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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 BRISTOL

FROM 3 TO 7 JULY 1989

(prepared by the Secretariat of Unidroit)

Rome, July 1990

The twelfth meeting of the Working Group for the preparation of Principles for International Commercial Contracts was held from 3 to 7 July 1989, at the Faculty of Law of the University of Bristol at the kind invitation of the Vice-Chancellor of the University, Sir John Kingman. A list of participants is annexed to these Summary Records.

Sir John Kingman welcomed the members of the Working Group, stressing the importance Bristol University attached to cooperation with the Institute. He hoped that this cooperation would continue and be further enhanced in the future.

Prof. Bonell thanked the Vice-Chancellor for his kind words and for the exquisite hospitality offered the members of the Group. He conveyed the satisfaction of Unidroit. Opening the meeting, he then thanked, also on behalf of the President and Secretary-General of Unidroit, Professors Fontaine, Maskow and Rajski for the revised version of the draft provisions of Chapter V Section 1: Performance in general (Study I - Doc. 44).

Fontaine introduced the revised draft provisions on performance in general, which were the result of the discussions held in Rome in May 1987. The provisions were mostly those which had been adopted at that meeting, although a few new ones had been drafted. Doc. 44 also contained a first attempt at drafting the comments, giving illustrations, notes and bibliographical references. He suggested that the nature of the comments might be discussed by the Group, in order to adopt uniform criteria for their presentation. This all the more so since, given the particular nature of the instrument being elaborated, the text would have no more authority than the comments.

Bonell indicated that in the chapter on formation a first attempt had been made to distinguish between the tasks of the comments, which was that of explaining the rules, and of the notes, which was to give the necessary cultural references.

Farnsworth, Hartkamp, Date-Bah and Maskow favoured shorter comments. Drobnig also favoured comments such as those drafted by Fontaine, although he felt that in certain cases, such as for public permission requirements, longer and more analytical comments might be justified.

Farnsworth agreed that in some cases a certain amount of detail would be necessary, as, for example, in the comments to Art. 2 of this chapter dealing with different types of obligations, or Art. 1 of the validity chapter dealing with causa/consideration.

Lando, Tallon and Fontaine agreed with this view.

Fontaine agreed that in principle references to national systems should be concentrated in the notes, but there might be cases where it

would be necessary to give some idea of the origin of the concept as a whole in the comments.

Tallon felt that the comments were intended to help construe the text, so there should be no limits should be placed on them. The origin of a legal rule was essential, and when it was derived from a legal system this should be indicated also in the comments.

Bonell wondered whether the comments should not be limited to the explanation of the meaning of the rule, while any reference to national or international sources should be placed in the notes.

Fontaine considered that the criteria suggested by Bonell would be difficult to apply, as the national provisions cited were those which dealt with the problem, but did not necessarily offer the same solution as that adopted in the article.

Lando felt that whereas academics might be interested in knowing the origin of a rule, the average user had no such interest. If the comments were intended to explain how to use the rule, then he thought that the comments should be limited to a simple explanation and the notes could indicate the source of inspiration.

Maskow also recommended having references to national and international instruments only in the notes. The rules adopted in the Principles were autonomous rules which had to explain themselves independently of where the concept had originally been taken from. Furthermore, when they had taken a certain national concept it did not mean that they had actually taken up that national concept in its entirety. What should be indicated were the deviations from the national laws.

Bonell observed that an indication of the national legal system which had inspired the rule in the comments themselves might provoke the users of the rules to go back to the national origin of the rule.

Drobnig felt that the rules they were elaborating were rules which were generally recognised by most legal systems, but if there was a rule which had a very specific national background, this should be mentioned in the comments. Apart from these instances, he felt that there should be no references to national legal systems in the comments.

Farnsworth and Cr  peau also felt that any detailed reference should be kept in the notes.

Date-Bah suggested that it be explained at the beginning what the purposes of each section of the commentary was. It should be made clear that even if a rule had been derived from a specific legal system, they did not necessarily have to have incorporated also the jurisprudence associated with it.

Bonell reminded the Group that a suggestion had previously been made that a provision should be included in the opening chapter on the interpretation of the rules. He had taken it for granted that such a text would more or less follow Art 7(1) CISG. Also the Commission on European Contract Law had such a provision clearly emphasising the necessity of an international, autonomous interpretation of the rules.

Turning to the literature cited in the bibliographical indications, there was general agreement that it was not interesting to cite the standard texts which would have to be consulted on every point.

Farnsworth considered that if a specifically national concept had inspired a provision (e.g. the German concept of the "Nachfrist") then it would be interesting to have bibliographical references to works treating that concept. The problem with bibliographical references was that they would soon be out of date. He would be satisfied if only the provisions of the codes were cited.

Maskow also preferred not having bibliographical references.

Crépeau stated that the sources of inspiration might also be found in literature. He would therefore put an indication in the notes of any article or book which had inspired the rule.

Drobnig agreed with Farnsworth and Crépeau that they should not cite any literature unless it had been a source of inspiration. He saw no utility in indicating literature from all over the world.

Tallon distinguished between the citation of provisions of the codes or of precedents which were made in the notes, basic texts which could be cited in a general bibliography to be given at the beginning of the book, and comparative literature, which tried to deal with the questions in a comparative way and which should be put in.

Furmston also considered that they could put a general bibliography at the back. He also agreed that it would be useful to cite specific books or articles which discussed the problems in a comparative context.

In the end it was decided that the comments should be as concise and as direct as possible, with titles to assist the user in consultation. National references should be avoided in the comments to the greatest extent possible. References to national legal systems should instead be made in the notes wherever necessary, although exceptions for specific cases could be envisaged. As regarded the literature, it was agreed that specialised literature should be cited, although the form of presentation still had to be decided. The citation of literature on international conventions was not considered to be necessary, as if a provision of a convention was cited it was clear that the literature which treated that provision should be considered. The commentaries on

the international conventions, as well as the standard texts, should be cited in a separate general bibliography.

Article 1

Introducing Art. 1, Fontaine stated that it was the same text as had been submitted in Rome. At the time it had been decided to come back to it after considering the chapter on interpretation.

Crépeau was not sure whether the rule dealt with performance or with the contents of the contract. If it was a question of performance, then it was not sufficient, as parties had to perform also according to the other rules found in the Principles, i.e., it should refer not only to the contract itself, but also to other rules of interpretation. If instead it dealt with the contents of the contract, then the reference to the express or implied provisions of the contract was insufficient as they were not told what the sources of the implied terms were.

Bonell pointed out that Art. 3 of the interpretation chapter referred to usages as a possible means of interpretation, and that the definition of usages found in Art. 4 of Chapter 1 corresponded to the CISG formula. Thus, the combined application of this rule and of Arts. 3 and 4 could lead to some results.

Drobnig felt that implied terms could be found by the process of interpretation, but what had to be performed was much more than what was expressly or impliedly stated in the contract. In the comments (p. 1) it was specifically stated that "[i]n some jurisdictions, for certain types of contracts, implied terms have been codified by statute", and he felt that this showed that in addition to the (express or implied) terms of the contract, all that other body of rules which is made up of non-mandatory or mandatory rules has to be performed as well. In this respect Art. 1 was too narrow, and something like "and applicable rules" (i.e. also national or international law rules) should be added at the end of the provision.

Lando felt that the provision might in actual fact be stating the obvious. One could question the need for this article as it would be difficult to give an exhaustive list of all the things that bind the parties without making reference to the whole chapter on performance. He pointed out that the Principles had no provision stating that the parties were bound by usages, and he wondered whether they should perhaps have one.

Furmston stated that if there only was Art. 1 there would be some dispute as to what was impliedly required.

Tallon stated that it was possible to have a very broad notion of implied terms - usages and "loi supplétive" were implied terms. He

felt that they should have something along the lines suggested by Drobnič, possibly "usages and other applicable rules" and then this should be explained in the comments.

Farnsworth stated that basically, what they wanted to say was that the contractual obligations of a party may be implied as well as express.

Bonell felt that since Art. 3 of the chapter on interpretation spoke of "all relevant circumstances, including any preliminary negotiations between the parties, any practices which they have established between themselves, usages and any conduct of the parties subsequent to the conclusion of the contract", this would mean that one would have to look at each of these criteria to see if the implied terms could be construed into the contract. If a reference were to be made also to non-contractual rules, it would be difficult to differentiate between the Principles and the rules provided for by national laws and/or international binding instruments.

Lando wanted to know if interpretation included also what in America was called "deciding omitted cases" ("ergänzende Vertragsauslegung"). There were only four different sources from which the implied terms might be derived: interpretation, ergänzende Vertragsauslegung, usages and statutory directory rules, and perhaps it would be sufficient to say so. He thought it would be better not to have the rule, but if they did, then he agreed with Crépeau that they should say what they intended by implied terms.

Furmston did not think that implied terms were a matter of interpretation and he did not think that Art. 3 of the chapter on interpretation covered many cases of implied terms. One of the main techniques used by English courts was to say "we will imply this term because we think that terms of this kind ought normally to be implied into contracts of this kind". In the common law a major technique for developing contracts was to build up rules which very often the parties were totally unaware of, which were not based on anything the individual parties had done and the usages might not be widely known to the public either. Furthermore, the illustrations to Art. 1 seemed to be illustrations as to when a term was to be implied, but there was nothing in the text about that. As it was stated, the rule was that some terms can be implied (which was a rule no one would doubt), but the text offered no guidance as to when a term might or might not be implied.

Fontaine pointed out that to determine what was impliedly required by the contract they referred not only to the interpretation principle but also to the principle of good faith.

Crépeau felt that as they no longer referred to performance (the original version of the provision had done so) but rather to content, one could reintroduce the concept which had appeared in the previous

draft, of the "nature of the contract" as a juridical basis for implied terms.

According to Date-Bah the provision should deal with the performance of obligations already established elsewhere: in other words, it should say that parties shall perform their obligations, while what formed the content of the obligations should be stated elsewhere.

Farnsworth agreed with Date-Bah. To the common law mentality this belonged somewhere in the neighbourhood of interpretation, even if it was not the same as interpretation. He suggested that a possible wording might be "The contractual obligations of the parties may be /impliedly as well as expressly required by the contract/ /implied as well as express/". By using "contractual" it was clear that all problems of national legislation and other things from which obligations might be derived were omitted. The question of where these obligations came from could be dealt with elsewhere, i.e. in the neighbourhood of the interpretation section.

As regarded statutory obligations, Drobnig felt that these were explicit obligations, and he therefore hesitated to include them under the term "implied".

Tallon agreed with Drobnig. Common lawyers and civil lawyers did not speak of the same thing when they spoke of implied terms.

Fontaine agreed with Tallon.

Furmston pointed out that in common law it made a difference if the statute said that a "term is implied" or simply imposed a duty. There were quite a lot of contractual situations where a statute might impose a duty but the remedy might not be contractual, it may be tortious or public law, whereas if there was an implied term there would be a contractual remedy.

Farnsworth added that they sometimes distinguished between terms implied in law and terms implied in fact. For example, Merchant A simply sells a bottle to B. In this case there is a warranty that it is merchantable. This would be implied in law, because it has no basis in anything. On the other hand, if B explains to A that he wants a bottle for a certain purpose, and says that he does not know much about bottles and is counting on A to pick out the right kind, and A then sells him a bottle which is not suitable for his purpose, the warranty that is broken would be called a warranty implied in fact, because it is based on facts that suggest that B was counting on this obligation. On the other hand he would not be bothered by terminology such as "the obligations of the parties to perform may be express or implied or otherwise imposed by law" to cover such cases as statutory law, although he did not think that it said very much.

Hartkamp did not favour any such additional reference to the rules of law. He liked the present rule, which was simple. He felt the difficulties to be insurmountable once one started to define what was meant by "implied".

Crépeau favoured sticking with the idea behind Art. 1, but suggested that the reference to the terms being implied by the parties or by law should go into a second paragraph.

Voting on the proposal to have a second paragraph listing criteria for determining the implied obligations, 4 voted in favour of the proposal, 5 voted against and 2 abstained.

Turning to Farnsworth's suggestion to add "or as [otherwise] required by law", Tallon asked what "law" meant - it could be usage or statutory law. He therefore preferred the word "rules".

Hartkamp thought that putting in "law" as suggested by Farnsworth would create confusion. This would cover statutory law, but what about equity? What about usages?

Voting on the suggestion to add a reference to other applicable rules, 4 voted in favour, 4 voted against, and 3 abstained. The provision therefore remained as it stood, subject to reformulation.

Farnsworth suggested that the provision might be drafted "The parties' contractual obligations to perform may be express or implied".

Crépeau felt the words "to perform" to be quite unnecessary.

Maskow pointed out that the other articles of the chapter always spoke of what the parties should do, whereas here they did not.

Furmston pointed out that it was the obligations which were either expressly or impliedly stated, not the duty to perform.

Tallon queried the use of the word "contractual". Some obligations were contractual, some were not, some were imposed by statute, some were not, etc. He therefore suggested saying "obligations under the contract".

To Date-Bah it seemed that this text did not mean that non-contractual obligations could not be implied.

In the end the Group decided to accept the proposed text, and to have more detailed comments explaining in particular the question of the criteria to be used in the determination of the meaning of "impliedly". The text of Art. 1 thus read:

"The contractual obligations of the parties may be express or implied".

Article 2

Introducing Art. 2, Fontaine queried the utility of keeping Arts. 2 and 3. The distinction between the "obligation de moyens" and the "obligation de résultat" was relevant mainly when it came to problems of non-performance, when burden of proof and other causes of exemption were discussed. Of course, one had to know in advance whether one had an "obligation de moyens" or an "obligation de résultat" as that would determine the way one performed the obligation, and that was the justification for putting it here. Furthermore, Arts. 2 and 3 were useful as an introduction to Art. 4, which was the real novelty in this codification, because for the first time a codification tried to give the criteria by which these two types of obligations could be distinguished.

Bonell reminded the Group that the usefulness of Arts. 2 and 3 in connection with exempting events had already been discussed, and that it had been felt that notwithstanding the valid argument of leaving everything to non-performance, they could serve a useful purpose as they introduced the distinction and tried to define the two types of obligation.

Drobnig stated that, having Art. 4, it was not possible to dispense with Arts. 2 and 3, since while Art. 4 spelt out the conditions for distinguishing between the two kinds of obligation, Arts. 2 and 3 expressed the consequences which flowed from them. He felt that the distinction belonged in the chapter on performance and not in that on non-performance.

Crépeau had no objections on the question of principle, but questioned the use of the concept of "duty of care". The concept was inspired by French legal writing which used the terms "obligation de moyens" and "obligation de diligence". To use in English the concept of "duty of care" (which was a concept peculiar to the common law), was not a mere translation, but rather going from one inspiration to another. It would be in better keeping with the spirit of the distinction if the equivalent civilian terminology were kept and "obligation of diligence" were used.

Bonell observed that the formula "To the extent that [...]" had been chosen on purpose, to take into account the fact that it was sometimes difficult, if not impossible, to make a clear-cut distinction between the two kinds of obligations, the two might in fact be mixed. He had always understood "To the extent that" to introduce the relative character of the distinction.

Date-Bah pointed out that "duty of care" had tort law connotations in the common law, so a move away from this would be helpful.

Farnsworth stated that he too would prefer "diligence" to "care", partly because "duty of care" tended to suggest a possible liability to third parties. An American lawyer would then say "you are talking about best efforts", but he was not sure that that terminology could actually be used on an international level.

Drobnig felt that the concept which best conveyed the concept was "duty of best efforts", so he suggested that it be used here.

Hartkamp felt that a word such as "efforts" would be clearer than "diligence".

Fontaine did not favour the use of "best efforts" as they were used in contracts with many different meanings and shades of meaning. He therefore preferred either "care" or "diligence".

Tallon and Lando favoured "diligence".

Farnsworth raised the question of exemption: if A undertook to use diligence to paint a decent replica of the Sistine Chapel on the ceiling of B's library, then if A drank while he was doing so he undoubtedly had not met the standards and that was primarily what they were talking about here. If on the other hand A was hit by a car, broke his leg and was unable to get up on the scaffolding, that raised a different question of exemption. His question was then did the word "diligence" to some extent prejudice that question, i.e. it seemed to him that using "diligence" rather than "best efforts" made it easier to argue that A was absolutely liable to paint it, and that the diligence only described the quality of the performance.

Tallon, Crépeau and Hartkamp considered this to be an open question. Farnsworth felt that it should be left open.

Hartkamp observed that this was why it was better to have "to the extent", because in Farnsworth's case, the obligation had both an aspect of result - A had to be there at a certain time - and an aspect of care - A had to paint the ceiling.

Farnsworth felt that to sound as if the answer was going to be that if A broke his leg as a result of an accident, he would be sent to the chapter on exemptions. It seemed to him that in some kinds of contracts it should be open to A to argue that he did not need to claim an exemption, that in fact he had not broken the contract. Either answer should be possible.

The Group finally decided to change "duty of care" to "duty of diligence".

Date-Bah wondered whether a policy decision had been taken to use "activity" rather than "act".

Farnsworth felt that all those words could be deleted, just as Crépeau had suggested.

Bonell instead placed great importance on this concept, because it introduced one of the most important discriminating features of the Principles, i.e. that they were mainly concerned with services, with activities. Once you spoke of acts, or even omitted that, then what Hartkamp said as to the necessity to observe diligence also also to achieve the result where there was an "obligation de résultat" would come into play.

Crépeau pointed out that another difficulty was that when you use the words "in the performance of an activity" that only implied positive duties, not negative ones, and the dichotomy might apply to both the obligation not to do as well as to the obligation to do.

Tallon considered "activity" to be too narrow.

Bonell instead considered that the words "the performance of an activity" made the juxtaposition between Arts. 2 and 3 clear.

Lando felt that it was sufficient if they said "To the extent that an obligation of a party involves a duty of care".

Farnsworth observed that there were cases in which the duty they were talking about (care or diligence) was not an aspect of the principal duty of performance. For example, if A had to get financing in order to engage in the services, it might be understood that his using due diligence in getting the financing was a condition and that A was obliged to do that, but it would not be part of the prestation. Thus, it seemed to him that they would lose nothing by eliminating those words.

The Group thereupon decided to delete the words "in the performance of an activity".

Maskow observed that nothing was said of the time element: was it understood that this diligence was the diligence observed at the time the activity was performed? In long-term contracts it should not necessarily be the degree of diligence observed when the contract was made.

Tallon considered this to come under "similar circumstances".

If this was the case, Maskow requested that something on the time element be added in the comments.

Drobnig had doubts on the word "expected". Originally, he observed, it had been "obliged".

Crépeau and Fontaine suggested that it be changed to "bound", and this suggestion was accepted by the Group. It was decided that this amendment should also be introduced in Art. 3.

The text of Art. 2 as finally adopted therefore read:

"To the extent that an obligation of a party involves a duty of diligence, that party is bound to observe the diligence observed by reasonable persons of the same kind under similar circumstances".

Article 3

Introducing Art. 3, Fontaine remarked that they introduced the problem of the quality of performance in the context of of the obligation to achieve a specific result, but he felt that it was a much broader problem which was not exclusively connected with the obligation to achieve a specific result. What, he asked, if the quality usually achieved was very bad? In the report of the Rome meeting it was said that "usually achieved" meant "which should usually be achieved", but that was not what the words said. In Art. 2, for the obligation of diligence they had "observed by reasonable persons of the same kind", which was very objective. Here, it was the "quality that is usually achieved" - "achieved by a reasonable person" was probably more demanding than this. He therefore suggested that they amend the text to read "/.../ a result of the quality achieved by reasonable persons under obligations of the same kind".

Maskow stated that he had been under the impression that Art. 3 mainly related to things of an objective nature, where it was possible to compare the result with other results. In Art. 2 this was only possible by comparing the behaviour of the party with the behaviour of another person, for which reason it was necessary to mention "reasonable persons".

Fontaine commented that if the result usually achieved was poor, that was no reason to justify the fact that a party had just adapted himself to the common bad standard. The quality of the result was not always an easy concept to grasp.

Bonell referred to Art. 10 on price determination with which he could see a certain parallelism as where the price was not sufficiently identified by the parties the gap had to be filled in with a reasonable price. A quality provision such as that suggested by Fontaine could either precede or immediately follow Art. 10. This was done in the Principles of European Contract Law where a provision on "Quality of

Performance" (s. 1.105E: "Unless otherwise agreed, a party must tender a performance of at least average quality") came soon after that on price determination (s. 1.105A).

Fontaine stated that a provision along the lines of the European Principles was not compatible with what was said about the obligation of diligence and an exception should then be made for it, because more would be required of the "duty of diligence" than the "average quality" of the performance.

Tallon pointed out that in the Principles of European Contract Law they had no provisions on the "obligation de moyens" and the "obligation de résultat". He could not understand why they spoke of quality in the context of an "obligation de résultat", because the two things were antinomies - quality was "more or less", a result was "yes" or "no", so they should not speak of quality, they should rather say "such a specific result as usually achieved under the obligation".

Fontaine, Lando and Hartkamp also stated that they could not see why quality should be spoken of in an obligation de résultat.

Date-Bah also held the same view: if the duty involved an obligation to achieve a specific result, then the parties should be bound to achieve that result.

Farnsworth liked the formulation "achieve that result". He had problems with "usually" and with the language at the end dealing with quality in this context. It seemed to him that the word "usually" and the formulation used did not take sufficient account of the creativity of the people who made these contracts. If you read cases in the US you were constantly amazed at contracts to do things that were quite novel and to say that you have to produce a result like the one usually achieved would mean nothing. If you dealt separately with quality it would make sense to say that one test of quality was what was usually achieved if it was a thing that was usually achieved, or that what was usually achieved under obligations of the same type was a test of quality. He had some trouble with the phrase they had approved in Art. 2, because it also assumed that you could find a lot of cases for every obligation of diligence, and that was not the case: it was very hard to imagine what you would do if you were the first to market a product. Thus it seemed to him that even in this case it might be the diligence that would be observed by a reasonable person of the same kind in the same circumstances.

Maskow thought it very important to have a general obligation concerning quality; he could not see why they needed something else which said "if a result should be achieved this result should be achieved", because then the consequence might be that if it had not quite been achieved, the contract was considered as not having been performed at all. There would then be no possibilities for price

reductions, etc. He therefore suggested to keep Art. 3, but without the reference to quality.

Lando agreed that there were many "obligations de résultat" where you could not speak of any quality: if you had promised not to compete with a certain firm for a certain period against payment, if you had promised to install an apparatus so that the temperature in the room was always 18°C etc., you could not talk about quality. You either reached the result or you did not. Quality mostly referred to where you had to provide some kind of goods, so he thought that they should have some general provision as in the Principles of European Contract Law, which could to a certain extent apply also to "obligation de moyens".

Drobnig suggested that the article read "[...] to achieve that result" and that the question of quality be dealt with in a new provision. This suggestion was accepted by the Group, and Art. 3 thus read:

"To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result".

Farnsworth suggested that they should consider combining Arts. 2 and 3 into a single article as the revised Art. 3 was very short. This suggestion was accepted by the Group.

New article on determination of quality

Turning to the proposal to introduce a provision dealing with the determination of quality, Fontaine stated that many codifications had provisions of this kind, including the Principles of European Contract Law. Usually such provisions were satisfied with a performance of average quality, and they could have that as a general rule. He suggested a wording such as "Unless otherwise provided in these provisions performance normally should be of average quality."

Tallon could not see any very great difference between "average quality" and the "reasonable person". The general idea was to help arbitrators and courts to save a contract which was commercially sound, to add an element which is essential for the contract but which might not have been essential for the parties.

Maskow informed the Group that a scientific group working in the framework of the cooperation between the legal institutes of the Academies of Sciences of the East European countries had elaborated rules on this issue. The first thing they said was that if an obligor has to perform or if he has to achieve a result, then he is obliged either to perform or to deliver as is usual in the trade of the country of the obligor. If the obligor has to perform an activity, he is obliged

to perform this activity with an expert's diligence. In other words, an "expert's diligence" was their criterion for quality. They did not speak of a general average quality, but of the average quality in the country of the obligor, because they felt that the standards of quality were different.

Hartkamp commented that what was really meant by "must tender a performance of average quality", was that the debtor is not allowed to offer a performance of less than average quality - he may of course do something better. He therefore suggested that they draft the provision along the lines "he is not allowed to do less than that".

Lando suggested "at least", but Maskow had doubts on that formulation as if a debtor were asked to deliver at least a certain quality it was unclear what he could be asked for. Hartkamp's formulation made it clear that he was not allowed to perform less, but that meant that it was not possible for the other party to ask for more. In Lando's formula it was not clear whether the other party could ask for more before he is obliged to deliver "at least".

Bonell suggested that the language could be aligned with that in Art. 10(1) to the effect that "[...] the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to a performance which cannot be less than the average quality".

Farnsworth suggested "[...] impliedly made reference to the quality of performance generally rendered".

Furmston felt it to be a false analogy, as the price is determined by the market, so it made sense to say that in the absence of agreement the price should be the market price. In relations of quality, the average performance may be mediocre, whereas there was no such thing as a mediocre price. If you went into a restaurant and got a meal of average quality it might not be of reasonable quality.

Farnsworth considered that if an English restaurant owner contracted to serve him a meal, and served him the not very good meal that they imagined, then he supposed that the restaurant owner had performed his contract. If they wanted to say more, then they should say what more they expected. There might be circumstances in which you could demand a better meal from the restaurant owner than the average meal, but it was not really fair to leave it in the air that the restaurant owner could not do less than the average not-so-good meal but might be expected to do more but they would not tell him what more.

Furmston explained that for English lawyers there was conceptually a major difference between "reasonable" and "average" performance. There was an endless number of cases saying that it was no answer to say that everyone else is equally incompetent, that you have

to achieve the standard of a reasonable performance which is typically well above average performance. If you told an English lawyer that you had to achieve the average standard rather than a reasonable standard, he would think that you were deliberately laying down a lower standard.

Farnsworth added that a common example in the US was that of technical advances, i.e. if technology made it possible to do a very safe and simple operation, the old way might not be good enough even if most people in the past year have done it the old way.

Drobnig could not quite see the difference between average and reasonable quality. He felt that the restaurant case might be misleading, as it was clear that the restaurant owner performed only in his place and the customers came to him to be served there. In many cases, if delivery was to be made somewhere else, it was not so obvious that only his local conditions were to be the yardstick, be it of a reasonable or of an average standard. He was not sure that one should always use the obligor's average: if it was an international contractor, was it not understood that it must be at least the average quality of the place of destination?

