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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 16 TO 20 JANUARY 1989

(prepared by the Secretariat of Unidroit)

Rome, June 1989

INTRODUCTION

The eleventh 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 16 to 20 January 1989. A list of participants is annexed to these Summary Records.

The President of Unidroit opened the meeting, thanking Professors Ulrich Drobnig and Ole Lando for the document they had prepared (Study L - Doc. 43, Revised Draft and Explanatory Report of Chapter IV : Mistake, Fraud, Threat and Gross Disparity) which was to form the basis of the discussions of this meeting.

Bonell welcomed Mr Adolfo di Majo, Professor of Civil Law at the University of Rome I, "La Sapienza", who was taking part in the work of the Group for the first time. Mr di Majo was, he stated, an outstanding scholar in the field of contract law, both as regarded Italian law and the comparative aspects of the subject, and his main book on the law of obligations was unanimously considered to be not only the most recent, but also the most exhaustive treatment of the subject in Italy.

EXAMINATION OF THE REVISED DRAFT AND EXPLANATORY REPORT ON MISTAKE, FRAUD, THREAT AND GROSS DISPARITY

Drobnig introduced the revised draft chapter on mistake, fraud, threat and gross disparity by stating that the new draft Lando and he had prepared for the meeting was based on the old text as contained in Doc. 26, taking into due consideration the comments made at the discussions of the Louvain meeting. In addition three new provisions had been added: Articles 0 (Validity of mere agreement), 19 (Illegality) and 20 (Unilateral declarations). Since the subject-matter of the chapter had thus been widened, he suggested that its title should be modified to "Substantive validity".

Article 0

Introducing Article 0, Drobnig stated that it went beyond the subject-matter of the other provisions, which essentially dealt with defects of consent, as it dealt with two other aspects of the substantive validity of contracts, i.e. consideration and the "real" character of certain contracts.

The rule proposed in paragraph 1 was clear, i.e. a lack of consideration should not be regarded as a cause of invalidity of contracts. Under classical common law consideration might apply to various phases of the contractual agreement, the first of which was the

coming into existence of the agreement, the second was the modification and termination of the contract. However, since almost all commercial contracts provided for both a performance and a counter-performance, the requirement of consideration was almost always satisfied. Nevertheless, in order to dissipate any doubt as to the few remaining situations it was felt to be useful expressly to remove the requirement of consideration. A precedent to this effect was to be found, at least with respect to modification and termination, in the Vienna Sales Convention (CISG Art. 29(1)).

Paragraph 2 went against the classical Roman conception that certain contracts are not concluded by a mere agreement between the parties, but that in addition the giving of performance is necessary (the so-called "real" contracts). One of the most important of this type of contracts was the contract of loan, where according to this classical doctrine a mere promise to make a loan is not valid. This view ran counter to modern business expectations. While it had been overcome in most countries, a few others, like France, still maintained the old position. It was therefore suggested that the requirement of such part performance expressly be done away with.

Tallon stated that he agreed with the solutions behind the text but had some difficulties with the way in which they were expressed. In particular, he did not think that it was necessary to say that a contract is not invalid if there is no consideration, as consideration is not mentioned anywhere in the Principles as a possible requirement for the validity, neither of the offer, nor of the contract as a whole.

Crépeau basically shared the views of Tallon. He saw a discrepancy between the text of the article and the first sentence of the commentary ("Art. 0 establishes the general rule that mere agreement of the parties creates valid contractual obligations"): if that was the philosophy behind the provision, why not say it instead of having it merely as a comment to two negative rules relating to validity requirements peculiar to national legal systems? He therefore suggested that it might be preferable simply to say "Substantively a contract is entered into by mere agreement /sole consent of the parties/" and then to see whether the other substantive requirements relating to the validity of contracts (e.g. a lawful object of the contract; the capacity of the parties) ought not to be brought into the picture. In such a case the two paragraphs of Article 0 might well be unnecessary.

Fontaine also shared the views expressed by Tallon. After all, in his view paragraph 2 did not adequately cover the problem of the "contrat réel", i.e. the definition of the "contrat réel" was not that the contract is valid only when it is performed as prior delivery was a condition for the formation of the contract and was not yet performance. The existence of the "contrat réel" in some legal systems did not really constitute any great practical problem; of course the remedies were not the same - if a "contrat réel was not performed the remedy would not be specific performance - but a promise of a "contrat réel" was usually

valid. It was not valid when the requirement of the delivery of the thing was grounded on the need for the protection of a party, as was the case in Belgian law for instalment sales, which many scholars considered to be a kind of "contrat réel", where they were only valid at a down-payment of a certain percentage of the price. In that case the promise of an instalment sale would not be valid, because it would be a way to circumvent the protection specifically provided for a party.

Date-Bah recalled that traditionally the consideration doctrine was not regarded as a validity doctrine, but as a formation doctrine, traditionally it was part of the offer and acceptance process. If it was made clear in the chapter on formation that mere agreement is enough, then it would not be necessary to address this question in the chapter on validity. He confirmed that in the commercial context it was quite possible to have agreements without having recourse to consideration.

Furmston agreed entirely with Date-Bah, stating that if consideration were discussed at all, it should go in the chapter on formation and not on validity. He recalled that the attempts made in the 1960's and 1970's by English and Scotish lawyers to agree on a contract code for the United Kingdom had failed because the Scots did not have consideration and the attempts to reach a compromise totally floundered. He therefore doubted the wisdom of talking about it at all. Furthermore, if one were going to say that consideration was not necessary one had to explain what it was, and that opened up Pandorra's box. He did not believe that in practice consideration would very often be a problem, even if the contract did end up being subject to English law, nor did he think that an English commercial judge or arbitrator would hold an international commercial contract invalid because someone had managed to raise doubts as to the doctrine of consideration.

Bonell agreed with this last remark. In English law books, it was possible to find very learned explanations of the origin of the doctrine of consideration, of the difficulties in applying it etc., but when certain contracts, such as letters of credit, and their validity were discussed, then it seemed as if it was a common view in England that it was useless to speak of consideration as it was a contract which had been developed in commercial practice.

Farnsworth instead thought that a provision such as this one would be useful. He wondered even whether it might not be helpful to say something here also on causa. These rules were going to be applied mainly by arbitrators, and in arbitration the parties were frequently represented by lawyers from different legal systems. While all those from common law countries tended to say that consideration was not very important in commercial cases, he could indicated many decided cases in the US where lawyers had tried to argue that there was no consideration. They almost always lost, but they still tried to argue. One could imagine that the same would be the case for civil lawyers with causa.

There was only one substantive point as regarded consideration: while it was true that in the USA the Uniform Commercial Code (UCC) struck out against the doctrine of consideration in specific instances, it did not abolish it, it said that you did not need it for possibly the two most common cases in commercial transactions, namely for firm or irrevocable offers and for modification. The only really important case where consideration played some role in the US was the so-called "illusory contract" which may arise in commercial situations. In the case of franchises this would be the case if one party, usually the franchisor, had the unrestrained power to terminate at any time at will, where the other party would argue that he was not bound because there was no consideration. In the US this was an acceptable argument. It was important to clarify whether the proposed Art. 0 changed the law in the US for franchisees, or whether the issue in question was decided under some other provision.

Bonell wondered what the common law colleagues meant when they said that consideration should no longer be relevant in the context of the application of the Principles. He put this question as there were certain analogies between causa and consideration, and he would himself be rather shocked to find a statement, even in an instrument such as the Principles, saying that contracts needed no longer have a causa. At least as far as his system was concerned, it was one thing to say nothing, and therefore not to emphasise the role of causa (in many cases it was taken for granted that the causa was implicit), and quite another positively to state that causa was no longer a requirement for the validity of a contract. What about consideration?

Furmston suspected that it was difficult for English or American lawyers to answer that question. There was a small number of commercial situations where consideration was quite a problem (firm offers were an obvious example). In English law a firm offer was not binding unless you had actually delivered and turned it into a contract by providing consideration. On the contrary, the problem of consideration was ignored for letters of credit or for making an option. It was again a big problem as far as requirement contracts were concerned, i.e. for situations such as when hospitals issue tenders for supplies and tell a supplier that they are going to place orders with him, with the consequence that the supplier thinks that he has a contract but in actual fact he probably does not because they have not agreed on the placing or a particular order. He stated that he would have thought that the answer was that in international commercial situations you would want firm offers to be binding, you would want letters of credit to be binding and you would want the requirement contract situation to be binding, so he felt that the substantive answer they wanted to reach was fairly clear. The question was if it was best provided for by ignoring the problem or by positively stating that consideration was no longer required.

According to Tallon causa was particulary interesting as far as the problem of groups of contracts were concerned, where one contract constituted the causa of another, i.e. the link between the two was often considered to be the causa, and this happened for instance with loan contracts.

Bonell added that causa had a variety of different meanings. One of these concerned the abstract or non-abstract nature of the obligation. He gave the example of independent bank guarantees (the "garantie à première demande"), where the validity of such an abstract and absolute undertaking was discussed. Therefore, simply to state that "no causa is needed" would, he felt, rather frighten civil lawyers because of the multiplicity of its implications. After all, the "causa" of Italian law was not exactly the same as the "cause" of French or Belgian law. To have typically national concepts mentioned in the Principles could give rise to short-comings.

Hartkamp supported the idea to have a provision along the lines of Art. 29 CISG, such as e.g.:

> "A contract may be concluded, modified or terminated by the mere agreement of the parties".

It should also be stated that there was no need for causa. Both provisions should go into the chapter on formation.

Farnsworth agreed with this suggestion of Hartkamp's.

Tallon and Fontaine objected that the language proposed could make an ordinary civil lawyer think that what was at stake was the distinction between consensual contracts and "contrats réels" or "contrats solennels". They had nothing against this text, although they felt that the problem would then be what to say in the comments.

Bonell wondered why one should worry about consideration and causa and not about similar expressions used in other legal systems for the same purpose. National laws would then have to be carefully scritinised to see first of all what they actually meant by excluding the relevance of causa, and secondly what this meant in other legal systems which did not have that concept but which probably had a functionally equivalent concept or solution.

Drobnig agreed that causa had many functions, but stressed that the rule proposed was intended to do away with consideration and causa only with respect to validity. For this reason he insisted on having it in the chapter on validity and not to move it to that on formation. Also in CISG a similar provision was not in the part on formation, but in another part of the convention.

Maskow and Wang agreed.

Di Majo insisted that the concept of causa was a controversial one in the Italian legal system, each lawyer having his own personal meaning for the concept. He felt that it might be better to say nothing about either lack of consideration or of causa. The only problem was the problem of modification, which in fact was more a common law problem than a civil law one, as for the civil law subsequent modification was no problem as it was justified de re ipsa and you did not need consideration for subsequent modifications.

Hartkamp felt that one could eliminate causa by stating in the text that agreement suffices, and by explaining in the comments that this eliminated the element of causa.

Crépeau considered that a provision of the kind of Art. 29 CISG would not solve the whole problem, because the requirements of a valid contract were not limited to the existence of an agreement between the parties, but the agreement had to have a lawful object and a lawful purpose. One could eliminate the notion of causa as the draft Civil Code of Québec and the Netherlands Civil Code had done, but one could not eliminate the concept behind causa, i.e. the purpose of the contract.

Bonell pointed out that there seemed to be a consensus on Hartkamp's formula which could replace the wording of para. 1. He wondered whether the Group was not ready to close the discussion on consideration and to turn to para. 2 and the question of the so-called "real" contracts therein addressed.

Date-Bah wondered what the effects would be if one did not speak of causa in para. 1 as regarded the enforcement of guarantees of the kind mentioned earlier by Bonell.

According to Tallon the "garanties à première demande" were considered to be "actes abstraits", i.e. valid even without a causa; the whole problem, however, was very theoretical since no one questioned the validity of such guarantees.

Bonell stated that on the contrary in Italy there was a lively discussion on this point as an abstract promise to pay was only admitted in cases expressly provided for by the law. In all other cases the problem was to see to what an extent the absence of a causa, i.e. the reason for which the promise had been given, affected the validity of the promise itself.

Maskow and Lando insisted on the necessity of having consideration and causa expressly mentioned in the text, since to merely state that "a contract may be concluded by mere agreement of the parties" would not make what was actually meant by the provision sufficiently clear, i.e. that consideration and causa should no longer be considered necessary requirements for the validity of a contract.

Farnsworth, Crépeau, Tallon and Drobnig presented a new proposal which read as follows:

> "Except as otherwise provided in these Principles, a contract may be concluded, modified or terminated by the mere agreement of the parties, without any further requirement such as bargain, exchange, delivery or the existence of a cause".

Introducing this proposal, Farnsworth indicated that the words "bargain" and "exchange" were sufficient to suggest to any common lawyer that consideration was being mentioned; the word "delivery" was the best English translation of the concept related to the real contract problem ("remise de la chose"), and "cause" took account of "cause" or "causa". The opening words "Except as otherwise provided" had been inserted to ensure that this was subject to Art. 19 on illegality. One could of course also think that the reference to the "existence" of a cause at the end of the provision made it already sufficiently clear that the article did not intend to interfere with Art. 19.

Crépeau and Bonell stated that they had understood the discussion so far in the sense that what the Group really wanted was to get rid of the idea that for the valid conclusion of a contract there must be some sort of bargaining or exchange - these old concepts which had developed as an alternative to the formalism of the stipulatio of Roman law which by definition had no causa or consideration because the form requirement covered everything and no one could question what was behind it. They saw great merit in trying to achieve this, but the reference to cause, without any further specifications, could suggest that the provision referred also to the purpose of the contract. One could see a contradiction between this text and Art. 19, because the statement that the existence of a causa was not needed, implied that also a purpose was not needed. But if there was no need for a purpose, how could then ever an illegal purpose become relevant under Art. 19?

Fontaine also was still uneasy about mentioning causa in Art. 0, because it was so ambiguous. For example, one of the meanings of cause was that of the counter-performance in bilateral contracts, and if one had that meaning in mind this provision made no sense, because in the sales contract the respective causes would be the transfer of title and delivery and payment of the price. A main difficulty was that of the group of contracts or abstract promises in which case causa had a further meaning, i.e. the relationship between the different contracts. In this case the provision that the "existence" of a cause was no longer necessary would be adequate, but the ambiguity still remained, so that he would have prefaced the explanations contained in the comments by a statement saying that the intention was to avoid difficulties such as those created by some concepts of cause in some cases.

Furmston stated that the idea was that those making international commercial contracts would adopt these Principles, and he would assume

that the idea was that the Principles should produce the same results whether the parties were English or Italian, or whether the arbitrator was English or Italian. It would, he stated, come as a great surprise to English commercial parties to find that they had to learn about the doctrine of causa. There was all the more reason to make it clear that they did not want to know about it, and he thought that they had to say so because if they did not they would leave it open to the parties to argue for days about cause. Why, he asked, should they not?

He wondered whether it would not take care of the worries if the article were placed in the chapter on formation, as it would then be clear that they were only talking of it in the context of the formation of contracts, whereas if they had it in the chapter on substantive validity it was much more likely that these doubts and difficulties as to which parts of the doctrine were excluded would arise.

Hartkamp informed the Group that the Dutch Supreme Court had defined cause in a subjective way which had nothing to do with exchange or bargain - it had been defined as the purpose which the parties together want to reach with the contract. This was why he admired this formulation, as cause could mean anything and ought therefore to be got rid of.

Bonell stated that precisely because of the last statement he was afraid of the consequences of having an express reference to causa in the provision. It had now been confirmed that when one spoke of causa one also spoke of motives and purposes, but certainly noone wanted to eliminate the requirement that every contract must have a lawful purpose.

Wang wondered what international businessmen would think when they read the present text - would they really conclude a contract without a purpose or without motives? He felt they were talking about something that did not exist, so he therefore would prefer it if they deleted the text beginning with the word "without". He thought that the comments could give an explanation about causa and consideration.

Bonell felt that the majority of the Group was clearly in favour of the proposed text, with the exception of the opening phrase which it would appear noone would object to having deleted.

Lando and Tallon suggested changing the order of the chapters themselves, so that Chapter IV would be closer to Chapter II, as both dealt with the elements of the formation of contracts.

Maskow agreed and suggested that Art. 19 should be placed at the beginning, as it dealt with the scope of the rules as a whole.

Bonell considered that it was understood that the Group as a whole wished to bring the present chapters II and IV closer together, by simply placing one after the other or alternatively by merging them,

although this should be decided once the new version of chapter IV was ready.

A new version of the provision was proposed which read:

> "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement such as bargain, exchange, delivery or the existence of a cause".

Tallon had also drafted a proposal for the French version which read:

> "Le contrat est conclu, modifié ou révoqué par le seul accord des parties, sans que soit exigée toute autre condition supplémentaire, telle qu'une contrepartie, un échange de prestations, la remise d'une chose ou l'existence d'une cause".

Crépeau stated that if this provision could be transferred to the chapter on formation, this would put it in a different context, i.e. that it only really referred to the formation requirements necessary for the validity of a contract. If that was agreed, the last words, i.e. "or the existence of a cause", could be struck out. It would seem that if the provision stated "without any further requirement such as bargain, exchange, delivery", that would deal with the problems referred to in Art. 0.

Fontaine agreed with Crépeau.

