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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

OF

THE MEETING HELD IN ROME

FROM 30 APRIL TO 4 MAY 1990

(prepared by the Secretariat of Unidroit)

Rome, April 1991

The thirteenth meeting of the Working Group for the preparation of Principles for International Commercial Contracts was held from 30 April to 4 May 1990, at the seat of Unidroit. A list of participants is annexed to these Summary Records.

Mr Malcolm Evans, Secretary-General of Unidroit, opened the meeting. He welcomed Dr Huang Danhan, of the Department of Treaties and Law of the Ministry of Foreign Economic Relations and Trade of the People's Republic of China, and Professor Alexander S. Komarov, Head of the Legal Department of the USSR Academy of Foreign Trade, who participated in the work of the Group for the first time.

Mr Evans informed the Group that at its session held the preceding week the Governing Council had discussed the document prepared by Mr Bonell on the controversial issues of Chapters 2 (Formation) and 3 (Validity) (cf. C.D. 69 - Doc. 7). Mr Lando, who was one of the authors of the chapter on validity, had attended the session. He reminded the Group that Mr Bonell had prepared the document following a decision of the Governing Council at its 68th session to follow the progress of the work closer than it had hitherto done. Thus, rather than limiting itself to an examination of a short progress report prepared for the sessions of the Governing Council, it had been decided that the Secretariat should in the future for each session of the Governing Council prepare a document which would highlight controversial points of one or two chapters at a time. It had been felt that this was the way that the Governing Council might make a constructive contribution to the work of the Group. The Governing Council had found the exercise to be a profitable one, and it had therefore been decided that it would be repeated in the future. Mr Bonell would report more in full on the discussions of the Governing Council later on in the meeting.

On the agenda for examination were the revised draft and explanatory report of the chapter on interpretation, prepared by Prof. M.J. Bonell (cf. Study L - Doc. 42) and the draft and comment of Chapter 6 Section 1 (general provisions on non-performance) prepared by Prof. M.P. Furmston (cf. Study L - Doc. 45). Professor Date-Bah was asked to take the Chair for the first part of the proceedings.

Chapter 4: Interpretation (Study L - Doc. 42)

Articles 1 and 2

Opening the discussions on the draft chapter on interpretation, Drobnig stated that the written comments submitted by Farnsworth brought out very well that in reality they were dealing with two objects of interpretation: contracts and unilateral statements or declarations. This dichotomy should be pursued throughout the text. This was already

done in Art. 3, which referred to both "a contract or statements", but not in Arts. 4 and 5 which should therefore be broadened in scope to cover also unilateral statements. Art. 6 was separate because it only applied to contracts.

Lando agreed with Drobnig, but observed that rules on interpretation had two characteristics everywhere: firstly, they were almost never exhaustive and secondly, it was very difficult to establish a hierarchy between the rules on interpretation. He felt that these two principles might be stated in the comments.

Fontaine agreed with Lando. He added that one must also be aware of the fact that each of the different rules could lead to contradictory results and felt that it would be good to have somewhere in the comments, perhaps in the general comments or in the comments on the first provision, some explanation along the lines suggested by Lando.

Bonell recalled that Art. 1 as it read now should be read together with Art. 2, as it was the result of a decision taken by the Group at the Louvain-la-Neuve meeting to split the former Art. 1, which had been made up of the present Arts. 1(1) and 2(1), into two different parts. Farnsworth's suggestion was to revert to the original structure of the provisions. He therefore suggested that Arts. 1 and 2 be discussed together.

This suggestion was accepted by the Group.

Hartkamp was neutral on how to position the articles and the paragraphs of the articles. However, he saw a material discrepancy between the present Art. 1(2) and Art. 2(2): Art. 1(2) read "Statement made by and other conduct of a party shall be interpreted according to his intention where the other party knew or could not have been unaware what that intention was", but the situation where Art. 1(2) was not applicable was laid down in Art. 2(2), which used a different criterion: not "could not have been unaware of", but "nor should have been known to". The two criteria did not fit together, because in theory that left the possibility of there being a situation where one was not unaware of, or could not have been unaware of, but where one should not necessarily have known it. In Art. 8 of the UN Convention on Contracts for the International Sale of Goods (CISG) this discrepancy was avoided by the formulation "If the preceding paragraph is not applicable" (cf. Art. 8(2)). He therefore suggested aligning both rules so that they both spoke of either "could not have been unaware of", or of "should have been known to". He himself preferred the second test, but as CISG used the first test it might be more sensible to choose that one. He did think that his objection would be taken care of by Art. 2(2) of Farnsworth's text.

Drobnig declared that as far as the organisation of the articles was concerned, he had a strong preference for the proposal made by

Farnsworth. Furthermore the title of Art. 1 fitted only the first paragraph and not the second. Changing the organisation of the provisions would also make it clear that the chapter dealt with two objects, which, albeit in some respects interrelated, were separate.

Furmston gave an example: suppose all that could be said with confidence was that the parties had agreed to contract on a well-known standard form and that they in effect had agreed to whatever it was that the form meant even though neither of them actually knew for sure what the form meant. For many standard forms there was scope for argument as to what they meant, but if it was quite clear that the parties had agreed to the form, an English lawyer would say that they had agreed to whatever it was that the judge eventually held it to mean. Was that an example of Art. 1(1) or 1(2)?

Bonell felt that this point would to a certain extent be met by Art. 4. He observed that whereas English judges might be ambitious enough to say that only what they felt the meaning to be should be the binding meaning, in other countries the tendency was more for judges, when faced with such questions of interpretation relating to standard form contracts, to consider what the current view in the trade concerned was. It was only if there was no such opinion that they would themselves decide on the basis of reasonableness.

Furmston did not think that the standard problems faced by English courts every day would be solved by Art. 4: Art. 4 dealt with a relatively small, albeit important, problem, i.e. what is meant by A or B, whereas the problem of construing a standard contract which is in common every day use was not simply a problem of deciding what commercial terms meant, it was a much broader problem than that. It seemed to him that it could be said with confidence that in many cases the parties were perfectly happy to agree to the form even though they were not sure what it meant, because they took their chances on that.

Farnsworth could not see the problem. If a common intention could be found, then one found it, but if the parties had not thought about a certain point it would not be possible to find a common intention. If a meaning in the trade could be found, it would be followed, but if that could not be found one was left with the standard of reasonableness and a judge would try to ask what a reasonable person in the position of the parties would have understood in the circumstances.

