.e. if one of the parties expresses his intention to make the conclusion of the contract dependent on agreement on the issue, this then makes a per se non-essential issue become an essential one.

Furmston stated that the concept of an essential term is not part of the concept of an offer as contained in these principles - if he looked at the definition of what constituted an offer it did not make any reference to essential terms. Bonell stated that this was correct - it referred to an offer being "definite".

To Rajski it seemed that Art. 12 was needed but mainly, if not only, for those cases where a contract is made not by way of offer and acceptance, but by way of arms-length negotiations, and this was why he wanted to suggest that perhaps these articles should be preceeded by a

provision dealing expressly with this problem. He agreed that a solution could be found in the general rules on offer and acceptance, but he did not think that businessmen negotiating contracts would be very eager to look at the definition of an offer and the definition of an acceptance to know if the contract is concluded, so he would like to have a very specific, express rule covering this point, and thereafter to consider the clear link between the rule in Art. 12 with such a specific provision.

Maskow was of the opinion that the situation covered by this article was a very frequent one. He referred to a case (which also related to agency) in which parties exchanged several letters and finally stopped sending letters. Later on one party paid a certain amount of money to the other party, saying it was a gradual payment. The other party denied this, saying it was part of his contractual obligation, and what about the rest. In such cases it was important to know whether there had been a contract although not every item had been mentioned by the parties in the course of their exchange of letters or had been expressly rejected, although not all these problems had been settled. His own impression was that this rule did not cover this problem because it was too hostile to the formation of a contract. It gave too many reasons to a party who (possibly in bad faith) did not want to be bound, or no longer wanted to be bound, to argue against the contract. For this reason the "threshhold" for getting into a real contract should be lowered. He thought Farnsworth had taken a step in that direction, although he was not sure whether "insists" meant "insists repeatedly" or only at a certain stage.

Lando referred to the provision in the BGB which, he said, in this respect was a good provision. It had two qualities in particular: firstly, it referred to "matters" and not "terms", and secondly it only gave a rule of assumption ("/it/ is in doubt to be assumed that the parties..."). This, he stated, was the idea - although it gave certainty, it avoided the bad faith Maskow rightly spoke of. If the provision was made into a rule of presumption, and "terms" were changed to "matters", then the provision should be kept; otherwise deletion would be preferable.

Drobnig wondered whether the new text, which referred to "specific matters", would cover an agreement by the parties that their agreement be reduced to writing. Usually, he stated, it was not only one party who wanted to have a writing - both parties did, and in telexes they envisaged more formal documents only to forget about it, or perhaps not to agree.

Crépeau recalled that this point had been raised at the beginning of the session with respect to the form of a contract. It had then been suggested that the parties themselves might wish to make it so that the contract would not be entered into unless they have committed their agreement to writing. It had already then been suggested that

this would not be covered by the text of Art. 12, and maybe there could be a second paragraph stating that where the parties have expressly indicated that there will be no contract unless it had been reduced to writing, then the contract is only entered into when such writing has been provided.

Farnsworth stated that without a typed text of Art. 12 it was difficult to make changes, but he would have thought that they would want to cover not where the parties have agreed, but the more difficult case where it is one party only who says this. That meant that it would be parallel to what they had in Art. 12, and maybe a few words could be added to include that thought. He suggested a formulation such as "...until there is agreement on specific matters or in a specific form the contract is not concluded before the parties have reached agreement on those matters or in that form".

Tallon stated that he did not understand: they appeared to be mixing two different situations, the first being where one party wants the other to agree that the contract will not be in force until they have written it down, in which case it is only when they agree that there will be a written form that the contract will be concluded; and the second being when one of the parties refuses to sign the written agreement, which was a question of performance and not one of formation.

Bonell referred to the situation envisaged in comment (c) on p. 33, while Maskow referred to the agency case he had mentioned earlier, where an agreement had been reached and a final letter had been sent by the agent, who was Nigerian. He wrote to the Principal saying that he would be in Warsaw in August but then he never came. The question therefore arose of whether there was a contract or not, and he thought this was the case which was exactly covered by the new rule.

Crépeau stated that Tallon was right in saying that it was one thing to reach agreement on the form and quite another when you say that the contract is concluded when that form has been followed. He asked Farnsworth whether they could not take Tallon's observation into consideration by saying that the contract is not concluded before the parties have reached agreement on such matters or set their contract in the agreed form.

Farnsworth stated that either party could reserve his assent on any term he chose. If he said that he would make a contract with Maskow if they sign standing on their heads, if he insisted on this they would have no contract unless Maskow and he were able to perform this act - but they did not have to agree in order to prevent there being a contract. They would have to agree for there to be a contract, but he could reserve his assent. He therefore did not think that they wanted, or needed, to say that the parties had to agree on form.

Also Lando considered that were two issues involved. The first was where a party says that he will only make an agreement if they reach agreement on certain matters or on a certain form; i.e. it was a one-sided statement. The other one was the merger clause situation, where it is agreed between the parties that they will only make an agreement if they reach agreement on certain matters or in a certain form, i.e. it was a "double-sided" statement. In this context what they were dealing with was the one-sided statement.

Furmston stated that these were two quite separate questions and it was quite difficult to deal with both questions at the same time; it was much more elegant and easier to understand if you asked the questions one at a time. The situation where the parties say that they are not bound until they have a formally written contract was not actually governed by the wording of Art. 12. He thought that they certainly should have a provision to deal with it, but it should at least be a separate sentence, if not a para. 2. Art. 1(2) again was a separate question, and this point was not governed by that provision. The problem they were discussing had been endlessly litigated in the U.K., and probably in the whole world, because people constantly say that they are going to make a formal contract, and then they in fact arrive at something which looks terribly like an agreement, but they have not yet signed the document.

Farnsworth considered that it would be useful if Furmston could draft what he meant. He thought that it would come out the same, except for the few word that would be different. If they accepted the proposition that he could reserve his assent unilaterally, on any conditions, that he was the master of his offer if he did it by offer and acceptance, then if he first said that he would not be bound until there was a written contract, he could then on the following morning say to Maskow that he had changed his mind, that he would be bound if they shook hands, but if Maskow had said that he agreed, that he did not want to be bound without a written contract, then it would take both of them to change their minds. But except for this, and this was the same problem as in the agreed tariffs, it seemed to him that if they said that he would not be bound if he said that he would not be bound until a writing, then they did not need to say anything about what if they both said it.