Fontaine felt "average" to be ambiguous, as it could be understood as "usual" or in the middle of a scale of qualities, even if in that particular area or in that particular trade or under those particular circumstances performances were usually below average. That meant that there was an extremely close link between the criteria and the location. He suggested a formulation such as "average in the trade concerned [at the place of performance] [from the obligor's point of view]".

Date-Bah pointed out that the concepts were different. "Average quality" was empirically ascertainable - you took the lowest, you took the highest and struck a median. The reasonable standard instead was what judges set. The thing was whether it was a workable solution in the Principles which were not so judge-centred as the common law. He had noticed that civilian lawyers were always uncomfortable when one spoke of the reasonable man, because they were not used to judges making standards as they go along. One possibility was to go for the average quality, but with a warning to the users of the Principles that if they wished to avoid this lower quality they would have to specify the higher standard. If the reasonable standard was used it meant that the arbitrators were going to be like English High Court Judges, setting the standards of society.

Lando's thoughts went in the same direction. He thought it should be possible for arbitrators or judges to raise standards so that, e.g. with technical developments it should no longer be possible to accept the old average quality.

Maskow stated that the same problems had arisen when they had this point had been considered in the socialist countries - if they only referred to the "average" level, the question was then average at what time? The year before or maybe even five years before? "Reasonable" was difficult to determine as it was very much left to the discretion of the judge. He therefore felt that he could go along with the proposal "not less than" which would make it clear that this was the obligation, but that the obligor was entitled to deliver better quality.

Farnsworth therefore proposed saying "A quality that is reasonable having regard to all circumstances and [not less than that usually rendered/ [not less than the average quality/".

Tallon saw no need for such a formulation, and in general he disliked the formula "according to circumstances". He favoured Maskow's precision about time and place of the average quality, because this was a precise standard.

Lando also disliked the formula "according to circumstances", but instead liked the general idea of "reasonable" and "not less than average" quality.

Drobnig insisted on the formula "according to the circumstances" which he found very useful, and which could be important for performance over distances.

Fontaine also liked the reference to the circumstances, which would cover also the situations where, e.g. you appealed to a very expensive contractor from a country with high technological standards; you would then expect very high quality from that contractor even if the standards were much lower in the country where he had to perform. One could also apply to a cheap contractor from another country from whom one could not expect the same quality even if the place of performance was the same in both cases.

Date-Bah was happy with a phrase such as "having regard to all the circumstances", but "all the circumstances" referred to "reasonable". If one wished to qualify the average quality by time and place, you had to add other qualifying language after "average".

Farnsworth commented that if one were to look for bids in one's own country and a foreign firm gave bids to serve meals, if there were nothing further probably the place where the service was to be rendered would make the most sense. On the other hand, if one phoned one of the top chefs of Paris to come to Bristol, it would not be reasonable in the circumstances if he provided just an average meal of those expected in Bristol.

Lando insisted that they were only setting general standards; that they could not legislate for the unusual situation. They also had a

rule saying "unless otherwise agreed", and if the restaurant had called in a French chef, then something else had been agreed upon - it was implied. He completely agreed with Farnsworth in the result, but he thought it was covered by "reasonable" and "at least average quality". They had to tell the judges in which direction they should go, they should use very general terms, and then perhaps in the comments they could say that regard is to be had to the place of performance etc.

Bonell therefore suggested a wording such as:

"If the quality of performance is not fixed by nor determinable from the contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances".

The Group decided to adopt the wording suggested by Bonell. It was understood that the comments would then mention that judges and arbitrators were not prevented from raising the standards, and that the time factor would be indicated among the circumstances to be taken into consideration. As regarded the location of the provision, the Group decided that it should be inserted after Art. 11, as Art. 11 bis.

Article 4

Introducing Art. 4, Fontaine wondered whether lit. (d) really helped to distinguish between an obligation of due diligence and an obligation to achieve a specific result. Was it not rather a possible cause of exemption of liability? If so, he suggested that (d) be deleted, and only the first three criteria remain: the list was in any case not intended to be exhaustive.

Tallon considered here the case where the creditor contributed to the result - in France there had been cases concerning riding lessons where, as the pupil had to do something, there had been much hesitation to state that this was an "obligation de sécurité, de résultat" of the riding school. Instead, it had been said that as the pupil had to contribute to his own safety it was not an "obligation de résultat" and this was therefore not a question of liability. In French case law it was just a question of the policy of the court - if the court wanted to impose strict liability it would say that there was an "obligation de résultat" and it would find a way of explaining it afterwards. One had to refer to circumstances "such as", because it was impossible to lay down that this was an "obligation de moyens" or this was an "obligation de résultat".

Crépeau felt litt. (c) and (d) to be very closely related. There was no doubt that in the jurisprudence of the countries that had this distinction the degree of certainty normally involved in achieving the expected result was an important criterion, and one of the circumstances

under which one can determine that degree of certainty was whether or not the debtor has full control over the performance of the obligation.

The Group decided to keep (d).

Farnsworth found Art. 4 to be a useful and illuminating provision for common lawyers, because they did not have a very developed jurisprudence in this field. He suggested moving "among others" to after "the following circumstances". As regarded Illustration 3, which referred to lit. (c), he suggested that the space agency might never have launched a satellite before, that they might estimate a 30% chance of failure. They had this kind of argument with some frequency when someone agreed to make technological innovations, and the courts often said that they did not promise that they would do it, they promised that they would try to do it. He therefore wondered whether the word "normally" was necessary. If it was not, then one could say it more directly by saying "the degree of certainty that the expected result will be achieved". The present language suggested to him that if it was uncertain whether or not one had succeeded this would be included under this wording.

Bonell instead had thought that "normally" avoided misunderstandings between the parties, because A might have taken it for granted that B would be able to achieve that result, and B might himself have been mistaken. Without "normally", whose would the certainty be? "Normally" would be an objective test.

Farnsworth felt that to make some sense, although that left him with an ambiguous (c), because "certainty" caused him trouble. If they said "the degree of risk normally involved in achieving the expected result" it would no longer be ambiguous. This suggestion was accepted by the Group.

Crépeau suggested that the comments on (c) could bring in the concept of "aléa".

Art. 4 as approved thus read:

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

(a) the way in which the obligation is expressed in the contract;

(b) the contractual price and other terms of the contract;

(c) the degree of risk normally involved in achieving the expected result;

(d) the other party's ability to influence the performance of the obligation".

Article 5

Opening the discussion on Art. 5, Lando queried the origin of Illustration 1.

Farnsworth stated that it was a U.S. case which dealt with minerals and not with oil, but he was not sure that the answer had been the same in that old case. In that old case it had been said that if only so much was bought that the seller's price was pushed up, that was not a dirty thing to do, but if all of the commodity was bought that was naughty.

Furmston considered that it would be very odd if, having contracted to buy goods from B, A was disabled from going into the market to buy goods of the same kind - that was what traders did all the time, even if they did buy a lot.

Bonell suggested that a phrase could be added to the Notes on p. 10 to the effect that also in other jurisdictions the result arrived at on the basis of the principle of good faith was the same as that arrived at in jurisdictions where the parties' obligation to cooperate was stated explicitly.

Art. 5 was adopted as it stood.

Article 6

Fontaine introduced Art. 6 by pointing out that Arts. 6 and 7 had originally been linked together, but that in Rome it had been decided to split the provision into two separate articles: Art. 6 which discussed the question of whether a party in principle had to render a performance, which could be rendered in instalments, at one time if nothing was said about it and unless the circumstances indicated otherwise; and Art. 7 which dealt with the problem whether, independently of whether it was a full performance or or an instalment of the promised performance, what had to be performed at maturity had to be performed completely and the obligee could refuse a partial performance. Art. 7 also dealt with the problem of additional expenses. It had also been decided in Rome to keep Art. 6 in brackets.

Crépeau did not think it was true to say that if the whole of one party's performance can be rendered at one time it is due at one time: it was not because it was physically possible for a party to render its performance in one go that it was due in one go, but it was due in one go if the contract said so or if the circumstances were such that the intention of the parties was that it had to be performed in one go and not in instalments.

Farnsworth felt that it would be useful to consider the cases where this provision would be relevant. CISG would take care of the sale of goods, but in the case of shares of stock, if A promised to deliver B 1000 shares and came with 100 and said he would then give another 100 and another 100 etc., then he thought that B would be entitled to say that he wanted them all at once. This might also be true in the case of land and, more importantly, also in that of money: if there was a global price the assumption was that you would want all your money at once. He suggested that the sense might be better expressed if they said "unless it is impossible to do so".

Lando felt that the test in Art. 6 should be the same as that in Art. 7(1). He could not see why, in cases where a party had no legitimate interest in claiming to have performance at one time, the obligor should not be allowed to deliver in instalments.

Bonell considered that partial performance was really a concession by which a party at the deadline accepted only part of what he was owed. He would not say that if a party accepted half the performance the other party would no longer be in breach: he would be in breach for the other half.

Date-Bah suggested that Cr peau's point might be met by the phrase "unless the parties have otherwise agreed", which had been missed out in this case.

Cr peau suggested that what was intended was that normally an obligation had to be performed in one stroke at the time of exigibility unless the contract provided otherwise.

Fontaine suggested that "at maturity" was covered by Art. 7. Art. 6 dealt with the case when there was vagueness about the time of performance: performance could be either in March or in a certain period, so there was no earlier performance because there was no certain time for performance.

Tallon agreed; Art. 7 applied when you had to perform at one time, at a specific time, whereas Art. 6 applied when you did not know exactly if you had to perform at one time or in instalments.

Fontaine thought that in Art. 6 it should be stated that it covered cases when the time for performance stretched over a certain period of time, as otherwise it would not be clear what the relationship between Arts. 6 and 7 was. Whatever the phrasing of Art. 6, it should state that if a party's performance could be rendered within a certain period of time, then it was due at one time. Art. 6 covered only this case, because if there was a special date of performance, or if the time for performance could be derived from the other rules, Art. 6 would not apply: Art. 7 would if there was partial performance.

Tallon felt that it was Art. 7 which should state when the performance had to be performed in whole and when it has to be performed in part, etc. It was there that it was important to know that partial performance was partial performance of something which had to be performed as a whole.

Drobnig felt that a specification of the time element was as necessary in Art. 6 as it was in Art. 7. The two situations of Art. 6 were first, when the contract specified a period of time and secondly when it said that performance had to be made within a reasonable time, which might also be a period of time. He suggested a formulation such as: "If the contract does not fix a specific time for performance then performance must be done in one stroke unless the circumstances provide otherwise".

Lando pointed out that the characteristic performances of most contracts extended over a period of time (e.g. licence contracts, agency, service contracts, insurance contracts). Art. 6 would not apply to all these contracts, it would only apply to sales and similar contracts (e.g. leasing contracts), and to monetary obligations. Secondly, Art. 6 said that the performance had to be rendered at one time, but it did not give any sanctions or remedies if performance were not rendered at one time. Art. 7 instead said that you could refuse, and that was already a remedy, so there was an imbalance between the two provisions. Thirdly, Arts. 6 and 7 had different criteria, and he had difficulty to see why.

Hartkamp stated that if it was decided to retain Art. 6, the time element should be made clear in both Arts. 6 and 7. Furthermore, the two articles should be moved to after Arts. 8 and 9.

Maskow stated that a distinction should be made between situations where in terms of fact performance extended over a period of time, and those where this was legally so. In the example of a contract for the construction of a plant, the work in fact extended over a certain period of time, but the time of performance was the time of the acceptance of the finished plant, and this occurred at one time. If a plant was being built then it was not permitted to offer it for take over partially (first one hall, then another, etc.). In a certain sense this was the case also with the contracts they were considering here, including leasing and insurance contracts. As regarded the sanctions a procedure such as the one described in Art. 7 could be envisaged, i.e. if delivery or performance has to be done at one time the other party is nevertheless under the circumstances indicated obliged to accept partial performance. He might then ask for compensation for any additional expenses, but not for damages, provided of course the later performances are made within the original period of time.

Furmston wondered whether the draftsmen saw Arts. 6 and 7 as being mutually exclusive, or whether they overlapped, i.e. did all

circumstances fall under one or the other, but some fall under both? He considered that Art. 7 clearly applied to some cases to which Art. 6 did not apply. On the other hand there were some cases to which you first of all applied Art. 6 and then applied Art. 7. Was that not rather confusing?

Bonell felt that the actual situations might also be confusing - it was possible to imagine a great variety of cases in which the parties would split performances and speculate about the date of maturity saying that the rest would be delivered on the following day, that it was permitted to split the performance, etc.

Furmston referred to Illustration 1, in which the contract was to deliver 100 tons of coal in March, and A tenders 25 tons on 1 March. Art. 6 suggested that in most circumstances A would be required to deliver 100 tons all at once, unless something in the contract or in the surrounding circumstances would justify the inference that A could deliver 25 tons at a time. Suppose nothing could be found in the surrounding circumstances: did this mean that one had to turn to Art. 7(1) and have a separate inquiry as to whether the buyer had a legitimate interest in refusing the tender?

Fontaine thought that this would be the case. If according to Art. 6 performance was due at one time, then if instead of performance at one time A came with partial performance, B would apply Art. 7 and could refuse it unless he had no legitimate interest in doing so.

Farnsworth wondered whether he was correct in thinking that Art. 7(1) applied largely, maybe exclusively, to cases where there was a breach by the obligor. He thought that it would help in Art. 7, and make Art. 6 more palatable, if Art. 7(1) was more explicit, e.g.: "If the obligor performs less than the obligor is bound to, then the obligee may refuse", or, if it was the case that there was always a breach, "The obligee may refuse a partial performance that is a breach".

Crépeau observed that Art. 7 dealt with the principle in the specific context of partial performance before maturity, but Fontaine objected that it instead referred to partial performance at maturity, which made Crépeau observe that that meant that you could refuse partial performance before maturity or at maturity a fortiori.

Bonell noted that this was the case raised by Furmston, i.e. A tenders 25 tons on 1 March meaning that he has one month before him, although he tenders only a quarter of the whole amount, notwithstanding the fact that he found himself in a situation where he should perform all at one time. You could of course then imply that by rendering 25 tons on 1 March A is transforming the period of time for performance granted at the beginning into a fixed date, and at that date the other party may consider it a partial performance at the date of maturity and therefore refuse the performance on the basis of Art. 7. On the other

hand, why should he refuse, he may just point out that A is not correct and that he accepts only on condition that A performs within the period of time agreed upon, and that A refund the expenses he incurs as a result. He however found these to be details. He thought that the purpose of the rule was simply that of giving an indication to the parties. If, contrary to the indications, a party behaves differently, all the consequences of such a different behaviour could not be covered by this rule: it would be covered partly by the damages section, partly by the principle of good faith, etc.

Hartkamp observed that the fact that Art. 6 was derived from the R2C or the UCC and was not in the European Civil Codes, whereas Art. 7 was in the European Civil Codes but not in the R2C, seemed to indicate that it was too much to have both provisions. It was necessary to choose between the two. If drafted properly, Art. 7 could easily embrace also Art. 6.

Bonell instead felt that the two provisions addressed different questions and served different purposes, so he saw no inconsistency between them.

Farnsworth stated that if Art. 6 was deleted he would still not understand the answer to the questions raised as to Art. 7. Was he correct in assuming that the partial performance in Art. 7(1) was a non-conforming partial performance? If this was the case this must be said, independently of whether Art. 6 was there or not, because in English a "partial performance" was when someone who had promised to deliver 1000 tons - 100 tons every month - delivered 100 tons the first month: this provision stated that the other party could refuse those 100 tons.

Fontaine observed that it was implicit that it was non-conforming partial performance. He suggested that this should, perhaps, be stated explicitly.

Bonell agreed that it should be made clear that Art. 7 covered a breach situation.

Furmston stated that there were a lot of very important questions which were covered by Art. 7 and which had nothing to do with delivery in instalments or over a period of time. For example, over the whole of the academic year the University Teachers' Union had been threatening to go on strike, and the strike took the form of not participating in the examination process, i.e. they did everything except examining. The question was what remedies did the University have in this situation? The House of Lords had in a decision said that you cannot pick and choose what part of the contract to perform.

Fontaine suggested a wording such as "If, according to the contract, performance of one party's obligation can be rendered over a

period of time, that party is bound to perform at one stroke" for Art. 6.

With reference to Art. 8(b) and (c), Hartkamp suggested placing this provision after Art. 8, as that was exactly what was covered. Fontaine, Drobnig and Farnsworth agreed.

Lando wondered how this draft would fit to construction contracts, as they had to be performed over a certain period of time.

Drobnig suggested that performance would be at the time of the taking over of the finished construction, but Lando felt it to be artificial to say that it was the taking over which was the "one time".

Bonell commented that in building contracts the object was not the construction but the result. Crépeau agreed with this.

Farnsworth on the other hand felt Lando to be right. If A promised B to build him a doghouse within the next year, that would come under Art. 8(b). If A promised to build B a doghouse full stop that was within Art. 8(c). He did not have to build it all at one time - he obviously could not do so. Thus, Art. 6 did not cover cases within (b) and (c) - Art. 6 stood on its own feet.

Fontaine suggested that after Art. 6 it be stated that "In cases of Art. 8(b) and (c) the obliged party is bound to render performance at one time unless the circumstances indicate otherwise".

Bonell suggested that Art. 6 could become a second paragraph of Art. 8, instead of being a separate article. Farnsworth felt this to be a good idea.

Date-Bah was not clear as to what exactly "at one time" meant, and Crépeau also felt that the expression was not too felicitous. Farnsworth suggested the comments indicate that "one time" meant more or less instantaneously.

Farnsworth pointed out that the Group had in fact rejected the R2C rule which was far more important for such contracts, i.e. the rule that when one party's performance is to go on over a period of time and the other party's can instead be done immediately (e.g. payment), then the party whose performance takes a period of time is expected to go first. There were several rules of this sort in the R2C, none of which were found here. Furthermore, in the R2C a distinction was made between performances that take a period of time, like building contracts, and those that could be performed at one time - since they did not have these other rules they did not have the language in juxtaposition.

A suggestion was put forward for a New Article 8, on "Time of Performance", which read as follows:

- "(1) A party must perform its obligations:
- (a) if a time is fixed by or determinable from the contract, at that time;
 - (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; or
 - (c) in any other case, within a reasonable time after the conclusion of the contract.
- (2) A party must perform its obligations under (b) or (c) of the preceding paragraph at one time, if that performance can be rendered at one time and the circumstances do not indicate otherwise".

Drobnig considered that the second paragraph did not fit in a provision on time of performance. If it was decided to keep it here, it should be made clear in the comments that the time at which performance was made did not fix the time of performance or change the contractually agreed time of performance, which under (b) and (c) was a period of time. This had practical consequences, because if performance was defective the debtor could make a new attempt at performance within the agreed period of time. He thought there was a danger that the wrong conclusion might be drawn from para. 2, namely that if the debtor performed e.g. 10 days before the expiry of the period of performance, this would then mean that that was the due date, and that if anything was wrong with the performance he would then be in breach. That conclusion should not be drawn and this should be made clear. The fact that this provision came under the title "Time of performance" might give rise to the implication that there were certain consequences for the time of performance also for para. 2. However, if it was made very clear in the comments that this was not so, then he thought he could live with having the rule in this provision, although he would prefer to have it as a separate article.

Fontaine suggested that the title of the article be changed to read "Time of performance. Performance at one time or in instalments" combining the titles of Arts. 6 and 8.

Date-Bah raised the point of the interpretation of the title - was the title part of the provision?

Bonell thought so. The weight one might attach to the title in interpreting the provisions was a question of principle, and he questioned the wisdom of going into this.

Maskow assumed that even if one used titles, the actual text would be decisive, because it was not always possible to express the contents of the text in the title. On the other hand, if they did use titles, these could be used to interpret the text if it was unclear. As regarded para. 2, he found it difficult to think that if its conditions were fulfilled it would not be breach of contract if somebody performed

his part of the obligation later: if an obligation had to be performed at once and it was not, then he did not see why it should not be treated as a breach.

Fontaine agreed that it should be a breach.

Bonell also agreed that it should be a breach. He stated that that was the difference with Art. 7, as in Art. 7 the obligee could refuse a partial performance. It stated what the position of the obligee was vis-à-vis the tender of a partial performance, but once one accepted it, it did not mean that for the rest of the obligation the other party was not in breach. Here one was laying down the rule that if nothing else was determined by the contract (etc), one had to perform one's obligation at one time, and if one did not, one was in breach. Thus it was no longer a question of whether the other party might refuse or not because one was tendering only a part. What instead was at stake in Art. 7 was the alternative of whether to render the other party totally in breach or only partially in breach, and therefore it was important to establish whether one could or could not refuse the tender of a partial performance strictu sensu, because then it would be up to the other party to decide the entity of the breach, and it would of course be very important for the party in breach to know whether he may be considered to be in breach for only half of the obligation instead of for the whole, whether he has to pay damages, etc.

Fontaine stressed that they were considering Art. 6, and that if the partial performance were refused with a legitimate interest, and if it was still tendered, then it would of course be a breach which could give rise to damages and to other remedies.

Maskow agreed with Fontaine.

Lando did not think that it made sense to say that to refuse a tender was not a remedy, because to refuse something was a remedy - it was something you did when performance was not all right.

Maskow also thought refusal was a remedy. Tallon considered it to be a provisional remedy, just as withholding performance. Lando pointed out that under CISG the exceptio non adimplendi contractus was a remedy. Bonell, however, felt this to be something different.

Hartkamp still preferred to delete either this provision or Art. 7: he felt that they were two different views of the same medal. Whether you said that a party has to perform all his obligations at the same time or that the other party may refuse partial performance was, to his understanding, the same rule. If they kept both, he thought it better to keep the provision here.

To Fontaine it made very little difference if they had a separate Art. 8 bis stating that "a party must perform its obligations

under Art. 8(b) or (c)" and with a separate title that would be clearer.

The Group finally agreed that a new Art. 8 bis would take the place of Art. 6: it would keep the title of the former Art. 6 (Performance at one time or in instalments) and would read:

"In cases under Art. 8(b) or (c), a party must perform its obligations at one time, if that performance can be rendered at one time and the circumstances do not indicate otherwise".

Article 7

Hartkamp asked Fontaine for clarifications as to the relationship between Art. 7 and the new Art. 8 bis.

Fontaine stated that Art. 7 dealt with the problem of whether performance could be partial or full at the date of maturity, or at the moment it was due. The moment that it was due was partly determined by Art. 8 bis. In the cases covered by Art. 8 bis the provision could tell you that it had to be performed as a whole or that it could be performed in instalments. If it could be accepted as instalments Art. 7 would apply. When performance was due (whether it was due as a total performance or in instalments) the principle was that the obligee could refuse the partial performance. It was to make this clearer that a suggestion had been put forward to state in Art. 7 that they were referring to a particular moment, i.e. to the date of maturity, and that the partial performance referred to the obligor at that moment tendering only part of what he should tender.

Crépeau and Lando wondered whether the provision did not refer to partial performance prior to the date of maturity. Fontaine confirmed that it referred to the moment in which the performance was due. Lando and Crépeau observed that that could equally apply to an earlier performance, but Drobnig referred them to Art. 9, which specifically dealt with earlier performance. Lando observed that that was also partial performance and Tallon suggested it was earlier partial performance.

Fontaine suggested leaving the text as it stood, and the comments could then, where they on page 12 stated "When performance is due at maturity (whether it is the whole performance or an instalment)" explain that what it did not cover was the special case of earlier performance, that it was at the time that performance was due legitimately that performance had to be full and not partial.

Drobnig suggested including the time element in Art. 7. Furthermore, a second element which should be expressed was that by partial performance they intended a partial performance which was allowed neither under Art. 8 bis, nor under the contract.

With respect to the expression "may refuse a tender", Farnsworth was not sure whether it also applied to things other than tender: how did it apply to A painting half of B's house if he had to paint the whole house? Could B refuse that? It was B's house and the paint was there, so he did not see how B could refuse it.

Hartkamp suggested that if the painter came to B's house and said he would paint one part of the house then and the next part only the month after, then B could refuse to let him begin even with the first part.

Bonell gave the following example: if he had commissioned the painting of his house during his absence in Bristol and the painter had promised to finish by the end of the week, the end of the week was the date of maturity. If at the end of the week the painter had only painted part of the house, in his view he could then refuse this partial performance, because to refuse would mean that the painter would be totally in breach, and he could then ask for damages or for specific performance if this were appropriate.

To Farnsworth it seemed that what one wanted to say was that the obligee could treat it as a total breach. He suggested that it would be clearer to say "reject" rather than "refuse".

To Furmston the problem was that the provision was trying to deal with several different problems in the same sentence. In the painting of the house example, there were at least two questions: one was whether, if the painter had not finished at the end of the week but was still painting and said that he would finish the day after, Bonell could then tell him to go away as he had not finished on time. An entirely separate question was what Bonell could do if the painter had done three quarters of the house and actually said that he would do no more but wanted to be paid for what he had done.

Bonell felt that if the painter were still painting, it would depend on the interpretation of the contract, and he would then have to determine whether or not the date they had fixed (because they had fixed a date under Art. 8(1)), had to be considered an "essential" date. So he would not assume that this necessarily had anything to do with Art. 7, he would rather look at the precise meaning of the date, but if it then turned out that Saturday night was essential because he had told the painter that he was giving a reception on Saturday night, then he would consider it a partial or incomplete performance under Art. 7, and he would feel entitled to consider it a total non-performance.

Furmston did not find "refuse" to be the correct word: take the classic case of the man who signs on for a voyage across the Atlantic and dies two thirds of the way across. His widow goes to collect his pay, and is told that she will not get paid as he did not finish the voyage. They did not refuse to accept his partial performance because

while he was performing it was all entirely legitimate, nor did he break the contract by dying. It was not a question of refusing a partial performance, it was a question of whether you had to pay.

Farnsworth added that similarly in the painting of the house case it was not refusing a partial performance.

To Hartkamp's recollection this was outside the scope of this article, which only concerned whether, when the debtor tenders performance, you were allowed to say that you did not accept the performance unless the debtor did it all at once. In his opinion, the case of the painter leaving off half way through would not come under this article. Tallon agreed with this view.