Drobnig stated that it was certainly not the drafters' intention to "kill" the cause, they only wanted to make it irrelevant for the conclusion of a valid contract. If the reference to the concepts of "bargain" and "exchange" already achieved that purpose, then he thought that this would be satisfactory, but the Rapporteurs would reserve the right to mention in the comments that first, consideration was to be abolished, and secondly that the corresponding aspect of cause was also covered by those words.

Bonell concluded that all that could be said on the subject had been said, and one could hardly hope to make further progress. He therefore suggested that the text with the reference to the existence of a cause should remain, but that square brackets should be inserted around this phrase, to indicate that this wording had not been carried by the Group. The provision was thus kept as Art. 1 of the chapter on validity, and read:

> "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement such as bargain, exchange, delivery [or the existence of a cause]".

Article 1

Drobnig introduced Art. 1 which he stated had been taken over literally from the previous versions of the chapter.

No comments were made, and the text was thus adopted as it stood.

Article 2

Introducing Article 2, Drobnig stated that the purpose of the words in the brackets was to make it clear that in order to find out the true meaning of the contract and whether there had been a mistake, the rules of interpretation should be taken into account. Parties did not always do this, so to find out if there really had been a mistake it was necessary to request the parties explicitly to interpret the contract.

Crépeau, Tallon and Farnsworth wondered why only the provision on mistake stated "in accordance with the principles of interpretation" as interpretation applied to all rules on contract.

The Group eventually decided to delete the words "in accordance with the principles of interpretation as laid down in chapter III" contained in lit.(a).

In relation to lit. (a), Farnsworth wondered whether instead if "is of such importance" they did not in fact mean "was of such importance" as the importance of the mistake was to be judged as of the previous time. Lando agreed with this criticism, and stated that he would favour a phrasing such as "if, when the contract was concluded". This suggestion was accepted by the Group.

Farnsworth wondered how the provision would apply to what was perhaps the most commonly litigated mistake in the USA, i.e. construction contracts, where the builder or contractor makes a bid and, because this is often done under a great pressure of time as the sub-bids typically come in very late, he makes a mistake in the addition of the figures which leads him to bid an amount that is too low. The bid is accepted and nothing is done in reliance. Then the bidder seeks to get out of the contract on the ground of mistake. This case would not come within any of the categories of lit. (b), and therefore if these Principles applied bidders would be bound in cases where under US law they would not be bound.

Furmston stated that if, as was often the case in practice, the individual sub-figures which had been incorrectly added up were set out in the bid, he would think that the other party ought to know because he ought to add them up himself. If only the total were shown, then something should be added to the present provision. In England, courts

had decided these cases in the sense that even if the bid had been accepted so there clearly was a contract, the bidder would be excused if there had been no significant reliance.

Bonell wondered where the lack of reliance was once the bid had been accepted.

Farnsworth stated that the reliance in the case of public bids was that by accepting the bid of the one who made the mistake the other party may have lost the others, and he might have to advertise again for bids. Some courts had suggested that it might be enough to compensate that party for the cost of any extra bids, but usually if the first series of bids was still available he would take the next bid in line: e.g. A makes a bid and makes a mistake in adding the figues. B accepts the bid, A immediately tells B that when B accepted his bid he thought something was wrong and checked his numbers and they are wrong. B says says he will then accept C's bid but A must pay him the difference as C's bid was higher. A does not accept this, as there was no reliance on the part of B on his bid.

Tallon stated that in France the case given as an example would be argued on the negligence of the bidder. They would say that the bidder had made a mistake, but that as he could add properly it was negligence on his part and therefore he could not argue about mistake, even if there had been one. Thus, Art. 2(2)(a) which referred to mistake committed with gross negligence was of particular interest to him.

Lando wondered whether the American rule should be adopted since, as it had been illustrated, he did not find it quite convincing. According to Scandinavian law, in general a party would be bound if he had made such a mistake, as the least you should be able to expect of a person was that he could calculate correctly. Another reason for not accepting the American solution was the difficulty of deciding when there had been reliance.

With reference to the terms "knew or ought to have known" used in para. 1(b), Tallon wondered whether this referred not only to the mistake as such, but also to the "caractère déterminant" of the mistake: a party might have known of the mistake, but he might have thought it just a minor one which did not fulfil the requirements of the definition in lit. (a).

Hartkamp stated that he wanted to raise the same point but in relation to the phrase "or has caused the mistake", i.e. in a situation where a party has made a representation and has caused a mistake but does not know of the "caractère déterminant" of the mistake. He thought that in these cases an avoidance should not be allowed.

He referred to a case in which A wants to buy eighteenth century French furniture. He enters an antique shop stating that he is a collector of eighteenth century French furniture, and asks whether the

cupboard on sale is an eighteenth century French cupboard. The antiquarian confirms this, adding that it was made in Orléans. A buys the cupboard and later finds out that it was not made in Orléans, and as it turns out, he collects exclusively furniture made in Orléans. Under this provision he could then go to the shop and say that he wants to avoid on the ground of mistake as the antiquarian told him the cupboard was made in Orléans whereas it was not. In the Netherlands this was not considered to be fair - the antiquarian could not know that this was essential to A, so A should not be allowed the remedy of avoidance.

Bonell wondered whether this conclusion could not be derived from lit. (a), which referred to "a reasonable person *[...]* would have contracted only on" - then reasonably you had to state that it was an essential condition for you.

Drobnig stated that two issues had been raised; the first concerned whether, in the context of lit. (b), the mistake must be material. He thought that this was clearly to be derived from the text, because it referred to "the mistake" or "the same mistake" which meant that the condition of materiality of the mistake as given in lit (a) was clearly imported into lit. (b). The second issue concerned whether the party who has induced or committed the same mistake must be conscious of the materiality of the mistake. The idea of the Rapporteurs was that this was not necessary - it was sufficient if he innocently caused the mistake. The general idea behind lit. (b) was that avoidance on the ground of mistake is only justified if the mistake made by the errant party is caused by the other party or is somehow induced or shared.

Fontaine stated that he had been convinced by Drobnig's argument for the case where the other party had caused the mistake, because he had then been instrumental in the errant being mistaken, but he was not so sure about the situation when the other party did not cause the mistake, but "knew or ought to have known" of the mistake. In that case he wondered whether one should not require that he not only "knew or ought to have known" of the mistake, but also of its importance - he would distinguish between the two cases.

Drobnig stated that he would say that the party "knew or ought to have known" of the mistake imported lit. (a), which stated that it must be materially different. If one considered the structure of the provision, then lit. (a) described the nature of the mistake from the point of view of the errant, and lit. (b) in addition stated that certain elements must be present on the side of the other party.

Fontaine considered that a problem of interpretation remained, as there were two definitions of mistake - one in Art. 1 and the other in Art. 2(1)(c), but Drobnig considered that the two provisions had to be read together.

Furmston considered it to be very unclear what the text as it stood meant.

Farnsworth agreed with Furmston. He did not agree with Drobnig that what was said in lit. (a) was read into lit. (b) as a definition of mistake. To him "mistake" meant only what was stated in Art. 1.

Date-Bah stated that traditionally English common law considerations on doctrines of this nature concerned the likely impact of avoidance on third party rights; thus, the provision could be made narrow if one wanted to preserve third party rights. Was it intended that the avoidance should be avoidance ab initio with the consequent falling down of all third party rights?

Drobnig stated that it was correct to say that an avoidance on the ground of mistake, threat or fraud made the contract void ab initio. The question of third party rights should be left to national law, because that was probably quite a marginal situation, so perhaps it should be made clear in the comments that third party rights would not be affected by these rules.

Referring to p. 7 of the comments on Art. 2(1), Fontaine wondered what was meant by "caused the mistake" in relation to the sentence beginning "Mere puff used in advertising or in negotiations in itself, is nowhere considered to be a representation". It was true that such statements were to be found everywhere in classical treaties, and in fact were still often made, but he wondered whether in connection with the development of the obligation to inform, of the obligation for acurate advertising, for frankness, openness in negotiations, it was good to express this in the comments.

Farnsworth suggested that they might say something like "Mere puff may sometimes be tollerated in advertising or in negotiations".

With reference to Art. 2(2)(a) Tallon proposed that "gross" be deleted before "negligence".

Fontaine supported this proposal, as in some legal systems, such for instance his own, it might be deceptive. In Belgian law the expression was "faute inexcusable" - "inexcusable" sounded very good, but according to the definition of this expression given by the Cour de Cassation it was just negligence.

Farnsworth stated that his initial objection to the expression was that "gross negligence" as a level of fault was not thought to be very meaningful in the US, but he was not sure that a party's simple negligence, at least as they would think of it, should bar that party from relief for mistake. He suggested a wording like: "A mistaken party's fault in failing to know does not bar him from relief unless his fault amounts to a failure to act in good faith and in accordance with

reasonable standards of fair dealing" (cf. Restatement, Second, Contracts (R2C), § 157), which was far more extreme than negligence.

Furmston stated that he too had difficulties in understanding what "gross" meant. He supposed that those who had inserted it wanted to indicate that a high degree of negligence was intended.

Date-Bah agreed with those who wanted language indicating that more than simple negligence was necessary, as he did not agree with a party being excluded from the ability to avoid only because of simple negligence.

Tallon on the other hand considered that they should not use the term "negligence" as they did not agree on what it meant. He therefore suggested that they take the wording of the Restatement, saying something like "acted as a reasonable person".

Bonell asked Tallon whether his suggestion was then to reformulate lit. (a) along the lines of "If [...] (a) in committing the mistake he failed to act in good faith and in accordance with reasonable standards of fair dealing" which was the R2C formula. Tallon considered the second part of the formula to be good, but had hesitations as regarded the beginning.

Farnsworth presented a proposal intended to replace lit. (b). It read:

> "(b) the other party made the same mistake, caused the mistake, or ought to have known of the mistake, or the other party at the time of avoidance has not materially relied on the contract; and
> (c) it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error".

Introducing his proposal, Farnsworth pointed out that if a party wanted to avoid a contract because he made a mistake, then the first thing that a judge or arbitrator would ask the other party would be whether he had relied on the contract. If he had relied on the contract quite seriously, then in all probability it would be too late for the first party to get out of the contract. He had the feeling that these rules in the civil law tended to talk in terms of innocence and good faith, whereas the American common law tended to emphasize reliance more. As he understood his proposal, the consequence would be that if A as a buyer by mistake typed one million instead of 1000 and the seller received it but had done nothing about it the following morning when A discovered his mistake and called the seller asking him to stop everything because he had made a terrible mistake, if the seller actually had done nothing about it A would not be bound by the contract.

Tallon suggested that "relied on the contract" be changed to something like "acted upon the contract" because he was not sure whether

"relied on the contract" meant the same thing. Farnsworth confirmed that it did mean the same thing, adding that in the R2C and also elsewhere "relied by preparation or performance" was a formula sometimes used. If they were to say "acted by preparation or performance" that would not be quite so good, but it would be good enough. Lando pointed out that "acted in reliance" was the formula used in CISG.

Maskow in general agreed with the new proposal.

Hartkamp on the contrary stated that he had misgivings. In the Netherlands there was something like the doctrine of reliance, but only for cases of unilateral promises and the like. In a bilateral commercial contract Dutch courts would, however, decline this doctrine because of the threat it represented to the certainty of the coming into existence of the contract, and if this was true in a national context, he thought it would be even more dangerous to have in an international context.

Bonell wondered whether, as Hartkamp nevertheless appeared to be prepared to go along with the majority view, the Group would be prepared to include a provision on reliance in Art. 2, which had the implication of braodening also the field of application of Art. 3.

At the end two possible versions of Art. 2 were presented, the first of which read:

> "A party may only avoid a contract for mistake if when the contract was concluded the mistake was of such importance that a reasonable person in the same situation as the party in error would have contracted only on materially different terms or would not have contracted at all if the true state of affairs had been known, and
> (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error, or
> (b) the other party has not at the time of avoidance acted in reliance on the contract".

The second version read:

> "A party may only avoid a contract for mistake if when the contract was concluded
> (a) the mistake was of such importance that a reasonable person in the same situation as the party in error would have contracted only on materially different terms or would not have contracted at all if the true state of affairs had been known, and
> (b) the other party
> (i) made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error,or

(ii) has not at the time of avoidance acted in reliance on the contract".

Farnsworth stated that the differences were not intended to be substantive. Drobnig had thought that the first version was a little heavy, and he had lightened it by putting in the divisions (i) and (ii) in the second version, cognizant that some might think that it looked remarkably like the style of the Uniform Commercial Code (UCC).

Bonell suggested that if there was no difference in substance, it might be left to the Rapporteurs to choose between these two versions, and this suggestion was accepted by the Group.

Crépeau observed that all articles dealing with defect of consent began "A party may only avoid", or "A party may avoid" whereas he suggested that it might be preferable to say "A contract may be avoided when", because when one was dealing with mistake, error, fraud and all defects of consent, at least in the civil law countries the question was who can take action? In certain instances, if it was a case of relevant nullity then only the party aggrieved - or only the party the law wished to protect - may take the action. On the other hand if nullity was absolute, then not only a party to the contract, but persons other than the contracting parties may, in certain circumstances, take action, and he wondered whether there was a definite will on the part of the authors to reduce the scope of the annulment to either one or the other of the parties to the contract in all instances.

Drobnig admitted that this was the case - there was no "nullité de plein droit" - avoidance must take place and only one of the parties (the one protected) may avoid.

Tallon agreed with the observation made by Crépeau and considered that his formula was better. This could be compared with termination: if you said that "a party may terminate" then it meant that a party had the right directly to terminate the contract; as he did not have a right directly to avoid, if you said that a contract is avoided it would then be up to the court to say that the contract was avoided.

Crépeau pointed out that according to Art. 13, "Avoidance of a contract must be by express notice", which surely was not the intention of the drafters: avoidance could not be by notice, it had to be requested from a court.

Bonell, however, pointed out that the system was such as to avoid court intervention, so he found the parallelism with termination to be perfect.

Article 3

Furmston opened the discussion on Art. 3 by remarking that the "mistake" referred to in Art. 3 seemed to mean something different from what was meant in Arts. 1 and 2.

Farnsworth agreed, stating that it referred to error in transmission resulting in an error in expression. This was the case where A says he will sell B 1000 when he means 100, which he did not think was the case dealt with in Art. 1.

Drobnig stated that Furmston was correct in pointing out that the second mistake as used in Art. 3 was different from mistake as dealt with in Arts. 1 and 2, but the essence of the provision was that the onus for any failure, distortion, in expression or transmission should be placed on the one making the mistake, that the rules on mistake in Arts. 1 and 2 should then apply.

Furmston wondered what the situation would be where A sends B a message via computers and the £ key on A's computer corresponds to the $ key on B's computer which A does not know. The offer therefore appears on B's screen as an offer to sell at 1000 $ although A's intention is to sell at 1000 £. Would that, he asked, be an error in transmission which was the sender's fault?

Bonell saw computer transmission as a new dimension. The cases of the telephone conversation where a party misunderstands because of noise, or of the telegram which the post office transmits wrongly, these were cases where you could identify who had actually made the mistake, and in these cases the rule was, and was intended to be, that of placing the onus on the party who made the declaration which was then wrongly transmitted or expressed. In the computer case, there was no intermediary, but it was not a declaration from the first party, because it terminated somewhere in between and the electronic impulse then produced something different from what was intended, so perhaps a different solution should be provided for such cases.

Hartkamp remarked that this rule was a rule on formation and not on validity: it was a rule on how a contract came into being, on whether or not the other party had understood the statement by the first party correctly, but it was not a mistake in the meaning of the draft.

Furmston said that he understood that Art. 3 was intended to cover both mistake in expression and mistake in transmission, but certainly in his law, if he made a mistake in expression, in the terms in which he made an offer, and the other party knew, and perhaps ought to know, that he had made such a mistake, then the other party could not accept the offer - there was no contract.

Drobnig wondered whether it would not be covered by the rules on offer and acceptance; as if there was no contract there could be no question of avoidance for mistake. If there was a contract, then the rules on mistake might be relevant.

Furmston stated that in English law it made no difference, because of course the contract was void and did not require anyone to avoid it. As he understood this system, in the case of mistake it required the positive act of avoidance, whereas in the case of failure of the offer and acceptance situation there was no contract, so there was a difference in result depending on which technique was used to get the result.

Maskow thought that the provision was particularly important for the determination of which party has to take the initiative to avoid the contract. The most simple example of this would be the case where a party sends the other party a cable saying "I sell this or that for the unique price of $ 100". The other party receives this cable which has been mutilated by transmission and now reads only $ 10 and accepts the offer, cabling back "I accept your offer to deliver at $ 10 a piece". In this case the first party would have to avoid the contract because the message had been mutilated. This situation was, however, clear, whereas there were other cases where the other party only states that he accepts the offer, and it consequently is not evident that there are differences of opinion as to the content of the offer. This difference might become apparent when there is an invoice, at which point the other party will object that they had agreed on only $ 10 per item and the first party will have to avoid the contract.