As a rule, Furmston guessed, if the parties say there is no contract until they have signed a written document, then if there is no written document there is no contract. In practice, however, there were situations in which even though there is no written document signed by the parties, nevertheless there was a binding contract because the conduct of the parties showed clearly that in fact they intended..etc.

Bonell stated that he always had in mind a situation which is fairly common in complex negotiations, i.e. the parties exchange pieces of paper, and they do not say "I need a writing", they say "let us sign

something because before leaving for our respective headquarters we must have something in our pocket". Very often only one party raises the question openly, and the other may or may not act as if he agrees - it is understood that this is just a promemoria, a "Memorandum of Intent" or a "Preliminary Agreement", so in these cases it is not just a question of "a writing", but of a particular writing which might, and quite often does, follow another, less formalised, writing, and for these cases he thought that, at least for pedagogical reasons, it would be advisable to draw the parties' attention to this problem.

Furmston stated that he was not saying that they should not have a solution, what he was saying was that the solution should be contained in a separate sentence. Maskow stated that he would prefer to have a second paragraph.

Lando stated that he was very scheptical about the rule. He thought that to bind parties by unilateral declarations, and in fact to bind both of them by a statement along the lines just decided on in substance was dangerous; such a rule was more dangerous when it came to such matters as form, and he was impressed by Furmston's argument that courts would say that there was at least reliance on something like that, and that therefore there was a contract. In many cases people would forget about such earlier statements, or would not like being reminded of them, but then when they later on found that the contract was unfavourable to them, then they would suddenly discover that they had made such a reservation. He had read of such cases, and he had the feeling that in England judges would not like such formalities, and would try to get away from formalities, so he suggested not binding these rules by too many forms.

Date-Bah said that they had to go one way or the other. One solution was to delete the provision and to have only the general principles. He felt, however, that they were stuck with some language, as if the form problem were not mentioned, there was a risk of misinterpretation.

Tallon stated that it was necessary to induce parties to be clear in their intentions. He referred to a recent French case concerning one of the biggest provincial papers, the "Progrès de Lyon". It was a matter of a "battle of the press", in which there was an agreement signed by both parties which contained the words "Cet accord doit être régularisé par acte notarié". The problem was the actual meaning of "régularisé". One party said that he could withdraw his acceptance until the act was formalised, the other said no, they had agreed that it was just a formality. It was, he stated, very important to point out that parties must explain clearly what their intentions are.

Furmston questioned whether they were dealing with only one party or with two. Farnsworth reminded the Group that when Wang had

asked what the situation was when both parties agreed, everyone had reassured him that it was so clear it did not have to be decided. Furmston objected that surely, if one party has stipulated that he will not be bound until there is a written contract, he can presumably waive that, but if both parties have agreed, it would require both of them to agree to waive it. Farnsworth considered that this should then be stated also in the existing text. Maskow considered that if both parties have agreed, and one party waives, then it is one party who insists on this point. It seemed to Furmston that the practical situation regarding form was where both parties have agreed to adopt a particular form, and later on one of them wants to argue that both of them have changed their minds. Bonell objected that this was a question of proof, and Crépeau wondered whether they were not then fairly close to the policy adopted in Art. 1(2). Furmston thought not, as Art. 1(2) was all to do with changing terms.

Crépeau therupon wondered whether the Members of the Group could agree to decide the first issue: "Where one of the parties, in the course of negotiations, insists that a contract not be concluded until a specific form [...] the contract is not concluded until [...] unless the circumstances otherwise indicate".

Farnsworth proposed an alternative which read:

> "Where one of the parties in the course of the negotiations insists that a contract not be concluded until there [is][has been] agreement on specific matters or in a specific form [the contract is not concluded before there is][there is no contract until there has been] agreement on these matters or in that form".

Farnsworth's proposal was adopted by 11 votes for and 2 abstentions.

Rajski thereupon suggested that Art. 12 be placed before Art. 11, as Art. 12 treated the conclusion of a contract whereas under Art. 11 writings in confirmation of contracts which had been concluded were treated. Lando also referred to the suggestions he had made on the order of the provisions (see p. 4 of his written comments). Crépeau suggested deferring this matter to the drafting committee.

Article 13

Opening the discussion on Article 13, Date-Bah suggested it be deleted as it was adequately covered by Art. 2 - it was a matter of interpretation whether there was a sufficiently definite agreement or offer. He was concerned about para. 1 seeking to impose obligations on the parties - it was formulated as an exhortation to the parties - but the rules should allow the parties to do their own thing and it should

then be the duty of the lawyers to draw the consequences. He felt that there was a danger of the parties being construed into an agreement. The matter could be adequately dealt with by the general rules on offer, and no harm would be done by the deletion of Art. 13.

Bonell wondered whether there were not a misunderstanding in Date-Bah's interpretation of Art. 13, caused by the not too fortunate wording of the text. He could not agree with Date-Bah when he expresses his belief that the same result could and should be reached by a proper interpretation of Art. 2, because in theory there was a clear distinction between an offer and, if it is later accepted, a contract where one or more matters are not settled expressly because the parties do not care, and the situation where right from the moment the offer is made or, if it is a jointly negotiated contract, the situation where in the final agreement matters are deliberately left open. Since existing domestic laws (at least in theory or as a starting point) do differ quite considerably in this respect, it had been felt that it would be useful to treat the matter in the Principles although admittedly, what was said here was not very much, but so far it had been felt that the rule could be of some, albeit a limited, use.

Hartkamp stated that the rule contained in para. 2 was a useful one, and he was not in favour of its deletion. The Principles, he stated, should be drafted in the form of rules which could be inserted into a code, should a law on these matters be felt to be useful. Para. 1 instead was more in the nature of a legal guide - it was the only rule which was formulated as advice to the parties. He therefore suggested leaving out para. 1 and keeping para. 2.