Fontaine felt the discussion evidenced the difficulties of phrasing. Of the sources which he had consulted, Art. 1244 of the French Civil Code stated that "Le débiteur ne peut point forcer le créancier à recevoir en partie le paiement d'une dette, même divisible", the Dutch Civil Code (Art. 1426) and the New Civil Code (Art. 6.1.6.3) both talked about the "schuldenaar" so there again it was phrased from the debtor, similarly the Benelux project (Art. 3) stated that "Le débiteur ne peut sans l'accord du créancier s'acquitter de son obligation" and the BGB § 266 stated that "Der Schuldner ist zu Teilleistungen nicht berechtigt". Of those that phrased the provision from the creditor, the Québec Draft Civil Code stated that "A creditor may not be compelled to accept partial payment of a debt" (Book V, Art. 211) and the Italian Civil Code stated that "Il creditore può rifiutare un adempimento parziale anche se la prestazione è divisibile, salvo che la legge o gli usi dispongano diversamente" (Art. 1181). The one which was the closest to their Principles was the Swiss Code of Obligations which stated that "Le créancier peut refuser un paiement partiel, lorsque la dette est liquide et exigible pour le tout" (Art. 69(1)). It might actually be more satisfactory, because of what was said about the refusal being a remedy, to turn the rule around and to state something like "The obligor must tender full performance", or "The obligor may not tender partial performance unless [...]".

Bonell considered that what was really at stake was a substantive rule stating if one had, or did not have, the right (at least at the date of maturity) to discharge your obligation at least partially, because if it were a total non-performance damages would accrue etc.

Drobnig commented that in Chapter VI he saw no remedy for the creditor (obligee) for this situation.

Bonell observed that this was definitely a breach of contract, and that the remedy would be termination if the breach was a fundamental breach - if he ordered 1000 pairs of skis and 999 were delivered, then it would not be a fundamental breach.

Lando objected that he could still claim damages for that one pair, so the "legitimate interest" was now in danger because you could say that you could refuse it, but you could not refuse it if you had no legitimate interest. If the obligor delivered 999 then you could say that the obligee must accept it because he should not terminate, but the question of damages was not solved by this, he could still claim damages. The question then was whether they still needed the "no legitimate interest".

Bonell felt that they still did need it, because if, e.g., the obligor offered only 500 pairs on 1 December for the sales, then the obligee could refuse, he could consider the obligor to be totally in breach and therefore immediately terminate the contract and buy the 1000 skis elsewhere.

Maskow suggested that in the ski case, if the buyer for example wanted to launch an advertising campaign, if he was offered only 500 pairs of skis he had a legitimate interest to refuse. If, however, he was told that ten days later he would be offered 1000, then this might not be a fundamental breach - it would be a ten-day delay. He would nonetheless still have a legitimate interest not to accept the half he was offered.

Farnsworth observed that the legitimate interest was an alternative test for fundamental breach in the case where there was a performance of less than 100%. He pointed out that if they said "tender" the provision would be narrowed enormously, but in the course of the discussion the comments had indicated that it was not limited to tender. Illustration 1 on p. 13 of Doc. 44, which concerned the renting of office space due to be finished, where the construction company finished 4 offices out of 10 and Firm A refused to move into those offices, would not be covered by the rule, as that was not a tender.

Fontaine commented that it was a kind of compromise, because there were provisions in other codes which said just the opposite. Art. 218 of the Czech Code on International Contracts, for instance, stated that "A creditor is bound to receive partial performance of an obligation, unless such partial performance is contrary to the nature of the obligation", and there were also exceptions as, for instance, in the case of monetary obligations, so they had thought to say that partial performance may be refused, but with the exception of there being no legitimate interest.

Hartkamp and Fontaine felt that you could consider that as tender. Farnsworth conceded that you might if the premises were to be let, but in any case the painting of the house case where Bonell returned home to his flat which has only been partly painted, would not be included.

Furmston observed that he could see the influence of sales law, which he had understood to be outside the Principles. In sales the seller would normally tender a performance, or tender something which was less than performance, but there were many other types of contract in which one just went ahead and performed, one did not tender performance. He found Illustration 1 deeply ambiguous: he could understand when it said that Firm A may refuse moving into the four offices, but did that mean that if the builders said that the other offices would actually be ready the following week Firm A would then be entitled to bid them get lost and to go somewhere else, or did it mean that they did not have to move into the four offices until the remaining six were available? There were at least three different tests being propounded to answer that question: there was "no legitimate interest", there was "time is of the essence" and there was "fundamental breach". Different people had used them, they might be all the same but they did not sound the same.

Bonell suggested that if instead of the four rooms in Illustration 1 a normal contract for the construction and the delivery of a plant were considered, if something was missing at the date of delivery and the builder was not able to provide a full package, that would be partial performance. At that point, could the purchaser refuse it or not? In such a case, the legitimate interest could help out, as why should the purchaser have a legitimate interest to say that he considered the whole thing as not being done?

Farnsworth observed that if in Illustration 1 the offices were to be finished by 1 September and not four but nine offices had been finished at that date, and the lessor said "sorry, we have not finished ten, but here are nine", and furthermore there was a legitimate reason for not wanting just nine, as he understood it, what this said was that even if there was this legitimate interest, the lessee could say "no, we are not going to take the nine" and the lessor could still say "yes but time is not of the essence and we will have the tenth office by 3 September, and so you cannot terminate the contract". His understanding was that this answer would be possible, i.e. it would be possible that arbitrators would say that the lessee had the right to say that he would not take the nine, but that the lessor also had the right to say that time was not of the essence as the lessee was not opening his business until 1 October, so if he got the remaining one done by 3 September that would be enough. Would that be a possible answer?

Tallon observed that he would get damages for the inconvenience, for the delay. It did not matter whether time was of the essence or not, whether it was a fundamental breach or not - the problem was simply that of seeing if it was a whole non-performance at the time performance was due.

Lando saw the logic of the rule, but wondered whether it had any practical use.

Bonell referred to loan agreements and construction contracts, to commercial distributorship and to transport contracts, where this rule might be of practical use.

Farnsworth felt that the provision was much more limited than Bonell suggested, since it only spoke of a "tender" of partial performance.

Crépeau thought that the situation described by Farnsworth might well apply, but wondered whether it was not an undue restriction of the scope of the rule for it apply only to tenders: it applied to all kinds of performances, and tender was only one form of performance.

Hartkamp asked what exactly was intended by "tender".

Farnsworth stated that a tender was where A could perform by holding B out the glass - a tender of the glass. He would not be able to tender a haircut if he were to cut B's hair. The notion of tender, among other things, was that it involved the possibility of rejecting it. One could not reject a haircut - if A had cut B's hair B might not like it, but he could not refuse it, it was there. Similarly, in the case of the half painted flat, it was there and could not be refused.

Hartkamp stated that he had not meant it in this limited way. What he had intended was what the Germans called an "Angebot" and the French an "offre", i.e. one offered the performance. Thus, if the barber were to come to him and say that he would cut all his hair and be back the next day to cut the beard, then he could refuse it. In other words, it was a very broad concept of offer.

Furmston added that if the barber cut half of A's hair and then said that he was going to have his lunch break, A could no doubt refuse to pay and he could probably leave the barber's shop, but he would not describe that as refusing a partial performance. One had to ask oneself first if one had to pay at this stage, and secondly whether one was entitled to terminate the contract. Those were two separate questions which might get different answers. The answer to the first question was in general that one was not obliged to pay unless the performance was so close to an adequate performance that one ought to pay and set off one's claim for damages.

Bonell observed that this was precisely what the rule was, and Drobnig added that it was implied.

Farnsworth wondered what the situation would be if, in the flat case, the painter left just one square foot.

Bonell suggested that if the painter had really left this square foot and it had not been left by mistake, then it would be a partial performance in a strict sense, but under this rule he would fall,

because what interest could B have to say that because of this one square foot left out he considered the whole as not having been done? This was the question, not that B could not refuse the walls which had already been painted, but could he consider the whole as not having been done?

Farnsworth wondered whether Bonell was saying that the obligee may refuse to pay for a partial performance. Bonell confirmed this, but Farnsworth objected that that was not the rule. Bonell observed that that was the consequence.

With reference to the two questions referred to by Furmston, Fontaine observed that they came after the very first question, i.e. was this a breach or was it not? Furmston took it for granted that it was, while this provision was intended to lay down the criterion for the determination of whether or not it was a breach to deliver, tender, perform partly.

Furmston explained that historically in England it did not depend on whether it was a breach. For example, in the case of the man who dies on his way across the Atlantic, he did not break the contract but he still did not get paid, because it was a partial performance. Things had changed in the last 200 years so things were not quite so simple now: whether or not it was a breach was really the first question.

Drobnig suggested that the confusion arose because the formulation of Art. 7 brought in a remedy, i.e. refusal, so if that were taken out it would be clear that everything relating to the consequences had to be derived from the remedies chapter. He suggested a formulation such as "The obligor is not entitled to render an incomplete performance unless the other party has no interest in not accepting it".

Maskow did not feel this formula to be acceptable, because it meant that if there was no legitimate interest then the other party was entitled to perform partially and would no longer be in breach.

Bonell disagreed on this point, because he thought that there was no question whatsoever that even if a partial performance had to be accepted according to Art. 7 because the obligee had no legitimate interest in refusing it, there was still a breach situation as regarded the remaining part of the performance.

Fontaine explained that his idea had been that if the obligee, who was entitled to refuse a partial performance, accepted it, this meant that there was a change in the contract. Thus, when the obligee later on receives the rest he might be able to claim additional expenses, but not damages.

Farnsworth therefore concluded that the consequence of Art. 7, if it applied, i.e. if there was no legitimate interest, was that there was

no breach and consequently no damages, but there was some allowance for expenses. Fontaine agreed that this was the case. Farnsworth wondered whether in the case of the half painted apartment there was or was not a breach under Art. 7, as the obligee had no legitimate interest in refusing the partial performance.

Bonell concluded that in such a case it would still be a breach, but it would not allow the obligee to terminate.

Tallon felt that it would be clearer if Art. 7 were rearranged so as to have, first, in para. 1, the principle no partial performance, and then in para. 2 the exception and its consequences.

Suppose, Farnsworth said, A contracts to deliver 1000 widgets and turns up with 999 widgets and tenders; he could understand a rule which said that the buyer had no legitimate interest to refuse to accept, but it did not follow from that that A was not in breach of contract by having failed to deliver the 1000th widget, and that he therefore was liable in damages.

Hartkamp did not agree with this - it depended on how the buyer refused the partial performance: either he could waive his rights as regarded the non-performance, or he could accept the partial performance but reserve his rights as to the breach.

Farnsworth suggested that a better example might be where A has contracted to sell 1000 widgets of 0.99 mm each and delivers ones which are 0.985 mm, so they are not as per contract, but there is no legitimate interest to reject them because 0.985 mm widgets will do the job just as well as the 0.99 mm widgets. The first case he had given was clearly partial delivery, but in either case there was a damages action.

Farnsworth wondered if what was meant here by partial performance was full performance rendered at more than one time, with part of it rendered after the time it was due: that was the situation in the two illustrations.

Fontaine insisted that it was partial performance, because it was rendered at the date of maturity and at that time one did not know whether the rest would be performed or not.

Crépeau added that the break-point was at maturity. In the apartment case, the owner could say to the painter that he had told him that it had to be painted by a certain deadline as everything had to be in place for the reception on the following day.

Farnsworth objected that it would not apply if the owner had no legitimate interest. It would only apply if the painter were ready to continue painting, not if he had done two-thirds before quitting and the owner had no legitimate interest. The only consequence of the provision

would be that the owner did not have to continue with his performance, which in this case was to let the painter in, because each of the illustrations said that the innocent party could refuse to go ahead - neither of them dealt with the question of whether one had to pay when one had not received everything - which was the only question that would arise if the painter had walked off.

Suppose, Bonell said, A was waiting for the arrival of a ship supposed to transport 1000 tons of coal. At the arrival of the ship he discovered that only half of the cargo was on board, and the carrier said that the rest would follow in a month's time. What, he asked Farnsworth, would A's position be legally speaking?

Farnsworth supposed that in most common law jurisdictions A might very well have a right to say that he would not take it, but he would need to know more to say. Why, he asked, would A care? It was not because he was being asked to pay, because he clearly did not have to pay for the part delivery, he could wait to the end and say that he would pay only after he got the last bit. The only reason he cared was that he was expected somehow to cooperate and to take the coal and put it somewhere, and that was on the assumption that more was coming, because if the carrier said that he did not know what had happened to the remaining half, that this was all he was going to get, then he did not think that this rule would apply.

Furmston saw another difficulty, in that English law made no difference to these rules if the performance was defective or partial. In English law his two examples of the 999 widgets and the widgets of slightly the wrong size would be treated in exactly the same way.

Lando suggested that for policy reasons the possibility of treating the two cases the same way should perhaps also be considered, because otherwise an analysis of whether rules could be given on due performance and defects etc, would have to be embarked upon, which would be a departure from the original purpose.

Crépeau felt that for the final draft the possibility of bringing together partial, early and defective performance could be considered, if the same rule were to apply to them.

Date-Bah felt that part of the problem was that the concept "partial performance" was not self-evident to non-civilian lawyers and no attempt was made to define it or to give it an inherent meaning.

Farnsworth stated that his problem was that it was difficult to imagine a case of defective performance, other than performance defective in quality, that was not covered by the provision: it covered divisibility (do I have to pay for part delivery of goods when I know that the seller is bankrupt as to the rest?); it covered substantial performance, it covered the case where somebody paints an apartment but,

either inadvertently or intentionally, leaves a small portion not painted and does not intend to come back to finish it, it covered the case where he has painted only half of the apartment and has disappeared, it covered the case where he was still painting but had only done half of it by the deadline.

Hartkamp made two suggestions: first, to limit the discussions entirely to performance and to omit these other considerations which belonged in a different chapter as had been suggested by Tallon and Fontaine, and secondly, to consider whether the article were to be restricted to offers to perform partially, in which case the words "the obligee may refuse an offer of partial performance [...]" could be inserted. That would then also include an offer to perform a service. If that were considered feasible no more was needed, if it was not, a decision would have to be taken as to whether to include the case where the debtor leaves after having performed only half of his obligations. It would be more difficult, because then all the doctrines of the common law would creep in. His suggestion was to restrict the article to an offer to make a partial performance so that one could decide in advance whether or not one would accept that offer for partial performance. It would not be a breach rule, it would only be a rule on performance. The one side of the coin would be to state what the debtor is allowed to do, the other would be to state what the creditor is allowed to refuse. To take the house painting example, it would only cover the offer to paint the house, and not the case where part of it had already been painted.

Tallon agreed with this suggestion. He thought they were mixing the two issues. As regarded the second issue, that of the consequences of a partial performance, there was Art. 1: "The parties shall perform their obligations as required by the contract", so no rule was needed. A rule was only necessary in the case of a refusal of an offer of performance.

Lando agreed: a rule like Art. 51 CISG could then be inserted in the chapter on non-performance.

Farnsworth suggested "The obligee may reject an offer of partial performance unless he has no legitimate interest in doing so", although he realised that that would give the wrong answers to all the apartment painting cases. The first part of the provision caused no problems, but the phrase "unless he has no legitimate interest in doing so" brought some problems. If he had no legitimate interest in doing so, then there was no breach, but it could not be said that this was dealt with somewhere else, because para. 2 stated that expenses and "[a]dditional expenses [...]" are to be borne by the obligor" which suggested that it was not breach, that the remedy was expenses.

As far as the remaining part was concerned, to Bonell the breach situation was the rule, and the other situation, the agreement to settle amicably, was the exception. Para. 2 still served a very useful purpose because the expenses referred to only referred to those caused by

accepting the part partially performed, and not to what one did not get.

Farnsworth suggested that there were three cases: 1) the obligee rejects the partial performance: it is a breach, so presumably there are no problems; 2) he has legitimate interest in rejecting it, but still takes it; 3) he has no legitimate interest in rejecting it so he takes it because his lawyer tells him he has to take it. It seemed to him that in the last two cases that it was important to know whether para. 2 applied.

Fontaine stated that it would apply to both the second and the third case.

Farnsworth added that if so, if he accepted partial performance the additional expenses had to be borne, but that would suggest that it was not a breach because if it were a breach one would not have to say that.

Hartkamp did not think that it was necessary to know whether it was a breach to understand the article, because one could always say that he had to pay the additional expenses in any case, and whether or not it was a breach was not discussed here. If it was a breach, the additional expenses would of course be detracted from the damages he has to pay, because he has already paid them, so this did not have to be decided within the framework of this article.

Date-Bah stated that if it were assumed that it was a breach, it would be yet another sub-item of damages, so if one's view was that it was a breach, then para. 2 was not needed.

Tallon felt compensation for expenses to be too limited: the obligee might have incurred actual loss if he accepted or were forced to accept. Delay might cause a loss which was greater than the expenses.

Maskow suggested that it might be a modification of the contract, in which case it was no breach, or it might not be, but this was a question which had to be decided by other rules and not by this one. He thought it important to state here that additional expenses had to be paid, because they had to be paid irrespective of exemptions.

Drobnig stated that the comments should make it clear that para. 2 was not intended to be an exclusive remedy, but that the broad area of damages was still left open.

Bonell pointed out that this was on the assumption that it was made clear, even in the text, that the provision did not answer the question of the qualification of the remaining part of the performance.

Tallon suggested a wording such as "sans préjudice des réparations qui pourraient être dues par ailleurs", Farnsworth suggested "subject to any other remedy", and Drobnig suggested "without prejudice to any other

remedy". These additional words would go at the end of para. 2. Tallon pointed out that additional expenses were not a remedy, which made Farnsworth suggest that the word "other" be taken out.

Lando wondered about the situation under Art. 8(b) where there was a period of time and the other party had to choose a time. Did that mean that if he could deliver 100 tons of coal during the month of March, it would not be earlier performance if he delivered on 8 and 15 March?

Bonell pointed out that the answer was in Art. 8bis. If the conditions of Art. 8bis were fulfilled, one could deliver in two instalments, in which case it would then not be earlier or defective performance.

Hartkamp felt the point Lando raised to be a problem: in Dutch law this rule on expenses would apply also to the Art. 8 bis situation, where one had a month to perform but was supposed to perform in one go, if one performed in instalments one also had to pay the expenses.

Bonell stressed that Art. 8 bis stated that as a rule one may not perform in instalments. If one still did, then one was in a breach situation, but Art. 8 bis left this possibility open in certain circumstances.

Lando concluded that then, if these circumstances were present and one performed in instalments this would be legitimate under Art. 8 bis(2), and they must then say that this situation was not envisaged by Art. 7. He wondered whether the average lawyer or businessman would understand that.

Turning to the wording of Art. 7, Farnsworth felt that the phrasing suggested ("At the time performance is due, the obligee may reject an offer of partial performance unless he has no legitimate interest in doing so") was ambiguous. He therefore suggested:

- "(1) The obligee may reject an offer to perform in part at the time performance is due unless he has no legitimate interest in doing so.
- (2) Additional expenses caused to the obligee by partial performance are to be borne by the obligor without prejudice to any other remedy".

The Group adopted this formulation.

Drobnig suggested placing Art. 7 after Art. 8 because of the additional reference in particular to the time of performance.

At the end it was decided to leave the location of Art. 7 to the discretion of the Rapporteurs.

Summarising the discussions, Bonell concluded that Art. 6 disappeared, that Art. 7 remained where it was as amended, that Art. 8 still had to be discussed and that Art. 8 bis was added.

Article 8

Introducing Art. 8, Fontaine stated that it had been inspired by Art. 33 CISG. It had been adopted at Potsdam, and no questions had been raised in Rome.

With respect to Art. 8(c), Tallon wondered why it referred to "a reasonable time after the conclusion of the contract". He felt that to be obvious. Furmston agreed.

Fontaine indicated that that was the formulation of Art. 33 of CISG, so it might be better not to depart from it, as interpreters would start trying to interpret why the departure had been made.

Hartkamp added that in the case of the granting of a permission the time had to be calculated from the actual granting of the permission.

With reference to Art. 8(a), Crépeau wondered whether whenever a time was fixed, time would be of the essence in all commercial contracts.

Bonell did not think so - it was a problem which had to be addressed in the non-performance chapter, in particular he was thinking of the first provision in the section on termination, para. 2(b), which indicated that whether or not strict compliance with the obligation which had not been performed was of the essence to the contract was a circumstance which had to be taken into consideration in determining whether a failure to perform an obligation amounted to a fundamental non-performance.

Coming back to Art. 33 CISG, Maskow recalled that that provision concerned only the delivery of goods, and the time for payment was fixed in a different manner in Art. 58. They instead did not limit their article to delivery of goods, but related their article to monetary performances as well as to other performances. As it stood now, their text would mean that payment had to be made independently of other performances, which was perhaps not so good. As far as he could remember they had previously had a provision concerning contemporaneous performance, but this had unfortunately been deleted.

Farnsworth's recollection from Potsdam was that when it had been suggested that it might be well to deal with the problem of the order of performance, the problem had not been the contemporaneous performances which were mainly limited to the sale of goods (or constituted the characteristic of the sale of goods), the problem was what did you do

when one performance took time and the other was instantaneous, like the payment of money? As he recalled, the usual rule of thumb was that the performance goes first and the payment comes afterwards, but they all knew that almost everyone provided otherwise, so he thought it had been dropped.

Fontaine added that Art. 9 of the former draft (cf. Study L - Doc. 39) had dealt with simultaneity of performance. Then in Rome, in view of the difficulties in drafting a provision which could adequately accommodate the objections raised, the Group had decided to delete Art. 9. It had, however, been felt that the question should be reconsidered when examining the chapter on non-performance, the general provisions of which were intended to include also a provision on the right to withhold performance (cf. Report of the Rome meeting in P.C. - Misc. 11, p. 11).

Farnsworth thought that it would be a good idea to reconsider the possibility of reinserting the provision.

In the end it was decided to examine the possibility of reintroducing Art. 9 of the former draft. Subject to the outcome of the discussion on that provision, Art. 8 should be considered as having been adopted in its present form.

Study L - Doc. 39, Article 9

The text of the former Art. 9 read as follows:

"(1) If the parties' performances can be rendered simultaneously, they are due simultaneously, unless the circumstances indicate otherwise.

/(2) If the performance of only one party requires a period of time, its performance is due at an earlier time than that of the other party, unless the circumstances indicate otherwise./"

Fontaine stated that the provision was partly inspired by § 234 of the Restatement. It gave the general principle of the simultaneity of performances in bilateral contracts in para. 1, and a special rule in para. 2 relating to the case where the performance of only one party required a period of time. For that case it was actually more a provision on the order of performance than on simultaneity of performances. In Potsdam they had decided to put it between square brackets, as they had felt that there were many exceptions to the rule, that in many sectors where performance by one party required a period of time, the order of performance was different, as, e.g. in insurance, in transport, in leases where one performance was usually done beforehand. In Rome it had been felt that it was a useful provision for sales, but not that useful otherwise. Furthermore, para. 1 was obvious, although it might not be as obvious in some parts of the world as in industrialised countries, so perhaps it had still better be said. They had had a long

discussion on what was meant by "simultaneously", during which it had been observed that it was very rare in international contracts that performances were simultaneous: usually payments were by letters of credit etc., so the problem was then more than the problem of the order of performance even if they were not under para. 2 where the performance of one of the parties would require a period of time. It had also been felt that this article did not introduce the distinction between the "contrat à exécution instantanée" and the "contrat à exécution successive" which was known in French and other civil law systems, and then the application of the rule to "contrats à exécution successive" would be rather confusing. It had therefore been decided to delete the provision, although they had also felt that they should come back to it when discussing the chapter on non-performance.

Farnsworth recalled § 234 of the R2C which read: "(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary. (2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary". There were then other sections which said that the party who is to go later has the right to withhold performance if there is a fairly significant failure of the party who is to perform first. Thus, in the R2C scheme one would need to have a provision such as Art. 9, or one would have to indicate that the order of performances would have to be determined by the arbitrators without the aid of these rules.

Hartkamp pointed out that the situation might in fact be reversed, in that the party who has to perform first may withhold performance if there is a substantial risk that the other party will not perform.

Farnsworth commented that that was a different rule, that was insecurity, insurances. If it was a contract to cut hair or to paint an apartment and the question was whether he could refuse to pay, the first point to decide was who had to go first. This rule in para. 2 would say that the person who painted the apartment had to go first. Then, one would say that the person who was to pay may withhold performance if there was a breach by the person who was to perform. If, however, one asked whether a person could refuse to paint an apartment in those circumstances, that was governed by a rule dealing with the subject of the risk of future non-performance, but the apartment painter's remedy would presumably be to ask for some assurance of payment if it became insecure. The basic rule was that if he had to paint the apartment he had to go ahead and the other party could not withhold performance on the ground that he had not paid because he did not have to pay - he could withhold performance if the painter had not painted the apartment or not painted it well.

Bonell stated that he had understood the rule Farnsworth referred to, and the rule on the right to withhold performance envisaged in Rome, as being definitely a remedy rule, which had nothing to do with order of performance and was more or less along the lines of Art. 71 CISG ("(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract"). One of the weaknesses of Art. 71 was that it took it for granted that one knew exactly who the first party to perform was. He thought it interesting in the approach of the R2C that there first was a substantive rule dealing with the order of performance, and then, once it had been established that the performances had to be simultaneous or it had been determined who, according to this rule, had to perform first, one was in a position to exercise one's right under the remedy section if this was appropriate.

Maskow felt that they needed two rules, one saying that if a party was not bound to perform first, then he could wait until the other had performed, i.e. if the contract did not say which party had to perform first, both of them could wait, which ultimately would mean that they had to perform simultaneously, and a second provision stating that if a party must perform first, then he could withhold performance if there was a serious danger or if it was clear that the other party would not perform.

Drobnig agreed that they needed a rule. He thought that the order of performance and the withholding of performance, which would be covered later, should be separated. The report of the Rome meeting (P.C. - Misc. 11, p. 11) indicated an alternative which could serve as a starting point: "the performance of the obligations is to be simultaneous unless the parties have agreed otherwise". Re-reading it, he found it to be a better formulation than the one presently in Art. 9(1). A second rule would be necessary for those performances which took some time and perhaps the idea contained in the bracketed para. 2 could be developed.

Fontaine and Lando observed that in practice it was more common that when a performance takes a long time it is usually paid in advance. From a list drawn up in Potsdam it was apparent that advance payment was made in case of insurance, theatre, legal advice, privilege and leases, transport and tuition.