Farnsworth referred to a case where the seller is the manufacturer of lables and the buyer writes intending to order 1000 lables which he indicates with the symbol "M". Somehow, by transmission or by error in typing, there are two "M"s meaning a million. The lables are small lables, so a million lables is not so unreasonable and the seller accepts the offer. Very shortly thereafter the mistake is discovered and in the meantime the seller has done nothing. The solution adopted in the US was that it does not make any sense to enforce that contract. Art. 3 instead seemed to lead to the contrary conclusion, i.e. there would be an enforceable contract. The comparable example which had been discussed earlier was that of the person who makes an arithmetical mistake in calculating his bid. He then came to the conclusion that by American standards you had a very harsh rule about the bid in Art. 2. Now he found that to apply the same harsh rule to mistakes in expression and in transmission would be even worse.

Bonell considered that, apart from the conceptual framework, the result achieved by the two approaches was exactly the same, i.e. in these cases you can get rid of the contract.

Farnsworth wondered how you could get rid of the contract in cases where the other party has no reason to know of the mistake, as was the case with the lables. An order for a million or an order for 1000 were pretty much the same to the seller, whereas the buyer needed only 1000 and now he had a contract according to which he had to buy a million. If there had been no reliance, if the seller found out quite quickly, then the buyer ought to be excused.

Maskow felt it to be a question of distinguishing between hidden dissent and the possibility to declare the contract avoided. In case of doubt it was preferable to use the technique of avoidance of the contract as this was clearer than if you said that under certain circumstances there was no contract at all, because at least one of the parties might not know that this was the case as they might not be aware of all the facts which lead to this result.

Wang stated that according to Chinese law when a contract was concluded by fraud or threat this simply led to the contract being void, whereas for the cases of gross disparity and mistake the contract was voidable on the initiative of a party.

Hartkamp indicated that his point was that if A knows that B has made a mistake or that there has been a mistake in expression or transmission and A knows this or ought to have known it, then there was no contract because there was no consensus and A cannot rely on this declaration. Art. 3 combined the two cases illustrated by the classical distinction between mistake, as expressed in Art. 2, and what the Germans call "versteckter Dissens" or falsa demonstatio, the idea in one being that you do not want what you say, the idea in the other being that you want what you say but that you are mistaken as to the object of what you are buying.

Lando referred to the rule in § 32 of the Scandianavian Contract Act which provided that if there was a mistake in the transmission of a message, the party was not bound by the declaration he had given if the recipient of the message realised or should have realised that there was a mistake.

According to Drobnig, if the recipient knows that an error has been made in transmission or expression, then it follows from the rules on formation that no contract comes into being. He, however, did not think that this situation should be dealt with. The only questionable case was that where the other party ought to have known - a case which he would have thought should be brought under Art. 3, and consequently under Art. 2.

Hartkamp insisted that the provision did not make sense. It began "A mistake in expression or transmission" meaning an incorrect transmission but using the word mistake in a way which did not correspond to the definition given in Art. 1, according to which a

mistake was an erroneous assumption - in Art. 3 there was no erroneous assumption. It then continued, coming to the offeree, the recipient of the transmission, who thinks that the expression transmitted is correct despite the fact that it is not. Thus, if there is a mistake, it is on the part of the offeree, but the article instead went on to state that the mistake shall be considered to be a mistake on the part of the one from whom the statement emanated. From a technical point of view, when one compared it to Arts. 1 and 2, this was totally unclear. There were two different concepts of mistake, one of which related to formation, and the other of which was mistake in the traditional sense of the word.

Date-Bah suggested that the term "error" might be used instead of "mistake". He thought that if the offeree did not detect that there was anything wrong with the declaration, then it did not belong to formation so the problem was not solved by treating it in connection with formation.

Farnsworth stated that it seemed to him that there were three situations: the offeree knew; the offeree did not know but had reason to know; neither of the first two cases. The present rule did nothing about the third case. It was undesirable to say that the case where the offeree knows is governed by the rules on formation, and that the case where the offeree has reason to know is governed by the rules on mistake. The reason it was unsatisfactory was that in many legal systems these questions were actually put to trial in an adversary proceeding - it was very difficult to know whether a party really knew or whether he had reason to know, but it did not matter as long as the same rule applied.

Lando stated that one might consider introducing a general rule, covering not only mistakes in Art. 2, but also mistake in Art. 3 as well as other mistakes and giving more extensive possibilities to avoid the contract in cases where there had been no reliance on it. In Scandinavian law there was a general rule stating that if, on a sale, a party who discovers his error or mistake immediately reacts on his discovery,then if the other party has not relied on the mistaken declaration the contract may under the circumstances be considered not binding.

Bonell stated that he could see two alternatives. First, there was the formation approach, the Scandinavian or Dutch approach, according to which you should state in positive terms that under certain circumstances a party is not bound by a declaration erroneously given, expressed or transmitted, i.e. there was no contract. The second approach was the present one.

Date-Bah felt that the two approaches were not mutually exclusive, as one could deal with the "know" situation and the other with the "ought to know situation". As regarded the third category, the "really does not know", it was not a question of choosing between either of

these two approaches - if one was really dealing with this third situation one was not in a position to choose.

Fontaine, Wang, Crépeau and Tallon all prefered the assimilation approach and therefore the present text.

The majority thus supported the approach presently adopted in the draft for the cases where the other party either knew or ought to have known of the mistake.

As regarded the cases where the other party neither knew nor should have discovered the mistake but at the same time has no serious reason to object if the first party invokes the mistake as he has not relied on the mistaken declaration, Bonell wondered why the first party should not be permitted to denounce this error in spite of the general rule contained in the Principles. In particular Farnsworth, Lando and Date-Bah, had suggested that there should be a provision in the Principles according to which in these special cases, notwithstanding the fact that the other party did not know of the mistake nor should have known of it, the first party is nevertheless entitled to invoke this error provided that he proves that the addressee has no reason to object to such an avoidance.

In the light of the new proposal for Art. 2(1)(b), which Farnsworth had in the meantime presented (see supra p. 15 ) the Group agreed that the problem had been adequately settled.

Drobnig and Lando put forward a proposal for Art. 3 which read:

> "An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated".

Drobnig introduced their proposal saying that the criticism levied against the undiscriminate use of the word "mistake" had been justified, and that they had therefore decided to replace it by "error" at the beginning while retaining it at the end.

The Group accepted the new wording.

Article 4

Wang wondered about the relationship of Art. 4 with Art. 2. In particular, in case of common mistake, which party would not be able to avoid the contract?

Maskow stated that he had the same difficulties as Wang, and he thought that this depended on the wording. He suggested that a wording

such as "could have afforded him to rely on the non-performance" might be better than "could have afforded /.../ him a remedy for non-performance", as in his view a remedy for non-performance meant that a party had a remedy because the other party had not performed, whereas here he had the impression that what was intended was that the party was not allowed to avoid if he could rely on a remedy for non-performance.

Bonell wondered whether the answer to Wang's question would be that in the case of common mistake it depended on who took the initiative: if a party started by claiming that he was mistaken and that he therefore wanted the contract to be avoided, then according to Art. 4 the other party may, if appropriate, claim that the first party had delayed too long and that he should have relied on remedies for non-performance. If this was so, then, he said, it just depended on which party took the initiative.

Date-Bah and Drobnig added that it also depended on which party was aggrieved, that that was essential, as only one party would be aggrieved, and it was only that party who could have recourse to remedies for non-performance, who could avoid or terminate or claim damages - not the party who had not performed.

Article 4 was thus adopted as it stood.

Article 5

Opening the discussion on Article 5, Farnsworth said that he did not see a requirement which he thought was a characteristic of the common law in cases of fraud, i.e. that not only must there be a causal connection between the misrepresentation and the making of the contract, the person who complains of fraud must justifiably or reasonably have relied on the misrepresentation.

Drobnig stated that he thought that the term which came closest to this problem was "has been led to conclude", but as far as he could remember the question had not been discussed.

Farnsworth stated that he thought that a common lawyer would be likely to say "has reasonably /justifiably/ been led to conclude", which might be too elliptical a formula to be pressed, but the sense was this. He wondered whether relief in case of innocent misrepresentation would be covered by art. 2 since it was not covered by Art. 5. The other members of the Group confirmed that this would be the case. The only question was then whether this also meant that a party may avoid a contract even if he had unreasonably been led to conclude it, e.g. in a nineteenth century US Supreme Court case in which someone induced another person to buy land by saying that he, the seller, was the Governor of the state of West Virginia when he was not. The Supreme

Court had not given relief because it considered that even though the misrepresentation was false and even though it was intended to affect the other person, no reasonable person would care whether or not the previous owner of the land was the Governor of West Virginia.

Bonell stated that a similar distinction existed in the Italian Civil Code (cf. Arts. 1439-1440), but since the criterion was whether or not the misrepresentation was decisive for the conclusion of the contract, in the case mentioned by Farnsworth the answer would be that such a fraudulent misrepresentation could not be held to have been decisive for the conclusion of that particular type of contract, although the other party claimed that it was. He wondered whether the same result could be achieved by means of the present text.

Maskow wondered why in a case where someone claims that he is entitled to sell land on the moon and actually does so, the other party should not be able to avoid the contract even if it was unreasonable for him to rely on the first party's claim.

Farnsworth agreed that both views could be supported. He simply wanted to recall that in the USA less and less emphasis was being placed on the moral aspects of fraud. Now one focussed less on the person who makes the misrepresentation and more and more on the person who has, or claims to have, been affected by it, and one would not upset the transaction unless the person who has been affected has behaved in a reasonable manner.

Furmston wondered whether they all knew what fraud meant. It was assumed in the text that the meaning of fraud was self-evident, but in England if you told a lie about what your state of mind was, that was fraudulent, if you said your opinion was this and it was not, then that was fraudulent, because the state of a man's mind was as much a fact as the state of his digestion.

With respect to cases where the fraudulent misrepresentation could induce a party to conclude a contract but where that party should have been clever enough to check, Fontaine felt that there could be reason to add a qualification such as "justifiably" or "reasonably".

Bonell stated that he would have thought that this was implicit, and wondered whether it really was necessary to change the text, whether it would not be sufficient to take these additional clarifications into account in the comments.

Maskow was still not convinced of the advisability to make such a distinction. Lando also stated that in cases such as that of the Governor of West Virginia one should be allowed to avoid a contract even if it was completely silly. He also considered that if the standard of reasonableness was introduced, this would open the gates for litigation He thought that fraudulent people should not be protected to any high

degree, so the provision should be left as it was and standards of reasonableness should not be introduced in this context.

Fontaine stated that he was not sure that "fraud" as defined here covered all that was covered by "dol" in civil law systems, because there were other forms of dol than fraudulent misrepresentation or non-disclosure of circumstances, such as, for example, the creation of appearances e.g. the decoration of a shop so as to create the impression that it belongs to a franchise group. Would that, he asked, be misrepresentation? A flag placed on a ship or mast to create the illusion of nationality, would that be misrepresentation? Would the case of a false picture of a house showed potential customers in order to be able to sell it be covered by this concept? He wanted to be reassured on this point.

Drobnig pointed out that the comments used the terms "fraudulent practices" and added that one should perhaps better speak of "declarations and practices", as if they only spoke of "practices" this might give the impression that words were not sufficient, although in effect that was the most important category of fraudulent representation.

Farnsworth agreed with this. He had no objection to "practices", but stated that they had to say something like "language and practices" or "declarations and practices". In the US, he stated, they thought of three kinds of misrepresentation: language, concealment and non-disclosure, so they would have no trouble saying "language or practices", as they would think that this more or less corresponded to those categories.

He suggested to change the wording of the provision as follows:

> "[...] by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure [...]"

which, he said, also made it clear that in their use of the words the "practices" they were referring to were practices that amounted to misrepresentation, so that they would not be confused with practices that might simply be non-disclosure. The last part of the article would remain as it stood. This proposal was adopted by the Group.

Article 6

Crépeau raised the question whether the term "unjustified threat" was to be understood as covering any kind of threat to life, limb or to patrimony, as well as a threat also to someone close to the party such as consort or children. Drobnig confirmed that this was the case, provided that this influenced the contracting party sufficiently to make

him contract under the impression of that threat.

Wang and Date-Bah wondered whether in case of threat emanating from a third person it was intended to permit the avoidance of the contract irrespective of whether or not the other party was aware of that threat.

This was confirmed by Drobnig.

Hartkamp thought that the different treatment in this respect of threat, as compared with the other grounds of avoidance, was a very old-fashioned rule derived from Roman law. He felt that it was no longer justified in the present day, and therefore suggested to align the situations so that also threat emanating from third persons would be relevant only in so far as the other party to the contract is aware, or should have been aware of it.

While Maskow and Tallon supported the present rule, Farnsworth and Furmston agreed with Hartkamp. It was stated that if threat was limited to people going around with guns, it would probably not matter very much as the number of cases where people did that without the contracting parties knowing about it was likely to be small. In fact, in modern society threat in practice included economic duress, which was certainly more wide-spread than fraud. If economic duress by A which is unknown to C can enable B to avoid the contract between B and C, then that was a potentially very wide doctrine.

Bonell summarised the discussion by stating that the majority of the Group seemed to be in favour of the proposal to delete the words "from whatever person it emanates" in Art. 6, and to add threat in Art. 9.

Fontaine stated that he agreed with the proposal for Art. 6, although he considered that they should go further, as the crossing out of the phrase "from whatever person it emanates" would leave the question open. He considered that reference should instead be made to the threat emanating from the other party. Farnsworth suggested that this could be formulated "by the other party's unjustified threat" and this was also agreed.

Farnsworth observed that the word "unlawful" was used twice in the second sentence, and this caused him trouble of two kinds. First of all there was a slight suggestion in the English that you would have to find a law that was violated - whether that would be statutory law or not he did not know, but the word "unlawful" did raise that question. Secondly, on an international level that word prompted the question what law and suggested that you had to look at some sort of proper law of the contract in order to find out whether it was unlawful or not. He was not sure that that was what was intended, and he could think of at least three other words that would avoid that problem: "improper", "wrongful", "illegitimate" and "illicit".

Bonell recalled that at the 1982 meeting precisely this point had been raised, but in reverse - the text had then read "improper" and it had been Rajski who had insisted on "unlawful".

Drobnig felt that "improper" would indicate more social norms against propriety, whereas what was meant was that it was against the law, so he thought that "wrongful" would be preferable.

Furmston pointed out that there are threats which would have this effect but which would not be unlawful: e.g. if the Ford Motor Company says to its supplier "if you insist on behaving like this you need not come around again", that would not be unlawful, but it would be very coersive.

The Group therefore decided to replace "unlawful" by "wrongful".

Article 6 as adopted thus read:

"A party may avoid the contract when he has been led to conclude it by the other party's unjustified threat which, having due regard to the circumstances, is so imminent and serious as to leave him no reasonable alternative. In particular, a threat is unjustified if the act or omission with which the promisor has been threatened is wrongful in itself, or it is wrongful to use it as a means to obtain the promise".

Article 7

Introducing Article 7, Lando recalled that the provision reflected a laboriously achieved compromise solution reached in 1982.

Furmston stated that he had some difficulty with the language of the provision as it stood. When it said that there was "gross disparity between the obligations of the parties", then presumably the obligations were imposed by the contract. Thus, taking the situation where one of the parties has assumed obligations under the contract which are much greater than those of the other, if that was all, assuming there was no other disparity, then that would seem to be a very wide doctrine. For example, he said, a few years back Manchester City Football Club had a manager who succeeded very nearly in bankrupting the club by buying many players for far more than they were worth - he had bought players for one million pounds who a few weeks later had had to be sold for 100,000 pounds. There was a gross disparity between the obligations of the parties in the sense that he had entered into very foolish contracts, but no English lawyer, and he did not suppose any of the Group either, would, if those were the only facts, think that the contract should be set aside. Would not that, he asked, be covered by gross disparity?

Lando felt that it would not come under this rule, as if one read the rule, one might first question whether the football players had taken unfair advantage of dependence, of economic distress or of urgent needs, and secondly, he would certainly think that the commercial setting of the football players was one under which you buy a football player for what you think he is worth, which is something very subjective, and you have to stand by that even if he is considered to be too expensive by some. He would thus, he stated, say that a reading of lit. (a) and lit. (b) in this case would not lead to the upsetting of the contract, which, however, could be revised.

Furmston considered that the only problem he would have with that was that the provision said that regard was to be had "among other things", and that meant that lit. (a) and (b) was not an exhaustive list to which one must have regard.

Farnsworth had the same problem as Furmston. Among American lawyers there had been long discussions over what they called "substantive" and "procedural" unconscionability. The question that was discussed over and over again was whether substantive unconscionability alone was enough, and the prevailing view was that at least in international commercial transactions substantive unconscionability should not be enough. The first part of Art. 7 on the contrary seemed to suggest that it would be sufficient. He therefore agreed with Furmston, and suggested to rewrite the first sentence so as to indicate that there had to be some element of unfair advantage.

Crépeau stated that the problem of lésion or gross disparity had been debated at great length in Québec. The general view was that there should be two requirements: the disproportion between the prestations of the parties and the exploitation of one party by the other, because there might well be instances where there can be gross disparity without any exploitation whatever, and there can be exploitation without gross disparity. This was stated in Art. 37 of Book V of the Draft Civil Code: "Lesion vitiates consent when it results from the exploitation of one of the parties by the other, and brings about a serious disproportion between the prestations of the contract./ Serious disproportion creates a presumption of exploitation". There were therefore the two substantive requirements of disparity and exploitation, but disparity was sufficient to create a presumption. If that presumption was rebutted, then even though there might be disparity there was no reason why the contract should be annulled or avoided. This had been felt to be a fair approach to the problem of disparity.