Wang requested clarifications as to the difference between the situations in Arts. 12 and 13 - the situations appeared to him to be the same, although the circumstances were different.

Bonell stated that Art. 12 deals mainly with the case where only one party expressly declares that an agreement on a matter, e.g. on the settlement of disputes, is essential for the conclusion of the contract. The situation envisaged in Art. 13 was very different, because first of all there must be an agreement between the parties - it cannot be a unilateral declaration; secondly because the parties want to have a contract concluded here and now, (which, again, is precisely the contrary to the Art. 12 situation) and agree to leave one or more matters open for further negotiations, further agreement and/or to be determined later by a third party.

Wang questioned what the situation would be if both parties agree that some difficult or crucial matter should be agreed upon at a later stage through further negotiations, and they could not reach agreement on this crucial matter. For example, sometimes in the negotiation of construction contracts parties negotiate technical matters, and then they negotiate some commercial matters, and then

finally they sit down and talk about the price, because the price can only be fixed once the technology and the quality of the machines is known. If they cannot reach agreement on the price, would there then be a contract?

According to Bonell if the parties start to negotiate and right from the start declare that they will devote the first week of negotiations to the technical aspects and the second week to the price, then it is obvious not only that there will be not contract at the end of the first week even if everything else is settled but the price still has to be settled, but also that if after the second week no agreement on the price has been reached there is no contract. This would be an Art. 12 situation despite the fact that the parties agree. Art. 13 would come into the picture only if and to the extent that the parties - whether from the beginning or at the end of their negotiations - realise that there are terms/matters in their agreement which still have to be settled, but since they want to have the contract operating immediately and they say "let us start doing our business, start building the plant, we will settle this or that other aspect later on, after all we will then be in a better position to make evaluations, but we intend to be bound right now", i.e. both parties agree to this.

Lando stated that Art. 13 was one of the articles he had had the greatest difficulty in understanding.

Farnsworth too, stated that the Group should seriously consider deletion unless it could "fix up" the provision quite a bit. The case where something has to be determined by a third person seemed to him to be arguably different from where the parties have to solve things by negotiations. He at least, would like to have some enlightenment on that. Assuming the Group kept that in, it seemed to him that it could go the route of Hartkamp and take the first half-dozen words of para. 1 and put them into para. 2, which meant that it would read: "When the parties have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person, the fact that no agreement is reached or the third person has not determined the term does not in itself prevent a contract from having come into existence" - and here was his problem of logic, because what they were saying was that the contract may come into existence before, and the things that come later will not have prevented it from having done so, and that to him was less than perfectly elegant. You might also reverse Hartkamp's solution and keep para. 1 getting rid of para. 2, but without giving lectures to the parties they could say "The parties may conclude a contract although they have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person". That at least did not lead them to say that something which comes later does not prevent something that has already happened from happening.

Crépeau referred to Art. 26 of Book V of the draft new Québec Civil Code, which states that: "Parties may bind themselves immediately,

while withholding their agreement on certain points./ If there is no subsequent agreement on the reserved points, the court settles them, taking account of the nature of the matter and of usage". It said that before you reach the point where you have left some terms open you have to reach an agreement, and an agreement can only come in a certain modicum of definiteness.

Date-Bah saw the provision as a guide on how to interpret "definiteness" in Art. 2 - so it was unnecessary to be explicit. Whether or not you could have an agreement if there were terms left open was a matter of interpretation.

Tallon thought it an important rule, but one which was difficult to draft. It was important because in many legal systems (his own first of all) the law on this point was in a mess. They had harsh rules on sales ("Si le tiers ne peut ou ne veut faire l'estimation il n'y a pas de vente"). As Art. 13 now stood, there was no rule in para. 1, and there was a negative rule in para. 2; but the problem was what should be a positive rule. He thought it necessary to make an effort to find a positive rule, as a rule on this point was necessary.

Bonell stated that the present rule was definitely to be considered an ultima ratio, i.e. the Group had started by laying down hard and fast rules - distinguishing between the agreement to agree and the reference to a third party's determination, admitting the latter but not the former - and then it turned out that opinions in the Group were too divided, with the result that it was felt that the provision should be drafted in a much less ambiguous manner. Thus, the approach adopted in Art. 13 was in reality rather self-restrained, and it had quite properly been pointed out that one should, perhaps, try to see whether here and now they were not able to do something more ambitious.

Drobnig stated that in essence Art. 13 should be maintained. He agreed with the criticism levied against para. 1, and he found Farnsworth's suggestion to formulate it positively, i.e. that a contract had been concluded in spite of the open terms, on the basis of an agreement that the terms be left open, was excellent. As regarded para. 2, he found Farnsworth's suggestion confusing as "agreement" had two different meanings - the drafting was not fortunate on that point. He did think para. 2 had a necessary function to fill for the warding off of the consequences which would otherwise derive under certain national legal systems, although it would need better drafting.

Hartkamp wondered whether it was not sufficient to state that if the agreement was not reached or if the third person did not give its solution determination, this did not invalidate the contract.

Bonell had hesitations in this respect. Was it intended to state that if the parties failed to reach an agreement and/or the third person did not determine the missing term, then there would always be a

contract?

Farnsworth stated that no - the parties may conclude a contract, i.e. if they wanted to say "we have a contract even if we do not agree on these terms", it was possible to do so. Bonell queried how this would be filled in, and Farnsworth stated that the courts would do so.

Bonell stated that this was the crucial point because, e.g. the common law legal system, but also Italian law, distinguished between a contract containing a so-called "agreement to agree" clause, and one where a third person has to determine the term.

Maskow suggested that it might be possible to cover both issues by saying "The fact that the parties have left a term of the contract to be agreed upon in further negotiations or to be determined by a third person does not in itself affect the validity or existence of a contract even if the parties fail to reach such an agreement or the third person does not determine the missing term". His intention with this formulation was to combine the coming into existence and the maintaining in existence of the contract by saying that the existence or the validity of the contract was not affected, and then of course there was the positive rule stating that the contract was valid. However, the problem Lando had pointed out was not solved, i.e. what should be put in place of the missing terms. So far he would say that their rules on performance might cover this in part; these were, however, conditions which were not so easy to cover by legal rules. For example, the parties say that the technical solution for a certain part of the plane should be agreed upon later. Then, of course, you could not solve this situation in a positive manner by the use of legal rules whereas you could solve it (at least this was theoretically possible) by giving a certain methodology indicating how it could be solved - maybe arbitration etc. He thought they should abstain from this, but he did think other items could be solved.