Furmston thought that a discussion on the contract as a whole was misguided, because actually the individual obligations were concerned. In a complex contract where there were many obligations, some of them could be performed simultaneously with some of the ones on the other side, so English law did not say that the whole of the seller's obligations must be performed at the same time as the whole of the

buyer's obligations, they said that payment and delivery were concurrent. In a contract of employment the employee usually had to do the work before he was paid, but the employer had other obligations (such as an obligation to provide a safe place of work) which started the moment one came through the gate, so the individual obligations should be analysed.

Tallon wondered whether they needed a rule on this point. Were there any practical difficulties which made such a rule necessary? He did not know of any French cases on this point.

Farnsworth found that it was useful to state something obvious before stating the more interesting things. It seemed to him that these rules were correct in the limited extent that Maskow was talking about them. It might be that in 90% of cases people made other arrangements, but nevertheless it would be useful to have a residual rule. One might ask whether it would be useful to have a different residual rule; he supposed that in a large number of cases (including most employment and building contracts) it was neither 100% one way nor 100% the other way - one was paid as one went along. It was not possible to have a residual rule that said that one was paid as one went along, so what had to be said was either 100% first or 100% afterwards, or nothing at all. It was not entirely the case that para. 1 applied only to sales. In, e.g., the sale of fast food, what was usually litigated in the US was not the sale of fast food, it was the sale of fast food restaurants. It was not at all clear that CISG applied to the sale of a Pizza Hut franchise, to sales of stock, etc. It was certain that para. 2 was probably more important than para. 1, and he would have thought that if one could not accept para. 2 one would think twice about having para. 1.

Crépeau too, thought that a rule was necessary. He thought there had been no problems in the French system because there was a basic underlying rule that reciprocal promises were owed simultaneously unless the parties or the circumstances had agreed otherwise, and it seemed to him that that was what should be said. He also expressed a preference for the version suggested in the report as para. 1.

Hartkamp agreed as regarded para. 1, but as regarded para. 2, he saw no use in having a rule which in so many cases did not reflect reality. He wondered whether it would not be possible to draft a rule which indicated that if performance implied a regular flow of activities or of services, either on a time basis or on a performance basis, normally the party who owes this performance would pay at intervals, in instalments. If they could reflect this idea also in para. 2, this would reflect commercial reality.

Tallon suggested that if so, they would have to consider that there were two different situations: the "contrat à exécution successive", which meant that there was a constant performance, and the "contrat échelonné", when performance was in instalments (i.e. when

there was a series of separate performances).

Hartkamp stated that he had not intended to cover delivery of goods by instalments, which did not come within their sphere of interest. He had thought of contracts which took some time in performance or where there was a more continuous flow of interest. He had thought that a general statement could be made to the effect that in these types of contracts normally also the payment was in instalments.

It seemed to Farnsworth that if he said that he would rent a flat for so much for a year, the question would be if he should pay at the end of the month or at the end of the year and that that might be determined by usage, or it might be a question of interpretation, but it might be difficult to lay down a general rule which governed it. It was far more complex in the US than perhaps elsewhere, because often these part payments as one goes along were not treated as actual payments, but as advances. In the building industry, they were called "progress payments" and the law was very much as if the owner were lending the money. As one went along one always had something which one called a "retainage", which might be 20%, i.e. even after the house was finished 20% was held back. That was not true in, for example, the case of an employee, it was not treated as an advance or a loan when he was paid at the end of the month in a one year contract to teach, it was treated differently. If in the exception clause the words "unless otherwise provided" or "notably by a provision for pre-payment, instalments, progress payments or other" were inserted, some of the principal ways that this was avoided would be covered and at least the reader would think that it was a rule that applied in most cases because everyone knew that in business required letters of credit or progress payment were required.

Fontaine shared Farnsworth's hesitations on the possibility of having a rule on performances at different stages for contracts where the other party has to give a continuous performance. As regarded the two paragraphs, para. 1 was obvious, but he agreed that it could be useful to state it, perhaps with the variation which had been suggested in Rome. As regarded para. 2, he agreed with Farnsworth that it could be made to look a little more realistic if the exceptions were more expressly indicated, but if the exceptions were so numerous he would prefer to use the opposite presumption, i.e. that if the performance of a party requires a period of time, the performance of the other party would normally be due first unless otherwise provided.

Drobnig felt this to go much too far. He thought that considering all the different types of contract with a variety of agreements on the time for the counter-performance, the only thing that could realistically be done was to give the main rule first, and then to make an exception for the contractual agreements of the parties, for the circumstances and for the kind of contract envisaged in para. 2. He did not favour attempts to express any positive rule, as it would give an

advantage to the one or the other party.

Fontaine did not think that the exception had to be stated expressly, because it was obvious that if the performance of one party required a period of time and that of the other by implication did not, then they could not be rendered simultaneously. Para. 2 should therefore be deleted.

Furmston did not think that the conclusion followed from the premise. It was no doubt true that parties very often agreed on something different for para. 2, but the reason they did that was that para. 2 was a general rule and it did not remove the need for para. 2: there was still a residual group, e.g. building contracts, for which in the UK all contracts had provisions for periodic payments if the contract was of any size, but if he had someone round to do work in his house, it was a perfectly sensible rule, because that was the man who might do no work if he had been paid up-front.

On the point raised by Furmston Farnsworth referred to a nineteenth century case where the parties did not make provision for progress payments and the question was whether the house had to be built first. This ordinarily did not come up with whole performances, but with complex contracts where there were many things to be done and the argument was who goes first with respect to some aspect, or did the parties have to perform at the same time. The parties did not always make these provisions, so it was not true that these rules did not play a role in practice, what was true was that that role was limited to that suggested by Furmston.

Furmston pointed out that in a building contract the customer commonly had obligations other than payment, e.g. to allow the builder onto the site, to provide instructions and drawings, permits, licences, etc. There was a whole series of obligations, some of which had to be done before the builder could build. The rule in para. 2 applied to each stage - one was paid every month, if one did no work that month one was not paid that month.

Lando preferred the present formulation of Art. 9 to the one suggested at the Rome meeting, because the latter really had a meaning only in certain contracts and he did not think it realistic to state a principle when it would not apply to the majority of contracts. He was very much in favour of para. 2, but he suggested it also speak of part of the performance.

To Date-Bah it seemed that the formulation was ambiguous as it did not specify if it concerned the performance of an obligation or the performance of a contract. The language seemed to indicate that it was performance of any of the parties' obligations. He suggested the Group might consider saying "If the parties' performance of any of their obligations can be rendered simultaneously [...]/". In substance he

agreed with Lando, and he also agreed with Furmston that what should be spoken of were obligations rather than the contract as a whole.

Drobnig declared that the conclusion he drew from Furmston's remarks was that even in the cases of para. 2, several obligations other than perhaps the counter-performance had to be done immediately and that in these case the principle in para. 1 would also apply. The only open point was that it did not apply to the main counter-performance, the payment of money (but not salaries, because for that there were various different types of arrangements). That reinforced the importance of para. 1, and he would very much insist on the revised version which was discussed in Rome, rather than the one in the old draft.

Bonell considered that the difference between the two formulations did not lie in the "unless the parties indicate otherwise or the circumstances indicate otherwise", the difference was that in the present Art. 9(1) the rule of simultaneity was linked to a very specific situation, i.e. where the parties' performances can be rendered simultaneously, whereas the revised version would broaden it and state "in general the rule is simultaneity", and this would go too far.

Bonell indicated that there were now two alternatives: the present text with the suggested amendments, i.e. "Where all or part of the [parties'] performances can be rendered simultaneously, they are due simultaneously unless the circumstances indicate otherwise", or "Obligations must be performed simultaneously unless the contract or the circumstances indicate otherwise".

Lando thought that different meanings were being attached to the word "simultaneous", it was a question of substance.

Crépeau agreed with Lando. There was a substantial difference in the meaning given to the word "performance". It seemed to him that in a building contract the performance of the builder would be completed only when he delivered, and it was at that moment that the rule of simultaneity applied; it was the basis from which there were contractual derogations for pre-payments, it was the basis for the contractual derogations.

Maskow declared that he preferred the shorter form of the provision.

Farnsworth said that there was a difference between the two alternatives if "parties' performances" were referred to in the first alternative, as it might be possible for one party to do many things at the same time. The first alternative said nothing about that, whereas the second one if read literally did, which was a deficiency in the second alternative.

Crépeau suggested the formulation "Reciprocal obligations in a contract must be performed simultaneously unless the contract or the circumstances indicate otherwise". He thought that the word "reciprocal" could be used because that introduced the reciprocity of obligations: A had to perform and B had to perform, and that had to be done simultaneously. Of course, if one had to perform in time, he had to start first, because then they would come up at the same time when the building was ready.

Maskow thought that that would solve the problem of it being related to the obligations of only one of the parties, and that it could also take care of Farnsworth's problem.

Tallon suggested that what was intended in para. 2 could be introduced into para. 1 by the formulation "Obligations must be performed simultaneously unless the parties agree otherwise, the nature of the contract or the manner of performance and such other circumstances indicate". He thought such a formula would cover the problem of the "obligation à durée successive" and of the "obligation échelonné".

Farnsworth still liked the idea of a second paragraph. He suggested a text which he thought would do what Tallon wanted it to and still be fairly faithful to the original one, which read: "To the extent that the parties' performances can be rendered simultaneously the parties are bound to render them simultaneously unless the circumstances /including the language and the nature of the performances/ indicate otherwise". He still favoured the original text, because there were instances where one piece of the performance was related to another in the manner described in para. 2.

Bonell therefore suggested the following formulation: "(1) To the extent that the parties' performances can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise", which would then be followed by para. 2. As an alternative they had "Reciprocal obligations under a contract must be performed simultaneously unless the contract or circumstances indicate otherwise".

Voting on para. 1, 7 favoured the original text as amended by Farnsworth, and 4 opposed it; 4 favoured the second alternative and 7 opposed it.

In the light of the decision taken on para. 1, the formulation suggested for para. 2 was modified to read: "To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first unless the circumstances indicate otherwise".

Hartkamp, Fontaine and Drobnič felt the provision to be too far removed from real life, because many contracts did not fall under this paragraph, and there were so many exceptions to those that did, that they did not think it wise to put it in.

Bonell reminded them that those who had expressed support for the provision had done so on the assumption that the comments would play an important role, because the "unless the circumstances indicate otherwise" should of course be rendered more explicit.

Farnsworth and Fontaine added that the one thing that was not covered by any formula was where each party had a performance that took time.

Voting on a para. 2 along the lines indicated by Farnsworth, 6 voted for, 3 against and 2 abstained. The whole provision thus read:

"(1) To the extent that the parties' performances can be rendered simultaneously, the parties are bound to render them simultaneously unless the circumstances indicate otherwise."

"(2) To the extent that the performance of only one party requires a period of time, that party is bound to render its performance first, unless the circumstances indicate otherwise."

As a title, the Group decided on "Order of performance".

Article 9

Fontaine introduced Article 9 by saying that the three paragraphs had been adopted in Rome, but should probably be harmonised with what had been said on partial performance, to read in para. 1: "The obligee may reject an earlier performance [...]" The discussion on para. 3 in Rome had concerned whether an accepted earlier performance was still a breach of contract, whether one should think also of damages besides additional expenses. As in the provision on partial performance "without prejudice to any other remedy" had been added, he suggested that this might be advisable also here.

Bonell stated that personally he would never have thought that earlier performance could amount to a breach - it really was just a question of timing, it was a question of expenses.

Fontaine stated that in the light of the discussion he would also agree that it was not a matter of breach of contract, but in that case they should not have to add "without prejudice to any other remedy".

Maskow stated that earlier performance could be a breach, but only if it was legitimately rejected, which was not the case here.

Fontaine thought of another example where earlier performance could be a breach of contract, i.e. in a deposit contract: A has goods deposited until a certain time; the depositary, the person who has accepted the goods, has undertaken to keep them for a certain time and he is obliged to return them at a certain date. If he wants to return them earlier, could that not be a breach of contract?

Date-Bah did not see why earlier performance could not be a breach. If A undertook a certain obligation and the promisee had arranged his affairs on the basis that performance should be expected at a particular time, if A then surprised him by tendering performance earlier than he was prepared, he may be prejudicated by it. He did not see why the promisee could not treat it as a breach. If he was to receive a particular kind of service, if, for example, he had ordered a package tour for August and the travel agency tendered it in May, then of course it was a breach.

Bonell explained that he did not see a breach situation with respect to so-called earlier performance because if the promisee accepted it, it was a modification of the contract, and if he rejected it the other party was still in time to perform. So what happened if A just said that he was not interested in making the journey in May, he could not blame the travel agent for having offered it to him, for having breached the contract, A had to wait until the obligation became due.

Furmston thought that a lot of the difficulty lay in the fact that there was ambiguity as to what was intended by earlier performance. If he had a contract of sale that said that he would deliver 1000 widgets in March, delivery on 1 March was not an earlier performance, it was simply a contractual performance. Delivery on 28 February would be an earlier performance, and in English law one would not be obliged to accept it, but if one did accept it, one would waive this. In the case of a building contract which said that one was to put up a building which was to be finished by 30 December, the builder could finish at any time before 30 December, but the practical problem would then be whether he was entitled to demand to be paid. He did not see what meaning it would have to discuss whether the building could be refused because it had been finished a few days earlier: that was a meaningless question. He thought that in English law the builder would not be entitled to be paid simply because the building had been finished if the contract called for completion, but one could also imagine the sort of case where it was not a question of doing something with a terminal date, but of doing something on a specific date, like a holiday. If he hired a taxi to arrive at 8 o'clock to go to the airport on a particular date, he was not interested in it arriving at 7.30 or at 8.30. If, e.g. it came at 8 on the evening before, then if the driver admitted it was a mistake and said he would come back at the right time, then it would not be a breach, whereas if he insisted he was right, then it would be a breach.

Fontaine said that a similar example was when A orders food for a party and it arrives on the day before when he is out. When A returns home he sees that the goods have arrived, and somebody who did not know has accepted them. This would then be a breach.

Bonell felt that if he did not come back the next day with fresh food, then it would be a breach.

Maskow observed that theoretically it always was a breach, even if there hardly ever were any consequences. If the performance was offered again, then of course no damage was suffered and there was no reason to claim anything.

Lando pointed out that the discussion dealt with whether or not it was a breach, but as yet no one had defined what was meant by a breach. In English and US law breach was linked to damages, in CISG and in Scandinavian law it was linked to the existence of a remedy: even if a person committed something which was reproachable, a breach ("kontraktsbrott") would only be spoken of if there was a remedy. If there was no remedy there was no breach.

Fontaine suggested aligning para. 1 to the preceding provision by using the formulation "The obligee may reject an offer of early performance unless he has no legitimate interest in doing so".

Lando wondered whether this did not apply only to offers - could one not reject an act when it had been performed?

Maskow felt "offer" to be more comprehensive, that it would include also the actual act of performance.

Furmston stated that performance would sometimes be an offer, and sometimes it would not be possible to reject it because it would be done before one knew it was being done.

Farnsworth added that the question would arise in the case of the painting of the apartment: if A had contracted to have his apartment painted this week and he were in fact gone for two weeks and the painter came to paint the apartment the second week and A came back, it would not be a question of whether he could reject it - the apartment was painted - the question would be whether he would have to pay something for it or whether conceivably he could sue for damages for having his apartment painted at a time when he did not want it to be done. He thought that all the other members of the group described both of those questions as remedies, so he could not see that they belonged in a chapter which dealt with performance.

Bonell agreed with Farnsworth, although he had reservations about his conclusion, as if the painter finished earlier than agreed, that was not even to be taken into account in this particular instance.

If, however, the painting of a house in the mountains was concerned, and the owner and the painter agree that the work should be done from 1 to 10 July, but as the owner is not there and the painter has the keys he begins on 25 June without making an actual offer, and then the owner arrives on the 27th - what would the owner then be able to do?

Tallon pointed out that the parties had a duty to cooperate, thus, if one of the parties was planning to perform early he had a duty to inform the other party. In other words there was always a duty to offer early performance.

Lando considered that the owner would have a right to throw the painter out. Similarly, if A wants to instal a personal computer in his home and gives the technician the key, but the technician installs it too early, before A has had time to clear the room or paint it, A would then be entitled to throw out the PC even if it had been installed. He was thus against inserting "offer" in this provision.

All the examples given convinced Maskow that there may be a breach of contract, but that on the other hand the word "offer" did no harm at all. Why should it not be taken as an offer if the painter had entered A's house and painted it?

Furmston instead did not think that the offer concept was very helpful, because there were so many cases where the early performance was not effectively offered, it was just done, which was a different question.

Farnsworth increasingly felt that what was intended did not require the use of a word such as "offer" or "tender". Basically, if the provision said that one could reject some performance and if the comment explained that to the extent that the performance had already taken place and could not be returned one could not reject it, that was in the nature of things. It seemed to him that that would take care of at least most of the cases, including the putting of the PC at the door.

Bonell, however, had the impression that to a certain extent this was an invitation to provide for the "fait accompli".

Voting on whether to align the provision with the new Art. 7 and to introduce the concept of offer the Group reject the proposal to align the provision by 7 votes against and only 4 votes in favour.

Date-Bah suggested that "early" be replaced by "earlier" as they were comparing the due date with earlier than the due date. If "early" were kept it could be a comment on how quickly on the due date one performed.

As Farnsworth and Furmston did not feel that it made any difference and Drobnig felt that "earlier" would be easier to

comprehend, it was decided to replace "early" by "earlier". It was further decided to replace the words "A party" by "The obligee" and "refuse" by "reject".

As regarded para. 2, Fontaine considered that it would have to be modified in view of the changes already adopted to read something like "A party's acceptance of an earlier performance does not affect the time for the performance of his own obligation if it has been fixed irrespective of the performance of the other party's obligation".

Farnsworth considered that it covered only the case where it was to be paid 30 days afterwards, and he thought that something should be said about the case where he was to pay 30 days after the painting had been finished and not leave it to imagination. He also thought that it might be more difficult to cover that case, because if, for example, he said "come in March and I will pay you within thirty days of the time you finish", and the reason he did this was because he knew that he had money coming in, then if the painter came early one alternative would be to say that it did not matter but that you did not have to pay any earlier (which seemed to him to be the more reasonable result), the other alternative would be to say that under this rule the consequence would be that he would have to pay early, which in effect gave him a legitimate interest in sending the other party away. This seemed to him to be a little harsh, so he read the provision as speaking only to the case that was explicitly covered.

Bonell wondered what the difference was between a contract of the kind where the parties agreed that payment was to be made against delivery of the painted apartment and one where it was agreed that payment should be made 30 days after the completion of the painting. In both cases the two parties acknowledged that there was a relationship between the performance and the counter-performance, so also in the first case the party could say that he was prepared to accept it, but that he could not pay although he should.

Farnsworth said that the reason he did not want to cover the case was that it was very complicated. If, for example, A was to deliver some stock to B and get paid for it and A came on Friday rather than on Monday and the understanding was that B would pay for the stock when he got it, if B then said that he would accept the stock on Friday but that he would pay on Monday, that would not only affect the term when he must come up with the money, it would affect the security that A had because he had given up the stock. It therefore seemed to him that that was a situation which was quite different from the case in which it was a question of whether or not you had to wait 30 days or 33 days to get paid - that was not so different, that was just the amount of loss of the use of the money for three days, it was not a loss of security. The situation which normally led to litigation was where the parties did not say anything, where A comes on Friday and B thinks he is supposed to come on Monday. B lets him in and then before the end of the month A

wants to be paid. B does not have any money and says that he thought A was going to come on the Monday and that he would have paid him 30 days later. If the parties discussed things at the door these rules were not necessary, it was when they did not that they were.

Maskow considered that if there was a relationship between the due date of payment and the date of performance, then the former would change depending on whether earlier performance was allowed or not. If it was not, if there was a fixed date of performance then it would remain unchanged even in the case of earlier performance. In other words, he considered that this rule would cover also the case of payment having to be made 30 days after delivery.

Hartkamp and Drobnig agreed.

Hartkamp was troubled by the fact that something was stated in the comments which was not said in the text: if comment (2) had not been there this would not have been covered at all. The text stated that if the time for a party's performance had been fixed irrespective of the other party's performance then his acceptance of an earlier performance did not affect his own performance, whereas the comment stated that if there was a relationship a negative implication had to be drawn and it was disputable whether this inference could be made.

Crépeau drew attention to the word "accept" an earlier performance, because that changed the rules.

Furmston thought that Crépeau was right - "acceptance" was not the same as "failure to reject". He could imagine a situation in which the person receiving the early performance accepted it even if it was a nuisance for him. This was actually rather likely, and he might imagine that it would have no adverse effects on his own obligations. It would instead seem as if it would have adverse effects, and he thought that a decision had to be taken as to what the rule ought to be and how it would be expressed. He agreed with Hartkamp that the text and the comment were not perfectly parallel. There was also a case which was not explicitly discussed, but which he assumed to be also covered, i.e. where one party says that he would like to perform one week early and the other party thinks that that is splendid. Presumably that would affect his legal obligations. There would be circumstances in which there would be a good case for arguing modification.

Farnsworth thought it would be enough to say in the second comment that para. 2 did not explicitly deal with the case where the performances were linked, to add a sentence saying that a prudent party in the case of early performance would probably want to make it clear that there was reservation, and that if that were not made clear, if nothing was said, then the circumstances would determine the matter. Further, it should also be stated that a party might have a legitimate interest in refusing performance if it appeared that it would affect or

cast in doubt the time for payment and that there would be cases where it would depend on the circumstances.

Bonell felt that such a warning might be very useful advice to have in the comments.

Para. 2 was consequently adopted as it stood.

With reference to para. 3, Fontaine reminded the Group of the suggestion to add "without prejudice to any other remedy".

Maskow considered there to be no harm in making such an addition because there certainly were cases where it was even desired that performance be made early. He had in fact seen many contracts where this was already written in the contract, but in these cases there would either be a modification of the contract or the obligee would at least not be entitled to any damages. On the other hand, there were cases where additional expenses might arise and maybe even damages, and it was for these cases that the provision was needed.

Bonell came back to the painting of the house case: A accepts the earlier performance of the painter and when A raises the point of the extra fees to be paid to the char woman who has to come in on Sunday instead of Monday he immediately offers to reimburse the extra expenses A has incurred. A pays, the painter gives him the reduction, they part and the next day A files a suit for damages because he claims that he has suffered certain harm from the fact that something had been done before the scheduled time. What would then the reaction of the other party be? This was an acceptance situation - if A did not accept, then of course it would be outside this rule, as one could never claim additional expenses if one did not accept.

Lando instead thought one could claim additional expenses even if one did not accept: one could refuse the earlier performance but have no legitimate interest in refusing it and therefore be forced to take it.

Bonell objected that this was not possible on the basis of this rule, and Maskow agreed, although he felt that it was possible on the basis of the rules on non-performance.

Lando also wondered what remedies would be available in a situation where a party had to accept an earlier performance because he had no legitimate interest in not doing so. That could really be one of the situations covered by Art. 3. The remedy of termination was not needed because he had to accept it; cases where a party could claim a reduction concerned mostly non-conforming performances and this was unlikely. He really doubted the need for such a rule. Whether or not it was a breach was open to discussion, but he really did not think that there was any need for any other remedy.

Farnsworth commented that one would then wonder again about Art. 7. If he understood the provision correctly, what it said was that if A came early and B said that he did not mind, it was understood (unless they said something to the contrary) that though there was no breach the person who came early would reimburse the other party for additional expenses. His question was, if the consequence was that he must pay 30 days afterwards and he did not get his money in time, would that then include the additional interest in borrowing money to pay the other person?

Bonell felt that this would be included under additional expenses.

To Date-Bah it seemed that the earlier comments ignored the distinction between a full modification and a full agreement and a grumbling acceptance. It seemed to him that someone who was told that the goods were at the quay and clearly did not want them but took in the goods almost under protest to accommodate the other party must preserve whatever remedy he had - it was not a full modification, and therefore it seemed to him that it still was a breach situation and that additional expenses would be damages.

Farnsworth observed that the question was how one could suffer damage by accepting an earlier performance. In the US the most common application of the general rule in para. 1 was the prepayment of loans and the right to interest: e.g. A has a loan in which B is paying 18% interest and B wants to pay it off - B has no right to, but he tenders, he gives A the money and A takes it and now he can get only 12% on loans. He thought A would be entitled to the difference unless there was a modification.

Bonell objected that B would have to pay the interest he would have paid if he had gone ahead, not the difference between that and new loans.

Farnsworth stressed that he was damaged to the extent of 6% because if he now lent money he would only get 12% whereas the other party's interest rate was 18%. If there was no right to early pre-payment and B still sent the cheque, what was A's situation if he cashed the cheque? Had he then given up all right to anything, or could he recover his loss?

Voting on para. 3 with the addition of "without prejudice to any other remedy" the Group accepted the provision by 8 votes for and 3 against. The text of the whole of Art. 9 therefore read:

- "(1) The obligee may reject an earlier performance unless he has no legitimate interest in doing so.
- (2) A party's acceptance of an earlier performance does not affect the time for the performance of his own obligation if it

has been fixed irrespective of the performance of the other party's obligations.

(3) Additional expenses caused to the other party by earlier performance are to be borne by the performing party, without prejudice to any other remedy".

Article 10

Introducing Article 10 Fontaine stated that paras. 2 - 4 had been added after the Rome meeting. They were inspired by s. 1.105 of the Principles of European Contract Law (PECL). Para. 1 instead was inspired by Art. 55 CISG, the only addition being the last words "or if no such price is available, to a reasonable price".

On the whole Tallon considered the idea to be sound and the texts to be good.

Lando and Maskow suggested deleting both "expressly" and "implicitly", to make no reference to the parties and to their presumed intentions, and to say instead "If a contract does not fix or make provision for determining the price, the price charged is that generally charged [the price to be fixed is that generally charged]".

Drobnig stated that he would go along with the striking out of "expressly or implicitly" at the beginning, but he thought that some legal systems would regard the reference to the parties and to their intentions as being helpful, and he therefore suggested keeping the reference to the parties.

Bonell agreed with Drobnig.

Thus, 3 favoured the shortest formula whereas 4 were against it.

The Group decided to eliminate the words "expressly or implicitly" in the first line of para. 1.

Date-Bah suggested that if the second "impliedly" was kept the words "in the absence of any indication to the contrary" would not be needed as it would be rebuttable, i.e. if it was "implied" it was rebuttable, in the same sense that an implied term can always be overruled by an express indication.

Crépeau did not think that "impliedly" added anything, and Fontaine stated that he would rather drop "impliedly" than "in the absence of any indication to the contrary".