Fontaine questioned the use of the singular in the phrase "which is unjustifiable". It could not, he stated, simply be the disparity as the reference was to "a gross disparity /...7 or /..7 contract clauses". He wondered whether the phrase in reality should not be "which are unjustifiable" - unless it was the situation which was unjustifiable in the second case covered in the provision.

Lando stated that the intention was that there should be a gross disparity either in the obligations of the parties in the contract as such, or in one of its clauses.

Fontaine felt that if this was the case the phrase should not say "or /.../ contract clauses".

Furmston sugested that it might meet Fontaine's point and also read better if they said "there was a gross and unjustifiable disparity between the obligations of the parties or /.../".

Maskow had some sympathy for the views Crépeau had expressed, but he got the impression that if they went along those lines they would have difficulties with contract clauses in this context. What this meant was not clear to him either, as either they were contract clauses which had influenced or even caused the gross disparity in the contract as a whole, and would then be covered by the corresponding part of their article, or they were clauses which had not done so, in which case he was not sure what the consequences would be: would only these clauses be deleted or avoided? He suggested it might be better to have a special rule, possibly in this same article, in order to avoid these difficulties.

Farnsworth said that he was going to say much of what Maskow had said. It did seem that the language reference to contract clauses had not been well drafted. Either it meant the same thing as the first language, or it meant something that it did not really say, and he would have thought that either one made another provision - another sentence - on clauses, or that at least one redraft this part of the sentence. It did not seem to him that the kinds of clauses one wanted to talk about here generally upset the contractual equilibrium; they tended to be clauses that, if they applied, were very harsh, but he did not know that one needed to calculate an equilibrium in order to find that the clause was harsh. His sense, he stated, was to divorce that aspect from the notion of lésion from which he assumed that it originally came.

Lando expressed his preference for the broader approach, i.e. to strike out any contract or any contract clauses that are unduly harsh irrespective of whether or not there is a disparity or dis-equilibrium.

Bonell suggested that one might very well have two rules, i.e. Art. 7 could be redrafted so as to clearly refer only to the so-called lesio case - which in effect was a defect in consent as someone exploited something to his own advantage. The other provision could then either immediately follow as Farnsworth had suggested, or be placed elsewhere, even in a special section.

Tallon did not think that there should be a general rule on unconscionability because he thought that it would open a flood of litigation. He found the Canadian approach interesting, because it combined

the two notions, but he also thought that the purely classical notion of lésion should be done away with, as if a reference was made to lésion a Frenchman would always think of an excessive price for something, and here what was meant was not only the price, but maybe any kind of excessive advantage arising out of the contract (e.g. the right to change the conditions unilaterally). He recalled the French Law 78-23 of 10 January 1978 on consumer protection ("Sur la protection et l'information des consommateurs de produits et de services") which in Art. 35 stated that "/Les/ clauses /.../ imposées par un abus de la puissance économique de l'autre partie et /qui/ confèrent à cette dernière un avantage excessif /.../".

With reference to the Québec formula, Hartkamp wanted to know which circumstances would be relevant for the disparity or excessive advantage.

Crépeau stated that the point when the issue had been discussed in Québec was simply that whether one liked it or not, when one enters into a contract one of the parties is bound to benefit more than the other. That in itself would not be a cause for the annulment of the contract, the question was whether at some point some excessive advantage resulted from the contract and from the exploitation of the other party's condition, ignorance or lack of professional experience. If those substantive conditions were met, then, whether one called it lésion or gross disparity, the doctrine of gross disparity applied, but it was felt that from the point of the procedural, or evidentiary, rule, the onus of proof should be placed on the person who wished to allege the validity of the contract.

Bonell asked Crépeau whether, in the Québec draft Civil Code there also was a provision along the lines of the UCC unconscionability article. Crépeau referred to Art. 76 of Book V which stated that "An abusive clause in a contract may be annulled or reduced". Bonell considered it to be important to know that the Québec Code did contain two different provisions dealing with "suspect" clauses or contracts.

Crépeau agreed and made the example of an exemption clause which could well be considered to be abusive and as such be struck out under the second provision, although being perfectly valid under the first test, since there was no exploitation by the other party.

Farnsworth stated that in the US it was clear that one could get rid of an abusive clause, what was not clear was that where the whole contract was grossly disproportional one could avoid or annul it.

Bonell found this interesting, as he supposed that in the US things had developed differently from in the civil law systems. In the latter, because of the principle of the sanctity of the contract according to which one should not touch what the parties have agreed upon provided that they had agreed of free will and without undue influence, for a

very long time the only way to attack the content of an unconscionable contract was by means of a supposed defect in consent due to the exploitation done by a party. On the contrary the Americans had obviously not felt it necessary to go through all these passages and had instead directly stated that unconscionable terms may be set aside. In other words, historically speaking perhaps one might even argue whether the lesio enormis was still necessary once one accepted the principle that unconscionable contract terms may be avoided as such.

Date-Bah, considering also the fact that for a legal system such as his where it was more likely that traders could not look to their interests as well as they might, endorsed both notions - the notion of disparity and the second part, which he understood mainly to deal with harsh provisions, but he thought that it could be expressed in a better way.

Bonell summarised the discussion by referring to the two alternatives they faced: the first was a combined approach where one had one article more or less along the lines of the present Art. 7 covering both, or, secondly, a two-fold approach where one had two separate provisions, one dealing with the exploitation case, and the other with the unfair content of single clauses in contracts.

Tallon stated that he favoured the one text approach, where both situations were covered by the same text.

Furmston suspected that there were actually more than two problems. He thought that it was actually extremely difficult to devise a single sentence covering all the different point which had been raised in the discussion. It seemed that the central case, which was easy, was where one party has taken unfair advantage of the other's dependance, and produces a gross disparity. He thought that everyone would agree that that ought to be set aside. There were then cases which according to his law were unclear, where there was gross disparity which did not arise out of any unfair advantage, just as it was possible to have what was objectively fair, but which arose out of taking advantage, and there were also the harsh clauses. He thought that it was difficult to catch all that in a single phrase or sentence.

Drobnig considered that the first three cases would be covered by Art. 7 reduced to one sentence because purely objective disparity was not enough. On the other hand also exploitation, if it did not result in objective disparity, was insufficient, so you had to have a combination of the two.

Lando and Crépeau stated that they were inclined to think that there were two different problems. First, there was the problem of the disparity resulting from the exploitation of one party's position to his disadvantage and to the advantage of the other. Secondly, there was the question of whether a particular clause was objectionable or

unconscionable on various grounds, and of allowing a very wide judicial power to either annul, delete, revise or reduce the obligations or even, as had been the case with their draft, not only to reduce the one side, but also to increase the obligations of the other, if justice would so require.

Tallon suggested a wording such as "A party may avoid a contract which confers one party an excessive advantage due to the abuse of his bargaining power", with as a second sub-section, "Si l'avantage excessif tient à l'existence d'une seule clause du contrat, cette clause seule sera annulée ou sera réduite" meaning that there would be a possibility, when only one term of the contract was abusive and its deletion would be quite fair, that the term should be considered not written.

Farnsworth and Hartkamp liked the idea, and favoured concentrating on both problems in a single section. If it were in two different sections, at least a common lawyer, who would not be familiar with the text, would perhaps imagine that these were two very different doctrines, and would suspect that one of the doctrines was lesio enormis or something like that, which did carry the implication of a particular legal system's rule, and they were not sure that that was what was wanted. Tallon's formula seemed to take care of all problems without suggesting some particular doctrinal base.

Fontaine also found the approach very convincing. The main difficulty was the problem of the single clause, but that would be provided for, perhaps not by the second paragraph, but by Art. 15, which had, however, to be rephrased.

Lando had hesitations about Tallon's formulation, which presupposed an abuse of superior bargaining power, because the most frequent situations in which you found these unfair contract clauses was in standard form contracts, and it was very difficult to say that there was abuse of unequal baragining power in cases where none of the parties ever read the standard form clause. In some legal systems such clauses in standard form contracts had been struck down because they were unconscionable or because they were not fair as in reality both parties entered into the contract with closed eyes, so he thought that the formulation could be modified along the lines of unconsionability.

Crépeau, Drobnig, Farnsworth, Fontaine and Tallon submitted a proposal for Art. 7 which read:

> "A party may avoid a contract which gives the other party an excessive advantage.
>
> 1st version: due to /that latter party's/ unfair behaviour
>
> 2nd version: resulting from the avoiding party's dependence, economic distress or urgent needs, or his improvidence, ignorance,

inexperience or lack of bargaining skill.

/Excessive advantage creates a presumption of unfair behaviour (of the avoiding party's dependence...)/

If this advantage affects only a term of the contract, this term only may be avoided or reduced."

Tallon introduced the proposal, stating that the idea was that of combining the two conditions. First, there was the objective condition of disparity of advantages in the contract, which, however, was not sufficient and it was to indicate this that they spoke of an "excessive advantage". This excessive advantage had, however, to be due to the other party's attitude, and they had drafted two alternative versions, the first of which was synthetic, the second descriptive. The words in square brackets were proposed by Crépeau following the example of the Québec draft Civil Code.

Hartkamp stated that he was disappointed in the draft, as he was of the opinion that a difference existed between the avoidance of a contract in its entirety, and the avoidance of the single term of a contract. He agreed that a contract should only be avoided in its entirety if there had been unfair behaviour, but as regarded individual terms of a contract, he was attracted by the Québec formula which quite simply stated that an abusive clause could be annulled. In this draft instead, the excessive advantage idea attached to the contract as a whole as well as to the individual terms of the contract, and in his opinion in that case they did not need to have a special rule for the avoidance of single clauses as it was self-evident that if there was a ground for avoidance of the contract as a whole, it could also be directed to a single clause affected by that ground of avoidance.

With reference to the distinction Hartkamp wanted inserted, Tallon stated that at times it was the clause by itself which was abusive, but sometimes it was not. He referred to cases which concerned photography, where there were disclaimer clauses. These might be abusive if one paid a high price for the photographs, but the same clauses might not be abusive if one paid a low price. It was thus very difficult to say that it was just one clause which was abusive, as it might depend on the whole contract.

Date-Bah observed that as he read Art. 7, version 2 encapsulated both procedural and substantive unconscionability. If in fact an excessive advantage resulted from a party's ignorance, then, whether or not the other party had effectively tried to exploit that ignorance, the contract could be avoided.

Fontaine stated that he would prefer to do without the last paragraph. Although it had not been discussed yet, he thought that Art. 15 would cover the partial avoidance. As regarded the alternative

versions, he prefered the second one. Furthermore, he had reservations about the presumption in square brackets.

Di Majo found the concept of "excessive advantage" used in Art. 7 to be uncertain - what standards should be used to determine the excessive advantage, he asked. It was perhaps impossible to judge what standardised excessive advantage was.

Wang had sympathy for the draft proposal, but he found the original version easier to understand. He had especially appreciated the reference to the commercial setting and to the purpose of the contract. In contracts for the international sale of goods it was clear that parties sell at the highest price to make the best profit, but that was not necessarily taking an excessive advantage - the commercial setting had to be considered.

Bonell felt Wang's intervention to go in the same direction as that of Hartkamp. He could not deny that if the proposal were compared to the original version of Art. 7, it was somewhat reductive, as it omitted the possibility of avoiding an individual contract term on the ground of it grossly upsetting the contractual equilibrium, regard being had to the commercial setting or the purpose of the contract. According to the original Art. 7 this would suffice for the avoidance of that clause - there was no need to prove that there had been an exploitation, a procedural unconscionability, and this was the compromise which had been reached in 1982. According to the proposed wording this would no longer be the case.

Date-Bah and Hartkamp agreed and insisted to have, with respect to abusive clauses, a provision similar to that to be found in the Québec draft Civil Code adopted.

Drobnig stated that he understood the Group to prefer a provision which described the conditions under which the contract as a whole could be avoided and then a second provision relating to individual terms. For the first of these provisions, he himself would plead for the retention of the core of the original text, omitting only the words "or there are contract clauses grossly upsetting the contractual equilibrium". Then the task would remain for those who wanted to draft a separate provision on individual terms to do so; they would not be bound, as they wanted to depart from the structure and contents of the present Art. 7. He was of course prepared to consider that, but he would like to keep what he thought was essentially undisputed, including lit. (b) which he also had the feeling was important.

Tallon strongly disagreed with the two-provision approach. He could not understand why there should be a different treatment of the contract as a whole and of individual clauses of the contract. He did not think that the American distinction between procedural and substantial unconscionability was a model of clarity. It would be clearer if one

stated that first one had to have subjective disparity or excessive advantage - there must be a kind of disequilibrium - and then there must be unfair behaviour. He thought that one should have the two conditions, both the objective and the subjective, and therefore proposed a phrasing such as "A party may avoid a contract which gives the other party an excessive advantage due to that party's unfair behaviour".

Maskow thought it necessary to have two provisions. In cases of gross disparity the contract should be avoided as soon as possible, while the presence of an individual clause of a grossly unfair character may well remain irrelevant until that particular clause is actually invoked by the other party (e.g. a clause greatly limiting the possibilities to give notice of defects contained in general conditions).

Furmston considered that there was a bewildering variety of devises in the Principles to deal with individual clauses or terms which were disliked. In the formation chapter there was a provision dealing with surprising clauses; there was Art. 15 of the present chapter which dealt with partial avoidance, and there was yet another possibility, which was that although the contract as a whole was fair, a solitary term was not, but there had been no unfair behaviour. He wondered whether all these devises were needed.

Bonell stated that Art. 15 had always been intended as an ancillary provision, i.e. once one admitted a reason for a particular kind of avoidance, one might limit the effects of such an avoidance to such a part of the contract, but it did not introduce a new, autonomous ground of avoidance.

Drobnig considered the case where it was one particular clause on price which made the whole contract grossly disparate, then it would be possible to use Art. 15 to delete only that individual term, always assuming that Art. 7 was there, i.e. if the disparity affected the whole contract, and this was by virtue of a single provision, it would be applicable.

Lando was impressed by Maskow's argument about terms which only later on become abusive. He pointed out that many abusive clauses did not grossly upset the contractual equilibrium because they were only applicable to specific situations which may never occurred. In certain business branches these clauses were not unusual, and one could not always say that there was unfair behaviour or a gross abuse of the party's bargaining power, but nevertheless the clauses were abusive and should be revised.

According to Date-Bah the main problem was trying to prove causation between the ignorance or inexperience and the resultant harsh term. If the term itself caused hardship or was unfair, he saw no reason why it could not be tackled directly, without any reference to

seeking a relation with a party's behaviour (i.e. an exploitive relationship).

Di Majo agreed with the proposal to consider here two different problems. The first was the problem of the equilibrium of the whole contract and its upsetting, the second was that of individual clauses, and it was possible that they did not influence the equilibrium of the whole contract. He agreed with the proposal to have two rules or two paragraphs to the same article. They had, he stated, to decide whether to give more importance to the objective disparity of economic power or to the unfair behaviour of one party.

Furmston thought that Drobnig's example would not be covered by Art. 15 as he would naturally read it; if the price was too high, or much too low, he did not think that you could save that by simply removing the term about the price from the contract, because you must have a term about the price, and he did not think the Art. 15 entitled you to rewrite that term - which is what you would have to do to save it. More substantially, he thought that the question Lando raised was a sort of central question of principle about which he had grave doubts. He guessed that there must be terms which even though in a contract which would otherwise be perfectly unobjectionable, were so horrible that you would want to have the power to strike them out, but he thought that in the international commercial context they would be relatively unusual. He thought there was quite a danger of simply giving arbitrators the power to strike out clauses that they did not like, e.g. in time charterparties it was a standard clause to provide that if the time charterer does not pay the time charter on the due days, the owner can withdraw the ship. That had been the subject of repeated litigation in England, with the Court of Appeal led by Lord Denning repeatedly saying that that was unfair, and the House of Lords repeatedly saying that it was perfectly fair, because the parties were grown up and could decide for themselves whether to enter into this. In the leading case the House of Lords had held that the owner could terminate even when the due day of payment was a Sunday, and the charterer paid first thing on Monday morning.

Farnsworth favoured the Tallon provision which stopped at the end of the first version. He agreed with Furmston that you wanted to be fairly strict, and he was glad that it said excessive advantage and that it added something about unfair behaviour. In the US out of a number of 500 cases not many actually held that commercial contracts or clauses in them were unconscionable. The most appealing cases were limitation of remedies cases involving "farmers", i.e. businessmen who happened to deal with farm products, who buy seeds and the contracts for the seeds say that if the seeds do not come up they can get their money back. Courts have held that those are unconscionable and the opinions seemed to him to be convincing. It was certainly excessive advantage and the question really was whether there had been unfair behaviour, as they had sold in such a way that the buyer did not have a chance to negotiate,

there was no misrepresentation, and often fairly large print was used. In the US there were a number of cases which dealt with the question whether adhesion contracts were unconscionable for that reason. It did seem to him, that an arbitrator could say in such a case that there was an excessive advantage and that because of the adhesive nature of the contract there had been unfair behaviour, and he was not sure that you would need many more words.