Wang hesitated to support the revision of the text as suggested by Maskow. He illustrated his hesitations by giving the example of where a buyer comes to a factory making shirts. He sees that the shirts are good and wants to buy the shirts. The buyer is very concerned about the time of delivery, and asks the seller when he can deliver the shirts. The seller wonders what quantity the buyer wants to buy and what price he is willing to pay. The buyer specifies that he wants one million dozen and that he can pay so much. When they come to the time of delivery, the buyer says that he would like the shirts delivered before April as he wants to sell them in the summer season. The factory looks into the order book and states that it cannot deliver such a large quantity of shirts in April, and can he deliver them in July/August. The buyer says no, that he does not want to buy such a large quantity of shirts in July/August as summer would then be passing and he would have to stock them for a year before selling them the following summer. Would

there, he asked, be a valid contract in this case?

Both Maskow and Rajski denied that there would be a valid contract.

Bonell wondered whether, in the light of Wang's observations, they could not look at the comments on p. 36 under (c) entitled "Parties intention decisive". In line 4 he had stated that "If the parties make it clear that they intend to be bound by the agreement even in the event of their subsequently failing to agree on the missing terms, or of the failure of the third person to determine them, there is a binding contract from the very beginning, with the consequence that, if necessary, the missing terms will have to be determined otherwise; on the contrary, if the parties had not expressed such an intention, there will be no contract unless they subsequently succeed in agreeing on the missing terms or the third party determines them". Admittedly he had forced the traditional meaning of the article to give it more sense than it had in itself, but he had done so in order to avoid misunderstandings. While it was more or less obvious to state that an agreement with some terms left open for further agreement was valid and therefore admissible, what was crucial was to know what happens if later on no agreement is reached. In Italy, for example, courts would tend to imply that the reaching of the subsequent agreement was a condition, failing which there was no contract, i.e. there was no contract right from the beginning. He therefore had the impression that merely saying the the parties may enter into such incomplete agreements would not lead them too far. A solution could be to allow what was stated here, i.e. that if the parties enter into an agreement with terms left open and make it clear that they want to be bound by that agreement the contract shall be considered to be binding even if they later on fail or the third person does not make his determination.

Date-Bah stated that what had originally been a neutral rule was now moving in a direction which gave him cause for concern. He was not against a rule stating that the mere fact that the parties have left a term to be agrred upon or to be determined by a third person does not prevent an agreement from coming into existence - if there is an agreement, but the national and international situations must be distinguished. Where there was a community of values and a shared language there was much less room for misunderstanding, but in an international situation he felt that it would be extremely dangerous to give the courts the power to fill in all gaps. As the article stood at the moment there was no positive rule, so they had to fall back on Art. 2 to try to find a regulation of substance. A decision maker had to interpret the will of the parties, establish that they have sufficiently agreed on everything. A basic agreement was needed. It was all right to agree that certain gaps can be filled, but to say that 90% of the agreement can be filled in was worrying from the point of view of the developing countries, as it would then be possible to fill in obligations which would be surprising to them.

Farnsworth stated that he was troubled by the words "if the parties make it clear", as the situation only arises when the parties do not make it clear, and sometimes you go one way and sometimes the other, so he would have thought that a rule that requires them to make it clear in order to have either result would be difficult to draft and would perhaps be unacceptable. He was more troubled by the point raised by Maskow. In his mind, if you said on Monday that the contract comes into existence even though the parties did not reach agreement on the things left open, then he did not think that you needed to say that if something later happens on Wednesday no contract had ever come into existence. If you left out third persons though, then you could say "The fact that no agreement is reached does not in itself prevent a contract from coming into existence and a failure later to reach agreement does not affect the enforceability of that contract". The trouble with dumping third parties, however, was that if you tried the same formula for third parties at least in his legal system the answer would be that sometimes the failure of the third party to fix the term did affect the enforceability - it was a sort of a case of changed circumstances - and that sometimes it did not, so if you insisted on not only saying whether the contract may come into existence, but in going on and saying what the effect of the event not occurring would be, he thought that they would have to say something like "does not prevent a contract from coming into existence and the failure to later reach agreement does not affect the enforceability of the contract, but the failure of the third party may or may not affect the enforceability of the contract".

Drobnig shared one criticism levied against para. 2: he considered that saying that where in the second stage of development parties have not reached agreement or the third person has not determined the missing term the contract nevertheless "is regarded as having come into existence" was a mistake. He would be happy to accept a formulation such as "does not affect the existence/further enforceability of the contract". He also agreed that they must be very careful in giving positive rules. He thought that in perhaps 50% if not 80 or 90% of the cases the negative events described in para. 2 may have the consequence that the contract falls apart and that it cannot, although in legal parlance it is still in existence, be implemented because its terms are uncertain. It should be made very clear - at least in the comments - that very frequently the contract cannot be implemented, that it may be avoided if the terms left open are not of a marginal character. He was in favour of what Farnsworth had said, but considered that nevertheless they must clearly distinguish the two stages addressed by paras. 1 and 2.

Hartkamp stated that as they were dealing with formation they should restrict themselves to the rule similar to the Québec/Farnsworth formula, and should come back to the consequences of the second stage in the chapter on non-performance.

Wang considerd that it would be easier for him to understand if the formulation stated "does not affect the validity of what they have already agreed".

Bonell also felt that Date-Bah's concern should be taken into closer consideration. He had the impression that what was written in the Québec formulation in reality was very extreme, as it said that you may do whatever you like and if you do not agree then the court will settle the matter, i.e. the Québec formula left it to the courts which, as he had understood Date-Bah, could involve a number of difficulties in a number of regions or areas - Italy included - which led him to believe there was a misunderstanding.

Three proposals were on the floor for Article 13. One by Drobnig and two by Farnsworth. Farnsworth's first proposal read:

> "When the parties leave a term of the contract to be agreed upon in further negotiations or to be determined by a third person, the fact that no agreement has been reached or that the third person has not determined the term does not in itself prevent a contract from coming into existence".