Farnsworth also felt that "in the absence of any indication to the contrary" was needed.

It was therefore decided to delete the second "impliedly" in para. 1, the text of the provision consequently being: "If a contract does not fix or make provision for determining the price the parties are considered in the absence of any indication to the contrary to have made reference to the price generally charged at the time of the conclusion of the contract for such performances under comparable circumstances in the trade concerned, or if no such price is available, to a reasonable price".

Turning to para. 2, Fontaine stated that "or by a third party" had been placed in square brackets because in the version of the PECL (s. 1.105B(2)) which had served as a model there had then been no provision for a grossly exaggerated or unreasonable determination by a third person.

Bonell stated that what was at stake here was whether different criteria should be adopted depending on whether the price has to be determined by one of the parties or by a third person before allowing for the replacement of the performance, i.e. could one of the parties go further than a third person? The present text did not allow this: the limit was exactly the same for both.

Lando informed the Group that in the European Contract Law Group the similarity between arbitration and third party determination had been discussed. The reason no revision of a third party determination had been provided for was that in most legal systems it was very difficult to vacate an arbitral award even if it was unreasonable.

Furmston said that in England the current way to treat it was to say that the determination was binding between the parties unless there was fraud between one of the parties and the valuer, but that if the valuation was negligent the disappointed party could sue the valuer. Previously it had been said that a valuer was like an arbitrator and immune from suit, but in a decision of 1977 the House of Lords had reversed this. There clearly ought to be a remedy if the evaluation was grossly unreasonable, the question was should the remedy be brought through the contract or by an action against the valuer.

Bonell commented that if suing the valuer changed nothing in the transaction, then one would have to pay the unreasonably price or accept the unreasonably low price and then sue the valuer for the difference, and Furmston admitted that this was the case.

Farnsworth observed that he did not think that this would be allowed in the US, but there there also was the rule that the only exception was fraud in the case of third party determination, and then there were a number of cases that put a heavy pressure on that severe rule, that admitted an exception also if there was gross disparity or unreasonableness that amounted to fraud or was evidence of fraud. For American lawyers there was always a hope that it would be possible to

show gross unreasonableness - it was much harder to show fraud. There were very few cases of extraordinarily unfair determinations and he guessed that arbitrators using a fraud rule in these extreme cases would be able to handle the situation. He would not favour inviting parties to argue gross unreasonableness, so he favoured deleting the bracketed language. Where the price was to be determined by a third party gross unfairness should not be enough.

Maskow also preferred deleting the brackets. He saw no danger in arbitration coming into play. Nor did he see any big difference between the words which could be used in order to distinguish between the yardsticks that had been used in relation to one party or to a third party and fraud which in his view was outside the scope of the rules and should be covered by national law.

Fontaine, Furmston and Tallon preferred deleting the words in the brackets, mainly because the parties had agreed to choose the third party and therefore assumed the risk.

Lando stated that if the third party were deleted, the general interpretation would be that this would then be left to national law.

Tallon felt it to be impossible to dismiss fraud by implication.

Lando commented that fraud would operate then, and his conclusion was that then the solutions would be very different in different countries and the uniformity striven for would be lost.

Maskow considered that many cases which might arise under this related to consulting engineers. There were cases in which the contractor had no real choice in the selection of the consulting engineer because that person was imposed upon him by the customer. On the other hand, even if the consulting engineer was very closely linked to the customer, he still had to take certain decisions, such as the determination of the price by, e.g., assessing how much of the work had been done. Since these cases occurred frequently, he thought that there should be such a rule and that it was necessary to give a certain possibility to change the price which has been determined by the consulting engineer. Fraud was something very different: fraud was committed by the valuer; in which case it might, but must not necessarily, be the legal person who has the funds necessary to reimburse the damaged party. It was much easier to put things straight if one simply changed the price.

Lando observed that under FIDIC one always had the right to appeal to the arbitrator at the end of his decision.

Voting on the deletion of the square brackets and the words within them, which would have the consequence that they would not deal with the case where a third party determines an unreasonable price, the

Group favoured the deletion by 6 votes against 5.

Considering this narrow majority, Bonell wondered whether anything should be add about fraud.

Farnsworth commented that if the suggestion was to change para. 3 to say "Where the price is to be fixed by a third party, and he cannot or will not do so or does so fraudulently [...]" then that was fine. He also suggested that para. 3 should state "the parties are considered" or "a reasonable price shall be substituted" which was what was said in para. 2, because the form "deemed to be" troubled him: if A and B had a contract with the third party to fix the price and something happened to the third party and A went to court in New York and B went to court in Paris, then he did not know what the court would tell B in Paris, but the court in New York would tell A to go away, that they did not appoint third parties to fix the price. That made him very uneasy, because he was afraid that the judge in Paris would say that he was happy to fix a price and that B should come to see him to tell him of the case. It was true that such cases went to arbitration, but they did so two or three years later. What had happened was that the circumstance imagined had failed, and either one said that there was no contract any more, or one said what was stated in paras. 1 and 2, that the price was a reasonable price.

Tallon commented that in the cases where a third party was appointed to fix a price this was because there was no reasonable price, and it was very difficult to make this determination - it was necessary to have an expert. If what was stated was that a reasonable price had to be substituted, one party would say that the price should be 10, the other that it should be 20; they would go to court and the court would appoint an expert to determine the price, so one would end up with exactly the same solution.

Farnsworth objected that it was assumed that this would go to arbitrators and that would mean that the arbitrator would fix the price.

Bonell, Tallon and Fontaine commented that the arbitrator would appoint another person.

Lando wondered whether, if Farnsworth's solution were opted for, in the cases envisaged by Tallon the courts would not say that they could not fix a reasonable price because they did not have the means to do it, and that they therefore appointed another party to fix the price and this would be done under para. 3. If, however, the arbitrators were all, e.g., engineers, then they did not need to appoint an expert because they had the expertise themselves. Thus, Farnsworth's formula would cover both.

Farnsworth added that the problem usually arose long before the third person substitute could be appointed, because arbitration panels

took a long time to convene. It did seem to him that it would not be a bad idea to put the parties in the position to say that one was supposed to keep performing and the price was supposed to be a reasonable price so "let's make an arrangement for a price that is not too unreasonable to be paid - later on we will let the arbitrators tell us whether it was too high or too low and we will make an adjustment". That was the way business usually proceeded: businessmen would not wait for a year, a year and a half to find out what a substitute said to go ahead with the building of a bridge or whatever.

Date-Bah could see some merit in a substitute expert being appointed. His worry was which court did one go to? The provision said that the court may appoint - did that mean that the first person to go to his national court could get the court to appoint somebody? He would have thought that this mechanism of getting somebody to appoint such an expert would be useful as it would settle the problem of which decision maker was invoked. An arbitral tribunal might not yet have been empanelled, so one could not go to that, and that was not really determining a reasonable price, because a determination of an expert in that particular industry was required. The issue was who should nominate this expert.

Tallon commented that determination by third parties was often used in the sale of works of art and an expert had then to determine the authenticity of the work of art and set the price. Which court would make the nomination in such a case would depend on the law of the contract. Either the parties agreed, which meant that these Principles would be useless, or they did not agree and it would then be a court which would have to determine what price was a reasonable price.

Maskow stated that as the text stood, it was quite clear that if the parties had decided that an expert should decide, and for one reason or another this expert was not in a position to do so, then another expert should do the job. If the parties could not find such an expert themselves, then a court had to do so. Which court? - Of course it would be the court which had to decide everything according to the contract. However, here the competence of the courts was not dealt with; difficulties might of course arise (two different courts being competent, etc.), but it was not possible to solve all problems. In the case of a third person acting fraudulently, it would of course be necessary for a court to determine first of all whether there had been fraud, and it was then less clear that this same court should then proceed to nominate another expert - it would be more natural if the court itself then decided, although it might have to engage an expert as well. At that point it would be necessary to follow the approach of the original proposal. He himself did not favour the solution, but it was necessary to be consistent.

Farnsworth wondered whether an English court would appoint an expert. It was true that US courts would appoint experts whenever they

had an action before them over which they had jurisdiction, but if they, e.g., went into federal courts, which had jurisdiction in controversies with a minimum dollar amount and which would also entertain an action for a declaratory judgment, he suspected that it would be difficult or impossible anywhere to get a court to appoint an expert.

Tallon wondered whether a clause of the contract saying that the parties agreed that if the expert died before the end of the mission they would ask the court to appoint another expert, would be valid under American law.

Farnsworth was not sure - all the cases he knew in which people were appointed in this way were matters that were already before the court, i.e. the court had an estate for the administration of which it was able to appoint someone.

Bonell commented that in Italian law it was the court which then made the determination, which was something quite different. However, a special rule was provided for sales contracts for the determination of the price which specified that it was up to the President of the Tribunal to make the determination, independently of the sum involved. As this was completely outside ordinary judicial functions the provision even specified which Tribunal was concerned, i.e. the Tribunal of the place where the contract had been entered into (cf. Art. 1473 of the Italian Civil Code). He concluded that if the Italian legislators had felt the necessity of being so specific, they must have thought that the rule would not work otherwise.

Drobnig suggested that the consideration that courts in many countries might decline jurisdiction spoke for the solution indicated by Farnsworth, as if that were to be the case, then the main purpose of the rule, i.e. that of saving the contract, would fail, and the courts might say that there was no mechanism to determine the price, therefore there was no price, therefore there was no contract and the only way to get around this would be to proceed as had previously been done in other cases.

Farnsworth had a nightmare that he had a contract with Bonell, this happened, and he would run to New York and they would say that they did not do this, that Bonell would run to Italy and they would say yes we will pick you some fine Italian who will set you a price. In Drobnig's version of the nightmare, he would run to New York and they would say no, Bonell would run to Italy and they would say yes, go to the President of the Tribunal where the contract was made - where was it made? New York - go to New York. Then they had no contract. He thought that if one had a simple provision saying that the price was a reasonable price, this would empower the arbitrators to decide that as they were experts in the field concerned they would decide the price, or alternatively that as they knew nothing about this field they would implement the rules and get in an expert. It seemed to him that if one

used the short form and said what was said in para. 2, plus to some extent what was said in para. 1, that was not going to turn out so different and it would avoid the terrible problem of Bonell going to Rome, being told to go to New York and then being told to go home. An alternative would be to refer to the court in the seller's or the supplier's or the characteristic station.

Tallon considered that if the parties could not decide the price, then they must try to find a substitute expert. If they did not agree, they would go to the national judges, and if there was an arbitration clause to the arbitrators - he saw no problem in this.

Bonell specified that the determination of the price might well be made by the State court which was the court which would normally be competent to settle disputes arising out of that contract - this was a problem that was always having to be faced, but the intervention of a court just to appoint a new expert was not one of the usual interventions of a court, and if in some countries a special court was indicated (as in Italy) the courts might very well say that it was none of their business and therefore decline to make the appointment. He found this to be worrying, because the parties were in fact driven into a deadlock instead of being helped to avoid one.

Farnsworth observed that there surely were cases where it was clear from the contract that if the expert should disappear one should go to the arbitrators under the arbitration clause and he did not think that it was necessary to say that.

Bonell stressed that this was intended to be an ultima ratio rule.

The proposal to eliminate the reference to the court and to have a provision stating "Where the price is to be fixed by a third person, and he cannot or will not do so, the price shall be a reasonable price", was adopted by 8 votes in favour.

Turning to the proposal to add "or has done so fraudulently", Hartkamp found it to be too restrictive to insert tests which were different for the parties themselves and for third persons: there might be cases of third persons being more attached to one or other of the parties and then the test should not be different. He therefore preferred not including this phrase.

Fontaine agreed with Hartkamp that they should not deal with this subject here. He thought that the objections raised could be dealt with in the comments.

Maskow found that in a way gross negligence was an objective criterion, that it would determine whether the valuer had been negligent by asserting whether or not a price was reasonable. If the price did not

correspond to normal standards, it was possible to say that he had been grossly negligent. Fraud instead seemed to be a subjective test, and it was very difficult to establish.

Bonell found Maskow to be correct, but the point was that if they did not have a reference to such a possible limit to the third party determination, a reader of these rules might infer that as they provided for other possibilities ("cannot/will not do so") they intended a third party determination to be binding no matter what, even if they did not want to exclude any setting up of third party determination whatever and actually intended to refer to national law.

Voting on the suggested inclusion of the reference to fraud, only 3 were in favour of the addition. The rule therefore remained as already adopted. Furthermore, para. 2 remained without the square brackets and the words within them.

With reference to the word "grossly" in para. 2, Crépeau stated that while he could see that gross negligence would be perfectly legitimate in its use of the word "gross" because it brought it close to recklessness, he thought it should be sufficient just to be "unreasonable" or "unfair".

Tallon indicated that in the original French it had been "manifestement déraisonnable", i.e. it was a problem of translation. The idea was that it should be evident from the contract and no research should be necessary to determine the unreasonableness.

Furmston observed that if there was a provision which permitted the determination to be challenged simply on the grounds that it was unreasonable and then to substitute a reasonable price, then in effect that undercut having it fixed at all, because it could always be challenged. There were situations in which there was good economic sense in having one party determination (subject to some restraint). The typical English example was that of contracts which were made by filling stations tying them to a particular petrol company, where the petrol company has the right to fix the price. It was actually extremely difficult to devise any other way of fixing the price where one had a contract which ran for 5 or 10 years, where the commodity was very volatile and there were constraints on the petrol company from going outside what was grossly unreasonable, because of economic forces. If the retailer could always challenge it on the grounds that it was not reasonable, this would open up a whole area of disputes which would serve no useful purpose.

The Group decided to replace "grossly" by "manifestly". Furthermore, it was agreed to replace the term "third party" by "third person".

With reference to para. 4, Farnsworth suggested that the "nearest equivalent factor" might not be very near. In the case of long-term contracts for commodities (which was the context in which he knew this) even a slight difference in the indexes might mean hundreds of millions of dollars. There must be some safety valve such as "Where the price is to be fixed and there is one or more equivalent factors the nearest equivalent factor shall be treated as a substitute". He even had trouble with that, because it was assumed that there were several near factors and if one then imagined as a hypothetical that the nearest one dropped out, then the next nearest would be the nearest, and obviously one got farther and farther away, and it took only a penny per ton when selling millions of tons, to get a lot of money. Another way would be to replace "shall" by "may", giving the arbitrators discretion to treat the nearest equivalent factor as a substitute.

Date-Bah wondered whether "equivalent" made any difference. He suggested "nearest equivalent factor, if any" because "equivalent" must cut back by the category.

Tallon indicated that "near" was not "equivalent", so the "nearest equivalent" meant that there must be a close tie between the first factor and its nearest equivalent.

Farnsworth observed that sometimes a factor might be used if it were adapted and not treated as a substitute. If, for example, two indexes were similar, except that taxes were not included in one of them, then by calculating in the taxes one could perhaps come up with a substitute.

Drobnig wondered whether these circumstances would not be covered by "equivalent" -- clearly, if one index was with and one without taxes they were not as such equivalent and must be adapted. The comments should point out these problems.

Lando wondered whether it really was necessary to add something like "if any" or "if there is one" and to explain it in the comments -- "the nearest equivalent factor" meant that there must be an equivalent factor.

Bonell, however, pointed out that "nearest" was a relative concept.

Furmston observed that "nearest" was simply a subclass of equivalent factors. If there were no equivalent factors then none of them could be nearest.

Farnsworth felt that this had to be stated -- it could not be left to the imagination. The possibility had to be left open that there was no contract in such a case. He would not mind saying that if there was no equivalent factor the price "shall be a reasonable price".

Tallon did not think that this met the situation, because what would then be the reasonable price? If one had an index it was precisely because one could not foresee a reasonable price, so what was a reasonable price? It had to be fixed every month or every so many days.

Drobnig objected that the alternative would be that the contract was void and he wondered whether that was sensible.

Tallon found it to be sensible if the contract could not work any more.

Lando found the suggested addition "or if no such equivalent factor is available the price shall be a reasonable price" to be a good solution, but it did not meet Farnsworth's objection that the nearest equivalent factor could be unreasonable. It was generally for contracts of duration, when one had, e.g., that the price of the oil to be paid is determined with reference to the spot oil market in Rotterdam and this falls out for some time (as it did in 1973). Then the question was what was the nearest equivalent factor? There had been several cases on this. The courts sometimes made an artificial indexation by looking at the prices in Bremen and at some other spot market and by then taking the average of the two prices to make their own index. The result had not been a reasonable price but a reasonable indexation.

Voting on the new approach of deleting "nearest" and of adding a reference to a reasonable price, 8 members of the Group favoured this approach.

Date-Bah then suggested that what was missing was that what was being looked for here was a reasonable factor rather than a reasonable price, because it was the mode of determination which was at issue.

Maskow felt there to be no need to stick to the factor approach if it failed, if, for example, the factors had disappeared. At that point the reasonable price might also be determined by a comparison with comparable goods or services on the market. He therefore preferred not to refer to factors.

Tallon was afraid that a lot of power was being given to the courts. What was being stated here was that if there was an index which did not work and there was no substitute, then the courts would be entitled to remake the contract, and this was not well considered by practitioners who were against giving a large power to the judge to modify the contract.

Drobnig thought that there were two answers: 1) the parties were not precluded but were on the contrary invited by that wide power to indicate a substitute factor, either from the very beginning or later; 2) this wide power was being given in order to save the contract. Date-Bah's wording was nearer to what the parties had originally agreed

than the solution of going directly to the price would be. Fontaine also found that it would be more logical to refer to a substitutive factor, but he wondered whether it was practicable. There were cases when the parties could perhaps invent another factor, but an outside factor was chosen precisely to have an objective test and to recreate it was a little difficult.

Date-Bah stressed that a continuing adjustment might be necessary, it might be the case of an inflation indexation, and consequently the price was never once determined, it was constantly being adjusted. So, if the index fell away and one was determining a reasonable price, how was one to determine it? One needed a substitute factor or index to use. If one just said "a reasonable price" he was not sure what the mechanics of determining the reasonable price would be.

To Furmston it seemed that it was a question of what evidence would be a lead for a judge or arbitrator as to what a reasonable price would be. If there was a contract for deliveries at monthly intervals in which the price was indexed according to some index which disappeared, then surely almost all judges would decide that if deliveries continued that reasonable price would be reviewed with each delivery. Once one had done that, he saw no substantive difference between "a reasonable price" and "a price calculated in relation to reasonable factors", and as the notion of a consistent price had consistently been used, he saw no reason to depart from it.

Crépeau found the reference to "factors which do not exist" surprising.

Tallon pointed out that it was intended to cover cases where the reference made was wrong or where the factor in question had ceased to exist.

Maskow added that also factors which were expected to come into existence and which subsequently never had done so, would be covered.

The proposal to replace the reasonable price by a reference to reasonable factors was rejected by 4 votes against, 3 in favour and 2 abstentions. The text therefore remained as it stood.

The text of Art. 10 as finally adopted therefore read:

"(1) If a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such performances under comparable circumstances in the trade concerned, or if no such price is available, to a reasonable price.

- (2) Where the price is to be determined by one party whose determination is manifestly unreasonable, then notwithstanding any provision to the contrary, a reasonable price shall be substituted.
- (3) Where the price is to be fixed by a third person, and he cannot or will not do so, the price shall be a reasonable price.
- (4) Where the price is to be fixed by reference to factors which do not exist or have ceased to exist or to be accessible, the nearest equivalent factor shall be treated as a substitute."

Article 11

The Rapporteurs had presented four different versions of the provision on the place of performance. Introducing the provisions, Fontaine stated that the principles behind para. 1 were the same in all four versions and were those which had been accepted in Rome. The real differences appeared in the second paragraphs. Versions A1 and A2 dealt with the problem of one of the parties changing his place of business before performance - i.e. he actually physically moved - which could have consequences as regarded the place of performance. A1 only considered the creditor moving and related only to monetary obligations because para. 1 stated that a monetary obligation had to be performed at the creditor's place of business. A2 considered the moving of either of the parties, because either could move place of business. That would not have any influence on monetary obligations, because the rule was that these had to be paid at the creditor's place of business, but A2 would have an impact on other obligations where the place of business at the time of the conclusion of the contract was relevant. Thus, A1 and A2 only dealt with the real move and its consequences on the place of performance, either only in cases of monetary obligations or in all cases. The two B versions considered the case where one party decides to change place of performance without changing his place of business. In a symmetrical way B1 dealt with the case where the creditor either moves or decides that the debtor has to pay somewhere else, and B2 considered the cases where either party either has moved or has designated another place for performance. The difference between B1 and B2 and A1 and A2 was the phrase "at the time of the conclusion of the contract" (cf. para. 1(b) of A1 and B1).

Drobnig thought that in para. 1 both litt. (a) and (b) should conclude with the words "at the time of the conclusion of the contract".

Fontaine recalled that in Rome the Group had considered another case, i.e. that of when one party decides to change place of business but it is technically possible to say that the performance still has to be made where it had been originally decided that it should take place.

Bonell thought that what certainly had to be settled was where one had to perform in normal cases, where one had to perform if there in the meantime had been a change in place of business, and who had to bear the

additional costs. It was further possible to add a fourth question, i.e. could a creditor just decide to change place of performance even if he did not move?

Lando considered that it was not only a question of expenses - it was also a question of risk as changing the risk could involve completely changing the nature of the contract.

Drobnig's thoughts went in the same direction. All kinds of regulatory provisions might apply at one place of performance but not at another place of performance, so the person who wanted to make such a change could substantially affect the conditions, and he did not think that this should be allowed.

Tallon stated that what was being allowed was a unilateral modification of a contract, and if this was so, why should this only be allowed for the place of performance? If one could change the place of performance, then logically one could change the quality of the goods or the time of performance or anything else. He concluded that this might be a bit dangerous.

Fontaine agreed with Tallon. In Rome examples had been given such as counter trade contracts, where the compensation goods would have to be delivered to another party, and factoring where the payment should be made to the factor, but in these contracts that was very much connected with problems of the assignment of contracts, which the Principles did not cover. The case where a party moves had inevitably to be covered, but he would be in favour of not covering other cases.

None of the members of the Group being in favour of dealing with the possibility of allowing the creditor unilaterally to designate another place of performance, it was decided that they should consider versions A1 and A2 as the basis for their discussions.

Fontaine stated that he had felt that "at the time of the conclusion of the contract" was not necessary in A1 (1)(a) which referred to monetary obligations, because para. 2 already covered the consequences of the move. It was thus implied that the place of performance should be the creditor's place of business at the time of the conclusion of the contract. The rule was different for other obligations because the place of performance in those cases could be also the debtor's place of business.

Bonell wondered why the case of a party having to perform a monetary obligation at the creditor's new place of business should not be covered, if that of other obligations was. He felt this to be important, because either it was self-evident, in which case there was no need to state it anywhere, or it was not, in which case it should be stated in both provisions.

Drobnig stated that it was implied in lit. (a) that also there what was intended was the creditor's place of business at the time of the conclusion of the contract, and that this implication was derived from para. 2. Fontaine agreed that it was implied.

Date-Bah could not see why the implication should be that it was the place of business at the time of the conclusion of the contract: the creditor moved, and this formulation would indicate that the place of performance was wherever he had moved to.

Bonell added that in addition the debtor would not be entitled to recover expenses. Since the Principles did not state that the rule was that one had to pay at the place of business when the obligation was taken on, the creditor could claim that the debtor only did his duty when he paid him at the new place of business and that the debtor was not entitled to be compensated for the expenses he had incurred because that was not stated anywhere.

Fontaine instead considered that the creditor would have to reimburse the additional expenses incurred by the debtor.

Maskow pointed out that it was the formula used in CISG, which had always been interpreted to mean that a monetary obligation had to be paid at the creditor's place of business at the time of payment and that if the creditor had changed his place of business then he would have to compensate for the additional expenses incurred by the debtor.

Lando wondered what the reason was to restrict the rule to a money creditor.

Fontaine pointed out that the reasons were given in the report of the Rome meeting, which stated that "[i]n consideration of the fact that the provision had real importance only for monetary obligations, a suggestion was made to restrict it to this type of obligation, as does Article 57 of CISG. The example was given of the draft new Civil Code of the Netherlands, which restricts a similar provision to cases where performance should be made at the creditor's place of business, allowing the creditor to designate other places for performance [...]."

Tallon wondered why it was so in the draft new Civil Code of the Netherlands. Was there a reason to limit it to the creditor?

Hartkamp suggested that it was because changing the place of performance of a monetary obligation was less important in the whole contextual framework than changing the place of performance for other obligations, because that would involve all kinds of other elements and not only additional expenses.

Bonell stated that the issue at stake was what happened if the debtor in a non-monetary obligation changed place of business. Under A1

he had to perform at his original place of business, whereas under A2 he could perform at his new place of business but he had then to reimburse the expenses incurred by the other party. As regarded non-monetary obligations they agreed and were happy with the text as it stood: the creditor could move but had to reimburse additional expenses. As instead regarded non-monetary obligations they agreed that performance had to be at the debtor's place of business. A1 specified "debtor's place of business at the time of the conclusion of the contract" meaning that if he moved he would have to return to his original place of business for the performance, but then of course no additional costs would be incurred by the other party. A2 admitted both that the creditor could move and that he could perform at his new place of business, but then he had to reimburse the additional expenses incurred by the other party and so the time for the conclusion of the contract was not mentioned any more.

Fontaine felt A2 to be better, because it was absurd to demand performance at the former place of business.

Maskow felt that there should be a time limit and that the creditor should inform the debtor that he has moved and the debtor must have the possibility to react. He also considered that reimbursement for additional expenses was too little, as performance might take a longer time and cause other inconveniences. If, for example, payment is to be made on 31 May in a country to which it takes some time (e.g. 2 months) to get the payment, the process of payment would have to be begun two months earlier, but then at the time of payment the place of payment has changed as the creditor has changed his place of business. The creditor should therefore inform debtor of his new place of business in time to permit the debtor to organise the process of payment.

Bonell, Tallon and Hartkamp felt that this was a clear example of the general "duty to cooperate".

Maskow added that not only might it take longer to pay at another place of business, it might be more risky and additional licences might be necessary. In that case it was not merely a question of additional expenses: if, for example, payment between two countries took one week the creditor would assume that he had to prepare everything one week before payment was due; if he then learnt that the other party had changed his place of business and it would take four weeks to pay at the other place, he would be in delay.