Date-Bah observed that there probably was not that much difference between the two approaches, in that when the phrase "interpretation of reasonable people" was used, it was presumably intended to invoke an objective interpretation. He took it that if both the attempt to find the common intention of the parties and the interpretation of reasonable people failed, then recourse would be had to the judges objective interpretation. Thus, the question was merely

that of the form of the words intended to invoke that situation.

Furmston was not sure that this was the case: suppose, he said, the parties agreed that the contract was subject to the Principles, then surely the question asked would be what did the Principles mean, and not what did the parties think they meant. As regarded standard conditions, he commented that in some cases there were very many conditions, and a judge construing them in court would in fact have a strong predisposition to construe them in the same way as other judges had construed them in the past, also because parties would naturally have assumed that that was what judges would do. That was a long way away from what the intention of the parties, or even of the hypothetical reasonable parties, was.

Lando wondered whether one could take an approach similar to the one in § 157 of the BGB, which stated that "Contracts shall be interpreted according to the requirements of good faith, giving consideration to common usage [usage of the trade]" ("Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern"). He knew this was done in Art. 4, but he thought that the words referring to the reasonable persons did not convey very much. He suggested adding "with due regard to commercial usages/practices" to the same sentence, and not to have a separate paragraph, because Art. 4 and Arts. 1 and 2 really came to the same thing when applied to standard form contracts: the meaning that "reasonable persons in the same circumstances" would give, was ultimately what usages were.

Fontaine had also come to the conclusion that there was a special interpretation of standard forms. Some very famous standard forms were the object of books and of comments, and were not drafted by the parties in a particular case, so Art. 1 did not fit. The solution could perhaps be to go back to Art. 4, but Art. 4 dealt with commercial contracts and perhaps they should have something similar about well-known standard forms.

Maskow felt that also the rule on good faith would come into play, as it would permit the use of a positive rule for a given case. He suggested that having such a rule here as well as in Chapter 1 could help.

Drobnig doubted the wisdom of re-incorporating into this chapter the general provisions which had been placed in the general part (good faith, usages, practices etc.), although he did agree that they had an influence. A specific reference to the relevant provisions in the general part should therefore definitely be made in the comments, and maybe also in the text.

Bonell felt increasingly attracted by the idea of having a special rule in the text along the lines of, e.g. the German Standard Contracts Act, according to which in dubio interpretation should be made

contra proferentem. The comment to this Act in Palandt further had a whole section devoted to the necessity of having an "objektive Auslegung" in addition to the special contra proferentem criterion. Thus, for example, in the case of the London Trade Sector standard forms there was no proferentem, as both parties agreed, and there should therefore be an "objektive Auslegung". What was important was not what parties individually expected but what the expectation of the common user of this or that other provision was.

Drobnig felt the same to apply to other expressions, e.g. to INCOTERMS, where the parties may agree on f.o.b. without precisely knowing what it meant, but then the parties were bound by the objective meaning of that term. He saw no reason to make a special rule for general conditions. He thought it was implicit in the words of the provision, because if there was no common intention the meaning must be derived from what reasonable persons would regard as applicable and that was determined by the courts.

Hartkamp and Lando agreed with Drobnig.

Lando added that very often in individually drawn up licence or agency contracts the parties or their lawyers borrowed from the general conditions, taking over expressions and even whole paragraphs. Thus, individually drawn up contracts and standard terms were very often indistinct.

Maskow suggested broadening the scope of Art. 4 to make it cover not only expressions, provisions or terms of contracts but also general conditions. Secondly, he suggested that it would be better not to have cross references to the chapter on general rules, as if such a reference were made here, then the conclusion could be reached that in other cases they would not apply, whereas the general rules applied to all cases.

Hartkamp added that the concept of general conditions was a rather broad one, especially under the definition in Art. 2.17(2) which merely referred to any provisions "prepared in advance for general and repeated use". These might be the famous general condition that were always used in the whole trade, but they may also be conditions used by only one manufacturer or dealer, and that was a very different situation. He thought that Art. 1 as it stood could take care also of those differences.

Farnsworth stated that judges in common law countries were likely to say that the terms had a meaning as decided in an earlier case. They would not ask whether the terms meant the same for A and B, because it would be a little strange to say that the terms meant one thing in the case of A's contract and another in the case of B's contract.

Furmston thought that the points he had raised could be taken care of by the comments. He did not want to have a special provision about the construction of standard terms, because it would then be necessary to decide what standard terms were. One could say that the parties did have a common intention, i.e. to contract on whatever the standard terms meant. If two traders in the sugar trade made a contract to sell/buy sugar on the sugar trade standard terms, what they intended to do was to contract on whatever those terms meant. If one were to put them into separate rooms and give them an exam on what exactly those terms meant, they would almost certainly give different answers and indeed for some professions they would not be able to give any answer at all - it might be that neither party has ever read the terms, but nevertheless it would be a perfectly valid contract. He would expect all contracts on those terms to have the same meaning, irrespective of the idiosyncratic views of the particular traders. There had been cases in England where the parties had discussed the meaning of such contracts in the public baths, and one had claimed they meant one thing and the other that they did not, that they should wait and see. The judges had then held that there was no common intention except whatever the contracts meant, and had then decided what they meant.

Huang asked whether the titles given to the articles would be published together with the Principles. If this was the case, as the whole chapter concerned the interpretation of contracts it was not necessary to specify this in Art. 1 which stated the basic principle.

Bonell stated that he had understood the title of Art. 1 as indicating that that article concerned the interpretation of contracts as a whole, as against the interpretation of individual statements and other conduct which was covered by Art. 2.

Crépeau raised the question of the hierarchy of the sources of interpretation. He suggested that all the rules of the Principles which referred to the subjective rules of interpretation should be brought together, and placed in their hierarchical position: first, the fundamental rule that a contract should be interpreted according to the common intent of the parties, secondly, if that failed, because it was difficult to ascertain the common intention of the parties, attention should be given to Art. 3, which stated that consideration should be given to all relevant circumstances (including the subjective test of the practices established between the parties), to Art. 1(2) and finally, once these subjective rules of interpretation had failed, attention should be given to the objective test of interpretation: what reasonable persons would have intended or the usages of the trade, the terms that are generally accepted in a particular trade or in general circumstances. He was therefore inclined to accept the first paragraph of Art. 1 which to him stated the Principle, but in the version of Doc. 42 which he preferred to the version suggested by Farnsworth, unless Farnsworth was prepared to put a full stop after "common intention".