Introducing his second proposal, which read:

> "If the parties intend to conclude a contract, the fact that they have left a term to be agreed upon in further negotiations or to be determined by a third person does not in itself prevent a contract from coming into existence".

Farnsworth stated that it was identical in substance with para. 1 of Drobnig's proposal. He felt that this was all that one would need to say in a chapter on formation.

Drobnig proceeded to introduce his proposal which read:

> "(1) The conclusion of a contract is not prevented by the fact that the parties intentionally leave a term of the contract to be agreed upon in further negotiation or to be determined by a third person.
> (2) The fact that subsequently
> (a) the parties reach no agreement on the open term or the manner in which it shall be determined, or
> (b) the third person does not determine the open terms and the parties do not agree on the replacement of the third person,
> does not invalidate the contract, provided an intention of the parties as to other methods of determination or as to the waiver of the open term can be established with reasonable certainty".

In essence his para. 1 did not purport to deviate from Farnsworth II; it dealt with the first phase in time, i.e. with the question of whether a contract comes into existence although the parties have left a term open. He had inserted the qualification "intentionally" to distinguish this situation from that when the parties intended to settle a matter and then forgot to do so. Para. 2 dealt with the question Farnsworth had addressed in his first proposal, and relied also on the text of the original Art. 13 as laid down in Doc. 41. It took up the two cases of where the parties, although they had agreed to do so, later on do not agree to fill the open term, and secondly where the third person who was to determine the open term does not do so. It spellt out that in this case the contract was not invalidated. So far he thought that in general it was in line with the existing Art. 13(2). What had been added was the phrase beginning "provided that", which tried to fill the gap which was left open in the provision. The intention was to indicate what would then happen with the contract. There were many cases where, when the parties subsequently had not agreed and the third person had not made the determination, the contract became ineffective, i.e. could not be implemented. He had wanted to indicate this by the word "invalidated". There were certain instances where the contract could continue to exist, and in his proposal he mentioned two cases. The first was that based on the presumed intention of the parties which must be established with reasonable certainty, covering also where there were other methods to determine the open term, e.g. where the parties have determined that a third person should make a determination and he no longer exists or is unwilling, when a neutral instance like the President of a Chamber of Commerce could be asked to appoint a third person or, if they had agreed on arbitration at a tribunal where also conciliation is provided for where the president of that arbitral tribunal might be asked to appoint a third party for determining the missing term. The second case was where the parties have left a term open, which from the beginning was not very important with the consequence that it could be inferred from the intention of the parties that they would continue with the contract despite the fact that the open term was not filled, or where such an intention becomes apparent as a result of their later conduct in the performance of the contract. One might well take the view that only para. 1 falls under formation, whereas para. 2 could just as well be brought under performance - it was an accident occurring in the course of performance. On the other hand, the inter-relationship between paras. 1 and 2 was so close that he thought it to be justified to deal also with the second point in the context of formation.

Bonell stressed that both proposals tried to take into account a substantial concern of the possible abuse of a provision such as Art. 13: both proposals made it clear that the rule laid down was not an absolute rule, and that it very much depended on circumstances and mainly, if not exclusively, on the intention of <u>both</u> parties. There was no room left for <u>one</u> party to push the other into a corner, in the sense that he says "leave it open, we will see later on" and later on it is

"accept or..." - or what? Drobnig's proposal was more ambitious than Farnsworth's, and he felt that the difference was not a mere question of style.

Tallon agreed that a text was needed. He felt that para. 2 would be useful in order to give some direction - Drobnig's idea was right, even if the formulation might be improved. He felt that such a provision might help courts to find some reasonable way to save the contract when it was obvious that the parties intended to have a contract.

The Group decided to use the formula proposed by Farnsworth as a basis for discussion.

Bonell suggested two amendments to Farnsworth's formula: first the adddition of "intentionally", so as to make it clear that it is not just the mere fact of leaving a term open, but that this leaving open of the term must be intentional, and secondly to delete "in itself" in the second last line.

Farnsworth found these amendments to be acceptable, and that they brought his proposal closer to that of Drobnig. The exact phrasing could be left to the drafting committee.

Drobnig wondered whether the first line was necessary at all, as the provision was in the general context of formation and it was understood that the parties intended to conclude a contract.

Farnsworth explained what he had intended when using this phrase, saying that there had been a lot of discussion on how you know that the parties intend to conclude a contract, and e.g. Bonell had said that this was only the case if the parties clearly indicate it. He had thought this to be dangerous, as it placed the burden on one side. As a result of the discussion he had thought that it might help to add a few words to suggest that it was essentially a matter of interpretation. If this was evident, then it was not needed.

Bonell considered that this was not evident and that doubts could arise if the phrase were deleted. For example, in Wang's case of a step-by-step agreement, where the parties reach an agreement on certain aspects and they also agree that certain other aspects are best dealt with later on, the parties clearly do not intend to conclude a contract here and now. It should be made clear that these cases are outside the provision and that Art. 13 should only apply if the parties not only intentionally leave matters open for further agreement, but also make it sufficiently clear that they intend to enter into a binding contract here and now.

Maskow and Furmston felt the proviso to be meaningless since Bonell's objection was covered by Art. 12 ("when an agreement is

reached").

Crépeau raised the point of the meaning of the word "term" in this text, whether it was a "term of the contract" or an "issue".

Furmston pointed out that what the provision aimed at was where the content of the term had to be agreed, i.e. the parties had identified the matter which was to be agreed. They were not dealing with the situation where the matter was not mentioned in the contract.

The Group proceeded to vote on a slightly modified version of Farnsworth's proposal which read:

> "If the parties intend to conclude a contract the fact that they have intentionally left a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence".

The first vote concerned Drobnig's proposal to delete the words "If the parties intend to conclude a contract". This proposal was rejected by 6 votes for and 6 votes against.