Farnsworth considered that this had to be read in connection with other principles. If A was going to repair B's boat in Bristol and A moved to Southampton or Baltimore (Maryland), this rule could not possibly apply. B could not be expected to sail his little boat all the way there. So one had to assume here that the performance was essentially the same. He did not think that para. 2 applied to the case where the contract specified that it was to be done at a particular

place of business. He thought that it only applied to cases within para. 1, so one could say "such a party must bear" meaning a party under para. 1, and then not say anything about what happens if a party contracts to do it at Bristol and then moves to Southampton. The comments could perhaps state that para. 2 applied to cases under para. 1.

Date-Bah could not see any language that would exclude Farnsworth's case, unless one was going to argue frustration or some excuse doctrine. If, for example, the party who has moved sends the other an air ticket, etc., why should then this rule not be applicable?

Tallon suggested that it could be said that it was derived from the contract that it had to be performed in Bristol and not in Baltimore: if the boat was in Bristol and A was to repair it, it could be said that the contract fixed the place of performance, no matter where the place of business was.

Farnsworth felt that the problems being raised were problems in which the moves were of different magnitudes, i.e. the circumstances of the case varied. The only escape clause here was whether it was determinable from the contract, and that locked you into looking at the contract at the time it was made and all the horror cases being imagined had nothing to do with the situation at the time of the contract. What was needed was an escape clause that referred to later circumstances.

No solution to the problem having been found, it was agreed to renounce consideration of it. The Group agreed to adopt version A2. Art. 11 therefore read:

"(1) If the place of performance is not fixed by nor determinable from the contract, a party is to perform:

- (a) a monetary obligation, at the creditor's place of business;
- (b) any other obligation, at its own place of business.

(2) A party must bear any increase in the expenses incidental to performance which is caused by a change in his place of business subsequent to the conclusion of the contract".

Article 12

No comments having been made on Art. 12(1), the Group passed on to examine para. 2.

Fontaine stated that para. 2 had always been considered a difficult problem because of the variety of banking practices. The provision was vague, but it did say something: that one had to wait at least until the transfer to the creditor's financial institution became effective - there was no payment until that moment. Thus, for example, when the order of transfer was given legal payment still had to be effected, and it also meant that one did not have to wait until the moment that the

creditor received the money on his account. The transfer to the creditor's financial institution became effective somewhere in between. It was very difficult to go any further, but as a comparison Art. 11(1) and (2) of the UNCITRAL text on international credit transfers could be considered, which corresponded much to the rule the Principles had had at an earlier stage, when it had not been restricted to the accounts indicated: "(1) Unless otherwise agreed by the parties, payment of a monetary obligation may be made by a credit transfer to an account of the beneficiary in a bank. (2) 'The obligation of the debtor is discharged and the beneficiary's bank is indebted to the beneficiary to the extent of the payment order received by the beneficiary's bank when the payment order is accepted by the beneficiary's bank'. He pointed out that the comment to Art. 11(2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order, and that at the same time the beneficiary's bank became indebted to the beneficiary. The use of the acceptance of the payment order as the relevant point of time was consistent with former provisions (cf. UNCITRAL Working Group on International Payments, Nineteenth Session, New York, 10-21 July 1989 - International Credit Transfers: Comments on the Draft Model Law on International Credit Transfers Report of the Secretary-General. A/CN.4/WG.IV/WP.41).

Farnsworth considered that the assumption was that somebody had an obligation to pay, and that what one wanted to know was when that obligation was performed. He would therefore put the first phrase in terms of "An obligation to pay [of payment] is performed when [...]". It seemed to him that there was some sense in the language of the UNCITRAL document, that if A was supposed to pay B and he paid by means of his dealings with a financial institution, it was when that financial institution was indebted to B, i.e. when B could get the money, that would be the key.

Crépeau could understand that Farnsworth would prefer the phrase "the obligation is performed", except that the concept of payment was precisely the performance of an obligation, so the word "payment" was merely a caption word to describe all this. He suggested a phrase such as "payment occurs when a transfer becomes effective".

Drobnig agreed that para. 2 should specify the main purpose of that rule, i.e. the discharge of payment. He thought that the rule as expressed here was difficult to apply in practice, because there was no open record of when the transfer to the creditor's financial institution became effective. Since they were thinking in terms of when payment was made, he tended to think that it would be in the interest of an easier application of the rule if an external point were chosen. His own preference went to the time when the creditor's account was credited, because that was easy to determine and so the parties could immediately settle any dispute on that. He had to admit that that was perhaps slightly in favour of the creditor because it might take a little longer, but he would accept this disadvantage because it was more than

compensated for by the advantage of certainty.

Personally Fontaine also favoured a moment that was more easily determinable even though that put the risk of the delays, or of the bankruptcy, of the creditor's bank on the shoulders of the other party. What had to be realised, however, was that that meant that if the creditor's bank went bankrupt and never credited the creditor's account, there was no payment.

Furmston pointed out that the expression "credit unconditionally" was not the same as "credit". The practice of English banks was to enter transfers on to the customer's account on the day that the transfer was received in the office, but to regard the customer as not having the money until it actually arrived through the clearing system - which normally took about four days. The reason for this was that most transfers were in fact effective and it was administratively simpler to make the paper transaction on the day the piece of paper was received and then to subtract the money from the client's account in that very small percentage of cases where the transfer turned out actually to be ineffective. In that situation, the customer who drew against the creditor was actually regarded as overdrawn even if his statement showed him at all times as being in credit. There was an ambiguity there in what was meant by credit in that situation. He also wondered whether it ought to turn on banking practice - and indeed on banking efficiency. The effect of this was to put the risk of incompetence in the banking system on the debtor: he did the best he possibly could but whether he got the benefit of that depended entirely on the operation of the banking system. It could be argued that the creditor ought to take the risk of the incompetence of his own bank.

Date-Bah agreed: the creditor chose his bank and therefore placed his confidence in that bank, so if that bank was incompetent, why should the debtor have to suffer?

Bonell suggested that the alternative which had been proposed in the UNCITRAL context should not be forgotten, i.e. "transfer to the creditor's financial institution becomes effective", by which was intended not when the acceptance became effective, but when the order to transfer could no longer be recalled, at which time it would have entered the sphere of risk of the creditor's bank.

Drobnig considered this to be very different from the rules set out here, because this provision spoke of the transfer becoming effective, and in his view that did not mean the order to transfer, but that the funds were actually in the possession of the receiving bank, and that took more time. What was being referred to should be made clear.

Fontaine stated that the formula was intentionally vague: there were so many moments that could be considered and so many different practices, as well as modifications in procedure which were being

introduced because of electronic means, that it had been suggested that one should have a slightly vague formula which could be interpreted according to the changing circumstances.

Drobnig considered that the comments should then say that the words "when the transfer becomes effective" were ambiguous, that not only could they mean that the order could no longer be revoked by the debtor, they could also mean that the funds had in effect been transferred to the head office of the receiving bank, and furthermore that there may be days or even weeks between these two points in time. This strengthened his view that although the formula was very flexible, it imported insecurity.

Date-Bah took up the suggestion that it was relevant when the order for the transfer was completed, i.e. instead of saying "when the transfer to the creditor's institution becomes effective" it would perhaps be better to make it more precise, to say "when the order for the transfer to the creditor's financial institution is made": it is fixed there so that it is out of the debtor's control.

Fontaine stated that if the intention was to be logical with the idea that the debtor should not bear any of the risk involved in the creditor's bank, one should say "when the transfer order is received".

Hartkamp suggested when "the bank of the creditor has received payment or the transfer order", i.e. when the money had left the bank of the debtor.

Bonell did not consider this to be the same thing and instead suggested that payment was effective the moment the debtor could no longer revoke the transfer order.

Maskow felt that it was difficult to make the effectiveness dependent on criteria such as no longer revokable, and Hartkamp agreed with this.

Date-Bah felt that the point was when the transfer order had been executed, so basically one looked at the last point of departure from the bank.

Maskow wondered when the payment would be executed: when it was credited to the account, transferred to the bank or to the special branch?

Bonell came back to the situation where the debtor's bank was a small bank and three or four passages were necessary for the payment to arrive at the creditor's bank. It would then not be fair to consider payment as already having been made notwithstanding the fact that the money arrived very late because of the bank the debtor had chosen.

Maskow felt this not to be relevant: the decisive question was whether a payment should be considered to have been made if it arrived at the bank of the creditor, independently of how many banks were involved.

Date-Bah felt that the suggested rule would be unfair, that it was incompatible with the general notion that the creditor must receive the payment. One possibility was to move as far as reception by the creditor, but he thought that crediting was taking it too far.

Bonell suggested this formulation be aligned with UNCITRAL and it state "accepted", which meant that the bank had accepted the income but had not necessarily credited it.

The Group eventually adopted the following formulation for para. 2:

"(2) In case of payment by a transfer the obligation of the debtor is discharged when the transfer to the creditor's financial institution becomes effective".

Article 13

Opening the discussion on Article 13, Farnsworth suggested aligning para. 1 to Art. 12(1) by stating that payment can be made. Furthermore, it stated "in any form" - in any form of what? Money?

Fontaine suggested that they could perhaps say "payment of money due". Farnsworth considered that in such a case it would perhaps be better to say "of money due" also in Art. 12(1).

As regarded the "any form" of the payment, Drobnig, Hartkamp and Fontaine indicated that this referred to cheques, credit cards and cash. Bonell added that it did not say "by any means", which would imply different currencies, but "in any form", so it was not intended to relate to the currency problem.

Farnsworth explained that unless they struck "of money due" in the first phrase the word "form" would suggest to many readers that what was meant was "form of money", which was apparently not what was intended. He therefore suggested the wording "payment can be made in any form used in the ordinary course of business".

Hartkamp pointed out that "payment" in civil law language could mean all ways of discharging a debt, not only money.

The Group therefore decided to delete the words "of money due" in para. 1.

Maskow and Drobnig suggested that Art. 13 be placed before Art. 12.

The Group agreed with this suggestion, and it was consequently decided to place Art. 13 before Art. 12.

Turning to para. 2, Furmston stated that in England it had been held that payment by credit card extinguished the debt, unlike payment by cheque or banker's letter of credit.

Farnsworth observed that in the US the commercial code and general practice indicated that if the creditor took a bank instrument instead of a personal cheque, this would probably extinguish the obligation.

Furmston added that in England a banker's draft would be treated as good as cash, and Farnsworth confirmed that this was the case also in the US.

Drobnig observed that if this rule were adopted, which said that the case of credit cards would be covered, but that payment by credit card was only conditional on the eventual honouring of that promise, this would be acceptable, because even if the creditor did not receive payment from the credit card company he could still go to the debtor under the underlying obligation and ask for payment.

Furmston thought the argument was that if the retailer chose to market his product by putting an American Express sign up and to take American Express cards, he was effectively taking his rights against American Express in substitution for his rights against the clients.

Farnsworth added that in the US they would certainly also say that the retailer was more sophisticated and better able to evaluate and determine the risk than the client was.

Hartkamp observed that in that case he would say that the presumption was rebutted.

Farnsworth stated that he could think of quite a few cases in which the presumption was rebuttable, so there would be a presumption that was going to suggest the wrong answer: in the US a banker's draft or cashier cheque was regarded as absolute payment.

Hartkamp pointed out that in the Netherlands even cheques guaranteed by banks were not considered to be payment because the creditor might lose them on his way to the bank and the debtor would then have to pay again because otherwise he would be unjustifiably enriched.

Farnsworth observed that in the US Art. 13(1) would be thought of as a rule of sales law, as a contract rule; Art. 13(2) would be thought of as a rule of negotiable instruments, commercial papers, etc, which made him think that one could easily have Art. 13(1) without Art. 13(2).

Hartkamp favoured retaining the rule, allowing the presumption to be rebutted every now and then.

Farnsworth suggested that the rule for a personal cheque could be stated, which was the case they all agreed on, and then the comments could say that in the other cases it was a question of intention, or at least that they were not governed by these Principles. He thought that for instruments other than personal cheques it was rather difficult to state generally accepted rules.

Furmston observed that letters of credit were treated like cheques whereas credit cards and banker's drafts would be on the other side. All that could be said as a general proposition was that sometimes some instruments were only conditional payment, and that in some other cases the creditor took them in absolute payment and the debt was extinguished.

Bonell stated that the intention was probably to address also the question of bills of exchange here, so he suggested restricting the scope of the rule to personal cheques and bills of exchange.

Both Furmston and Farnsworth had no objections to this, although Farnsworth pointed out that the only difficulty was that in the US a bank draft was a bill of exchange. That was the difference between common law and Geneva: Geneva treated cheques and bills of exchange as separate things, whereas the common law treated a cheque as a kind of bill of exchange, so when one said "bill of exchange" one generally referred to every kind of a bill of exchange, whether it was a bank draft or whatever.

Bonell suggested that one could then say "order to pay different from a banker's draft" because the procedure was the same everywhere: as a customer of the bank one received such a draft only against cash payment or against debiting the amount on one's account.

Fontaine considered that a banker's draft was not very different from a transfer order as a transfer order one would count as debited and one had paid for the banker's draft.

Farnsworth suggested the wording "A personal cheque or similar order to pay", and that then the comments could explain the essential elements of the "similar order" and that there were some instruments (such as bank drafts) that in many or most legal systems were distinguished from personal cheques in this regard.

Drobnig suggested that a general reservation could be made to the effect that the rule only applied to instruments that, according to the practices of the place of payment, were not considered as extinguishing the debt.

Lando felt that Drobniĝ's proposal was useful, because it was not possible to impose special rules on what extinguished the debt in various legal systems.

Fontaine wondered whether it really would not be possible to impose a rule that was different. After all, if the parties had chosen these Principles they had chosen this rule, and if this rule was different from the interpretation in the courts of the country of the parties, would not then this rule prevail?

Tallon thought that the rule only intended to say that all instruments which had to be honoured, i.e. which were not in themselves a payment, were always presumed to be accepted on condition that they would be honoured.

Bonell observed that payment by credit card was certainly payment by a means which had to be honoured, the question was whether the risk that it would not be honoured fell on the debtor or on the creditor. According to these rules it did not fall on the creditor, according to existing law and practice in, for example, the UK it did fall on the creditor.

Fontaine felt that as it was drafted the provision was very broad. They could restrict it to instruments such as cheques and similar instruments, perhaps qualifying cheques as personal cheques. He suggested deleting the extension to the transfer of an obligation in general, but then either a general formula was found such as "cheque or similar instrument", which might be too vague, or at least a few instruments that were not controversial could be enumerated, and the comments could then say that the rule could be applied by analogy to some other instruments depending on the customs in the countries. His suggestion was therefore to keep the provision, to delete the phrase "in place of [...] some other obligation to pay", and to add to cheques one or two other undisputed instruments.

Drobniĝ was not in favour of this suggestion, because enumeration in this field tended to be outdated very soon. The problem had to be clarified. There were two border line areas: 1) certain instruments which would fall under this formula were already regarded as payment or as instruments in discharge so they should be left out, and 2) many other instruments which would not be covered by that narrow definition, the assigning of a debt to the creditor for example, should be included in this formula. He therefore thought that one could draw the circle relatively broadly as far as the other instruments were concerned. A relative limit should be introduced, i.e. instruments which according to the law of the place of payment were regarded as discharging an obligation to pay money should be excluded.

Furmston thought that in many countries there was no rule, there simply was a presumption, i.e. there had the same kind of rule as in the

US, which only said that it is presumed that parties do not take cheques in absolute payment and it is presumed that they take payment by credit card in absolute payment. In both cases it being possible for the parties to agree the opposite.

Drobnig did not feel bothered by that, as that was in accordance with the main rule as laid down. He was only concerned with the cases of the banker's draft and payment by credit card as Farnsworth had stated that under American law it was clear that these were regarded as discharges, which might be a custom or might be the law, but which in any case was a rule.

Furmston stated that what the situation was depended on what the parties had agreed, but if they had not agreed expressly, the court would usually infer that a creditor who took payment by credit card took it in absolute payment, and that a creditor who took it by cheque took it in conditional payment, but it would be open to the creditor to accept a cheque in absolute payment. If one said that in deciding what the parties intended one should construe their intention in the light of the law of the place of payment, that general notion would be acceptable.

Lando agreed with Drobnig: he also thought that it would be practical to have a broader rule. As far as the instruments which functioned as direct payment were concerned (and where the problem of honouring would not arise), consideration might be given to whether this might not be covered by the rule in para. 1. The comments could say that what was intended here was not only payment in money, but also payment by credit card as well as other instruments which released immediately. The rule in para. 2 could then be kept, and the comments could say that this rule applied to those cases where the tender of the document was not automatically releasing.

Bonell concluded that the starting point, or minimum solution, could be stating "cheque or similar instrument" as there was agreement as to the fact that the rule was appropriate everywhere for cheques and bills of exchange. Alternatively, a broader approach had been suggested, i.e. to enumerate everything and then to make a proviso for different criteria to be adopted according to the law of the place of payment. Again, Lando had suggested putting this in the comments.

Maskow expressed a preference for the present formula, although he felt that some examples on which all agreed could be added. This meant that "an order to pay [...]" might have to be deleted as some members had expressed the view that in their countries that could be regarded as absolute payment.

Fontaine suggested that in the enumeration alternative, instead of having a cheque and a bill of exchange one could have two or three such instruments and then have the formula "and similar instruments", where

the similar instruments would then be more narrowly interpreted.

Hartkamp favoured the solution proposed by Fontaine.

Lando referred to the wording of s. 1.104(2) of the PECL which stated that "[...] a creditor who either by virtue of par. 1 or voluntarily, accepts in place of payment (a) a cheque or other negotiable instrument, or (b) whether it is written or oral, an order to pay, assignment or other obligation to pay, is presumed to do so only on condition that it will be honoured".

Furmston objected that in England 95% of cheques were not negotiable instruments, because they were crossed in order to make them non-negotiable. They were all bills of exchange. He would therefore prefer "cheque or other bill of exchange" rather than "cheque or other negotiable instrument".

Farnsworth stated that a bill of exchange was an order to pay and a cheque, whether it was or was not a bill of exchange, was an order to pay. It might thus be possible to get out of this by saying "a cheque or other order to pay". It would not cover promissory notes, so if one wanted to cover them, they would have to be added.

Art. 13 as adopted therefore read:

- "(1) Payment can be made in any form used in the ordinary course of business at the place of payment.
- (2) However, a creditor who accepts, either by virtue of paragraph (1) or voluntarily, a cheque, an other order to pay or a promise to pay, is presumed to do so only on condition that it will be honoured".

Article 14

Introducing Article 14, Fontaine stated that it dealt with the rare situation where the contract does not indicate in which currency the monetary obligation is due. Its formulation had been modified slightly in Rome to harmonise it with the phrasing of Art. 10.

Drobnig had the impression that this provision did not distinguish properly between the currency of account and the currency of payment. The text as such seemed to be directed at the currency of payment, but the comments appeared to think of both. He thought that what was intended should be made clear.

Bonell reminded the Group that at the Rome meeting it had been decided to delete a first paragraph dealing with the problem of what was intended by the "currency of account", i.e. once the contract stated

that the obligation was due in US\$ or in f Sterling or in Italian Lire, was that then necessarily also the currency of payment? There had been a rule stating that the debtor could always choose to pay in the local currency, but then it had been objected that the rule should be the reverse, that it was not necessary for a contract to state explicitly that payment had to be made in this particular currency; on the contrary: if nothing was stated in the contract then payment must be made in this currency. It had not been possible to reach an agreement and it had been decided to delete the provision and so now Art. 14 only addressed the rare situation where the contract does not state anything at all, meaning that there is not even an indication of the currency of account.

Fontaine observed that the GDR provision which had served as a model did not appear to distinguish very clearly between the currency of account and the currency of payment.

Maskow explained that in the GDR they did not have such a distinction, as they started from the assumption that if a certain currency was indicated in the contract payment would be in that currency.

Furmston observed that Art. 14 did not say what the currency was in many cases, and in others one might reach the conclusion without Art. 14: it was not difficult to guess that transactions for the sale of oil were usually in US\$.

Maskow observed that the main examples were certain commodities where the price was in a certain currency. There were also sometimes agreements between States which specified that all transactions should be made in a certain currency, and this case would also be covered by this article.

Fontaine reminded the Group that the now deleted rule on currency of payment had stated "Unless the circumstances, including exchange regulations, indicate otherwise, a monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity". In the course of the Rome meeting it had been observed that international commercial practice was opposed to the rule. It had been recalled that "also in Vienna in the negotiations for the adoption of CISG a similar provision had been rejected because of the interest of countries with weak currencies to receive payment in the agreed currency. [...] if such a rule were adopted then in many cases a debtor from a country with a weak currency might feel tempted to insist on having the place of payment fixed in his country so as to be allowed to pay in his national currency notwithstanding the currency in which the price has been expressed in the contract. It was true that such a rule appeared in the Geneva Uniform Law on Bills of Exchange (cf. Art. 41): significantly enough, however, the UNCITRAL draft Convention on

Bills of Exchange and Promissory Notes no longer contained it (cf. Art. 71)" (cf Report of the Rome Meeting, P.C. - Misc. 11, p. 18).

Maskow did not see any very great possibilities to have a rule, as the interests were too divided. In Vienna, some countries (Latin American countries and Spain) had considered that payment in the currency of the country of the debtor should be allowed, here, payment in the currency of the country of the creditor was preferred, because that was the place of payment. Here there would of course be a strong majority as most of the members of the Group came from developed market economies, but he thought that the majority of the other countries would be of a different opinion and they would not accept the rules if they felt that their interests were not covered.

Fontaine recalled that the provision as originally drafted had met with considerable criticism in Potsdam (cf. Report of the Potsdam meeting, P.C. - Misc.8, p. 13 - 14).

Lando agreed with Maskow that in the absence of developing countries one should not draft for them - their interests had to be taken into account.

Drobnig and Hartkamp both suggested that Art. 14 as it now stood be deleted.

Drobnig added that of course any rule had to take into account the interests of countries which did not have full convertibility or which did not have a convertible currency, but although he did not see that this could be taken care of in a rule which mainly indicated which exchange rate was to be taken into account.

Hartkamp suggested having the old rule of Art. 14(1) plus "unless the currency of account and the currency of payment are not freely convertible", i.e. the rule could be kept for all western currencies and at the same time it could be indicated that the rule would be the opposite for the other currencies.

Tallon suggested that there might be situations between the two extremes of convertible and non-convertible currencies - under what rule would countries where there was a control over currency movements come? It was not a prohibition, it was not freedom but a measure of control and authorisation.

Fontaine suggested a shorter formula: "A monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the place of payment if that currency is convertible /freely convertible/"

Maskow observed that that would mean that payment had to be made in the currency agreed upon, but that where there was a freely convertible

currency at the place of payment one could pay in this currency even if the contract said otherwise.

Bonell specified that what was stated in the contract was the currency of account and what one actually paid in was the currency of payment. It was allowed to pay in the currency of the place of payment if this currency was freely convertible unless the contract clearly indicated that the parties intended to have the same currency of payment as currency of account.

Furmston suggested that a loan agreement would be a good example. One borrowed one million US\$ but one could repay in a number of countries and the assumption there would be that if one repaid in London one had to repay in pounds the equivalent of the amount in US\$. So the US\$ would be the money of account, the measure of what one owed, and the pounds would be the money of payment.

Maskow wondered where they got that from: if the contract only said that the loan was of one million US\$ to be repaid at such and such a date, then in his view it was agreed that US\$ had to be paid.

Bonell pointed out that account had to be taken of the western-type monetary system under which each State was sovereign over its national currency, which meant that it considered the rule to be that every monetary obligation had to be paid in its currency. If foreign currency came into the country (which it might because it was of course allowed to contract with a foreigner and to accept his currency), then the State nevertheless would not renounce its sovereignty and therefore imposed a choice between the foreign currency indicated in the contract and its local currency. In practice it posed no problem, because one then just had to convert it into that other foreign currency, but just because this might at times be too burdensome for the parties and/or because exchange risks were involved, there was the practice of stating expressly in the contract that the currency in which the obligation was expressed was the currency in which the obligation had to be paid. This was also to be found in the Geneva Uniform Laws on Bills of Exchange. He realised that for countries which did not have a freely convertible currency such a rule made no sense, so the compromise solution was just to hint at the problem and to indicate that those situations where the opposite rules applied also had to be taken into account. He thought that the proviso "unless that currency is not fully convertible" made it very clear that exactly the opposite would apply in those situations.

Maskow wondered what the opposite rule would be, i.e. if the currency of the place of payment was not fully convertible.

Fontaine indicated that in that case the money of account could be paid. Thus, if the conditions were not fulfilled, one could not pay in the currency of the place of payment.

Maskow pointed out that there were cases in which no currency and no price were indicated in the contract. If there was no price and the price had to be determined according to the Principles it had to be determined in a certain currency, but which? He would hesitate to accept the currency of account, because one could say that that was the currency of the seller or the person who made the characteristic performance who of course would have to bear the expenses of the currency, and then one was back at square one.

Bonell considered this to be a different problem: if the currency was not determined in the contract (and that would be the currency of account) then the currency had to be determined and he had understood Art. 14 in the sense that it then provided auxiliary criteria for the determination. Once it had been established that the currency was, e.g., the currency customary for that commodity, one might still have to face the problem of a possible divergence between that currency (the currency of account) and the currency in which the obligation would actually be paid (currency of payment).

Maskow expressed strong reservations, because the point of departure was now always the Principles and the assumption was that the place of payment was the place of the creditor, but the parties could also agree on a different place of payment. Thus, a contract for £1000 which was to be paid in Italy could according to this rule be paid in lire. For GDR enterprises that would come as a surprise. They might not always have easy access to a currency exchange, they might actually get the information later and then the rule would require them to state explicitly that the actual payment had to be made in pounds. This he did not feel that he could go along with.

Furmston did not understand why what was a well-established distinction between money of account and money of payment was actually held to have values which were favourable to developed as against developing countries. He thought of it as simply a device for measuring the obligation and deciding how you could pay it, which were two separate questions. He thought that an attempt to deal with it which ignored that distinction was bound to be confused. One needed to state the distinction and then to state the rules for identifying in general terms how one found out what the money of account and the money of payment were. They might often be the same, but often they were not.

Bonell and Tallon suggested using the Potsdam rule with the amendment suggested by Hartkamp (the reference to convertible currencies) and put it in square brackets, and then also keep Art. 14 for the time being, placing also this article in square brackets. The Group agreed with this suggestion and it was therefore so decided.

Hartkamp suggested a tentative draft of the first of the two provisions, which read: "A monetary obligation due in a currency other than that of the place of payment may be paid in the currency of the

place of payment unless (a) that currency is not freely convertible; (b) the parties have agreed that payment should be made effectively in the currency in which the obligation was expressed".