Drobnig sympathised with Crépeau's observation: first there was the subjective test in Art. 1, then the objective test in Art. 2 and then Art. 3 was subjective again and Arts. 4 and 5 were objective and he found this to lack logical consistency.

Fontaine was also impressed by this point. He observed that in the article as it was formulated in Doc. 42, first a distinction was made between the interpretation of the whole contract and the interpretation of statements and other conduct, and then the comments stated that the distinction was of no practical importance. He wondered whether it really would be necessary to rearrange the articles, but in any case he felt that the comments to this section should be clearer.

Bonell recalled that the decision to split the provision which Farnsworth was now proposing to reunite had been taken at Louvain precisely because it had been felt appropriate first to lay down the subjective criteria for both contract and statements and then to lay down in a separate provision what happened if this did not work. He disagreed with Crépeau's view that Art. 3 related only to the subjective test: he felt it to relate to both, and he therefore insisted that it should follow the other two articles. As regarded the content, he felt that they might never reach an agreement, because what was the rule and what the exception? They might well say that for this Group the subjective test was the most important thing and they believed in the primacy of the intention of the parties, etc., but sooner or later they had to face the possibility that such an intention could not be established, which was a very common situation in real life, and it was this which he had tried to express in the comments. He wondered whether it really was that important for these Principles to establish an explicit hierarchy - they did so implicitly by stating that the intention of the parties should be considered first, and this was stated in both the original text in Doc. 42 and in the text proposed by Farnsworth

Farnsworth observed that what he had wanted to say could be achieved simply by cross references. He had not been able to understand Art. 2(1) until he had realised that what it intended to say was "If the common intention of the parties referred to in Art. 1(1) cannot be established [...]" and if that were stated, then the order would not make much difference. The situation was worse in Art. 2(2) because it did not say what statements it referred to, so one would have to say "[...] who made the statements or engaged in the conduct referred to in Art. 1(2)" etc. As in the past the Group had preferred not to make cross references, it had seemed sensible to him to move the provisions in such a way that it resulted logically.

Crépeau considered that the difficulty with Farnsworth's Art. 1 was that it seemed to be putting on practically the same level the subjective test, the common intention of the parties, and the objective test in the second paragraph. At some point or another a decision had to

be taken as to whether in looking at a contract all possible subjective tests of intention should be exhausted first. It was only when these subjective tests had been exhausted that one could go on to say that if the common intention of the parties could not be presumed, then one should go by objective tests.

Bonell disagreed with Cr  peau. Once one spoke of implicit intention one acted on an objective criterion and why should one then not state this. If one said that if the actual common intention cannot be established one should look at the presumed common intention, then on the basis of what would one do so?

Farnsworth indicated that if Cr  peau's approach were adopted, this should be explained: he felt that common lawyers would not see any difference in emphasis between the provisions depending on the order in which they were placed.

Drobnig favoured Cr  peau's view, but felt that it was necessary to be very practical: for example, there is a controversy on a particular term and one party offers proof of their common intention (e.g. evidence of the negotiations or of what happened in the course of performance). The question was then whether that proof should be accepted, or whether proof offered by the other party as to the usage or the reasonable person's understanding should be taken. In his view it was clear that first the evidence relating to the criteria of Art. 3 must be taken and only if that failed could evidence of the reasonable person's understanding be taken. The present setup, where Art. 2 preceded Art. 3, might cause confusion.

Lando commented that in theory it sounded very attractive to say that first every subjective element had to be exhausted, and that then one could pass to the objective tests. In practice, however, if there was an expression in a contract and there were doubts on its interpretation, the starting point was what did this mean in general language? Only if one of the parties could prove that the common intention of the parties was different, would this meaning be changed. In such cases he thought it sound to say that the starting point was the plain meaning of the words.

Fontaine considered that both approaches would be involved, because one party would say that that was not what they had meant, and the other party would say either that it was what they had meant, or would question what that expression or word meant in general. Both approaches would be on the table, and the arbitrator or judge would have to give priority to one of them. According to the Principles he would first try to ascertain the common intention of the parties, but there could be other rules outside the Principles according to which the judge should not pay attention to what the parties had meant, but only to the objective tests.

Bonell pointed out that the policy of the Group had always been to stick to the precedents of the Vienna Sales Convention (CISG) when there were any, unless there were good reasons to depart from them. Art. 8 CISG was exactly what Farnsworth was suggesting, and he wondered whether the discussion should be reopened with a view to reverting to the order followed by CISG, which would be the interpretation criterion followed all over the world with respect to sales contracts.

Lando agreed in principle, but doubted the effects even if the order were to be changed.

Fontaine also agreed that, in view of the late stage of the work, major changes should be avoided. However, if either of the present two approaches were retained (that of Doc. 42 and the Farnsworth proposal), then he insisted that the comments be made more explicit as regards the choice of criteria in the arrangement. Furthermore, he agreed with Crépeau that to some extent Art. 3 was subjective, so the comments should explain that they had first stated the test of the common intention of the parties, which was expressed in Art. 1 and which had some further implications in articles such as Art. 3, but that since it is very difficult to apply that test also alternative tests had been added.

Bonell assured the Group that the comments would reflect the statement of principle that they all had in mind. He was reluctant to exclude the reference to the determination of the reasonable meaning from the suppletive criteria contained in Art. 3, firstly because he did not find the reasons for doing so convincing, and secondly and most importantly because at that point the determination of the reasonable meaning would be left entirely to the discretion of the interpreter. If the scope of Art. 3 were to be restricted to the determination of the intent of the parties and the reasonable meaning were to be excluded, sooner or later cases would come up for which it was necessary to stick to the reasonableness test and on the basis of what indications would the interpreter then determine the reasonable meaning? Art. 3 was much more important for the determination of the reasonable meaning than for the determination of the intention of the parties.

Drobnig observed that neither the text, nor the comments, made clear what Bonell had stated, i.e. that Art. 3 was intended to supplement both the intention of the parties and the understanding of a reasonable person. The CISG formulation of Art. 8(3) was therefore better. If Art. 3 were to be revised along the lines of Art. 8(3) it would be easier for him to go along with its present location.