Proceeding to para. 2, Tallon suggested keeping the spirit of Drobnig's draft by saying something like "à défaut d'accord /des parties/ ou de détermination /de tiers/ le contrat ne devient pas caduque delors qu'une méthode de remplacement peut être déduite de l'intention des parties" ("in disagreement or determination the contract does not lapse by its very nature provided another method for determination can be found in the intention of the parties").

Farnsworth thereupon proposed to formulate para. 2 as follows:

> "The existence of the contract is not affected by the fact that subsequently
> (a) the parties reach no agreement on the term, or
> (b) the third person does not determine the term
> provided that a method of replacement can be determined from the intention of the parties".

He suggested, however, that the "provided" proviso might be left to the comments.

Both Drobnig and Tallon accepted this amendment. Lando stated that he had sympathy for the proposal, but that it could be shorter. Para. 1 stated "does not prevent", so thereafter one could put the two paragraphs together, saying that "the fact that the parties /.../" going on with (a) and (b). The intention of the parties must, he said, be presumed. The reasonableness test was better.

Bonell disagreed with Lando. He found it good to divide the two aspects as they refer to different stages of the whole process. The last part of the suggested para. 2 should, perhaps, not only make the "intention-of-the-parties-test" the decisive one, but the situation as such, including the intention of the parties, so he suggested wording such as "provided it would be reasonable to resort to another method of determination", so as to avoid it applying only where the intention of the parties indicates an alternative, which he was afraid would rarely be the case.

Farnsworth then suggested an amendment to the effect that "[...] provided that there is an alternative that is reasonable in all of the circumstances including any intention of the parties".

Maskow stressed that a deletion of the proviso, or if not the mere indication "unless the circumstances indicate otherwise" would be preferable. For example, take the situation where the parties agree firstly that a certain sum, say $ 1 million, is to be used for spare parts, and secondly that they shall agree later on which spare parts are to be delivered for that sum, only to be unable to agree on this. The plant is nevertheless erected, everything is done, and then the question arises of what they should do with the spare parts. It would then, of course, be crazy to allow the possibility that the contract was not valid because the parties had not foreseen an alternative for solving this problem.

Bonell, however, had understood the proposed text to take care of Maskow's concern, i.e. it was not intended to be an alternative provided by the parties themselves. Tallon also approved Farnsworth's new version, and indeed felt that they must keep the intention of the parties in the provision, as it was of importance particularly, he added, to experts.

Maskow instead saw a difference, as if they accepted the proposal, then the party who wants to stick to the contract has to prove that there is no alternative. The phrase "unless the circumstances indicate otherwise" would instead mean that the party who wants to give up the contract has to give some evidence that the circumstances indicate that the contract should be dissolved.

Farnsworth felt it to be dangerous to assume a burden of proof as an immediate consequence of a positive or negative phrasing, because this made drafting very difficult. They might, in fact, at some point wish to consider stating somewhere that the burden of proof is not to be allocated simply according to linguistic analysis.

Maskow's proposal to delete the proviso in para. 2 was rejected.

Farnsworth's proposal for para. 2 was adopted as it stood by 10 votes for.

The proposal to delete the whole article was rejected, there again being only one vote for. The article therefore stood.

Bonell considered that the arguments against the inclusion of an article such as Art. 13 were well taken, and should be reflected not only in the report, but also in the comments. It should be emphasised that the scope of the provision was restrictive, and had to meet certain tests, and that other situations considered would fall outside the article - clearly where no contract existed right from the start.

No further remarks were made as to the comments.

Article 14

Introducing Article 14, Bonell stated that it was an application of the general principle of good faith during the negotiation process in the course of the formation of contracts. This had particular importance as regarded complex and prolonged negotiations at international level, as well as for delicate subjects such as the transfer of technology or know-how contracts. The provision had no indication of the precise extent or nature of the damages recoverable. When the rule was drafted the intention had been to leave this question open, and to think it over at a later stage, i.e. at this stage. He drew attention to the fact that in the course of the meeting the Group had touched upon a similar issue, i.e. damages recoverable for breaking off negotiations in bad faith. Once they had reached a satisfactory solution they could imagine that the same could apply here, as they were still within the ambit of a duty arising from a precontractual relationship. The provision moved from the assumption that as a rule there is no duty of confidentiality, but that if in exceptional cases information of a confidential nature is given during the negotiation process, then this information may not be disclosed by the other party - irrespective of whether or not a contract is subsequently concluded.

Hartkamp felt the rule to be useful, and as they had decided to adopt a general rule on negotiations in bad faith he thought that there was no objection in principle to having this rule. He did, however, have one small objection: the confidentiality of the information was especially important if the contract did not come into existence. If the contract did come into existence, the way in which this information should be handled would also be governed by the contract, so they should only consider the situation where negotiations are broken off, and restrict the provision to this situation. Possibly it could also be added to the other rule on negotiations in bad faith.

Rajski agreed with Hartkamp on both points. The duty of confidentiality was a precontractual obligations which had been clearly identified by international business practice and which had been quite well described and analysed in legal writing. They had agreed on the new article on negotiations in bad faith which should be limited to the precontractual stage of negotiations, and this was why he saw a link between these two articles.

Drobnig saw a difference between the views expressed by Hartkamp and Rajski, and stated that he himself shared Rajski's view that the provision should cover the precontractual stage irrespective of whether or not the contract comes into existence, because if a contract does come into existence it clearly covers the period following its coming into existence, but not necessarily that before. He would therefore leave the article as it stood.

Also Maskow saw no reason expressly to limit the scope of the article. If the matter subject to confidentiality is regulated by a contract which eventually is concluded, then this article would have no object, but if a contract is concluded which does not regulate this matter, then there would at least be this solution, and the contract might deal with confidential information after the conclusion of the contract.

Wang considered there to be two situations: firstly where the confidentiality of the information was declared by one party and agreed to by the other - words to this effect should, he stated, be added to the provision - and secondly where the parties agree that the information should not be disclosed for a specific period of time. He referred to the law regulating the import and export of technology - if a party fixes too long a period for the duty of confidentiality this would be deemed to be a restrictive provision and therefore invalid. He thus felt that they should consider the possibility of adding a reference to the time factor.