As a possible compromise, Farnsworth suggested a wording such as: "A party may avoid a contract which unfairly gives the other party an excessive advantage". This, he stated, supposed that there were some cases in which a contract may fairly give an excessive advantage to a party. It was a formulation which certainly softened the behavioural aspect. It had the two elements, but whether the unfairness could only be behaviour, or whether the unfairness could, for example, be necessity of the other party and nothing more, would be left to the arbitrators to decide.

Lando wondered whether there were any clauses which were unfair despite the fact that they did not give a party an excessive advantage.

Bonell considered that by definition a contractual term must be in the interest of either one or the other of the parties, or in the interest of both. Sometimes the benefit may only be indirect, e.g. in the choice of the place of arbitration which in itself might not be considered to be in the interest of either of the parties, but which later would turn out to be greatly in favour of one of the parties.

Drobnig referred to a case which would not be covered by this formula, i.e. that of a loan, where the terms of the loan are not excessively advantageous to the lender, but are instead opressive for the borrower because of the situation in which he finds himself. Such terms could actually be almost neutral or come within the setting of ordinary commercial advantages of the lender. As the risk may in certain cases be twice as high as the normal risk, it would be justified if the lender charged an interest rate which was twice as high as the normal one.

Bonell stated that he would always have thought that "excessive advantage" was not excessive advantage in comparison with competitors, but when the terms were excessively favourable to one party as against the other: if A lends B money on condition that if B fails to re-pay one single day A shall stop the loan, A definitely stipulates a term which is excessively advantageous to him as compared to what he gives B.

Furmston could not believe that any member of the Group would accept an argument according to which a party says that the other has an excessive advantage, but it is normal for him.

Maskow stated that in the example Drobnig had given, of it being

justifiable that the interests were twice as high as the normal rates because the risk was higher, he did not see any need to grant a right to avoid as it should be considered a normal contract.

Tallon wondered whether the words "or any part of it" should be added to "A party may avoid a contract", had it in fact been the intention of Farnsworth to cover both the contract as a whole and the clauses of the contract, or had he intended to cover just the whole contract? As Farnsworth confirmed that he had intended to cover both, Tallon stated that he thought it important to point this out, and concluded that he could live with Farnsworth's proposal, if it were assumed that it addressed both the whole contract and part of it.

Lando thought that if one had a first paragraph stating that "A party may avoid a contract which [...] the other party an excessive advantage" and then added a second paragraph stating that "An abusive clause in a contract may be annulled or modified", one would then have a perfect rule.

To Date-Bah it seemed that it would not be too controversial to modify the last sentence of the proposal to read "if this excessive advantage affects only a term of the contract, this term may be avoided or adapted" or something along those lines.

Drobnig stated that if the general clause were adopted, everything would be left in the hands of judges and arbitrators, and while there of course were reliable judges with common sense, there were also arbitrators, and even judges (which was worse because parties could not influence them) who were not sensible. He could not go along with a provision which left everything to the discretion of those deciding. He felt that the original version of the article was the fruit of many long hours of discussion and did give more concrete indications of the criteria to be applied.

In a vote on the alternatives, the new formula derived from Farnsworth's suggestion received 6 votes, the old one, as contained in Doc. 43, 5, and one member of the Group abstained.

Bonell stated that if the rules of procedure were stictly applied, then the result would be that the new text was carried, but it was too crucial an issue to decide in such a way. Furthermore, he felt that the views of the Rapporteurs should be paid careful attention, and as Drobnig had voted against, and strongly so, and Lando had only abstained, he hesitated to apply the rules of procedure strictly.

Independently of the rules of procedure, Drobnig felt that Bonell was correct in proposing this, and that it would be unfortunate if such a very important provision were to be either adopted on such a small majority or rejected for the same reason. He thought it to be justifiable to attempt to reach a new compromise.

Farnsworth presented a new proposal which read:

"A party may avoid a contract if at the time of its making it unfairly gives the other party an excessive advantage. Regard is to be had to, among other things,
(a) the fact that the other party has taken unfair advantage of the avoiding party's dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience or lack of bargaining skill, and
(b) the commercial setting and the purpose of the contract."

Wang felt that this new draft was better than the previous one, and therefore declared himself prepared to vote for it. He did wonder, however, whether they could add some words after "excessive advantage" such as "which is unjust", which would conform to the words of the original version.

Also Drobnig found the proposal very acceptable, although he would have certain preferences for the amendment proposed by Wang. He was not convinced that "unfairly" had the same meaning as "unjustifiable" which was probably stronger.

Farnsworth stated that personally he would accept this substitution. Unfairness was in lit. (a), and it suggested that it was a factor - a factor in unfairness, in unjustifiableness. He thought that an arbitrator would know it when he saw it, so it would not make any difference what word one used.

It was therefore agreed that "unfairly" should be substituted by "unjustifiably" in the first sentence of the proposal

Lando stated that he thought that what was more important than the unfair contract was the unfair clause. He did not intend this as a criticism of Art. 7 - that was also needed - but a provision saying that an abusive clause could be made void or modified was certainly needed, and he thought that this should be said bluntly in this connection, and should not have to be deduced from other provisions on partial avoidance and similar provisions. He observed that rules against unfair contract terms were used more frequently in Scandinavia and in the Federal Republic of Germany than those on unfair contracts. Hartkamp agreed with what Lando had stated.

Farnsworth wondered whether Lando would be satisfied if "or any part of it" were added to "at the time of its making it". Lando thought that it might be, although the possibility to modify the term would then be needed.

Bonell wondered whether for the time being the two aspects could not be separated. He had understood the point raised by Lando and picked up by Hartkamp to be that it should be made clear not so much that the

excessive disadvantage may relate to a single clause, but that one may avoid a single term instead of the contract as a whole. It was the result which was important, so he wondered whether, instead of the proposal Farnsworth had just made, they could not say "A party may avoid a contract or a single term of it". The aspect of modification was one which was still open also as regarded the contract as a whole, so he suggested they come back to it later after they had discussed Art. 12.

Lando thought that this should be dealt with in Art. 7, but Bonell suggested that that would be a question of drafting, and ultimately depended on whether they decided to get rid of Art. 12.

Fontaine thought that the problem of the abusive clause could be solved by modifying Art. 7 and not Art. 12.

He presented a proposal for Article 7 which read:

"(1) A party may avoid a contract or an individual term if at the time of the making of the contract the contract or term unjustifiably gives the other party an excessive advantage. Regard is to be had to, among other things,

(a) the fact that the other party has taken unfair advantage of the avoiding party's dependence, economic distress or urgent needs, or of his improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the commercial setting and the purpose of the contract.

(2) Instead of avoiding the contract or term, that party may also apply to the tribunal and request an adaptation of the contract or term in order to bring it in accordance with reasonable commercial standards of fair dealing.

(3) If he receives a notice of avoidance the other party may also apply to the tribunal providing he informs the first party promptly after receiving the notice of avoidance and before that party has acted in reliance on it. The rules stated in Article 11 paragraph 2 apply accordingly."

Lando observed that in this case a party would be entitled to avoid a contract merely by giving notice, while if that same party wanted the contract or a single term of it modified, he had to go to court. He thought that either party could go and ask the other for adaptation or avoidance, so he would say "instead of avoiding the contract that party may also request an adaptation", and if this was not right, then of course it would be given to the court.

Bonell observed that what Lando was proposing was a unilateral right of imposing a revision of the contract. Lando agreed, but considered it to be under the supervision of the court, because if the other party did not agree to the revision he had to be taken to court.

Drobnig did not see this to be an imposition, because the party could say that he wanted the contract to read in a certain way, but the agreement of the other party would be required.

Crépeau too, maintained that if one created a system of avoidance by notice, there was no reason not to have also modification by notice.

Date-Bah observed that modification was inherently not unilateral. It worried him that a proposal by one party to modify could have some legal effect - he could propose the modification, and the other party may or may not consent, but to suggest that this proposal was to have some legal effect was a serious step to take: a party's views on modification were not necessarily wiser than those of the other.

Crépeau stated that if the provision read "that party may also request an adaptation" without the applying to the tribunal and it was in the form of a request to the other party, then it would not have the binding force of the avoidance, it would not be a notice.

Farnsworth considered that to be like a proclamation of freedom of speech in a limited area: you may request, and since it has no legal consequences of the sort that avoidance does, he would have said that it was implicit that the other party may say that he is not prepared to accept the request and then nothing would happen and there would be no adaptation.

There being no further support for Lando's idea, it was concluded that the intervention of the court was still desired by the majority of the Group, and the text remained as it stood in this respect. Drobnig felt that they should authorize Lando to insert in the comments that before seizing a court the parties may of course exchange requests for negotiations.

Fontaine considered that they had to keep in the situation where the other party has received a notice of avoidance. Farnsworth suggested that you could say something like "Upon the request of the other party a court may do so if the other party is informed of the request", and Crépeau suggested that para. 1 could say "A party may avoid a contract or an individual term /.../", and then in another paragraph you could say "Instead of /en lieu of/ avoidance of the contract by one party a tribunal may upon request adapt the contract".

Article 7 was thus adopted as follows:

"(1) A party may avoid a contract or an individual term if at the time of the making of the contract the contract or term unjustifiably gives the other party an excessive advantage. Regard is to be had to, among other things,

(a) the fact that the other party has taken unfair advantage of the avoiding party's dependence, economic distress or urgent needs,

or of his improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the commercial setting and the purpose of the contract.

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to bring it in accordance with reasonable commercial standards of fair dealing.

(3) A court may do so also upon the request of a party receiving a notice of avoidance providing that party informs the party who sent the notice promptly after receiving it and before that party has acted in reliance on it".

Article 8

Wang stated that in China, if a party at the time of the conclusion of the contract knows that it is impossible to perform, then the conclusion of the contract on his part would be considered to be a fraud.

Bonell stated that to him the purpose of the rule was to make it clear that the mere fact that you later discover that the goods were not there already at the time of the conclusion of the contract, shall not be a ground for invalidity, but should then be settled according to the rules on non-performance, because once the incident has occurred these rules were considered to be more functional, more clear in the distribution of the risk. If, on the other hand, one of the parties knows very well that he is selling blue sky and nonetheless does so, then of course this would fall under the previous provisions, dealing with fraud, for instance.

Wang requested that this be made clear. Another question he had concerned the case where a party has no capacity to sign a contract but nevertheless does sign it, i.e. there was an initial impossibility. Would this initial impossibility, he asked, not affect the validity of the contract?

Drobnig stated that capacity was not covered by Art. 8, nor was it covered by any of the rules, because they specifically stated in the introduction that capacity would not be covered. What they covered in para. 2, was the case when a party, who is capable, is not entitled to dispose of the goods, e.g. he sells something which at the time of contracting is still owned by another person. They distinguished between personal "capacities" (e.g. for a physical person his minority or for legal entities its acting ultra vires) which would not be covered by para. 2, and the party being entitled to dispose of the asset he was contracting about, which instead was what para. 2 dealt with.

Tallon and Crépeau raised the question as to the utility of the rather revolutionary rule here adopted.

Hartkamp considered that there was a clear advantage. For example, if you sold an object which was not yours which you promise to deliver in a month's time, and you then obtained the property of the object within that month, it was no use calling the contract void - you would be able to deliver, so why should you discuss voidness?

In addition, Drobnig pointed out that there were also advantages from a systematic point of view. If there was a separate doctrine of a void contract because of impossibility, the same exceptions would have to be made as now had to be made in the rule on non-performance, i.e. whether a party knew or did not know, if it was caused or not caused etc. All of this was now rationalised, all of this was placed on the same level as non-performance, and the only thing needed was this small provision stating that an initial impossibility of performance was put on the same footing as an impossibility of performance.

No more observations being made on the provision, Art. 8 was adopted as it stood in Doc. 43, with the addition of "mere" before "fact" in both paragraphs.

Drobnig suggested that they decide on the location of Art. 8 - it was in the middle of the rules on defect in consent, and it really belonged more towards the beginning, perhaps after Art. 0.

With reference to the comments, Wang asked that they should make it clear that the provision did not intend to interfere with the preceding rules on mistake, fraud, and so on, nor with those relating to illegality. It was so agreed.

Article 9

Introducing Article 9, Bonell recalled that when discussing Art. 6 it had been decided that Art. 9 should refer also to threat.

Lando stated that since Art. 9(2), by addressing those cases where there was mistake, threat or fraud on the part of a party different from the promisee, made the avoidance of the contract dependent on whether the promisee knew or ought to have known of the mistake, threat or fraud, it would be logical to align the provision to the similar provision contained in Art. 2 and to add also here the reliance idea.

Fontaine and Farnsworth openly supported this proposal.

After a short discussion the Group decided to add at the end of Art. 9(2) the words "or has not at the time of avoidance acted in reliance on the contract".

Article 10

Furmston suggested first that the wording of the provision should be changed around, and secondly that a few words should be changed, with the result that the provision would read:

> "If the party who is entitled to avoid the contract expressly or impliedly confirms the contract after the term for giving notice of avoidance has begun to run, avoidance of the contract is excluded".

Tallon suggested that the word "term" was equivocal as it might indicate either a term in the sense of time, or a clause. Fontaine recalled that in Art. 14 they had the word "time", and Bonell suggested that they might say something like "after time begins to run", which Furmston said was exactly what an English lawyer would say. Lando pointed out that CISG uses "period of time".

Bonell wondered whether it was appropriate to have the cross reference to Art. 14, as this was not the technique normally used in their draft, and Farnsworth suggested it might go in the comments. Drobnig suggested that such a cross reference might still help the reader, as it was more helpful for him to know immediately where to look if he wanted to find out when the time for giving notice starts, than if he had to look up the comments which might not be available. Bonell suggested that in that case it might be more appropriate to use the more common technique of incorporating words such as "in accordance with" in the text.

Article 11

Introducing Article 11, Drobnig stated that it had not changed as compared with earlier versions. Its purpose was to attempt to save the contract, provided that the other party who was not mistaken agrees to adapt the terms of the contract to the understanding which the mistaken party had.

Tallon considered that they could do away with the provision as it was some kind of confirmation which would come under Art. 10.

Drobnig instead felt that it was something quite different as the special agreement of the other party must be obtained, which was not the case with confirmation.

Farnsworth wondered whether the title of the article was appropriate. In America they said "reformation" and he thought the English said "rectification" (which was preferable if they had to make a choice between the two). More importantly, he thought that in common law it was a remedy used by a particular court in equity, and when you read the

title if you were a common law English speaker you did not expect what followed. As the word "rectify" was not used in the article itself, it seemed to him that there would be no great harm in trying to find another description for the article.

Hartkamp suggested "offer to modify a contract", because the other party offers, or declares himself ready to modify the contract to correspond to the original intention of the mistaken party. Fontaine referred to a similar provision which was contained in Art. 1951 of the Louisiana Civil Code, which had as its title "Other party willing to perform". The article itself provided that "A party may not avail himself of his error if the other party is willing to perform the contract as intended by the party in error".

Maskow drew the attention to p. 16 of the comments, which said that "On the other hand the mistaken party may claim compensation if he has suffered damage", and stated that he was not sure what cases were covered by this sentence.

Drobnig replied that it was a reference to the general provision on damages, and that the most important situation envisaged giving rise to damages was when the mistaken party, before receiving the offer to perform the contract as he had understood it, has already acted in reliance on the avoidance of the contract.

Maskow, however, considered that, as it was drafted now, Art. 17 gave no clear indication of when damages may accrue. Not only, in the section on damages in the chapter on non-performance the decisive questions were not answered: there were detailed provisions on how damages should be calculated, but the preconditions were only roughly indicated. Thus, if one intended to have damages for avoidance cases this should be indicated in the chapter on validity. He believed that in avoidance cases there was sometimes a need for limited damages and this should to be indicated here. It would not solve the problem to have a cross reference from this article to Art. 17 and from Art. 17 to the chapter on non-performance as these questions were not treated there.

Wang wondered whether this article covered the situation of common mistake, i.e. where the other party has also made the same mistake, or where the mistake is caused by the other party, and, in these cases, which party would be the mistaken party?

Drobnig stated that in the case of common mistake this provision would apply to both parties - both parties would be the mistaken party as it is a common mistake. As it is the same mistake he thought this would be quite sensible and it was all the more sensible as the other party made the same mistake. If one of the parties has caused the mistake, then it would depend on whether the mistake was innocently or fraudulently caused, as only the case of innocent causation of mistake would be covered, and then it would not be the party who has caused the

mistake, but the other party, who would be the mistaken party.

Farnsworth had some sympathy for Wang's objection to the drafting. Art. 10 referred to the party entitled to avoid the contract, and he thought that what was meant in Art. 11 was something like: "If a party is entitled to avoid the contract for mistake but the other party declares himself willing [...] to perform or performs the contract as it was understood by the party entitled to avoid, the contract shall be concluded".

Wang found this formulation easier to understand, but again asked which party would be the mistaken party in the case of common mistake. In the case of a mistake caused by a party, would, he asked, the party who caused the mistake be the mistaken party?

Drobnig explained that that the case of common mistake was where both parties, without knowing the truth, think that the truth is different from what it is in reality; i.e. their conception of the state of affairs is different from what the true state of affairs is, and both are completely innocent in this. In the case where a party has caused the mistake, he knows the truth but innocently gives the impression that the true state of affairs is different.