Voting on the two alternative approaches of Doc. 42 and of the Farnsworth proposal, 1 vote was in favour of the Doc. 42 version whereas 4 were in favour of the Farnsworth formulation. The formulation proposed by Farnsworth was therefore accepted as the basis of the deliberations on Arts. 1 and 2.

As regarded Crépeau's proposal to have Art. 1(1) as a separate article stating merely "A contract shall be interpreted according to the parties' common intention", Farnsworth commented that he could not see how it would make the slightest difference. He could not understand how para. 1 could be applied if it were not possible to establish a common intention. He felt that there was a desire to say something quite different from what was in effect stated, i.e. that one should try very hard to find a common intention. If that was what one wanted to say, it was better to say so.

Maskow felt that as in Farnsworth's proposal para. 2 opened with "If such an intention cannot be established" it would be superfluous to state "if such an intention can be established" in para. 1.

Farnsworth agreed that if the phrase were taken out because it was superfluous, that was fine, but if it instead were taken out because it gave the provision a very different meaning, then that left him confused.

Crépeau explained that placing Art. 1(2) together with Art. 1(1) in the same article gave it a sort of primacy over the other provisions on interpretation and it seemed to him that the consequence was that there were two basic rules on interpretation: first, look for the common intention of the parties, and if it is not possible to find that, look for what reasonable persons would devise as the common intention.

Bonell had seen the alternative between the two versions as being that the new version dealt with the interpretation of contracts on the one hand and the interpretation of individual statements on the other - the intention was not to change the substance in any way - whereas the text in Doc. 42 treated contracts as a whole and statements together, laying down the subjective test in Art. 1 adding what was now in the second paragraph of the two articles in Art. 2. The Group now felt that it was more appropriate not to deal with contracts and statements in the same article, but instead to treat them in separate articles. It was true that as the articles were presently drafted, the objective test came already in Art. 1(2), but was there really any difference between having it in Art. 1(2) or in Art. 2?

Date-Bah considered that Crépeau's view that by putting the subjective view first it was given primacy was not self-evident: no principle of interpretation of the rules had been laid down according to which whatever comes first will have primacy in the application of the rules.

Maskow felt that the net result of the provisions would not be very different from what Lando wanted. He did not feel that the division between subjective and objective interpretation was all that sharp. First, one tried to find out what a party wanted. The terms used by this party should be interpreted in a certain sense because of their

individual connotations, but the interpretation of words is mostly objective, so both criteria were needed and too great a stressing of the subjective approach, the common intention of the parties, was not to be recommended. In fact, it had always to be seen against the background of the objective terms.

Furmston did not think that an English lawyer would read Art. 1(1) in either formulation as a clear adoption of the subjective view. He did not think that the objective view required one to disregard the parties' clearly formulated common intention if there was one. He therefore did not think that it would make much difference to an English lawyer whether or not the phrase "if such an intention can be established" were in.

Drobnig stated that he would be satisfied if the comment to Art. 1(1) made it clear that in establishing the common intention of the parties Art. 3 must be taken into account. For clarity's sake, he preferred to leave the proviso "if such an intention can be established".

Bonell agreed with this suggestion, which followed upon that of Fontaine to redraft the comments so as to indicate that Art. 1(1) gave the first criterion to be adopted, and then to say that if, however, in the circumstances of the case, notwithstanding recourse to Art. 3, it was not possible to establish such a common intent, recourse was to be had to the reasonableness test, again in the light of Art. 3.

Komarov supported this view. He felt that the idea of a preference should be reflected in the comments, but did not think that it was necessary to put it in the text of the provisions, as it was very difficult to set up an order of preference.

Huang wondered whether the intention of the Group was to have Art. 1(2) as a separate article, or whether it would remain as a second paragraph of Art. 1, as if the two were separated she would prefer to keep the proviso, whereas if the two paragraphs stayed together the proviso would be superfluous.

Date-Bah considered that even if the two paragraphs were separated, the opening of the second of the two provisions would still fill any substantive gap which might arise, so too much should not be made of a possible separation.

Voting on Crépeau's proposal to delete the words "if such an intention can be established" in Art. 1(1), the proposal was rejected by 6 votes to 4.

Drobnig had the impression that Crépeau operated under a misunderstanding, as the words "If such an intention cannot be established" indicated that first the subjective test of Art. 1(1) must

be exhausted, and only if that did not apply would the objective test come into play, which he thought was exactly the sequence Crépeau wanted.

Voting on Art. 1 of the Farnsworth formulation, 8 voted for, one voted against and one abstained. Art. 1 was therefore adopted and read as follows:

"(1) A contract shall be interpreted according to the parties' common intention, if such an intention can be established.

(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning which reasonable persons of the same kind as the parties would give to it in the same circumstances".

Turning to Article 2, Farnsworth's proposal for reformulation read:

"(1) A party's statements and other conduct shall be interpreted according to that party's intention, if the other party knew or could not have been unaware of that intention.

(2) If the other party did not know of and could not have been aware of that intention, such statements and other conduct shall be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".

Hartkamp commented that in para. 2, the phrase "did not know of and could not have been aware of" was awkward, and a mere repetition of the preceding paragraph, and suggested replacing it by "if the preceding paragraph is not applicable".

Furmston agreed with Hartkamp.

Komarov wondered whether the word "reasonable" was necessary. He suggested that the notion "persons of the same kind" included that of "reasonable". Secondly, the provision had to state on what standards of reasonableness one should proceed: standards of commercial reasonableness were different in different countries, not to speak of international standards. Thus, should one take the international standards or the standards of the country of the buyer or of that of the seller? If the word "reasonable" were deleted, this would then be subject to a subjective determination of the intentions of the parties. Furthermore, the word "reasonable" might cause problems of interpretation, as there were legal systems which did not know this notion.

Farnsworth recalled that this same point had come up in UNCITRAL when CISG had been discussed. He felt that in the Principles it might be easier to accept this notion, as CISG contained provisions where this notion was used. Thus, a legal system which was not familiar with this notion could at least refer to the comments on CISG.

Komarov suggested that the comments then state that the provision referred to international criteria.