Tallon supported Hartkamp's suggestion. He wanted a sharp distinction between the precontractual period for which they could only give negotiators guidelines or a code of conduct, and the contractual period. He therefore thought that the words "whether or not a contract is subsequently concluded" should be taken out, as the rules changed nature once the contract was concluded.

Farnsworth stated that at the very least they should say in the comments that this was a minimum duty, because in the USA a much heavier duty would be imposed. He took it that the "shall" of this provision, like the "should" of the preceeding one, and the damages were "the guts" of the provision. In the USA if a party disclosed confidential information the other could probably get an injunction. He read this provision as not admitting this possibility as the emphasis was on damages. Furthermore, in some situations the bargaining relationship

was close enough for it to be regarded as a fiduciary relationship, and this seemed to be implicitly negated here, as saying that damages can be obtained would not seem to include the possibility of recovering the benefit that the wrong-doer has acquired. In the USA there were a number of cases where a party steals a secret process and makes a small fortune from it. In this situation the other party would not be able to prove damages as what he would have been able to make with the process in question is uncertain, but he would be able to prove what the other made by using his secret process. He would want this back and he would be able to get it back. The language used in the provision would be objected to by lawyers in the USA who would read it to say that you could not get specific relief and you could not get the lost benefit if that was all you could prove.

Lando stated that if the provision were read in the civil law way the words "shall not be disclosed" would open the possibility for an injunction. As regarded damages, in Denmark this would include both direct loss as well as a claim for unjust enrichment. He found the provision to be well formulated and a good rule. He supported the proviso "whether a contract comes into existence or not". He thought that they should possibly have another rule in the chapter on damages for disclosure during the contract, but it might not be necessary. In know-how contracts, if the information later becomes of public domain to divulge the information would no longer contravene the duty of confidentiality. He suggested this be taken care of in the comments.

Crépeau agreed with Farnsworth that as the article stood it seemed as if the only remedy was liability in damages. For cases like this that was not good enough, because what was important for the protection of the interests of the parties was that if there was disclosure, there must be a possibility to obtain an injunction immediately. As this did not appear to be in the text, they could either make a reference to Arts. 5 or 6 of Chapter V ("subject to the rules on performance in kind"), or say specifically that the two remedies were injunction - without prejudice to the remedy in damages.

Farnsworth stated that the word "shall" caused trouble. He suggested saying "under a duty not to disclose it" leaving the remedies for a breach of duties to the article on remedies, which he assumed would contemplate specific performance or an injunction, then if they said something about damages it would not seem to have the negative implications it now had.

Tallon supported Farnsworth in not saying anything about remedies, because if they referred to contractual remedies they always came up against the same obstacle: they would be giving judges orders on how to deal with a procedural situation, which was impossible - it was up to each jurisdiction to see what the sanction of this duty was. Furthermore, in French law the calculation of damages differed depending on whether they referred to the precontractual or contractual stage.

Crépeau remarked that if they were dealing with principles related to international commercial contracts then there was implicit in the scope of this codification that there must be a precontractual phase leading up to the contract, and the duties imposed upon the parties in the precontractual phase would normally be either specific performance or damages as the creditor prefers.

Drobnig stated that he would have difficulties mentioning remedies expressly, as they could not dispose of national procedural law. In Germany a duty not to do something would trigger off the appropriate remedy of civil procedure, and this might vary from country to country. Furthermore, for German law it would not be necessary to spell it out if the comments made it clear that the mentioning of "damages" did not preclude other remedies. He considered there to be a discrepancy between (c) in the comments and the text of the provision. He was not disturbed by the contract coming into existence later or not - the principles stood on their own two feet and ought to contain complete rules.

Lando thought that damages were the most common remedy - injunctions occurred only where there was partial disclosure or the possibility of the judge interferring before everything had been disclosed. He suggested changing the rule to satisfy those who thought "shall not" was not good enough. In order to leave open the possibility of other remedies which they had agreed not to mention here, they might, he suggested, consider having two sentences - one establishing the duty, the other giving damages as a possibility. Then there would be the question of whether or not it should be spellt out that the damages may comprise the enrichment - if this could be said briefly, he would welcome it. This enrichment might, in fact, constitute the normal damages awarded.

Bonell stressed that it had decided the question of whether or not to limit the provision to the case where no contract is subsequently concluded. He himself favoured the present solution, as whether or not a contract is subsequently concluded can, but need not necessarily, influence the duty of confidentiality which may remain an autonomous duty. As regarded Wang's observation of the necessity of there being an agreement between the parties, he stated that this had not been the intention of comment (b). The distinction was between those cases where the party giving information declares it to be confidential, for which cases it would be sufficient if the other party just receives the information without reacting for a duty to derive from good faith, and those cases where the party makes no such declaration. The intention was not to make the existence of such the duty of confidentiality dependent upon an agreement between the parties. As regarded the disclosure of the information, he pointed out that so far the text specified a duty not to disclose, but said nothing of those cases where a party uses the information for his own purposes. If the Group was of the opinion that they should be covered, then it would be better to say

so explicitly. As far as the time element was concerned, contract provisions imposing a duty of confidentiality for a certain period of time were not affected. However, in 99% of the cases no time limit was given, in which cases what constituted a reasonable time for this duty had to be interpreted from the circumstances. As regarded the question of damages/injunction, he found it interesting that some thought of injunction as performance in natura - he himself would have thought that it was simply a procedural remedy for a proper sanctioning of the duty. Italian law would certainly have read injunction into the text. He wondered whether this in fact was the proper place to include an express reference to injunctions. The comments attempted to draw attention to the problem of the recovery of the benefits the other party had received. He himself would favour an explicit mentioning of the possibility, as he did not think that it was covered by the concept of damages. If the concept of damages was to be kept, he suggested aligning the wording to that previously adopted, i.e. "losses caused", which did not give any qualification and which might therefore answer Tallon's objection.

Furmston stated that in commercial practice cases where confidentiality was not stated were a more serious problem than those where it was. He also thought that one should deal with exploitation as well as disclosure. He finally pointed out that in England damages did not include profits made.

Lando stated that "confidential" only referred to the duty to disclose the information, it did not necessarily mean that you may not use it yourself. As he had pointed out in his written notes, if no contract is made most legal systems would hold the discloser of the confidential information liable in tort. If, on the other hand, a contract is made, there would be a breach of contract. They should state something like "information given as confidential by one party or not to be used", although he was in doubt whether or not to bring it in here.