Drobnig reminded the Group of one element in the original Art. 14 which was missing in the formulation suggested by Hartkamp, i.e. the rate of exchange. Hartkamp thought that this should perhaps be added before lit. (a), but Fontaine drew attention to the fact that there was a para. 2 to the original Art. 14 (cf. Doc. 39) covering the case where the debtor has not paid at the date of maturity, in which the creditor "may demand payment in the currency of the place of payment according to the rate of exchange prevailing there at the date of maturity or at the date of actual payment".

Article 15

Introducing Article 15, Fontaine reminded the Group that in an earlier version there had been a wider provision about the costs incurred in performing an obligation, but the majority of the Group had thought that the rule was not necessary: if it had been decided where someone was to perform, the problems had already been covered, because if one said that he had to perform at a certain place, it implied that all the costs in performing at that place were borne by the person who had to perform. Only the part of the general rule according to which each party would have to bear the cost of taxes and duties connected with his part of the obligation had been kept. The second question was what about the taxes connected with the conclusion of the contract? The third question was whether the link created between taxes and duties connected with the performance of the obligation was workable. Some taxes were clearly linked with some specific performance like delivery of the goods, but was a general sales tax attributable to either party according to this criterion? What about the VAT?

Furmston wondered whether it would make any difference if the seller quoted a VAT inclusive or exclusive price. In the UK, if one was selling at retail, one was legally obliged to quote VAT inclusive prices, but in commercial practice the standard practice was to quote VAT exclusive prices, and he could not believe that it was normally intended that the supplier would bear the tax, as the whole purpose of the tax was actually to move money from the customer.

Bonell admitted that this was correct, although he wondered whether, when one spoke in terms of "bear the cost" one did not speak of who was ultimately responsible. Even if the VAT was ultimately reversed onto the customer, it was still the seller who had to pay the fiscal authorities.

Farnsworth stated that "bear" referred to who ultimately had the burden and not to who paid.

Farnsworth wondered what "connected" meant. If he went into a restaurant to have a meal and tax was added (which in New York would be an 8% sales tax), it would be connected with his payment because it was part of what he paid; it would also be connected with the seller's performance, i.e. it was arguably connected with both. It would be 8% on a number that he was given, but would that be 8% on what he was charged or on what he had to pay?

Bonell considered that this was ultimately related to the performance of the restaurant. The tax authorities said that if A sold something, if he gave a service, took a lawyer's fee etc. he added on the VAT. Obviously the client had to pay, just as he had to pay for all the other costs A incurred, but A was responsible vis-à-vis the tax authorities.

Furmston did not think that Bonell's answer was an accurate analysis of the nature of VAT as he understood it. VAT was different from a sales tax in that it was paid at every stage of the provision of the service, but the cost was borne by the ultimate consumer and what one had was a series of transfers, so people in the middle both paid and received VAT. In fact, it was neutral fiscally, because there were inputs and outputs and what one paid was the balance, so in fact if A was an ultimate supplier he did not pay any VAT at all: all he did was act as an unpaid tax collector and the person who bore the cost was the person at the end of the line who could not pass it on to anybody else.

Farnsworth concluded that it therefore was not so simple as "who pays the tax collector" and then his question on the sales tax was not answered either.

Bonell wondered whether it was agreed that the seller bore the cost of packing the goods that he sold; if so, who would ultimately bear the costs the seller had incurred? He saw no difference in this respect between tax as a cost and any other cost. Everyone knew that ultimately it would be the purchaser who had to pay, but he would have thought that here what was being considered was who was ultimately responsible.

Furmston said that presumably this rule was a rule designed to state what happened if nobody thought to say, and so the question was: suppose the seller quotes a price which does not include VAT or does not include sales tax, would he be entitled to add it on? That was the critical question.

Fontaine considered that part of the problem was that there was a desire to distribute the burden of the cost of taxes (each party has to bear the costs of taxes connected with the performance of his obligations). In more general provisions - but it could be restricted to taxes and duties - one just said that it was the performing party who had to bear the costs of performance in all cases.

Bonell agreed that a more general formula would have the advantage of covering something which so far had been left out and not to enter into too great details by passing directly to taxes and duties.

Tallon and Crépeau suggested that the cost factor should also be taken into account - why should only taxes be considered? There were things that were not quite taxes, and transaction costs, costs for a verification of quality, would they be taxes or expenses?

Fontaine recalled that originally there had been a provision, but it had been pointed out that saying where one had to perform implied that every cost involved in performing there would naturally be the burden of the performing party, so there was no need for such a provision. The same could, however, be said of taxes and duties, so he could not see why a rule about taxes and duties would still be needed.

Maskow stated that he would prefer not to delete the provision, but instead to use a more generic formula, as it was not always so obvious and self evident. As far as taxes, and especially VAT, were concerned, he thought that the obligation to pay depended on where it was levied. As regarded other costs, even though these were not exactly connected with the permission, the same principle should apply, i.e. they should be borne by the party in whose country such costs were levied.

Farnsworth felt that the comments had to say that this was a general rule that would answer many cases, but that, e.g. in the case of some taxes, the rule did not give a clear answer. That was the advantage of generalising the provision: the fault with the present text was that it suggested that it gave an answer for taxes.

Tallon wondered whether, if the text were broadened to cover taxes, duties and other costs, this would also cover the "frais accessoires" of the conclusion of the contract.

Fontaine indicated that here only costs connected with performance would be covered, and that the possibility of covering the costs involved in formation should be considered in the chapter on formation.

Drobnig felt that it would also be very important to make it clear that parties may provide otherwise, and to do so even in the text itself, because especially in connection with taxes and duties the impression might be given that this was public law so who had to bear them was fixed. One had to distinguish between the fiscal debtor and the ultimate contractual debtor. Who had to bear the costs of taxes and duties should also be explained in the comments.

In view of the comments made, Art. 15 was adopted with the following wording:

"Each party shall bear the costs of performance of its obligations".

Article 16

Introducing Article 16, Fontaine stated that Arts. 16 and 17 dealt with the imputation of payments. Art. 16 was the result of a merging of different provisions. Art. 16(1) was itself also the result of the merging of two former paragraphs, but was a revised text inspired by s. 1.116 of the PECL.

Hartkamp did not like para. 2: the imputation of payments should be done either by the debtor or by law. Of course the creditor and the debtor might agree on a different way of imputation, but he would hesitate to allow the creditor to make the imputation if the debtor did not indicate to which obligation he wanted the payment to be imputed. Art. 1255 of the French Civil Code spoke of the debtor accepting a "quittance" ("Lorsque le débiteur de diverses dettes a accepté une quittance par laquelle le créancier a imputé ce qu'il a reçu sur l'une de ces dettes spécialement, le débiteur ne peut plus demander l'imputation sur une dette différente, à moins qu'il n'y ait eu dol ou surprise de la part du créancier") and in the Netherlands they had interpreted this article to mean that the debtor should also agree to the imputation made by the creditor.

Bonell added that the Italian Civil Code did not allow unilateral imputation on the part of the creditor unless it had been accepted by the debtor.

Farnsworth stated that most creditors unilaterally declared how the payments would be imputed when the contract was made, and the debtor did not have much to say about it. He therefore did not know whether it made that much difference - in most cases of commercial contracts where it was important, the creditor would have a rule in a form contract. The sequence in para. 2 was rarely of importance because in the important cases the contract took care of it in a manner favourable to the creditor.

Maskow had no strong feelings, but felt that a rule such as para. 2 might be useful. Normally the imputation of the payment would not be expressly stated, although it might be clear from the amount actually transferred to which obligation it should be imputed. Similarly, the creditor might request a specific sum which had not been paid, and by doing so he would determine which obligations remained and therefore to which the payment would be imputed. The rule in para. 2 would give him this right, and this might prevent recourse to the complicated criteria in para. 3.

The Group finally decided to keep para. 2.

Farnsworth queried the use of the words "which are due" in para. 1: could not the debtor send payment asking that it be imputed to a debt falling due the following week?

Crépeau pointed out that in the theory of imputation it started only from the exigibility: it was a matter of obligations which were due and not which were owed.

Drobnig stated that statutory rules on imputation started with the criteria indicated in para. 3(a), but in paras. 1 and 2 also obligations which fell due in the future had to be envisaged.

The Group decided to delete "which are due" in para. 1. It also decided other drafting changes, and Art. 16 was therefore adopted as follows:

"(1) A debtor owing several monetary obligations to the same creditor may specify at the time of payment the debt to which he intends the payment to be applied. However, the payment discharges first any expenses, then interests due and finally the principal.

(2) If the debtor does not make such a specification, the creditor may, within a reasonable period of time after payment, declare to the debtor the obligation to which he imputes the payment, provided that obligation is due and undisputed.

(3) In the absence of imputation under paragraphs (1) or (2), payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:

(a) an obligation which is due or which is the first to fall due;

(b) an obligation for which the creditor has least security;

(c) the obligation which is the most burdensome for the debtor;

(d) the obligation which has arisen first.

If none of the preceding criteria applies, payment is imputed to all the obligations proportionally".

Article 17

With reference to Article 17, Tallon suggested that the illustration be changed, as one could not have security for a non-monetary obligation.

No other comments being made, Art. 17 was adopted as it stood.

Article 18

Introducing Article 18, Maskow explained that the aim of the article was to settle the relations of the parties in connection with public permission requirements. The first problem which arose was that if such permission was missing no contract had as yet been concluded, and the problem might arise of whether rights and duties between the parties could come into being before a contract had been concluded. According to the approach adopted this was possible and this corresponded to modern trends. This had inter alia the result of reducing the differences between the contractual and the pre-contractual stage, i.e. of increasingly accepting that the making of a contract had the character of a process with the rights and duties of the parties increasing with each step. Art. 18 made it clear which party had to apply for permission, i.e. the party who has his place of business in the country where the permission requirement is laid down or, if none of the parties has his place of business there, then the party who has to render his performance in that country. One of the changes introduced related to the question of which permits should be covered, and that had been indicated by using the word "public", i.e. not permission by a public authority, as also private entities, such as banks, might be entrusted with the granting of certain permits. In relation to the character of this obligation, it had been decided that it was an "obligation de moyens".

Drobnig had doubts on whether the solution adopted in Art. 18 was the correct one. If, for example, he wanted to buy a moveable in Switzerland he would have to apply for permission as he was not a Swiss citizen. According to Art. 18(1), if the seller was Swiss or domiciled in Switzerland, he would have to apply for the permission, but that did not make sense, because the Swiss wanted to know something about the buyer. He therefore wondered whether it was a good idea to try to go against the requirements specifying who had to apply which were set in public permission statutes by laying down this rule in Art. 18(1). The authority concerned might even disregard an application made by a different person. The principle was different in para. 2, which was transaction-related or performance-related and not person-related. Here again, he had some doubts and wondered whether it was not laying down a private law rule which did not take into account the public law requirements and which would therefore not work in all cases. He suggested that in both cases a reservation should at least be made to the effect that the obligation to make an application was determined in the first instance by the statute establishing the public requirement.

Bonell wondered whether Drobnig then distinguished between paras. 1 and 2 by saying that para. 2 was contract-related or performance-related whereas para. 1 was person-related. He had instead understood the difference as being that para. 1 addressed the situation where a party has his place of business in the State and para. 2 where neither party has his place of business in that State.

Drobnig did not agree. What he thought was that in both cases it was the statute itself which should in the first place determine which of the parties must apply, and it was probable that, in the case of para. 2, it was easier that the solution laid down there would be more generally accepted because it was transaction/performance-related, whereas para. 1 adopted a purely accidental solution in that it laid down that it was the party who happened to reside in the country of the permission requirement which had to apply.

Date-Bah agreed with Drobnig, because this was the type of point that would lead to sensitivity in host countries. It seemed to be important that this rule address the situation where it is unclear which party should bear the burden of the obligation, i.e. where the statute does not specify it, or where either party may be subject to the obligation, because otherwise one tried to overrule what might be mandatory rules in the host countries. It therefore seemed to him that this provision needed to be refocussed to become a subsidiary rule where the statute or other public regulation does not specify which party has the obligation. He did not understand why "in the absence of any indication to the contrary" had been left out: it seemed to him that this was a presumptive rule and that there should be some indication that it can be rebutted.

Maskow saw no objections to including this latter part as a hint to other agreements of the parties. He thought that together with this other provision one could say "or if the rules requiring permission requirements so require", and then make clear in the comments that if the party who does not have to apply has to furnish information, then he is obliged to give this information.

Farnsworth thought that it would be useful to have something like this. He thought that often a statute or regulation would specify who it was that was formally to apply, but experience suggested that the way it arose practically, was that A wanted to buy something in Switzerland and the question was who had to get the papers etc. It would not make much difference ultimately whether the signature at the bottom was A's or the Swiss seller's, the real question was who had to do all the work above the signature, and he thought that it might not be an unreasonable rule to say that that work should be done by the Swiss seller who would obtain the appropriate information. A lot would be taken care of by the provision on cooperation, but basically it regarded who had the burden. Sometimes permission was required to get something out of the country (e.g. works of art), and it should be made clear that this was not being dealt with here.

Tallon stated that he instead found which person signed the application to be very important, as quite often such requirements had penal sanctions and the one who would be punished was the one who had signed, not the one who had furnished the indications. It was therefore necessary to know who was responsible and it was the one who signed that

was responsible.

Bonell thus concluded that there were two concrete proposals for amendment, i.e. to make two provisos, one for the law of the State itself, and the other for the parties. No objections had been raised to these proposals. He wondered whether with such provisos the residual rules as laid down were considered to be satisfactory.

Furmston stated that the English rule was that if the contract did not say anything, one had to do the best one could with all the circumstances. A mechanical rule of this kind had actually been rejected on the grounds that in practice why one had to have the permission was very important, and the typical example where the buyer had to get permission for an export licence was where the destination of the goods was important. If A was buying a computer from an American computer company, they would be very interested in whether he planned to sell it to a Socialist country because where it went was very important, and in general it was the buyer who knew what he planned to do with the goods and not the seller: the seller only knew who the buyer was. Cases would undoubtedly be encountered where this rule, although clear, would actually come up with a not wholly satisfactory result. The question of whether one needed a permission was a question of public law in the particular State, but as a matter of contract law between the buyer and seller, English courts had said that one needed to look at the policy behind the rule which required permission in order to decide whether it was the buyer or the seller who had to apply.

Drobnig confirmed this. In the Federal Republic of Germany this question had arisen in connection with cases concerning the export of high sensitivity material from the USA, where the German buyers applied for permission and of course gave the wrong destinations: they wanted to export it to Rostock but gave Copenhagen as place of destination. This showed that in instances where export restrictions were made on political grounds what was interesting was the destination of the goods, which the buyer and not the seller knew.

Furmston presumed that this was for cases where the contract contained no express provision - obviously the parties could make whatever agreement they liked, so the question was what was the presumption? This was simple, but he thought that there would be cases where it nevertheless produced the wrong result. If that objection commanded any support, then consideration would have to be given to how to incorporate it.

Lando referred to a case he had had concerning a customs document which had been filled out within the EEC: the freight forwarder had to do the work, and the question was whether it should be charged to the buyer or to the seller. He had come to the conclusion that the real test was who was interested in the document, the seller or the buyer, because if the seller was relieved of some duties then it was the seller

who should pay for the filling out of the document, whereas if it was the buyer who was interested in the document because he in turn could get some customs advantages, then it was the buyer who should pay.

Farnsworth suggested adding at the comma the phrase: "where the law of the State requires a public permission the absence of which would wholly or in part affect the validity of the contract or render its performance impossible, and that law or the circumstances do not indicate otherwise, the party who has his place of business [...]" He suggested that "wholly or in part" might be left out, because if the validity of the contract was affected in part, it was affected. This might be put in the comments.

Lando wondered whether it really had to be conditioned on the validity of the contract. In his opinion it might pertain to cases where there was a permission requirement imposed by the Government, one was penalised if one did not have the permission, but the validity of the contract was not affected, although it could of course be considered legal impossibility. He observed that there were situations where none of the parties had their place of business in that country, and they came up against a long-arm statute which attempted to impose some rules upon the licensees of its own firm or on its branches abroad. He suggested the comments say, e.g., that this presupposed that under the relevant conflicts rules this permission requirement would not be disregarded.

Furmston thought that it was at least arguable that the text took care of that, because one could argue that permission was not required because it was a question of what law legitimately required permission.

Drobnig thought that the same problem arose under § 1. The best solution would probably be that it be said somewhere in the comments that the following rules assumed that under the applicable law those public requirements had to be respected.

Lando referred to the comments on p. 40 of Doc. 44, which under (b) stated that "Which of the different national permission requirements, if any, are to be taken into account in each single case has to be determined in accordance with the applicable law including rules of private international law. National courts nowadays tend to give effect only to the public permission requirement of the lex fori or possibly to those of the lex contractus, [...]" The first sentence was quite correct and the same might be said of the second sentence, although as regarded this latter that might not be the future law one wanted to see, as the policy was to extend mutual help. In view of Art. 7(1) of the 1980 Rome Convention, which especially stated that regard may be had to other laws than those of the lex fori and the lex contractus a certain indication should perhaps be given to the fact that they were aware of this trend.

Bonell doubted the opportuneness of making such precise statements in the comments, considering the nature of the comments. In substance he shared Lando's view, i.e. he would not subscribe such a statement as a recommendation for the future, but apart from the merit of the statement, he did wonder whether statements of this kind should be in the comments. He therefore preferred deleting the last sentence.

Drobnig instead felt the sentence to be quite useful. It was not a comment on the rule itself, and in fact it was necessary as the preceding sentence made it clear that the question of which requirements had to be taken into account was not solved by these Principles and it was then useful to indicate at least the main solutions, without giving preference to any one of them. He felt this to be legitimate in order to give information to those who were not so familiar with this problem. He did, however, share Lando's view that the last "while" was a little too critical and too narrow - it should be a little more open, particularly in consideration of Art. 7(1) of the Rome Convention.

Farnsworth presented a proposal for Art. 18 which read:

"Where the law of a State requires a public permission affecting the validity of the contract or making its performance impossible and that law or the circumstances do not indicate otherwise

(a) if only one party has his place of business in that State, that party shall take the measures necessary to obtain the permission; and

(b) in any other case the party whose performance requires permission shall take the necessary measures".

He stated that it only contained one substantive change as compared with the earlier draft. It made it much easier to speak in (a) of the case where one, or only one, party has business in that State, and then "otherwise" was all other cases. All other cases included not only cases where neither party had his place of business, but also where both parties had their place of business in that State, and the earlier draft had not covered that case. There was as yet no provision on the scope of the Principles, but he could see no reason why these Principles could not apply to an essentially international transaction in which two transnational corporations had their place of business in the same place.

Tallon suggested an alternative formulation which read: "Where the law of a State requires a public permission affecting the validity of the contract or rendering its performance impossible and that law or the circumstances do not indicate otherwise, the measures necessary to obtain the permission shall be taken, (a) if only one party has his place of business in the State, by that party; and (b) in any other case, by the party whose performance requires permission".

Voting on the two alternatives, the Group adopted the proposal made by Farnsworth by 6 votes while 5 votes were granted in favour of the Tallon proposal. The Farnsworth proposal was therefore adopted.

Article 19

Introducing Article 19, Maskow stated that it described the steps which should be taken by the applicant party to get the permission. In Rome, it had been decided to omit a reference to "due diligence" previously contained in para. 1. In para. 2 the most important change introduced in Rome was that information on the granting or refusal of the permission should be given only where it was relevant for the conduct of the other party. It had been felt that where the permission requirement was a mere formality and the permission was regularly given, it was not necessary to inform the other party of the granting of the permission and furthermore that where the other party might be informed by other sources there was no need to require that the applicant party inform the other. The question which he felt to be open was whether this should relate to both the granting and the refusal of permission, in which case the other party would in any case have to be informed of a refusal, or whether it should be limited to the granting.

Bonell added that although para. 2 stated that the applicant party should inform the other of the grant or refusal of permission, this was limited to cases where the information was relevant for the conduct of the other party. He wondered whether one could not be a little more explicit, because what one really wanted to say was that there was no need for the applicant party to inform the other where the application was a mere formality.

Farnsworth suggested that the simplest way not to change the substance would be a formulation such as "The applicant party shall inform the other party of the grant or refusal of such permission without undue delay unless it would not be relevant for the conduct of the other party".

Drobnig thought that the exception could be limited to the case of the granting of permission: if information about the granting of permission was of no interest, then it was not relevant for the conduct of the other party.

Farnsworth suggested "give him any necessary notice of grant or refusal". That would cover both cases, i.e. that where the understanding was that if the other party did not hear from the applicant party everything was all right, meaning that notice of the granting of the permission would be unnecessary, and that where the other party knew from someone else, in which case notice was again unnecessary. The formulation would thus be "[t]he applicant party shall give any necessary notice of the grant or refusal of such permission without

undue delay".

Hartkamp and Lando supported this suggestion.

Drobnig wondered what was intended by "necessary": could a notice not be necessary because the statute requiring the permission imposed it?

Farnsworth suggested that "any appropriate notice" would avoid the difficulty. The Group accepted this suggestion. The new text of the first sentence of para. 2 therefore read: "The applicant party shall without undue delay give the other party any appropriate notice of the grant or refusal of such permission".

Turning to Art. 19(1), Lando suggested that it should be made into a second paragraph of Art. 18, as it was more closely linked to Art. 18 than to Art. 19(2).

Farnsworth wondered whether there could be in the comments a sentence indicating that the mere fact that the signature of one party or the other was required did not necessarily mean that that party was the applicant party for this purpose, because it seemed to him that cases were being contemplated where all of these measures must be taken and the expense borne by someone, even though the other party was the person who signed. He could imagine situations in which a party (a foreign party, for example) was the party who signed on the bottom line, but that did not mean that the party having the domestic place of business was not expected to do the paperwork and obtain the signature and also bear the expenses. If that was possible, then one had a case in which the word "applicant party" might be misleading, because it suggested the signing party and he did not think that it was always the rule that the signing party must take the initiative and bear all the expenses. To him a wording such as "The party required to take the measures necessary to obtain the permission shall do so without undue delay" was preferable as it avoided the argument.

This suggestion was accepted, the provision then reading: "(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay. It shall bear any expenses so entailed. (2) That party shall without undue delay give the other party any appropriate notice of the grant or refusal of such permission".

Drobnig wondered whether "appropriate" did not refer to the mode or the manner of the notice rather than to the necessity of giving notice.

Farnsworth thought it referred to both. The word "any" suggested to him "if any", which would mean that none might be appropriate. If that was too burdensome for a few words, then it might be explained in

the comments, or the text might actually state "if any" or "whenever appropriate". If the second alternative were opted for, he suggested that the comments indicate that usually notice would be appropriate. The provision would then read: "[...] shall, whenever appropriate, give the other party notice of the grant or refusal of such permission".

Fontaine and Lando wondered whether para. 2 was not a problem of remedies, and whether it did not belong in the section on remedies.

Tallon stated that it was not a general remedy, it was not withholding performance, it was only a remedy limited in time, so one could not simply say that it was a remedy and it therefore did not belong here.

Farnsworth agreed with Tallon generally that there was no reason to have a sharp division between performance and remedy rules when it would be informative, but he favoured the deletion of the provision. Maskow had mentioned the formation of contracts in steps; probably just as common or more common were financing arrangements, but he thought that this was not dealt with here. Public permission was only one example of many preliminary steps and the remedial consequence was the same in all of them: if he did not get the money, if he did not cooperate, he was not entitled to rely on the contract. He found it a bit draconian if a party was to be liable for not giving the other notice if this other party was not hurt by not hearing of the grant.

Bonell objected that in the normal situation a party would be interested in knowing of the grant. If the other party went ahead with his performance without giving notice and claimed the counter-performance, the first party could object, saying that it had never heard of the coming into existence of the contract.

Farnsworth wondered whether a delay beyond the "undue delay" necessarily would mean that everything was off. It seemed to him that it was just like any duty of cooperation.

Maskow felt a party's not informing the other to be an omission on his part: if he did not inform the other party this latter party would assume that the contract was not valid and the first party could not then come and say that he should have performed when he did not even know that the contract had become valid.

Date-Bah recalled the observation that a refusal affected the contract in two ways: first, the validity of the contract, and secondly it rendered the performance of the contract impossible. Rendering performance impossible meant that there was a valid contract but that it was incapable of performance. There could therefore be a situation where there was a contract which could not be performed because the public authority had refused permission, and in that situation, assuming this rule were kept, should there not be an obligation to inform of the

refusal as well as of any possible grant?

To Farnsworth it seemed that what was being done here was to give a very specific example of the general duty of cooperation, and he could not see why the remedy for this, or the consequences of the failure to do this specific thing, should be given, because it would be the same as the consequence of another failure to perform the duty of cooperation, and to him the answer would depend on how big a failure it was. A great many circumstances would have to be known, and in some cases it would not be as draconian as this. What would happen if the person delayed giving notice but ultimately did give notice?

Drobnig considered that damages would probably result. However, he did not see that the specific consequence could in all cases be derived from the general remedies indicated here.

Farnsworth wondered whether one could not terminate for breach if there was a duty to give notice and that duty was not performed.

Tallon thought that the remedy in that case should be withholding performance

Fontaine wondered whether a special remedy was needed, as there already were three of the general remedies: withholding performance, termination and damages.

Hartkamp wondered whether, within the framework of the chapter on remedies, a general provision could not be discussed, which would take into consideration the observation that in general if a party does not comply with the duty of cooperation the consequence might be that it is not allowed, in whole or in part, to rely on the contract or on any of its terms. It would of course be a broad provision, but it would be applicable in many circumstances. If one had such a provision one would not need this one.

Lando felt that the rule had two dangers: first, the greatest danger was that one would not really know what was meant by "shall not be entitled to rely": could one terminate? Could one withhold performance? He thought that Hartkamp's point could be taken care of by the general provisions: damages if there was reason for damages, termination if there was a fundamental non-performance, and withholding performance when that was appropriate. He did, however agree that the situation could be analysed, and it could be seen whether the provisions on termination, etc. were appropriate for this measure. He was a little reluctant to have it as it stood.

In Maskow's view it was not a question of remedies strictu sensu, it was only connected with remedies to the extent that it related to exemptions which were dealt with in the context of remedies. He felt that the idea of the non-informing party not being allowed to rely on

the contract would be better expressed in a more global context, and he therefore preferred to have it in the chapter on non-performance, in the context of exemptions.