Bonell commented that this would come up in relation to Art. 3. Thus, first one determined the intention of the parties on the basis of the criteria in Art. 3, if it was not possible to establish such an intention, then the objective, reasonableness test, had to be adopted, and again the criteria set forth in Art. 3 had to be taken into account. Thus, the reasonableness test in Art. 2(2) was far from discretionary.

Hartkamp added that the uniform application of the Principles would make certain that the reasonableness test was of international character and not attached to specific national connotations.

Furmston wondered whether the illustration on page 5 of Doc. 42 was an illustration of common intention or of reasonableness.

Bonell considered it to be an illustration of reasonableness, because there was no common intention as the Libyan exporter was thinking in terms of US dollars whereas the Canadian importer was thinking in terms of Canadian dollars.

Furmston wondered whether this was really so, considering that all transactions on the Rotterdam spot market were in US dollars. What would happen?

Bonell suggested that if the Canadian could prove that there was a course of dealing between the two parties - they had always negotiated and paid in Canadian dollars and for the fifth order they only spoke of dollars - then on the basis of Art. 3 he could succeed in proving that in this respect they moved from the assumption that it was Canadian dollars.

Furmston could see that there could be examples of cases where the use of the word "dollars" was ambiguous and it was reasonable to argue whether it was Canadian, US, Australian or Singapore dollars, but this example was not a good one.

Drobnig came back to his proposal for a formulation of Art. 2 taking up the first part of the clause of Art. 8(3) CISG so that Art. 3 would serve as an aid in ascertaining the intention of the parties, as well as in ascertaining the reasonable person's understanding of the declaration of the parties.

Bonell stated that it had always been intended that a rule to this effect should be laid down, and, also in view of the discussion which had just taken place, he was prepared to adopt this new formula.

Article 2 was thus adopted, and read as follows:

"(1) A party's statements and other conduct shall be interpreted according to that party's intention, if the other party knew or could not have been unaware of that intention.

(2) If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances".

Article 3

Opening the discussion on Article 3, Fontaine suggested that as regarded the reference to the preliminary negotiations, as clauses excluding the relevance of the preliminary negotiations were very common in contracts the comments should indicate that such clauses were valid, even if this did go without saying.

Bonell agreed with Fontaine, but recalled that there was a provision on this question in the chapter on formation, where they dealt with the merger clauses (cf. Art. 2.16(2)). He therefore suggested a cross reference in the comments.

Lando observed that it was very often the interpretation of a statement which revealed whether a contract had been made or whether there had, e.g., been a mistake. He therefore suggested that the comments to Arts. 1 and 2 also make reference to the formation chapter and say that whether or not the contract had been validly formed would depend on the interpretation of the statements.

Drobnig found the reference to usages at the end of Art. 3 to be amazing as usages were contained already in Art. 1.6. He wondered whether there was any particular reason for retaining usages in Art. 3.

Bonell felt that usages should be retained, as that gave a complete picture - although the provision said nothing of which usages should be considered, it did make it clear that usages were also relevant. He referred to the French and Italian civil codes which distinguished between "usages interprétatifs" and "usages normatifs", i.e. usages referred to in order to supplement the contract as one of the sources of the rights and duties of the parties, and usages referred to as a means of interpretation which, at least in theory, could be considered differently. He feared that if usages were deleted in Art. 3, anyone who read the provision would not mentally say "and of course usages referred to in the preliminary chapter". On the contrary, the temptation would be to say that as usages were not mentioned here, whereas all the other criteria were, they should be disregarded.

Furmston commented that English lawyers had extremely restrictive rules about excluding both preliminary negotiations and conduct subsequent to the contract, but one thing which English law did

allow and which most systems would probably regard as important in practice was the commercial context in which the contract was set. Thus, if the factors were to be listed, the first one which he would put would be the commercial context in which the contract was made: knowing what people usually do and what the object of the transaction is, is the most useful guide to knowing what the parties intend. Usages were part of that, but not all of it. The text as it stood did not exclude the commercial context, but the fact that those which were listed actually were listed, was presumably indicative of the importance attached to them.

Bonell was attracted by Furmston's proposal. He referred to Art. 3.8 on gross disparity, which stated that regard was to be had to "among other things, [...] (b) the commercial setting and purpose of the contract", and as that was what Furmston referred to, he suggested using the same formula also in Art. 3.

Furmston and Hartkamp felt this to be a good idea.

Fontaine wondered whether this would be in addition to, or in substitution of, the factors already indicated.

Furmston suggested that if this formula were adopted, the reference to usages, which could be considered to be included in the new formula, could go out, whereas the others should remain: the other factors mentioned (preliminary negotiations between the parties, any practices which they have established between themselves, and any conduct of the parties subsequent to the conclusion of the contract) were all peculiar to the parties concerned, whereas usages were more general.

Crépeau agreed that usages should be taken out of Art. 3 as they were on the objective side of interpretation, and be placed in an article of its own, saying that in the interpretation of contracts, usage must be considered.

Hartkamp however observed that if usages were taken out, readers would wonder what the reason for this difference with CISG was, as Art. 8(3) CISG did have usages. Furthermore, he did not think that usages were entirely covered by the commercial setting and purpose of the contract.

Lando thought that both usages and good faith should be introduced here, and it did not matter if they were also in the general provisions of Chapter 1. There might, however, be a risk of ambiguity, in that Art. 5 spoke of "interpreted in a manner appropriate to the nature of the contract", instead of of the "purpose of the contract".

Komarov wondered whether it would be wise to state in the provision itself, rather than just in the comments, that the list of

factors indicated in the article was not exhaustive, by saying something like "including, but not limited to".

Hartkamp felt that the words "all relevant circumstances, including" would in themselves indicate that the list of factors was not exhaustive.

Furmston suggested a wording such as "[...] all relevant circumstances, including any preliminary negotiations between the parties, any practices which they have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages and the commercial purpose and setting of the contract".

Farnsworth suggested putting the commercial setting and purpose of the contract first.

Maskow agreed, as the commercial setting and purpose of the contract were more general than the preliminary negotiations, subsequent behaviour etc. However, to meet Drobnig's observations on usages, one could say "in the light of usages" at the end of the sentence.

Fontaine and Bonell considered that the order of priority of the factors listed was not indifferent. If some priority were given to the intention of the parties, then one should start with the preliminary negotiations and then go on to the more objective aspects.