Rajski stated that he could see Lando's point as to the meaning of the word "confidentiality", but he was of another opinion as far as the scope of application of the article was concerned. The problem, however, was appropriate drafting making it clear that the provision also covered use, which he considered to be frequently a more important question than disclosure.

Wang thanked Bonell and Maskow for their clarifications, and suggested that the remarks on the time factor be put in the comments, as it was a controversial issue. It was agreed that this should be done.

Farnsworth proposed leaving the first fourteen words of Art. 14, continuing " the other party is under a duty not to disclose that information or use it for his own purposes". He stated that he would appreciate a discussion on a possible second sentence covering usage,

but he did not know what to think of that. He agreed with Lando that it might be useful to separate disclosure and use by a full stop.

Bonell stated that the two levels may, but need not, overlap, just as for non-disclosure, because if during negotiations a party submits a number of different technologies to the other who chooses one of them, then the problem could arise with respect to all the other technologies. He therefore proposed maintaining the additional wording "whether or not a contract is subsequently concluded".

Farnsworth proposed adding at the end of the sentence "[...] that information or use it improperly for his own purposes whether or not [...]". With respect to the problem of what happens if the contract is made and the party is entitled to use the information for his own purposes, the comments could say that any duty can be modified by a later contract and might explicitly or implicitly relieve a party of the duty not to use the information.

Farnsworth's second proposal was adopted by 10 votes for and none against.

Farnsworth thereupon raised the question of a second sentence. He himself thought that what they had adopted was sufficient, but others did not appear to think so. Reflecting on Crépeau's suggestion of "Breach of the duty entails liability for losses incurred", he added that the trouble was that it would have to say "benefits". It had already been said that the expectation interest arising out of a contract not made would not be allowed, but that on the other hand what in the USA was called "reliance interest" would be allowed. Now they wanted to say that in addition to the reliance interest the unjust enrichment interest (or restitution interest) could be allowed. That is, it was clear that if A discloses information to B, B uses this information and A looses profits, A can get those profits, but some of the members of the Group wanted to say that even if A cannot prove his lost profits but can instead prove B's benefits, then B must disgauge these. The question was if there was also such a remedy, and he thought not.

Bonell stated that something should be said; this was a very peculiar case, and simply to rely on the general principles on damages was not sufficient. Although it belonged in the field of precontractual relationships, he thought that ultimately much more was involved because the agreement, or at least the fidutiary relationship, was there contrary to what was the case for other precontractual duties. At least, when one party declares the information to be confidential and the other takes it, then he would not say that it is merely a duty deriving from culpa in contrahendo. This had a contractual basis, and for this reason to stick to reliance interest alone could be misleading. He therefore suggested wording along the lines indicated by Crépeau: "liable for the losses caused to the other party or for compensation of

the benefit received".

Furmston wondered whether it would not be better to say nothing about remedies as it was difficult to arrive at a solution on which they could agree. If they simply had a statement of duty everyone would realise that there was a remedy.

Maskow suggested that all these situations might be covered by the introduction of the rule that sanctions on remedies foreseen for breach of contract should apply correspondingly also to precontractual situations. As regarded a party using confidential information for his own purposes, most members of the Group did not consider this to be covered by unjust enrichment, damages, etc. The question was whether they wanted to go further by referring to the illicit use of know-how - for a claim in damages the payment of a licence fee would then constitute damages. It would not, he stated, appear to be justified to allow a claim for all the benefits received, because to a certain extent the benefits were to be attributed to the party who makes use of the information. Similarly, to allow a claim for all profits would not appear to be justified.

Lando instead felt that it would be useful to have a provision providing for a duty not to diclose or use confidential information, and also remedies, as there was much piracy in international society. He favoured stipulating not only damages, but also for a duty to give out the unjust enrichment or gains. He felt that they should try to introduce new standards for international business, and that this was a field where they could do something useful.

Farnsworth was concerned that, particularly when negotiating at arms length, the parties may not want the gain to be recoverable. He therefore suggested saying nothing in the text, and saying in the comments that these principles do not attempt to restate the law on unjust enrichment. Alternatively, he proposed a text to the effect that:

> "If appropriate, the remedy for breach may include compensation based on the benefit received by the other party".

Implicit in this formulation was that you would have all remedies for a breach of duties and that in addition you would have this particular possibility.

Lando queried the necessity of having the words "If appropriate", considering that "may" was in the same sentence. Crépeau agreed that "may" carried the idea of "If appropriate". Farnsworth, however, considered that "may" would carry the idea "If appropriate" - if this were only in the comments.

Tallon felt that they were getting megalomaniac as they were creating new remedies which were not known in many systems, and they had no power to do so. They were, he stated, becoming the parliament of international trade. While Farnsworth tended to agree with Tallon, Lando instead saw the attempt to innovate as something positive; they were, he stated, creating a future law for a future world.

Lando asked Farnsworth whether, in fact, this were not accepted in the USA. Farnsworth confirmed that it was the law, although it was not written down - the attempt to draft a Restatement Second on Restitution had failed because of the difficulties in drafting it. Furmston added that it had been the law in England for the last 150 years, and Drobnig stated that in German case law it was under the heading of damages, although it was considered to be a somewhat extravagant extrapolation of the concept of damages.

Farnsworth's proposal was adopted by 8 votes for, 2 against and 3 abstentions.

Rajski thereupon drew attention to the question of the location of Arts. 14 and 3 bis. This was not, he stated, a question which could simply be left to the drafting committee; it was a very important point and a material one. It was difficult to deal only with precontractual relationships, so he suggested that these provisions should either form a separate part in the chapter on formation (which might be the best solution), or come before the chapter on formation, or be placed elsewhere as they had rules on liability or even more on remedies. They should take into account the purpose of the rules and the end users, i.e. the businessmen, and therefore, considering the complex nature of the articles, he would prefer to have these provisions somewhere in the front of the rules, well visible, so that the attention of the users was drawn to the existence of these articles.

The meeting thereupon adjourned.

ANNEX

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