Furmston was surprised by Drobnig's explanation, as that was not what he had understood Art. 2 to mean. To his mind common mistake and one party causing the other to mistake overlapped - at least they did in English cases. Hartkamp added that they overlapped also in Dutch cases.

Farnsworth stated that in the US they had a fairly common situation, in which A invites B to make a bid or an offer describing the project in such a way that it is not clear to B, and B makes an offer thinking that the burden is less than it actually is. It is not that B has added up his numbers wrongly, it is that A has misled B into making this mistake.

Furmston referred to the leading case in England on common mistake (Unilever), where the parties made a contract, both of them having forgotten, or one of them never having known and the other having forgotten, that the contract they were renegotiating was terminable at will because of breach by one party. That was common mistake as to the validity of the first contract which was the subject matter of the second contract. As to the employer's mistake, their mistake was caused by the fact that the employees never told them that they had been misbehaving. The plaintiffs were director and managing director of a subsidiary of Unilever. They said that there was a separate contract which was negotiated on the assumption made by both parties that the initial employment contract was still subsistently valid, and that was a common mistake because both parties thought that at the time the second contract was negotiated. In fact, the first contract had been terminated for breach because the employees had been guilty of

misconduct which would have justified immediate dismissal. They had forgotten that, and they had never told their employers, so they had caused their employer's mistake. To his mind, that was an example of both common mistake and of one party causing the other party's mistake.

Hartkamp thought that this illustrated also the third case, of a party who ought to have known of the mistake but did not know - he would be in mistake as well, so all three cases of Art. 2(1)(b) could overlap.

Drobnig wondered whether there were cases where they did not overlap, where there was only common mistake which had neither been induced nor caused; Furmston agreed that there were cases where they overlapped only partially and not totally. Drobnig stated that his answer would instead be that, for the application of Arts. 2 and 11, common mistake was only a mistake which was not caused or induced by the other party, it was pure common mistake because otherwise there was no sense in distinguishing between "common" and "other" mistakes. The category of common mistake must, he said, be understood in the narrowest way, namely as being one which was not covered by the other members of that enumeration, otherwise the enumeration and the policy behind Art. 2(1)(b) did not make sense.

Furmston asked what the situation would be in a case where A has a picture in his room which he believes to be a Rembrandt and he offers to sell it to B for 1000 million lire. B accepts. Would that, he asked, be a common mistake, or would that be a mistake caused by A? Drobnig considered it to be clear that in this case the mistake was caused. Maskow wondered whether the mistake would be considered to be caused if you knew what you were doing. Bonell agreed that this was the case - it would then be fraud.

Farnsworth wondered whether a distinction in result was made between common mistakes, mistakes that are not common but are caused by the other party, and mistakes that are common and that are caused. Would not the result be the same in Art. 2 ? He thought that it might be educational to find fault with Drobnig's explanation, but it did not make any difference to them did it?

Drobnig observed that the difference would be that in the case of common mistake both parties were entitled to avoid the contract, whereas in the case of a mistake that was caused only one party could avoid.

To Furmston it seemed as if most of the members of the Group assumed that the word "caused" was implicitly qualified by some word like "deliberately" rather than "innocently", although Bonell pointed out that then it would be fraud.

Farnsworth was troubled by the discussion of the Rembrandt: he could not see that Art. 11 could have much to do with that, because if it turned out that the picture was not a Rembrandt and it was thought to

be, or it was thought to be a copy and it turned out to be a Rembrandt, how could you use Art. 11? You could not waive your hand and change it into what you thought it was. He would assume that Art. 11 was intended to deal with problems such as those in Art. 3, i.e., to use the lables example, if the seller tells the buyer that he realised that the buyer had made a mistake, that he did not want a contract for one million lables but that he had thought he had said 1000 lables, and the seller is happy to have a contract. He did not believe that they had to make that explicit, but it seemed to him to be quite clear that most cases of mutual mistake could not be rectified by Art. 11 - you could not change a copy into a Rembrandt or vice versa.

Drobnig objected that if the seller thought he was selling a copy and it turned out that in reality he was selling a genuine Rembrandt, i.e. he sold the picture for one tenth of its value, then the contract could be maintained, but the buyer had to pay more to cover the price the seller could have asked. Farnsworth, however, returned that that was not what the provision said.

Fontaine thought that there was a third case between common mistake and cogent misrepresentation: suppose, he said, that a party does not make a mistake about what he wants to do, but does not explain himself clearly - he just makes things a little confusing and the other party misunderstands him. He clearly causes the mistake, he does not share it and there is no fraud.

To Date-Bah it seemed that what they were saying was that Art. 2 covered what the English called innocent misrepresentation as well as common mistake, and in the common mistake situation it could cut both ways. They needed to decide whether from a policy point of view they were prepared to live with it cutting both ways. He had the impression the Drobnig did not think that it could cut both ways, i.e. you share the same mistake, you have contributed, caused the mistake, and yet you can be relieved on account of the mistake.

Lando found that they were giving too many detailed rules of doubtful practical significance. If the rule were deleted, the situation would be the same in most situations, because if the non-mistaken party, having learnt about the mistake, agreed to perform the contract as the other party wanted it, then the other party would propose to make a new contract by revising the old one. If the first party did not like it, he could then refuse it. Lando therefore found that they did not need the rule.

Fontaine stated that if they had this rule in the Principles, this was probably due to the fact that it was a rule found in several codifications. Bonell had cited Art. 1432 of the Italian Civil Code - it was also to be found in Art. 25 of the Swiss Code of Obligations ("La partie qui est victime d'une erreur ne peut s'en prévaloir d'une façon contraire aux règles de la bonne foi. / Elle reste notamment obligée par

le contrat qu'elle entendait faire, si l'autre partie se déclare prête à l'exécuter") and in some others. He suggested that if they did not want to keep the solution but wanted to keep the idea, they might look closer at the Swiss provision which linked the idea to good faith. They had a general rule on good faith, and if they wanted to delete this provision they could perhaps explain in the comments that this method was governed by the principle of good faith, i.e. if in certain circumstances the other party offered to perform the contract as it was understood by the mistaken party, it would be contrary to good faith to avoid the contract.

Tallon added that in almost every legal system except common law if a party refuses the correction of the contract without any real reason, this could be an abuse of right, which was the same as good faith for Swiss law. This was much better than to impose a contract. There were two situations: either the parties were willing to correct the mistake, and then there was no problem, or one party was not. In this case he found that it would be unreasonable to impose the contract upon that party, that if he has committed an abuse in refusing to correct the contract he might have to pay some damages under a good faith or abuse of right clause, or under some general clause in national law.

Maskow found the policy issue to be quite different. In other words, contrary to those who stated that it would impose a contract, he felt that it would prevent a contract being avoided.

Tallon objected that the contract had already been avoided, but Drobnig explained that it had been avoided because the party had discovered his mistake and therefore had the impression that if the contract were maintained, it would be maintained on the mistaken terms which did not correspond to what he had intended with the contract. He therefore did not find the argument of the contract being imposed to be true: it was the contract as originally intended which was being maintained instead. Furthermore, it had been suggested that good faith be relied upon; he, however, thought that the whole purpose of elaborating these rules was to avoid having recourse to such very general principles, as the results they would have in the concrete cases were doubtful.

The Group voted on the proposal to delete the provision: the proposal was rejected, only 4 members of the Group having voted for deletion.

Bonell suggested that a compromise which might bring the two positions closer together could be the introduction of a proviso in para. 1 such as: "provided that the mistaken party has not yet acted in reliance on that avoidance". The idea behind this proposal was that the devise provided in Art. 11 giving the non-mistaken party the possibility to avoid avoidance by the mistaken party, should be given only to the extent that the mistaken party has not acted in reliance on the

avoidance of the contract, and up until he does so. There was thus a new limit to the possibility to react to the declaration of avoidance on the part of the mistaken party: i.e., you may not "impose" the rectified contract on the mistaken party if the mistaken party shows that he has in the meantime relied on the avoidance of the contract, perhaps even by starting negotiations or by taking formal commitments with other persons.

The Group found the proviso to be an improvement, 7 voting for the proviso, and none against. The provision was thus maintained with the addition of the proviso, the exact wording to be determined.

Farnsworth and Drobnig presented a proposal for Art. 11 which read as follows:

> "(1) If a party is entitled to avoid the contract for mistake but the other party declares himself willing to perform or performs the contract as it was understood by the party entitled to avoid, the contract shall be considered to have been concluded as the latter understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoid had understood the contract and before that party has acted in reliance on the /right to avoid/ /notice of avoidance/.
> (2) After such a declaration or performance the right to avoid is lost and any earlier notice of avoidance is ineffective."

Drobnig introduced the proposal, stating that it introduced the idea that confirmation is not possible if the other party (the errant) has already acted on the strength of his avoidance. The problem was whether, as Farnsworth wanted it, he has acted in reliance on his right to avoid, or on the notice of avoidance. His objection to Farnsworth's version was that the right to avoid of course exited from the beginning, and that this would be too vague. He thought that only if the mistaken party has acted, or the aggrieved party has acted, on his right to avoid and has given notice of avoidance, only from that point onwards should confirmation be precluded, whereas according to Farnsworth's formula as he read it any act immediately after the time of the making of the contract would preclude the other party (the errant) from confirming. As regarded para. 2, this formulation was merely a stylistic improvement on the existing text which did not change the substance.

Lando supported the proposal, and felt that it would perhaps be clearer if they said "acted in reliance on the notice of avoidance". Farnsworth suggested that they say "on a notice of avoidance" as there might have been more than one.

Fontaine agreed to this last modification, and stated that he preferred the notice of avoidance element.

The Group therefore decided to adopt the proposal presented by Farnsworth and Drobnig, and opted for the second set of words in square brackets

As regarded the title of the article, the Group in the end decided to accept Drobnig's suggestion of "Adaptation of contract", on the assumtion that Art. 12 would be combined with Art. 7 and would therefore no longer exist.

Article 12

In view of the new version of Art. 7, the Group decided to delete this article.

Article 13

Introducing Article 13, Lando stated that as far as notice of avoidance was concerned the reception theory had been used, which meant that an avoidance of a contract must be by express notice which must reach the other party, and as far as the termination of a contract due to the other party's breach or non-performance was concerned, the transmission theory had been used, which meant that as soon as the notice had been sent in a reasonable way, it travelled at the risk of the recipient. The reason for this difference was that for breach situations the party in breach had no right to be protected and should therefore carry the risk, whereas in avoidance situations it was the party who wished to avoid who must ensure that the notice of avoidance reached the other party.

Tallon and Crépeau wondered whether the distinction between avoidance by judgment and by notice was a good one. Of course, good faith necessitated some kind of notice, but it surprised them that this notice would have the effect of terminating the contract.

To Maskow, there was not such a great difference, because also in cases of termination, if the other party resists, there has to be a decision, and it was the same thing here: if one party avoids the contract and the other party does not agree, whether or not the contract had been avoided depended on the decision of the judge. If the judge said it was, then the contract would be avoided as of the date when the notice had reached the other party and not from the date of the decision of the judge, i.e. he only decided whether the contract had been rightly avoided, he did not avoid it himself. He suggested that it should be specified that the express notice must indicate the reasons for avoidance, as this was important for the other party to be able to assess whether or not he wants to resist the avoidance. It would also

be important for Art. 11 because also in that case the party has to say what he intended originally.

Fontaine agreed with Maskow that an express notice should at least indicate the cause of avoidance.

Date-Bah supported the provision as it stood, and suggested that it was a more cost-efficient system, in that it avoided recourse to courts when this was not needed: if a party wished to challenge the avoidance, he could then go to court.

In view of the prevailing opinion that the word "express" was not necessary to indicate that the intention to avoid had to be clear, the same purpose being achieved by the word "notice" on its own, the Group decided to delete the word "express" in Art. 13.

As regarded Maskow's proposal that the notice of avoidance give the reasons for the avoidance, Drobnig agreed and suggested that the words "indicating the ground" be inserted after "notice"

Farnsworth and Furmston expressed doubts as to the appropriateness of requesting the indication of the reasons for avoidance in all cases, i.e. even in the case of fraud and duress.

Bonell referred to the provision under CISG according to which a notice for termination did not have to indicate the reasons for the termination.

Maskow saw a difference as compared with termination, because termination or avoidance according to CISG was preceded by a breach of contract by the other party who consequently knew that there had been a breach. In such a case it might be less important to give reasons, but in their cases it might well be that the other party cannot imagine what has happened.

In view of the comments made, it was decided to keep the provision, deleting the word "express", and that the comments should then make clear what was meant by "notice". It was suggested that the avoidance of a term should also be considered in addition to the avoidance of the whole contract, and that the simplest form of considering both contract and term was to delete the reference to the contract. Art. 13 was thus finally adopted in the following form:

"Avoidance must be by notice which must reach the other party".

Article 14

Opening the discussion on Article 14, Furmston wondered what "it" in "after the avoiding party knew of it" in lit. (a) referred to. Lando stated that it referred to mistake, fraud and gross disparity. Furmston stated that it was not so much knowledge of the gross disparity as of his right to apply for relief, i.e. the party in the weaker position will know that he is in the weaker position, what he will not necessarily know is if he can do anything about it. In the case of mistake and fraud he will of course not know at the time of the contract that he has been the subject of a mistake or fraud, whereas in the case of gross disparity he will quite often know that the contract is one-sided.

Lando instead considered that this would quite often not be the case, as in his view gross disparity occurred mostly in standard form contracts which parties did not read, and they only discovered it when the question arose.

Furmston considered that if one were to say that a party who entered into a contract because the other party took advantage of his gross inexperience or lack of bargaining skill ought to avoid within a reasonable time knowing that he was inexperienced or lacked bargaining skill, that would very often deprive him of protection. It seemed to him that they could not expect him to avoid the contract until he knew that there was something he could do about it.

Hartkamp wanted to make the same point as Furmston. For example, A is kidnapped and is able through the window of his prison to contact someone passing by and to ask this person to free him. This person accepts but wants $ 100,000 to do so. A accepts this condition. From that moment he would know his position, but he could of course not avoid the contract - he could only avoid the contract after he had been freed. This would not be threat under lit. (b), but it would be gross disparity under Art. 7. He thus thought that in this case the rule on the time-limit running from a certain moment would have to be the same as that which covered threat. He thought that that meant that they would have to extend lit. (b) to cases where the contract has been concluded under an influence which prevents the party not only from validly concluding the contract, but also from avoiding it.

Fontaine thought that the formula "notice must be given within a reasonable time with due regard to the circumstances" might cover Hartkamp's cases.

Farnsworth and Tallon said that it seemed to them that what one wanted to say was that one had to act within a reasonable time after one had come to know all the relevant facts and was free to act, and that went for everything. Sometimes one would know all relevant facts and be free to act immediately, sometimes one would have to take longer, and so

they wondered whether lit. (a) and lit. (b) were needed.

Furmston stated that he would be happy to take out the whole of both lit. (a) and lit. (b).

Drobnig agreed that a general formula along the lines suggested by Farnsworth covered everything.

Farnsworth suggested the following formula:

"Notice of avoidance must be given within a reasonable time with due regard to the circumstances after the avoiding party knew of the relevant facts and became capable of acting freely".

Crépeau, Drobnig and Maskow raised the question of whether the knowledge was intended to be presumed knowledge or actual knowledge.

Bonell wondered whether one should not introduce the words "or ought to have known".

Date-Bah wondered whether there was not a problem in the gross disparity situation for the "ought to have known".

Lando thought that the words "or ought to have known" should be included as they would cover the situation of circumstances which had not been proved.

Hartkamp felt it to be very unfair to make a general rule in this respect, because things were different in the cases of, e.g., common mistake and mistake caused by the other party. If the mistake, or even fraud, had been caused by the other party, he would not be inclined to a rule which imposed a duty on the mistaken party to investigate, but of course, if everyone was innocent it was a different matter. Thus, he wondered whether they could extend the notion of reasonable time and circumstances also to this problem.

Bonell wondered whether Hartkamp considered that by saying "or ought to have known" they imposed a positive duty of inquiry - he himself would have thought that they were simply stating that you could not claim a negligent ignorance.

Hartkamp objected that negligent ignorance was in some way attached to the cause of the mistake. For example, because a positive statement made by A induces B to enter into a contract, B will be much less active in trying to find out what is going on.

Drobnig shared Hartkamp's objection - he thought that for fraud it may not be practical.

Bonell stated that as he saw it this was certainly not the intention. Take, however, the Rembrandt case - you had been induced to buy the painting because you had been assured that this was a Rembrandt. Then you have guests among which are art experts who advise you to have the painting evaluated and it turns out that it is a copy. Could you at that point, which might be after years, come back and say that you had discovered that it was a copy only now, and that you therefore avoided only now. He would have said that you ought to have known. In the fraud case, the defrauded party should perhaps not be completely put under a duty to investigate, but to a certain extent he should, especially considering the difficulties in distinguishing between innocent misrepresentation and fraudulent misrepresentation.

Furmston wondered whether that did not open the door to the argument that the person who buys the Rembrandt ought to have somebody evaluate it before he buys it, but Bonell stated he had not intended to go that far, although Date-Bah wondered how you could avoid it, if you had an objective standard such as "ought to have known".

Lando suggested that an alternative formulation could be "knew or could not have been unaware of".