Crépeau questioned the relationship between usages as one, but only one, of the particular circumstances which may or may not be considered, and the rule of Art. 1.6, which stated that "The parties are bound by any usage". As no qualification was given, he supposed it would be a usage either to the contents of the contract ("normatif"), or to the interpretation of the contract.

Bonell stated that he would consider Art. 3 a special provision, thus excluding the implication in Art. 1.6 that also "usages interprétatifs" were intended.

Drobnig was not sure that it was possible to separate "usages interprétatifs" and "usages normatifs" - would not the "usages interprétatifs" also have to be used, i.e. the criteria set out in Art. 1.6 according to which not every usage interprétatif or normatif existing anywhere can be relevant, but only those which have a local connection with the parties? If this was not the case, how would it make sense to mention usages in Art. 3 to make it clear that it is a usage which is different from the one in Art. 1.6? They did have a different function, but then it was necessary to describe which of many different interpretative usages is to be relevant for Art. 3, and that function was performed in Art. 1.6 but was not performed in Art. 3. He suggested deleting usages in the text of Art. 3, but to refer to Art. 1.6 in the comments, saying that in order to define the limit of the relevant

usage, the criteria set out in Art. 1.6 applied.

Maskow considered that if usages were mentioned in Art. 3 then they were subject to the definition of usages in Art. 1.6, and he could not understand why usages had to be deleted in Art. 3 for them to be consistent.

Bonell considered that the proposal to delete usages in Art. 3 did not have sufficient support, and that instead the comments had to make the connections clear.

Lando wondered if the Group had decided whether to consider his proposal to have an article here on good faith. He knew that there was an article on good faith in Chapter 1, but it was a very important factor, and in this case he would advocate repetition. He agreed that unnecessary repetition should be avoided, but felt that for the "simple businessman" who might not read all the provisions this should be added also in the chapter on interpretation, albeit as a separate provision and not in Art. 3.

Huang also felt good faith to be very important. When discussing Arts. 4.2 and 4.3, the relation with Art. 1.5 had not been considered, and perhaps a reminder of the principle should be inserted here, possibly by saying something like "In interpreting a contract or statement made by and other conduct of a party in line with Art. 1.5".

Fontaine and Maskow did not favour adding good faith in Art. 3, because it was not really a circumstance, but a kind of superior criterion, and Art. 1.5 already had it: it was a dominant principle which governed all the rules and did not have to be repeated. However, a reference to Art. 1.5 should be made in the comments.

Bonell suggested leaving the text as it stood for the time being, to come back to it when they had a written proposal before them, and to consider Lando's proposal when discussing Art. 1.5. This suggestion was accepted by the Group.

Article 4

Opening the discussion on Article 4, Drobnig suggested that the provision should not be limited to the interpretation of "expressions, provisions or terms of the contract", but should be extended to statements made by the parties.

Farnsworth agreed with Drobnig. He suggested a formulation such as "In the process of interpretation account shall be taken of". Then it would not be necessary to list all the possible things that might be interpreted.

Crépeau observed that the formulation of Art. 4 used the words "shall be interpreted" and was made subject to the application of Arts. 1, 2 and 3. If the rule was that the meaning to be given was "the meaning usually given [...] in the trade concerned" and there was an Art. 3 which included the commercial setting of the contract and usages, was there then any need for this provision independently from Art. 3?

Bonell recalled that one of the reasons CISG no longer contained an Art. 9 dealing with usages in a broad sense, contrary to ULIS which had a third paragraph of this content, was that many delegates had felt such a provision to be no longer necessary in the light of the two foregoing paragraphs. According to a strong minority view this conclusion was not entirely satisfactory. In other words, the feeling was that this provision addressed a special question, which might not be sufficiently clearly expressed here, as this provision spoke of expressions, provisions, and terms, and now it was suggested that it should be opened also to statements. Farnsworth had even gone so far as to suggest speaking only of the interpretation process. At this point he wondered about the relationship between Arts. 4 and 3 - had the draughtsmen of ULIS intended what he himself had attempted to lay down at the beginning of the comments by stating "Businesspersons in their contracts often employ expressions and terms commonly used"? It had been observed that this addressed the c.i.f./f.o.b. problem, and everyone agreed that in transport law there were certain typical clauses and expressions used for the sake of brevity which everyone knew had a particular meaning. This was a situation similar to the one of standard terms: when businessmen used such typical trade terms, they knew that their meaning would be determined in accordance with the objective meaning given to them within the trade concerned, unless they made it very clear that as between themselves they intended these terms in a different manner.

Fontaine found the comments much clearer than the text. He suggested formulating the article along the lines "Expressions and terms commonly used within the respective trade sectors or throughout the business community are to be interpreted [...]". Such a formulation would indicate that the terms and expressions dealt with were those used in a certain trade and not those of the contract.

Hartkamp agreed with Bonell's explanation, but wondered whether in that case the words "subject to" were correct: he considered that it should only be subject to the common intent of the parties, and perhaps to the intention of one party that the other party could not have been unaware of, but he thought that this article would prevail over the other preceding rules that the Group had already adopted, so the beginning of the paragraph should be adapted and Fontaine's suggestion would get rid of this problem.

Drobnig thought that it was necessary to be consistent, and as Art. 1 in its new version had been made the prime point of departure,

that must hold true for Art. 4 as well. If the common intention of the parties was that the terms meant something different, then that common intention must prevail. If the parties by subsequent conduct, by agreed course of action, had departed from the generally accepted meaning of for example f.o.b., then that departure must also prevail. He therefore thought that the "subject to" clause had to remain.

Date-Bah agreed with this view. He remembered fighting a losing battle against "usages" at the Diplomatic conference for the adoption of CISG, as there could be surprise in a usage, particularly for people in developing countries as these countries had not been too closely associated with evolving the meaning of these usages. He therefore suggested that something be added along the lines "where it is reasonable to expect that the parties to the contract could not have been unaware", i.e. some residual element to protect parties from complete surprise in the content of a usage. Something along the lines of Art. 9(2) CISG.