Summarising the discussion, Bonell concluded that the majority of the Group favoured deleting the second sentence in para. 2, and if appropriate to come back to it at a later stage, and then consider the possibility of having a special provision in the chapter on non-performance dealing with the breach of the duty to cooperate.

Furmston was surprised that there should be the apparent desire to provide explicitly for the consequences of a very wide range of breaches. He would have hoped that one could have had some general principles and then simply a list of special cases, rather than going through in an enumerative way.

Lando wondered what the "null date" referred to in illustration 1 to Art. 19 meant.

Maskow explained that in a case where delivery had to be made within seven or eight months, a date was needed from which the period started, and this date was the date normally fixed from the occurrence of different events, e.g. the contract had to be concluded, permission might have to be obtained, certain payments might have to be made, etc., and when the last of these had been performed, then that was the null date.

Farnsworth thought that it would be necessary to talk round it, and suggested "the date from which the period begins to run". With reference to the writing of illustrations, he thought that there was a tendency to use the word "valid" where at least common lawyers might use "effective", (e.g. a contract becoming "valid" after the granting of permission). He suggested that they might want to use "effective".

Furmston commented that in English law it was usually analysed in terms of conditions, but he admitted that "effective" was better than "valid".

Drobnig recalled that they had used "validity" in Art. 18: "affecting the validity of the contract".

Farnsworth commented that he had not understood that to mean what was now under consideration, he had understood Art. 18 to refer to some sort of a law or regulation that stated that a contract was not valid (was against the law) unless the permission it required was obtained. What he and Furmston were talking about, was the situation in which the contract stated that nobody should perform until permission had been obtained, and they would not call that "validity", they would not even say that it was not effective, they would say that it was valid and effective, it was simply conditional on the permission being

obtained, and therefore nobody had a duty to render any performance unless that permission had been obtained.

As regarded the text of the article, Crépeau queried the use of the words "so entailed".

Bonell suggested "incurred" instead of "so entailed", i.e. the second sentence of para. 1 would read "he shall bear any expenses incurred".

Furmston suggested that the "without undue delay" in para. 2 be moved to the end of the sentence as it was awkward to have it immediately after "whenever appropriate".

The text of Art. 19 as finally adopted therefore read:

"(1) The party required to take the measures necessary to obtain the permission shall do so without undue delay. He shall bear any expenses incurred.

(2) That party shall whenever appropriate give the other party notice of the grant or refusal of such permission without undue delay".

Article 20

Introducing Art. 20, Maskow stated that the purpose of the provision was to determine the consequences where permission was not obtained within a certain period of time. If permission was refused, the consequences depended on whether the whole contract or the main performance was affected, or only individual terms. In the first case the consequence was that the contract could be terminated; in the second, if the term was an important term the contract could be terminated, or if it was not the contract would be valid without this condition. However, even in this latter case, the party who had to apply for permission would be liable for damages if he had not done so with due diligence, although this would depend on the provisions on damages. As regarded the comments, he had taken up the question of vicarious performance as he had been advised to do so at the Rome meeting, although he felt it to be difficult to derive such a concrete conclusion from the provision. In his opinion it was not possible to derive this conclusion from these provisions and for this reason he had based it on the provisions on good faith and duty of cooperation.

Farnsworth made drafting suggestions following which the article would read: "(1) Either party is entitled to terminate the contract if, notwithstanding the fact that the party responsible took all measures required, permission was not granted within an agreed period or, where no period has been agreed, within a reasonable time after the conclusion of the contract. (2) Where the permission requirement affects only

individual terms the contract is valid without those terms if this is reasonable in the circumstances".

Lando suggested substituting "valid" in para. 2 by "effective", because it might also apply to the case where performance was prohibited but this did not affect the validity of the contract. For example, a "Nebenpflicht" or accessory duty could not be performed because the party was not allowed to do it, and not because it was invalid.

Bonell stated that then performance would be impossible, but this had nothing to do with the validity of the contract. Going back to Art. 18, he stated that he had understood the reference to the validity of both the whole or a part of the contract being affected, or performance being made impossible, to indicate two different situations. He had understood Art. 20(2) to refer only to the first of the two situations, because if the permission requirement related only to the performance of an obligation, the validity of the contract would never be questioned. Nor could the effectiveness be questioned, because the contract had per definitionem already become effective, otherwise there would be no problem in performing it. If it then turned out that it could not be performed because the permission required was refused, then it was a question of termination.

Farnsworth stated that if that was what it meant, then it seemed to him that it did not have anything particularly to do with permission, because in the USA a penalty clause was simply invalid, one did not have to get permission, yet the same problem arose. Another very common provision in the USA in contracts of services was the restrictive covenant to compete after the services' discontinuance, and there was the question that if that was invalid, was it all invalid, or was it partly invalid, but nobody said that the whole contract was invalid and he thought that somewhere a general provision would be necessary saying that the whole contract did not fall if it was just one clause.

Bonell observed that there was such a provision, although one might question the appropriateness of its present location as a paragraph of Art. 20. The problem still remained of those cases where the grant related either to a contract clause or to the performance of an obligation and was refused, but it nonetheless would be unreasonable to allow one of the parties to terminate. He referred to Art. 15 of the validity chapter (on partial avoidance) which stated that if a ground of invalidity (and the refusal of the permission required was such a ground of invalidity) affected only an individual term of the contract, then only that term, and not always the whole contract, should fall. He wondered whether it would be necessary, or at least advisable, to have a similar provision in this chapter, dealing with the particular case of invalidity as a result of the refusal of the permission required.

Drobnig and Maskow felt that such a provision would be necessary, because Art. 15 was limited to cases where one party had

avoided the contract or term and did not cover instances of partial invalidity ex lege. The scope of Art. 15 could of course be broadened, but that might be odd because that chapter concerned the validity of the contract and no legal grounds of invalidity other than avoidance were considered.

Fontaine also felt that Art. 15 was written in a certain context and that it was not evident that it would cover all other cases. He therefore favoured having such a general provision here, but felt that the wording should be aligned to that of Art. 15, to read: "Where the permission requirement affects only individual terms, the contract is valid without those terms if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract".

Tallon felt that all the consequences of such a rule should be considered: quite often the refusal of a permission would be considered a case of impossibility of performance. He wondered whether a general rule for partial non-performance was necessary or not. He suggested that Art. 15 could be used by analogy; whether it was a question of validity or of performance the result was the same.

Lando felt that this was precisely the reason why it should not be used by analogy; they were equally important commercially.

Bonell wondered whether the Group saw any relation between this rule and that in Art. 20(1).

Farnsworth did: if they were placed separately, if he wanted to get out of a contract he would rely on Art. 20 and terminate. In other words, para. 2 should say "However, neither party may terminate if the permission requirement affects only individual terms, if so, the contract is then enforceable without the affected terms".

Bonell thought that this was a different provision and he agreed that this should then be placed as a second paragraph to para. 1, but he still thought that originally the purpose of the rule was different.

Fontaine wondered whether para. 1 was not a little strange, because it did not distinguish between when the refusal of the permission affected the validity and when it simply affected the performance. If it affected the validity, was it then sensible to say that the parties were able to terminate the contract? The contract was not valid and that was all.

Bonell thought that what was stated in para. 1 was the rule, and it meant that if a permit was refused, either of the parties could say "forget about the transaction, I terminate". This was the purpose of para. 1: there should be a declaration on the part of one of the parties, it just did not happen ipso facto. He thought that it was

agreed that there should be exceptions to such a unilateral right to put an end to the contract, exceptions relating to when the refusal concerned only to a part of the contract and it would not be reasonable to put an end to the whole contract. Para. 2 did not now say this, but his understanding was that it had been agreed that such an exception should be provided for.

Drobnig had some doubts about whether para. 2 was not much broader in scope, because it could be said that the contract stood on its own as if the permission was refused it would still be effective or valid.

Personally Bonell agreed with Drobnig, although that lead him to the conclusion that the present para. 2 had nothing to do with para. 1. As it was agreed that the rule expressed in para. 1 needed to have an exception, that Art. 15 of the validity chapter was not sufficient and that the present para. 2 was unsuitable because it spoke of validity, what should be said was that neither of the parties had a right to terminate if the permission requirement affected only individual terms or the performance of individual obligations.

Farnsworth found it a little odd to have all these special rules for failure of permission - he would have no difficulty in applying the general principles to be found elsewhere in the draft to answer the single case.

Furmston observed that the more he thought about it, the more Art. 20 seemed to be a jumble. It made a lot of assumptions about what was in the contract: he took it that in any case (subject to contrary agreement), if the contract actually said "if we do not get permission then that is it", there would also be cases in which the failure to get permission simply meant that there was no contract. What Art. 20(2) dealt with was the situation where there still was a contract despite the failure to get permission, but the parties had not made any provision as to what was to happen if there was a failure to get permission, and then the provision stated that the parties could terminate.

Fontaine thought that the interest of Art. 20(1) was apparent mainly in cases where permission simply was not obtained - it was not refused, but the party just kept waiting for it and it never came. In that case it was useful to have a provision making termination possible.

Furmston observed that if this were the case, then it did not deal with a failure to apply within a reasonable time, it in effect dealt with the failure to get the permission within an agreed period. He then wondered whether the "reasonable time" provided for would be evaluated by local norms: if one applied for permission in Ruritania where everyone knew that everything took 20 years, would that be reasonable or would, for example, Belgian norms be applied? Presumably

what was meant was reasonable in regard to international objective standards. He could see that there should be a provision (if there was to be one at all) which dealt with the failure to process the application within a reasonable time.

Crépeau commented that if the party does not get an answer the State might very well say that if no permission was granted the contract never came into existence.

Bonell agreed that the State might say that if permission was not obtained there was no contract, but very often if there was no answer this did not mean that permission was not granted: the authority concerned might say that the application was being carefully considered. This situation was covered by the words "he failed to obtain /it/".

Farnsworth suggested that the words "was neither granted nor refused" might be used, meaning that para. 1 would read: "Either party is entitled to terminate the contract if, notwithstanding the fact that the party responsible took all measures required, permission was neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time after the conclusion of the contract."

Furmston suggested an alternative formulation reading: "If, notwithstanding the fact that the party responsible took all measures required permission was neither granted nor refused, either party is entitled to terminate the contract".

Lando observed that they also had to cover the situation where the permission was refused.

Bonell felt this to follow from Art. 18(1), because if the validity depended on the granting of the permission, then refusal would mean invalidity.

Maskow observed that the refusal might not always be final, that in some cases one might have to modify the application a bit and start all over again.

Drobnig wondered whether a new provision on the consequences of a refusal should be drafted if Art. 20(1) were restricted to cases of no decision, as he considered this to be decisive.

Fontaine and Tallon observed that in the case of refusal a distinction had to be made between whether it related to validity or performance, and whether it affected only one term or the whole contract.

Maskow reflected that there was a tendency to think that it was quite clear whether or not there was a refusal, that one received a document stating that permission was refused and no appeal was possible.

If things were like that, it would only be a question of information, but in most cases things were not that clear.

Date-Bah considered that the refusal situation could be relevant in a situation where performance of a contract which had come into being was rendered impossible. Was the idea that that should not be regulated because it should be left to general principles to work out?

The Group agreed to have a provision for the "Schwebezustand", the "nothing happens" situation, and that for this case it was necessary to grant the party a right to terminate, which was the present text of Art. 20(1).

Bonell observed that if also with the refusal of the required permission was also to be dealt with, this should obviously be done by distinguishing between the refusal of a permission relating to the validity of the contract and the refusal of a permission relating to the performance of the contract.

Lando considered that the pending situation and the rule on refusal should be merged, which would more or less be a return to the original text. He suggested a phrasing such as: "Either party is entitled to terminate the contract if, notwithstanding the fact that the party took all measures required the permission was refused /was not granted/".

If the party could terminate the contract when the permission was a condition of validity, what, Tallon asked, would happen if the party did not obtain the permission? Was the contract valid despite the fact that the authorisation had been refused? If the granting of permission was a condition of validity and no permission was granted, then there was no contract: he could not see how it could be otherwise.

Hartkamp considered that there were intermediate stages: for example, a party applied for a permission which was a validity requirement and this permission was refused. One would then say that the contract was null and void, that there was no contract. If, however, the party was allowed to lodge an appeal against the refusal, then after the permission had been refused a new period would begin and at that point the parties must be able to withdraw from the contract. Whether one called this "withdrawing from the contract", or "terminating" it, or "to be released from" it was of secondary importance.

Drobnig considered that this latter situation was covered by Art. 20(1) as the refusal was not final and could be appealed. Tallon also considered that by "refusal" a final refusal should be understood.

Bonell felt that at least the comments should mention what was meant by "shall take the necessary measures". This formula had always been understood to mean that a party not only had to apply in a proper

manner, but that he also should avail himself of any means of recourse, if this was reasonable. Art. 20 would not cover the case where an appeal was pending, because it covered that where "notwithstanding the fact that the party took all measures required" nothing has been said. If one had just filed an appeal the previous refusal would have to be considered to be suspended - the procedure was not yet completed and one had to wait.

Lando observed that he had difficulties in following Bonell, because in Scandinavian law most permission requirements did not entail invalidity, they only entailed impossibility - legal impossibility to perform. This had been the case for the Danish currency restrictions (now practically abolished) for the monopoly laws, in the price legislation, export prohibitions, etc. If a party made a contract to export something which it was prohibited to export, the contract was not invalid, he just could not perform.

Bonell commented that in Italy such a contract would be null and void.

To Crépeau it seemed that first, there was Art. 18 which referred to two types of situation, one of which went to the validity of the contract, and the other of which went to impossibility of performance. The third situation was that in Art. 20, i.e. failure to obtain within a reasonable time, which was a normal cause for termination. There was therefore in effect one cause of nullity, one of impossibility of performance (which brought the contract to an end) and one of simple termination according to the principles in the chapter on termination. One might therefore want to remind readers that in the first case of Art. 18 the remedy was nullity, that in the second case it was impossibility of performance and that in the third case (Art. 20) it was termination.

Furmston commented that in English law statutes did not often say what the effect was on contracts. The theoretical starting point for an English lawyer would be what the parties had agreed. Art. 18 provided a fall-back rule if the parties had not agreed. One of the things the parties might have agreed was that the whole existence of the contract was dependent on the granting of permission, and if that was so, an English lawyer would agree that if permission was not obtained there was no contract. There were, however, also cases in which English lawyers would say that the parties had agreed that there was a contract, but they had agreed that the performance of the contract by one side or the other was conditional on the obtaining of permission. Thus, if, for example, A sells B a piece of land conditional on B's obtaining planning permission to build a hotel, an English lawyer would normally expect to analyse that as a contract; if planning permission was not obtained, that would normally release the parties, but, for example, there would be an obligation to seek the permission because there was a contract. In many cases there would be the possibility of waiving the condition if

the condition was for the benefit exclusively of one side. It all turned on how one had analysed the contract in the first place. If he was going to write Art. 20 at all, he would want to have a rather longer article so as to enumerate these possibilities, in other words, he did not think that one could simply say that termination was the only consequence. For the case where nothing happened, he thought that if the coming into existence of the contract was conditional on the obtaining of the permission and permission was never obtained, then the contract had never come into existence.

Bonell instead thought that it followed from the general principles of law (in particular the law of contractual conditions) that as long as the condition was pending both parties were obliged either to take positive action (as was provided here) or at least to wait and see, even if the contract had not yet come into full existence. He had understood the purpose of Art. 20 to be that of saying that there was a point at which one could say that one had waited long enough and that one would get out of the agreement and this was the novelty of Art. 20.

Furmston thought that this was implicit. He would expect an English judge to say that if nothing happened within a reasonable time all bets were off. He could not believe that an English judge would say to the parties that they had to wait to see what happened in perpetuity, and he was surprised that anybody would do that.

Tallon agreed with Crépeau that consideration had to be given to whether in some countries it was mainly a condition of validity or mainly a condition of performance: both situations existed in nearly all countries so either both situations had to be addressed or the question should not be addressed at all. Alternatively, he suggested making a general reference in order to express the general idea.

In general Hartkamp agreed with Crépeau, but commented that in the performance case, if it was a case of force majeure a declaration of termination was necessary and for that reason it was necessary to decide whether to retain a rule like Art. 20(1) here, or whether to refer to the general rules on termination.

Lando stated that this had been extensively discussed in the EEC Group. According to one school of thought when a force majeure situation arose the contract would fall and no declaration of termination would be necessary. This he thought was the majority view, and was the position of a majority of legal systems, whereas in Scandinavia and, for example, the Netherlands a notice of termination was required even in case of force majeure. This was also the solution adopted in CISG, and he therefore thought that a notice of termination should here be required also for a force majeure situation.

Bonell felt that this would be in conformity with the general rules on termination. What was at stake, was whether or not to state expli-

licitly that in the refusal cases the general principles on invalidity and on termination for impossibility applied.

Drobnig felt that such an explicit reference should be made: it was desirable and necessary because it was an area in which there was much confusion and there certainly was no harmony between the various legal systems.

Fontaine on the contrary preferred not to have such an express statement in the text of the Principles, but instead to state in the comments when explaining Art. 20, that it did not cover the case of the refusal of the permission, that the consequences of that case were governed by the provisions on termination for impossibility.

Farnsworth agreed with Fontaine. He was happy with Art. 20(1) and nothing more, except some explanation in the comments, which he thought would point to validity and force majeure provisions which operated in the manner described by Hartkamp.

Date-Bah fully agreed with Farnsworth.

Bonell observed that within the Principles termination would not follow automatically from impossibility of performance: a notice of termination would be necessary.

Tallon suggested a wording such as "Selon que l'autorisation constitue une condition de validité du contrat ou de son exécution, son refus entraîne la nullité du contrat ou l'impossibilité d'exécution avec les conséquences de droit", which referred to the general consequences of validity or of impossibility of performance according to these rules, be it partial or total. It considered the two hypotheses in Art. 18, and stated that permission may affect validity or performance, so when there was refusal it was the consequence of the invalidity or the consequence of the performance. He thought that it could form the link between these special provisions and the general provisions.

Drobnig felt that the terminology suggested was a good beginning, but that something more would have to follow. There was no general provision in the Principles stating that partial invalidity might leave the rest of the contract valid or unaffected; there was no general principle which stated that in the case of impossibility there must be termination; there was no general principle which stated that in the case of partial impossibility the rest may still be valid.

Hartkamp felt Tallon's formulation to be extremely clear, but considered that it was only needed in the text if there was a supplementary provision on partial nullity; otherwise it could go in the comments.

Bonell suggested a wording such as "Where the granting of the

permission requirement affects the validity of the contract, the refusal implies the contract is to be considered null and void from the beginning", which would be a positive rule without references. Similarly, for impossibility the wording could be "If the permission requirement relates to the performance its refusal constitutes a case of impossibility and will be governed by the rules on exempting events". In other words, termination, and a notice for termination, would apply to the second case as they referred to the rules on exempting events in the chapter on non-performance.

Drobnig thought that a reference was not enough and that it should be spelled out also in this provision.

Faced with the two alternatives of either finding a wording to address the two refusal situations (affecting validity or rendering performance impossible, affecting the whole or part of the contract), i.e. the Tallon formula plus another provision, or to live with the new Art. 20(1) (the nothing happens situation) and to state in the comments that in case of a refusal the general rules on illegality or impossibility of performance would apply (as suggested by Fontaine, Farnsworth and Date-Bah), the Group gave the first alternative 6 votes and the second alternative 5 votes.

Hartkamp proposed that the text suggested by Tallon be adopted, and that then a second paragraph be added with a slightly different wording to align it to Art. 15 of the validity chapter. He did not think that a provision on partial non-performance was needed, because to cover that a reference to the general rules sufficed. The only thing needed was a rule on partial invalidity.

Farnsworth suggested that Tallon's formulation could be rendered in English as "Depending on whether the permission affects the validity of the contract or renders its performance impossible, refusal of permission results in nullity of the contract or exoneration from liability".

Hartkamp pointed out that it was not always exemption from liability, because it might be that the refusal of the permission makes a person liable because, for example, he should have foreseen the refusal. The provision should therefore only speak about non-performance or impossibility, and not of exemption from liability. Tallon's draft in this sense was neutral.

Crépeau objected that it was termination on the basis of impossibility of performance.

To Farnsworth it seemed that the intention was to express two somewhat different things: i.e. in respect to exoneration that if the permission went to making performance impossible then the other rules applied; and in the case of the permission affecting the validity of the

contract, for which more was being said because the other rules did not cover this, that it resulted in invalidity, or nullity; also being said was, he thought, that the other rules on nullity applied. If this was what was intended, he thought it unfortunate to try to put two different kinds of thoughts in parallel parts of a sentence. He suggested saying "in the case of impossibility look to our other rules, in the case of invalidity it results in invalidity and now look to the other rules".

Drobnig suggested an alternative formulation along the lines "Where a permission under a requirement affecting the validity of the contract is definitely refused, the contract is void. Where a permission under a requirement affecting the performance of the contract is definitely refused, the rules on non-performance apply".

Both Farnsworth and Lando felt this formulation to be much better.

Fontaine and Crépeau considered that it would be better to have this provision as a separate article, rather than as the beginning of Art. 20.

Drobnig thought that it should come after Art. 20(1), because Art. 20 envisaged the situation where the application procedure still was pending, whereas here the assumption was that it had been terminated by a refusal.

Farnsworth and Fontaine observed that the wording of this provision and of Art. 18 should be harmonised: Art. 18 spoke of "a public permission affecting the validity of the contract" whereas this draft spoke of "a permission under a requirement affecting the validity of the contract".

The Group finally decided to adopt as Art. X(1) the wording "The refusal of a permission affecting the validity of the contract renders the contract void".

Turning to the case of a refusal rendering performance impossible, the wording "When a refusal of a permission makes the performance of the contract impossible, the rules on non-performance apply" was accepted by the Group as Art. X(2).

As regarded the problem of partial invalidity or partial impossibility to perform, Crépeau wondered whether there was any indication that there should be special rules here, or whether reference should merely be made to rules that would be applicable in all cases of partial performance.

Bonell considered that in the para. 2 situation the rules on non-performance would certainly cover also the case of partial impossibility. He however had doubts that there would be any rules covering the para. 1 situation, although there should be. That meant

that only the para. 1 situation would have to be considered. He suggested adding to para. 1 the words "If the refusal affects only some terms of the contract" and then to use the formula of Art. 15 of the validity chapter.

Tallon suggested that if this rule were put in only for avoidance, it should be placed in square brackets, because if there was a general rule on avoidance which was the same, it could be struck out.

Bonell was surprised to hear Tallon refer to "avoidance" - this was not avoidance. Avoidance presupposed the notice of the party, and avoidance had been dealt with in the validity chapter. It was there made subject to a notice and it related only to so-called defects of consent.

Fontaine pointed to the difference between void and voidable.

Tallon did not feel that this was dealt with very clearly. He thought that somewhere the problem should be addressed as a whole. His proposal to place the article in brackets therefore stood, as a reminder that there might be general rules relating to what happened to the rest of the contract when part of the contract disappeared through avoidance or through nullity.

Drobnig suggested that a simple solution would be to say that where the permission requirement affected only an individual term, Art. 15 of the chapter on validity applied accordingly.

Farnsworth commented that "accordingly" was not really a word that would be used in English, and Furmston added that an English lawyer would set out all the conditions all over again, as there was a tendency not to legislate by analogy.

In the end, the Group decided adopt Art. X in the formulation:

- "(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of only some terms, only such terms are void if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract".
- (2) Where the refusal of a permission makes the performance of the contract impossible in whole or in part, the rules on non-performance apply".

It also decided to keep para. 1 of the present Art. 20 in a separate article, and not to add it as a third paragraph to Art. X. Following the suggestion to place the present Art. 20 before the newly adopted Art. X, the latter became Art. 21. Thus, there remained the adaptation of Art. 20(2), as also this provision had to address the situation where the pending permission only affected individual terms, in which case it might not be reasonable to allow the contract to be terminated. If there

only was para. 1, then even if the nothing happens situation related to a permission requirement which affected only a single term of the contract, the other party would be able terminate the contract. Para. 2 could make clear that it might not be reasonable to allow this, if it on the contrary was reasonable to uphold the remaining contract.

Drobnig considered the place and functions of para. 2 to be independent of Art. 20, because this idea of upholding the remaining contract applied whether there was a failure to obtain permission or whether there was a refusal affecting part of the contract. It applied from the beginning because if the permission which was required affected only one term of the contract and the remaining contract could stand on its own feet, then one did not even need to ask for permission. It was a general idea which was independent of Art. 20 and, of course, in a way independent of Art. 21. It must be spelled out, but separately from these two articles.

Farnsworth considered that Drobnig was right in substance. He wondered whether the answer was not to broaden the scope of the provision or to put it in such a location that it applied to Art. 20(1) as well.

Crépeau objected that they were dealing with a specific case of the granting of permission within an agreed time, within a period of time, or within a reasonable time.

Farnsworth observed that where that problem arose the remedy was termination, and the article just rewritten (the former Art. 20(2)) spoke of termination. It seemed to him that one could not terminate if one could salvage most of the contract, and that was a good rule for the case where there was a failure to grant or refuse permission and it was a good rule where there was a refusal.

The proposal was therefore that of introducing a provision along the lines: "Where the permission affects only some terms paragraph 1 does not apply if, giving due consideration to all circumstances of the case, it is reasonable to uphold the contract".

Hartkamp commented that the position was of course that it would be reasonable to uphold the contract even if the permission were not to be granted. He suggested stating "[...] if it is reasonable to uphold the contract even if the permission were to be refused".

Farnsworth agreed with Hartkamp, because the assumption had to be that the future might turn out to be black.

In the end, the Group decided to adopt both Arts. 20 and 21 which read as follows:

Article 20
(Permission neither granted nor refused)

"(1) If, notwithstanding the fact that the party responsible took all measures required, permission was neither granted nor refused within an agreed period or, where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract.

(2) Where the permission affects only some terms, paragraph (1) does not apply if, giving due consideration to all circumstances of the case, it is reasonable to uphold the contract even if the permission is refused."

Article 21
(Permission refused)

"(1) The refusal of a permission affecting the validity of the contract renders the contract void. If the refusal affects the validity of only some terms, only such terms are void if, giving due consideration to all circumstances of the case, it is reasonable to uphold the remaining contract.

(2) Where the refusal of a permission makes the performance of the contract impossible in whole or in part, the rules on non-performance apply."

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