Date-Bah supported Lando's compromise solution: knowledge or constructive knowledge would satisfy him, he said, "ought to" would be more of a duty to inquire.

The Group therefore decided to adopt Art. 14(1) with the amendments suggested by Farnsworth and Lando.

Hartkamp presented a proposal for Art. 14(2), which read:

> "Where an individual term of a contract may be avoided by a party under Art. 7, the time period runs from the moment that the term is invoked by the other party".

Lando wondered whether that was the only contingency which triggered the duty to invoke. Were there situations where it became relevant without being invoked? There may be situations where it became reasonable to react but not to invoke the term.

Farnsworth was somewhat concerned about the same thing. He suggested that it might be useful to think of other words for "invoked", such as "asserted". Bonell wondered whether "asserted" was not a bit too vague, but Furmston did not see much difference, although "asserted" did have a slightly wider scope in England.

The Group accepted Hartkamp's proposal for para. 2, substituting the word "invoked" by "asserted". Article 14 thus read:

"(1) Notice of avoidance must be given within a reasonable time, with due regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts and became capable of acting freely.
(2) Where an individual term of a contract may be avoided by a party under Article 7, the time-period runs from the moment that the term is asserted by the other party."

Article 15

Opening the discussion on Article 15, Farnsworth stated that it was rather artificial to say that the test was whether the parties regarded the contract as severable, because they all knew that when the problem arises, one party will regard it as severable and the other will not. Hartkamp agreed that they should find a more objective test.

Fontaine wondered whether this point was not governed by the rules on interpretation. He himself would just say "if the contract or an individual term of the contract is severable".

Farnsworth stated that there really were two kinds of severability. One was where, e.g., A makes a contract to paint two buildings and the price is stated separately: if there was a misrepresentation or a mistake as to one building, A could avoid the contract as to that one but not as to the other. Probably the most common case was the one in which there was an arbitration or a restrictive covenant clause, and if that was severable, it was severable in a very different way, because the party who wanted it in would loose that advantage, but would not get any corresponding compensation. In the case of the painting of the house, the party who does not get his house painted would not have to pay for it. It might be possible to deal with these in one general sentence, if "the parties regard" were eliminated.

Bonell wondered whether the words "provided that it is reasonable to uphold the remaining contract" would not be the decisive test. Farnsworth agreed, but stated that there should be examples in the comments.

Maskow felt that of the two types of severability referred to by Farnsworth, the former was the one that was particularly meant by this provision, whereas the latter would be covered by their rules on individual terms.

Drobnig raised the question of whether the relationship between Art. 15 and the procedure under Art. 7(2) and (3), or the whole of Art. 7, was clear, or whether there could be overlapping and conflicts.

Farnsworth recalled that the wishes of the parties had been eliminated, and therefore felt there to be no inconsistency. It seemed to him that in any case, under Art. 7, if a party stated that he just wanted to avoid one clause and the other party instead stated that he must avoid the whole contract or nothing, then the arbirator would look at all circumstances and see if it was reasonable to uphold the remaining contract.

Bonell added that the first question addressed by Art. 7 was that you may avoid an individual term even if it was not severable, but that did not mean that you would not be forced to choose between avoiding the whole contract or not avoiding at all, and this then had to be answered by Art. 15.

Drobnig wondered whether "inseverability" clauses which were to be found in many contracts were binding or not.

Lando considered that there were mostly "severability" clauses, and wondered whether such clauses, which usually stated that if a part of the contract was invalid this would not affect the rest of the contract, would take priority over Art. 15 which stated "if /.../ it is reasonable to uphold the remaining contract".

Bonell considered that it would not, and Farnsworth stated that if it was a case of fraud or threat he thought that an arbitrator would be unlikely to pay attention to such a clause, and maybe that would also be the case for mistake.

Maskow thought that they might have combined two different things in Art. 15. Normally the severability test related to performance, and the other test (whether it was reasonable to uphold the remaining contract) related to individual terms of a contract. Here they had combined the two and he thought that it might be better to concentrate on only one. He therefore suggested that they delete the severability test and concentrate only on individual terms which do not influence the upholding of the remaining contract.

Drobnig objected that to do that you needed the severability test - how else could you decide whether a particular term was necessary for the upholding of the contract.

Fontaine suggested a phrasing such as: "If a ground of avoidance affects only a term of the contract or a part of the contract avoidance is limited to this part of the contract or term if, given due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract", which he thought would imply that you would check whether it was severable or not.

Maskow stated that normally a part of a contract was considered to be severable if the party who gets the performance can do something with

only that part of the performance. As wording along these lines he suggested "If the ground for avoidance affects individual terms avoidance is limited to those terms if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract".

Bonell considered that the relationship with Art. 7 would then also be clear, in the sense that they coexisted and that Art. 15 furnished an answer as to the effect the declaration of avoidance of the individual term would have on the contract as a whole. It was only fair, if a party wanted to strike out a clause, that the other should at least have a chance to demonstrate that he should either avoid the whole contract or not avoid at all.

Farnsworth stated that "avoidance is limited to" might mean either of two things: that a party is entitled to avoid only to that extent, or that the party's avoidance in fact is limited. For example, in the arbitration case, suppose, he said, A claims fraud and sends B a notice saying that he avoids the contract. Did this provision then say that A's avoidance was limited to the avoidance of the arbitration clause (which would give his notice an unintended effect)? If it did not mean that a purported avoidance of all is limited to something less, then he felt that the language should be changed.

Bonell felt that it depended on the circumstances of the case: if A gives B a notice of avoidance of the whole contract despite the fact that he in his reasons only refers to the arbitration clause, then it would only be fair to allow B to question the avoidance of the whole contract instead of the arbitration clause. A might not agree, and litigation result, at which point a third party decides whether the remaining part of the contract stands.

Farnsworth suggested that if that was what they wanted to say they should use a formulation such as: "A party's avoidance may be limited". As regarded the substance of the envisaged solution, he would be happy with a solution meaning that a party's exercise of the right of avoidance may be limited to something the party did not intend - with the qualification that it has to be reasonable to do that. If A made a mistake and attempted to avoid the whole contract and if B argued to an arbitrator that only the arbitration clause was affected by the fraud, under this reading it would still be open to A to argue to the arbitrator that he intended to get out of the whole contract, but that if he could not get out of the whole contract he did not want to avoid the arbitration clause, i.e. to say that he wanted all or nothing, and he intended all, and now that he has discovered that he cannot avoid all he does not want his notice to be cut down in some other way. His understanding was that that would then be discretionary. If this was what was intended, they had not clearly said that, as they had not said whether what they were dealing with was the effect of an avoidance or whether it was the power to avoid that they were limiting.

In Drobnig's view in a case such as the one given by Farnsworth the unlimited notice of avoidance was restricted to having the effect that only the arbitration clause was avoided. Farnsworth's impression seemed to be that this should be at the discretion of the court to say whether he intended to avoid the whole contract and under Art. 15 the effect was instead limited to the arbitration clause, but Drobnig thought that that would modify the meaning of the notice of avoidance.

Farnsworth observed that what Drobnig was saying was that if a party was entitled to avoid only part of a contract and attempted to avoid the whole, the effect of his notice of avoidance would be limited to that part only, i.e. to what he was entitled to do. However, the provision did not say that.

Hartkamp considered that if the avoidance was limited to only the part the party was entitled to avoid, it would be conversion, as the avoidance would be a void legal act and you converted it into an avoidance of those specific terms. Drobnig, however, did not agree with Hartkamp.

Furmston was puzzled. Suppose, he said, you had a situation in which one party has made a mistake which arguably is about one term or terms, and there are three possibilities. The first is that he wishes to avoid the whole contract and he says something which makes it clear he wishes to avoid the whole contract. It would then be possible for the other party, or presumably the tribunal, to say that he could not do this because, taking into account all the circumstances, he should only avoid that term. The second possibility was that he seeks only to avoid the term, and presumably that it would then be possible for the other party or for the tribunal to say that he could not do that because it went to the root of the contract and therefore the only thing he could do was to avoid the whole contract. Thirdly, he uses some ambiguous words which do not make it clear what he was doing. Then the other party will have to make his position clear, or attempt to, and the tribunal will then decide what he can do. Then there was the question whether he could go back and do the other thing if he had guessed wrong about what he could do. Certainly, Furmston said, the existing clause came nowhere near to giving solutions to all those problems. As regarded the last point, he felt it to be a substantive matter, because avoidance in the Principles was an act of the parties and not an act of the court - this was a principle they had accepted, so what they were doing was imposing a limitation.

Drobnig observed that the other case where the party's declaration was smaller, limited, and it turned out that partial avoidance was not admissible under Art. 15, then his conclusion would be that the avoidance was ineffective - it had no effect at all. Lando observed that under § 36 of the Swedish Contract Law if a party files a claim for the avoidance of a contract term the court may say that there was no contract, i.e. the notice of avoidance had a larger effect, and he felt

that this was sometimes reasonable.

In order to cover the two situations of a party wanting to avoid the whole but being entitled to avoid only a term and that of a party wanting to avoid only a term but the term is too important for the remining contract to be upheld, Fontaine suggested a formulation such as: "If a ground of avoidance affects only individual terms of a contract, /the right to avoid these individual terms or the whole contract depends on whether/ /the aggrieved party may avoid these individual terms or the whole contract depending on whether/ giving due consideration to all circumstances of the case it is reasonable tq uphold the remaining contract".

Crépeau wondered whether, in the spirit of Art. 15, the right to avoid the contract or a part thereof, did not essentially depend on the severability of the contract.

Bonell stated that originally this had certainly been an aspect which had been dealt with, but, he asked, was that really the issue at stake, was that not just a pro forma reference to an aspect which was of relevance, e.g., in the performance/non-performance sector, but not with reference to avoidance where the alternative was between the avoidance of the contract as a whole and avoidance of single terms.

Crépeau objected that if one requested the avoidance of a term, or of individual terms, the substantive question would be one of determining whether you can really do surgery in this contract, or whether these clauses are so intimately bound that these terms in reality affect the totality of the contractual relationship, and consequently that the avoidance has to be of the whole.

Bonell agreed, and said that that was precisely what was addressed here. The solution was that it depended on the circumstances of the case, but the more precise criterion, and the decisive one, was whether or not it was reasonable to uphold the remaining contract. He did not think that severability was the decisive test, because to "declare null and void", or to "avoid" as they said here, was an abstract operation, it was an operation by law which was not like "perform", which was a concrete operation.

Drobnig stated that his opinion had changed somewhat in the light of the discussion. Now, he felt that if a party is mistaken as to term (a) of the contract, states that he avoids the contract because of his mistake as to term (a) and it turns out that the conditions of Art. 15 are not fulfilled, i.e. it is not possible to maintain the contract without term (a), then the effect of the avoidance would be that the whole contract must fall, because the party had a valid reason to avoid although he wanted to limit the avoidance to only an individual term; if it turned out that it was not possible to divide up the contract in this way, then nevertheless the intention of the party to rely on the

avoidance must be respected and the consequence must also be borne, i.e. that the whole contract falls. He thought that the comments should say this.

Maskow instead felt that the contract should be upheld. Take, he said, a case where somebody negotiating a contract makes a mistake. He reports back to his Board of Directors and then informs the other party that the whole contract is fine, but that there unfortunately has been a mistake on that issue. In that case the statement had to be interpreted so that if it were to be considered to be possible to avoid only one term that term would be avoided, but if it were not, then the contract should be upheld. In other words, the scope of the statement of avoidance depended on the interpretation of that statement. Another example, taken from real life, was a case in which they had had a contract with an English firm and it related to the delivery of something for a facory in X. They agreed to an independent guarantee as a means of security and the contract was concluded. The English went home, and there they discovered that they would not get a guarantee from the bank if they had agreed to an independent guarantee. They had made a mistake in the sense of these rules, because they were mistaken as to the legal consequences of the agreement. The English had then informed them that they had to avoid that clause. To the parties it was, however, clear that they wanted to stick to the contract - the question was whether or not it was possible to avoid this individual provision, but if it had not been possible they would have stuck to the contract anyway.

Furmston wondered what the situation would be in the following case: suppose, he said, that a party thinks that he has good reason to call the whole contract off. At the end of the arbitration three years later it turns out that he was only entitled to call one term off. Presumably, by then he will have committed grievious breach of contract - did that matter?

Bonell thought that it was precisely the sort of problem which they could not deal with in an exhaustive manner, and, furthermore, he could not see that it was linked to Art. 15 in particular, as the same question could also arise in other instances.

Both Drobnig and Fontaine presented proposals for Art. 15. Fontaine's proposal read:

> "If a ground of avoidance affects only individual terms of a contract the concerned party may avoid /either/ these individual terms /only/ or the whole contract depending on whether, giving due consideration to all circumstances of the case, it is /respectively/ reasonable or not to uphold the remaining contract".

Drobnig's proposal read:

"If a ground of avoidance affects only individual terms of a contract, the effect of an avoidance is limited to those terms if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract".

Drobnig's proposal was taken as a basis of discussion.

Farnsworth stated that he had objected originally because he could not understand which of two meanings was intended, and he thought that this formulation clarified it. He added that from his point of view it would leave it open to the arbitrator to say that in the particular circumstances of the case an attempted avoidance of all would not have the effect Drobnig suggested, but it seemed to him that the usual conclusion would be what he suggested and that seemed acceptable.

No objections being raised, Drobnig's proposal was adopted.

Article 16

As regarded the phrase "avoidance shall take place retroactively", Crépeau wondered whether there was something missing as to the moment when avoidance takes effect. Trying to put the articles together, he saw that Art. 13 said that this new institution was avoidance by notice, but in this new institution, when did the avoidance take effect? If it was when it had reached the other party, then what would happen if there was resistance, would there be a suspension of the effect?

Both Bonell and Hartkamp stated that this was not the case, Hartkamp adding that if the ground of avoidance was there and was valid, the avoidance would take effect immediately, if this was not the case there was no avoidance, although he admitted that this might only be found out later.

Drobnig stated that the retroactivity referred to the conclusion of the contract and not to the time when the notice reached the other party.

As regarded the phrase "subject to any rights of third parties" Crépeau wondered whether the question of acquired rights, of rights acquired in good faith, came into the picture.

Bonell understood the rule as stated in the text to indicate that there was no intention to interfere with these problems, meaning that other rules of law not contained in the Principles had to determine which rights were involved. Both Maskow and Hartkamp agreed with this interpretation.

Maskow suggested to delete the words after "retroactively".

Lando too, felt that the rights of third parties should not be regulated here, but left to national law.

Hartkamp agreed.

If there was a notice of avoidance, Date-Bah said, but according to national law there had been some acquisition by third parties of rights under the contract, what would then be the effect - would this prevent the efficacy of the notice of avoidance, or was the contract avoided only the third party rights were preserved?

Drobnig stated that these rules governed precedence as far as parties to the contract were concerned. The fact that third parties may have acquired any rights under the contract did not prejudice these rules governing the relations between the parties, i.e., it would be the reverse side of the general rule which was to be inserted in Chapter I - the rights of third parties were not affected, but vice versa, any rights of third parties did not affect any rights of the contracting parties under these rules.

The Group thus decided to delete the words "subject to any rights of third parties" in Art. 16, on the understanding that the substance remained and that the rule should then be expressed in more general terms elsewhere, in the introductory chapter.

Fontaine observed that the text of Art. 16 said "subject to any rights of third parties", whereas the comments said "the contract /.../ regarded as never having existed but the rights which third parties may have acquired are not affected". He felt this to go a little further than the text, which indicated that you go to national law to see what happens, whereas the comment was broader. Drobnig agreed that it was a little bit too general - they could either delete it altogether as they would no longer speak of the rights of third parties in the text, or alternatively they could mention that according to Art. X in Chapter I the rights of third parties were not affected by this, and that therefore the applicable national law would govern this.

Date-Bah observed that what they were saying here was that the contract really was void rather than voidable, i.e. in spite of the retroactive effect on third party rights, you could still avoid the contract. If they left this to national law, an English common law judge could say, before you avoided it, that the third party rights had acquired an interest, so you could no longer avoid; although there was the same notion of retroactive avoidance, once you acted before a third party acquired the right, if that third party acquired the right before you acted, then you could no longer avoid, and he did not know to what extent national law would overlap with their rules.

Drobnig stated that he would have thought that these principles applied only to the regimes between the parties, so as far as third party rights were concerned, English judges would stick with the common law distinction between certain essential mistakes making a contract void, and others making it only voidable; and that, as far as the rights of a third party were concerned, if this was a void contract then the restrictive consequences under national law applied, whereas if it was a voidable contract under the non-codified domestic law, then the other rules for third party rights were concerned.

The formulation of Art. 16 thus remained the following:

"Avoidance shall take effect retroactively".

Article 17

Introducing Article 17, Lando stated that the only change in para. 1 was the reference to the section on damages, and in para. 2 the reference to restitution.

Bonell recalled that Maskow had at an earlier stage suggested to deal in detail in this chapter with the possible consequences as to damages of certain cases of defects in consent. For the information of the Group, he referred to the text of the original draft of 1980 (cf. Doc. 17, Art. 17), which read: "(1) The party who is entitled to avoid the contract may, in addition to, or in lieu of, avoidance demand damages if the other party has negligently caused the mistake, has committed a fraud, made a threat or abused an unequal baragining power. (2) If a mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract. In determining damages, the court shall give due consideration to all relevant circumstances, including the conduct of each party leading to the mistake."