Furmston observed that if the article only applied to expressions such as f.o.b. and c.i.f., ought this then not to be stated in the text and not in the explanations? As it stood the text was not limited to technical terms. Secondly, was it true that in deciding what f.o.b. and c.i.f. meant, what one did was to give effect to the meaning usually given to them in the trade concerned? In English law that was not an accurate description of what English courts did - what they did was to read all previous cases on f.o.b. and c.i.f., i.e. they applied the substantive law for f.o.b. and c.i.f. contracts, they made no enquiry about trade. He was not sure what the trade would be. He supposed INCOTERMS were an attempt to say what these expressions meant, but as far as he knew INCOTERMS were the same for all trades, so if one said "c.i.f. INCOTERMS", one would go off and look at the 1990 statement of what it meant.

Fontaine commented that the formula referred to in the comments referred both to expressions and terms limited to a particular trade and to some others which were used throughout the business community. Perhaps with an adequate phrasing both instances could be covered in the text. INCOTERMS were of course an example of the latter, but for example in the insurance sector there were some terms and expressions which were very particular for certain branches of insurance.

With reference to the proposed modification of the opening phrase of the article, Bonell suggested that it would be difficult to rephrase it. Art. 8(3) CISG stated "In determining the intent of a party or the understanding a reasonable person would have had [...]" which was a lengthy formula and covered both the intent of the parties and the understanding of reasonable persons but only dealt with the interpretation of statements. As these rules dealt with both contracts and individual statements, they would end up with four formulas: in interpreting the common intention, the intent of one of the parties, the

meaning a reasonable person would attach to the contract or the understanding a reasonable person would have had. It was hardly possible to combine these four formulas. As regarded the question of businessmen of a certain sector using specific terms and expecting those terms to be understood only in that way and only in very rare cases being prepared to accept a different meaning, the new version of Art. 3, which would refer to commercial setting, introduced a new concept, was more specific and could therefore meet the problem.

Drobnig did not agree with this last comment. He thought that the commercial setting and purpose referred to the specific individual contract. Art. 3 was not only related to the interpretation of terms in the contract, it referred also to the interpretation of statements, or even conduct, of parties. Secondly, it referred to general usages, general agreements like INCOTERMS which had fixed and given a very specific meaning to certain commercial terms. The two were clearly different, and he would leave Art. 4 as these Principles should draw attention to those fixed trade terms, especially to those which had been codified or agreed internationally.

Lando agreed with Drobnig that Art. 4 was still necessary, although he would not say that it was subject to the provisions of Arts. 1, 2 and 3: these articles were resorted to when one tried to find out what the understanding of a reasonable person or the usual meaning of the term was, so he suggested saying "In applying" instead. He also agreed with Date-Bah on having a clarifying formula inserted into the provision, such as there was in CISG.

Furmston wondered what would happen in cases where parties misused the terms, so that some adaptation would be necessary to give some sense to the contract. In those cases it was not simply a matter of applying Art. 4.

Maskow considered that Art. 4 might be needed in cases where the parties did not belong to the same trade sector. As regarded the problem of whether the provision should be related in one way or another to international trade, he thought this had already been done, as the provision specified "in the trade concerned" and it was international commercial contracts which were the subject of this exercise, so the trade concerned was international trade. As concerned whether or not general conditions should be added, he felt that this should be considered unless the proposal to substitute the opening words for "In applying Articles 1 and 2" were to be accepted.

Fontaine had the impression that the two problems that had to be dealt with were, first, whether or not to cover contracts and statements at the same time, and secondly that of covering trade terms and general conditions. He suggested a more general formula such as "expressions and terms commonly used within their respective trade [...] are to be interpreted". Such a phrasing would cover both contracts and statements

and individual terms as well as general conditions. The article would thus read: "Expressions and terms commonly used within a particular trade sector or throughout the business community shall be interpreted according to the meaning usually given [...]".

Voting on whether to retain the opening clause of Art. 4, stating "Subject to the provisions of Articles 1, 2 and 3", 9 voted in favour of its retention.

Turning next to Date-Bah's suggestion to add to the final part of the provision a further qualification along the lines of Art. 9(2) CISG which stated "[...] which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned", Bonell saw some difficulties in adopting the CISG formula. He suggested a shorter, simpler formula such as "[...] according to the meaning usually given to them in the trade concerned and of which both parties were aware or could not have been unaware". Such a formula would cover INCOTERMS, but a particular meaning attached to a trade term, a delivery term at, e.g., the port of Genoa would not be covered, unless the parties were aware or could not have been unaware of it.

Farnsworth suggested that such a formulation would duplicate some of the sense of the opening "Subject to" phrase.

Fontaine suggested that if the phrase "the meaning usually given to them in the trade concerned" were kept before the qualification, there was a problem because the provision started with "terms used within a particular trade or throughout the business community shall be interpreted according to the meaning usually given to them in the trade concerned" and then one would expect something on the business community, or stop after "usually given to them". He considered that "trade concerned" really looked as though it were a particular trade.

Maskow stated that "in the trade concerned" might mean either a particular trade or, more generally, the business community and it would be the business community which was the trade concerned.

Lando still considered that some reference to international trade would be necessary, as the innocent reader would not get the notion of international trade and usages.

Crépeau wondered whether there was a difference between the phrase "meaning usually given to them in the international trade concerned" and "international trade usages".

Bonell considered that INCOTERMS were not usages as such, even though they to a certain extent originated in usages.

Komarov wondered whether misrepresentation was covered by the article. It did happen that parties used well established commercial terms in a way which was contrary to the way in which they were supposed to be used, e.g. parties making contracts for inland transport using the term c.i.f., in which case the contract would be interpreted in a narrow way according to the meaning usually given in the trade concerned.

Lando suggested that Komarov's problem might to some extent be taken care of by Art. 5(1), which stated that "In the event of ambiguity, the terms of the contract shall be interpreted in such a way as to give them effect [...]", so then c.i.f. would have to be interpreted to mean something like the "Carriage and insurance paid to (CIP)", which was the new INCOTERM which covered inland transport. Both Art. 5(1) and Art. 5(2) could be of use here.

Before taking a final decision on Art. 4 the Group decided to examine the proposal for Art. 3 prepared by Furmston.

Proposal for a revised Article 3

The proposal for Art. 3 which Furmston had prepared read:

"In applying Arts. 1 and 2 due consideration shall be given to all relevant circumstances, including any preliminary negotiations between the parties, any practices which they have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages and the commercial setting and purpose of the contract".