Fontaine wondered whether this version would not be better, because a reference to the rules on damages such as they had now might be appropriate for the different ways of calculating damages or for the characteristics of damages which can be repaired, but not for the defining of the right to damages: a breach of obligations gave a right to damages, and this was not a breach of obligations. They first had to define the conditions on which damages were given, and then refer to the rules of the relevant chapter for the calculation of the damages.

Maskow agreed with Fontaine. He felt a distinction should be made between different cases just as had been done in the preceding version; there should also be an indication of the cases where it might be possible to obtain restricted damages and reimbursement for certain kinds of "expenses", as opposed to cases where full damages might be

recovered.

Farnsworth wondered what kind of restitution would be available under Art. 17(1) if only a term of the contract had been avoided, e.g. an arbitration or an exemption clause.

Drobnig pointed out that only what had been rendered could be returned, so in the case of an arbitration or exemption clause nothing would be returned as nothing had been rendered in the first place.

Farnsworth considered that there were two kinds of severability: one was where one severed something that was to be performed on both sides, such as a clause for the painting of a house, and the other was where one took something from only one side. The test in Art. 15 was really whether it was reasonable to take something away from one party given the fact that nothing was taken away from the other party. This appeared to contrast with Art. 17 which suggested that one would get some if not all one's money back for a term that was taken out.

Bonell agreed that the language of Art. 17 would have to be adapted to the final wording of Art. 15. What it was intended to express, was that restitution related to whatever had been exchanged, i.e if the contract as a whole was avoided, then a party would be able to recover whatever he had given, whereas if only a term was avoided, then whatever had been performed under that term had to be returned, and if nothing had been given, such as in the case of an arbitration clause, nothing would be returned.

Farnsworth commented that it would be difficult to find appropriate language to express this, as Art. 15 had blurred all the different cases, but he suggested a wording such as "in appropriate cases there shall be restitution".

In view of the retroactive effect of avoidance laid down in Art. 16, Lando wondered whether the retroactive effect of restitution would be appropriate in all situations, particularly in cases of services.

Farnsworth had the same problem. In the common law the rule was that if it was not possible for a party substantially to restore what he had received, then there could be no avoidance.

Drobnig stated that the Principles did not provide for such cases, and suggested that national rules, particularly on unjust enrichment, might supply the answer.

Maskow suggested that it could be stated in a direct way that the performance as it has been rendered is evaluated.

Date-Bah suggested that if it was not possible to have restitution in kind, it would be possible to have damages on a restitutionary basis,

i.e. damages with the intention of putting the party entitled to damages in the same position as if the goods had been restored.

Lando indicated that in the European Contract Law Group the common law solution had been adopted as it was so simple, no complicated calculations of, for example, the services rendered had to be made, the contract would be terminated for the future.

Farnsworth agreed that in the common law rule the past was looked at differently from the future. He was troubled by the use of the word "shall" in Art. 17, because if all that a party wanted to do was avoid paying for future services then this rule would have no impact.

Drobnig indicated that the reason for the retroactive effect of avoidance was that the defect in consent had affected the contract from the very beginning, with the result that the performances made under that defective contract were also ineffective from the very beginning, which was not the case for termination. Admittedly the common law solution was simpler and avoided complicated evaluations and calculations, but such a calculation was necessary to give justice to what had been rendered and could not be returned.

Bonell recalled that when Art. 14 of the section on termination had been discussed, the Group had felt it necessary to supplement this rule by one in the restitution section to the effect that "on termination of the contract either party may claim restitution of whatever he has supplied, provided that he concurrently makes restitution of whatever he has received, or if he cannot make restitution in kind, he must make an allowance for what he has received". He wondered whether something along the same lines could help in the situation they were considering.

Farnsworth insisted that the problem was that Art. 17 indicated that restitution must necessarily follow ("shall"), whereas also the rules on restitution indicated that there were instances where restitution could, but did not necessarily have to, follow. What one wanted to say was that it was possible that there may be restitution, and that this was determined by some other articles.

Bonell suggested that the same wording as that used for termination could be used, meaning that the provision would read: "On avoidance of the contract either party may claim restitution of whatever he has supplied provided that he concurrently makes restitution of whatver he has received or if he cannot make restitution in kind, he must make an allowance for what he has received".

Drobnig observed that the formula proposed did not take the problem of partial avoidance into account.

Bonell considered that it would, if they added "under the contract or term avoided". He suggested they combine Arts. 16 and 17(1) as

follows: "(1) Avoidance shall take place retroactively. (2) On avoidance either party may claim restitution of whatever he has supplied under the contract or the terms avoided, provided that he concurrently makes restitution of whatever he has received or, if he cannot make restitution in kind, he must make an allowance for what he has received".

Maskow found the formulation to be misleading, as "provided he concurrently makes restitution" meant that if a party asked for restitution he must at the same time offer to return what he had received, and that was not the normal scenario.

Farnsworth had some sympathy for this objection, and suggested "but he must then make restitution" instead of "provided that". He also suggested they use the word "part" instead of "term".

The Group decided to combine Arts. 16 and 17(1) into a new Art. 16, albeit leaving the final drafting of the new Art. 16(2) open, and turned to discuss para. 2 of the original Art. 17, which considered the possibility of claiming damages.

Lando indicated that the original idea had been to spell out the conditions under which damages should be awarded. He was now toying with the idea of having a very brief rule stating that only in cases of culpa in contrahendo or fault by one party may the other claim damages.

Drobnig did not feel that a brief formula such as the one suggested by Lando would suffice.

Bonell on the contrary found the idea very attractive, as he did not think that a more analytical formula could cover all cases. Furthermore, he was struck by the fact that the former draft of Art. 17 stated that the claim for damages was to be governed by the rules on non-performance, which meant that one could recover just as if one were in a breach situation. The difference he thought lay in the the question of whether there was to be an expectation or a reliance interest. He suggested a wording such as: "A party who knew of the defect in consent or the ground of avoidance shall be liable to pay or to compensate the other party for having innocently trusted in the validity of the contract".

Drobnig wondered whether the wording proposed would mean that damages would be payable for innocent misrepresentation. Bonell confirmed that this would be the case if it was a mistake.

Lando wondered what the situation was for the party who did not know, but who ought to have known of the mistake. What he had wanted to express was that when there is culpa in contrahendo on the part of one of the parties and the other has relied on the contract and consequently suffered loss, then this loss should be compensated. They did not need

to spell out whether a party knew or ought to have known, because they said it was fault.

Hartkamp added that what should be made clear was that in specific cases of causation damages were granted, and that these specific cases could be described as "knew or ought to have known the ground for avoidance". As regarded the question of the interest which a party would be able to claim in damages, he stated that he would prefer to leave the question of the amount open, so that the court or arbitrator could assess the amount of damages. He had never understood, he stated, why one should never be able to claim more than the negative interest, there were cases in which one should be able to claim the positive interest immediately.

Lando and Farnsworth observed that "reliance interest" and the "negative Vertragsinteresse" were not the same thing, as reliance interest was to be understood in a broader manner. It expressed the idea of putting the person in the position he would have been in if the mistake had not been made.

As Rapporteur Lando requested directions from the Group. Should the rule be a general or a detailed one, should it be limited to the reliance interest or not, he asked. He himself thought that the rule should be a general rule which should not distinguish between threat and mistake, and furthermore it should cover lost opportunities, but he hesitated to go as far as Hartkamp had done in suggesting that it should be possible to claim the expectation interest of contracts induced by fraud or threat.

Date-Bah, Crépeau, Fontaine and Hartkamp all preferred a short formula as had been suggested by Lando. Wang also preferred a short formula, but added that he would prefer not to have any reference to the section on damages as it related to damages for non-performance whereas damages in the case of avoidance could be different.

Drobnig instead preferred a more analytical formula. With a short formula, he said, the comments would have to indicate that the gaps which were left open would be closed by the applicable national law.

Summarising the discussion, Bonell proposed that the Rapporteurs be requested to reconsider the wording of Art. 17 along the following lines: "restitution" should no longer be mentioned, as this was to be covered by the second paragraph of the new Art. 16. Art. 17 should be limited to damages. An attempt should be made to find a short formula stating that in cases of avoidance the party who is at the origin of the avoidance, and therefore in most cases knew or ought to have know of the ground for avoidance, shall be liable for damages, at least to the effect and to the extent necessary to place the other party in the same

position he would have been in if no such ground of avoidance had occurred.

It was so agreed.

Article 18

Introducing Article 18, Lando stated that it was the common core of legal systems that rules on threat or even excessive advantage, fraud and to some extent (not to the full extent) mistake, were always mandatory. It had no meaning to have rules where you could exempt yourself from the consequences of fraud or threat. As to the provision contained in para. 2, he thought that it was in line with English law, which does not permit the exclusion of the risk or the liability for mistake which is caused by the co-contractant's negligent misrepresentation: the contract is void if there is negligent misrepresentation. They had put this provision in square brackets because there had been doubts about it during the previous discussions of the Group.

Drobnig added that they perceived an inconsistency with Art. 31 of Chapter VI. Lando added that Art. 31 spoke of deliberate or reckless behaviour, whereas para. 2 just spoke of negligence.

Date-Bah wondered whether this article had a place in the Principles, given their character as non-binding rules.

Bonell considered that Date-Bah was perfectly correct on a purely logical level, but felt that one should not prejudice the persuasive value of the Principles by renouncing to place more weight on some provisions as compared with others. After all, the exact nature of the Principles had not been decided as yet. Drobnig added that all of this was stated in comment (a).

Fontaine could not see why they should be more severe in this case than in the case of exemption clauses. He himself would apply the same standards and therefore say in para. 2 that "contractual terms by which all the risk of mistake is transferred to one of the parties is valid unless the mistake is caused by the other party's deliberate or reckless behaviour". In other words, the other party's negligence would be replaced by his deliberate or reckless behaviour.

Maskow had some misgivings on para. 1. It might, he thought, be better to have a functional approach, i.e. to say that with reference to specific rules such as those on threat or fraud parties may not come to an agreement which is disadvantageous for one of them. If it was not possible to enumerate the articles which were to be mandatory in the article itself, then at least the comments should be more explicit, mentioning the more important provisions and saying something about

them. As regarded para. 2, he was not so sure that there really was a discrepancy between this paragraph and Art. 31. He thought that Art. 31 related to cases where it was the party himself who had done something deliberate or reckless, whereas para. 2 concerned cases where the other party had caused the party who had assumed a risk to behave in a certain way, and this was different. Apart from this, he considered the rule to be too detailed, and stated that he would prefer to use general principles, maybe that on good faith, to solve such questions.

Farnsworth observed that he did not have any substantive difficulty in saying as a general rule that a party can make the other take the risk of every mistake, even those that are caused by his innocent misrepresentations; what was important was not to allow a similar agreement with respect to fraud. He therefore did not think that they needed any para. 2, whatever the substance.

No support being forthcoming for the retention of Art. 18(2), the Group decided to delete this paragraph.

Wang doubted the necessity of having Art. 18 along these lines. He found the mandatory character of the provisions to be self-evident. He suggested that the whole Art. 18 should be deleted.

Bonell stated that Art. 18(1) raised a lot of general questions and he did not feel that this was the appropriate moment to take any final decision on it. They would certainly have the opportunity to come back to this problem and to discuss it when they were considering Art. 2 of Chapter I which was to contain general provisions. This article had not yet been drafted, but was intended to express the idea that these rules were in general of a non-mandatory nature and therefore open to exclusion and derogation by parties. At that point they would have to look also at other chapters, and therefore also at Chapter VI and its Art. 31. He consequently suggested that para. 1 remain until Art. 2 of the general provisions had been drafted, and be reconsidered thereafter.

It was so agreed.

Article 19

The Rapporteurs presented a new version of Article 19 which read:

"These Principles do not deal with an invalidity arising from a
(a) lack of capacity,
(b) lack of authority, or
(c) immorality or illegality".

Introducing this new version of Art. 19, Drobnig stated that the former version had only related to illegality. They had now reconsidered

this point, and they thought that also other possible grounds of invalidity for which the Principles contained no rules should be mentioned.

With reference to Art. 19(c), Bonell observed that he would have thought that Art. 7 could at least in certain instances fall under such a category.

Drobnig agreed that it could, but, he stated, immorality had a wider field of application under national laws and it was left to national laws as they did not wish to infringe on those rules of national law. To the extent that Art. 7 comprised certain aspects of immorality the provision of Art. 7 would of course have precedence, but otherwise the whole field of immorality was left out of the Principles.

Wang supported having a provision of this nature, but wondered what its implications would be when a contract is valid under the applicable law but is invalid according to the national law of the country where a party is situated.

Drobnig stated that the question of which law decides was left open, whether the lex contractus or another national law outside the lex contractus - this question had to be left open as they would otherwise get into extremely complicated problems of conflict of laws, and they certainly had no authority to do so considering the nature of the Principles.

Bonell added that more or less this problem had already been addressed by the Group at an earlier stage. This had led to a very valuable draft chapter prepared by Maskow, but the Governing Council of the Institute had finally felt that this question should not be dealt with by the Principles, so it was deleted. This was a decision of the Governing Council which was still standing, and they lacked the authority to reopen the question.

Wang and Maskow asked that this be stated in the comments.

Maskow welcomed the broadening of the scope of the provision by the Rapporteurs, and stated that in this connection it became even clearer that it probably had to be placed at the beginning of the Principles, because now they were obviously not dealing only with the problems of substantive validity. As far as immorality was concerned, he proposed that they strike it out here. He thought that they could consider that the Principles now dealt with the most important question which concerned immorality, as there were certain national legislations which had rules saying that under certain conditions the clauses were invalidated and were not enforceable. They could interpret those they had drafted now to mean that according to their rules this would only be possible if the respective clause was avoided, that it was no longer possible that, e.g. the court ex officio did not enforce a clause or

modify a clause, but that it was necessary that the party invoke this argument. As with the limitation period, they had rather long time limits which would permit a party to do this, and therefore they could think that the bulk of these problems would be covered by their Principles, but even if this were not the case, even if only a small part were covered, they could not say that the Principles did not deal with it, because at least to a certain extent they did.

Crépeau stated that he preferred the new version of Art. 19, because it did allow for possible invalidities, although this would be left to the local applicable laws. He however suggested that the provision be placed at the beginning of the Principles. He suggested that they keep immorality, because if it were left to the local applicable laws, it might very well be that invalidity might be based either on a narrow concept of illegality, or on a broader concept of bonus mores.

Date-Bah specified that he did not say that they should delete immorality, but it did seem to him that they needed to qualify the chapeau, they needed to say "except to the extent otherwise indicated in these Principles".

Bonell felt this to be a wise suggestion, as he was not so sure that the rules might not have implications also for all the other items excluded.

Drobnig wondered whether they really wanted this in the chapeau, as it then would cover also capacity and lack of authority. Date-Bah found the question to be academic, because although putting it in the chapeau did mean that it would also apply to capacity and lack of authority, they were sure that they did not intend to draft any provisions on these points. Drobnig objected that although it might be an academic question for some, it might be a practical and disturbing question for prospective users of the Principles, because if they saw that there was a general exclusion which, however, was subject to individual provisions, then they would have to search the Principles to find these provisions.

Bonell stated that Drobnig was of course right, but, as regarded lack of authority, they also referred to persons for whom you were responsible, persons acting on your behalf, so they could not really say that it was totally outside the Principles - not even in CISG had it been felt to be possible to forget about validity in toto. He thought that it was more or less a question of drafting, of where to put the proviso.

The Group thereupon decided to adopt the new version of Art. 19, bearing in mind that a provision would be drafted in Chapter I dealing with subjects excluded from the scope of the Principles.

Article 20

Introducing Article 20, Drobnig stated that it purported to extend all rules on validity to unilateral declarations, such as giving notice of avoidance. He thought that this was a gap which had existed so far, and which should be filled. The appropriate way to do this seemed to him to be that of having this somewhat broad and flexible rule which made a general reference to the individual provisions of the chapter, but which of course in detailed application might have to be adapted somewhat. He did not think that they should go further than that, in view of the unilateral nature of those other declarations.

Fontaine agreed with the substance of the provision, but wondered why offers were not mentioned in the comments to refering to the phrase "other unilateral declarations". He would have thought that the offer was the most frequent sort of unilateral declaration that could be affected by mistake or fraud. He thought that it should be mentioned in the comments, perhaps even in first place. Drobnig pointed out that for the case that the contract had come into existence on the defective offer, they had the general rules, and Hartkamp added that if the offeror realised his mistake immediately before the offer was accepted, then if the offer was revocable he could withdraw it, whereas if it was irrevocable he would have to avoid the contract.

Farnsworth favoured broadening the provision by simply deleting the words "after the conclusion of the contract". It could not do any harm, because they were applying rules by analogy anyway. He thought that the word "accordingly" was not the appropriate English term, as they wanted to suggest that they are applied to the extent relevant or by analogy. He thought that "by analogy" would be all right.

Article 20 was thus accepted with the changes suggested, and read:

"Unless otherwise provided in these Principles, the provisions of this chapter apply by analogy to declarations which are addressed by one party to the other".

ANNEX

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