Crépeau observed that it seemed to be a statement of all of the circumstances that had to be taken into account, and in that sense, when one said "shall be given to all relevant circumstances including", all of the factors listed were on an equal footing. The judge or arbitrator would look at the list and select one to apply. In a case like this, nothing would prevent that in the interpretation of Art. 1 and 2 all of this, and also the meaning usually given to terms and expressions in the particular trade, should be considered.

Hartkamp agreed with this, particularly as in the proposed new Art. 4 the words "and of which both parties were aware or could not have been unaware" had been added, which took much of the gist out of the original article. Thus, if it were at all necessary, it could be included in the list which at present was in Art. 3, i.e. Arts. 3 and 4 could be merged to read "In applying Arts. 1 and 2 due consideration shall be given to all relevant circumstances, including (a) any preliminary negotiations between the parties [...]" with "any meaning usually given to terms in a particular trade concerned or in international trade" as (e) or (f).

Farnsworth observed that Hartkamp's proposal had been prefaced by the assumption that Art. 4, if it were retained, would have the language "of which both parties were aware or could not have been unaware" at the end. If that language were retained, then he did not feel that Art. 4 stated anything very different from what was suggested in Art. 3, so he would therefore favour putting the substance of Art. 4 as redrafted into Art. 3.

Drobnig felt that a reference to both expressions and terms was necessary and then if the two articles were merged the provision would be very heavy. Thus, it might be better if the present Art. 4 became a second paragraph.

Bonell also hesitated to merge Arts. 3 and 4, as Art. 3 would become very heavy indeed, and as the scope of the two provisions was very different: Art. 3 spoke of applying Arts. 1 and 2, i.e. it was to be used also in order to determine the common intention of the parties, and what did it mean that in determining the common intention of the parties (which was a subjective test) consideration had to be given to the meaning usually given in the trade concerned?

Hartkamp, Crépeau and Furmston saw no difficulty as it was the meaning usually given of which both parties were aware or could not have been unaware.

Voting on the proposal to merge Arts. 3 and 4, the proposal was accepted by 6 votes in favour and none against.

Farnsworth suggested that the idea embodied in Art. 4 could be expressed in Art. 3 as "any meaning commonly given in a trade concerned", which could be either a specific trade or international trade.

Crépeau, Farnsworth and Drobnig suggested this phrase be inserted immediately before usages.

Furmston prepared a second proposal for Art. 3 incorporating the substance of Art. 4 which read:

"In applying articles 1 and 2, due consideration shall be given to all relevant circumstances, including:

- (a) any preliminary negotiations between the parties,
- (b) any practices which they have established between themselves,
- (c) any conduct of the parties subsequent to the conclusion of the contract,
- (d) any meaning commonly given in a trade concerned,
- (e) any usages, and
- (f) the commercial setting and purpose of the contract."

Hartkamp suggested changing "they" to "the parties" in lit. (b), as "they" might otherwise refer to the relevant circumstances in the heading. This suggestion was accepted.

Drobnig felt that lit. (d) as it stood did not make sense, because it appeared to relate to the relevant circumstances whereas it should refer to the terms and statements of the contract. Furthermore, he felt that lit. (f) should go before lit. (e), as lits. (a) to (d) and (f) all related to the contract whereas usages were outside the contract.

Crépeau wondered whether lit. (e) was specific enough, or whether it should be limited to, for example, international usages.

Bonell agreed that the problem did exist, but recalled that it had been decided that the comments should indicate that the usages referred to here were those which were applicable according to the general provisions. The comments would thus contain a cross-reference to Art. 1.6.

Hartkamp was not certain that the reference to usages in this article referred back to Art. 1.6, as there the usages concerned were those to which parties were bound, whereas here he did not think that parties were bound by the usages, but that the usages were instead to be used for the interpretation of the contract.

Bonell recalled that there had been agreement that the function of the usages was different here and in Art. 1.6, but that as concerned the criteria for the determination of which usages may become relevant under Art. 3 for the purposes of interpretation, Art. 1.6 should apply, i.e. even if the function was different, the ambit of the usages which should be taken into consideration was the same.

Hartkamp did not consider that this followed from the text: it would only follow from the text if Art. 1.6 defined "usages" for the whole set of rules but it did not. If one wanted to bring this about, the article should refer directly to Art. 1.6, by stating e.g. "any usages as defined in (mentioned in) Art. 1.6". As to whether this could be done in the comments, that would depend on whether one would be entitled to restrict the literal sense of an article in the comments. As a matter of principle he preferred the expression "any usages" so as to be broader than in Art. 1.6. He himself did not actually want to restrict it to the usages in Art. 1.6 but he had understood some members of the Group to want it to refer only to Art. 1.6 and as it was drafted now it was broader. If the same concept was desired an express reference would be necessary.

Fontaine agreed with Hartkamp. Art. 1.6 did not define usages, but gave a sort of restriction to the usages intended. He could imagine that anyone who had not followed the discussions could reason a

contrario and say that this article was broader than Art. 1.6 because it contained no restriction. It might suffice to have this in the comments, but he felt that it should also be in the text.

Maskow did not have the misgivings Hartkamp and Fontaine had, as he felt that usages could either describe the behaviour of the parties (as in Art. 1.6) or they could define something, which was what they were confronted with here. He did not think that in the context of Art. 3 it would make any difference if one stated "usages as defined in Art. 1.6", but if some members felt that it made the provision clearer, then why not.

Lando felt it to be necessary to define the usages that were being referred to, although the problem was not that easy. Of course the usages in Art. 1.6 should be covered and he agreed with Hartkamp and Fontaine that it was not possible merely to refer to "usages". However, what would happen if a foreigner went and negotiated a contract in Milan on the Milan stock exchange? He would probably be bound by the usages on that stock exchange, even though they were strictly local usages.

Drobnig felt there to be no doubt that transactions on a certain stock exchange would be subject to the usages of that exchange and should not be subject to the usages of any other place. He felt that the usages in Art. 3 should be restricted to those circumscribed in Art. 1.6, because it would not make sense for there to be a suggestion that any usages in the world could be used for the interpretation of the intention of the parties. He would therefore prefer to specify "any usages as defined in Art. 1.6".

Tallon wondered what usages would be relevant for the determination of the intention of the parties: he had heard of usages determining what was in the contract, but not determining the intention of the parties. If the usages intended were those in Art. 1.6 which were used to determine, for example, the commonly recognised meaning of a word which was used, then he wondered what the difference was with (d), which referred to "any meaning commonly given in a trade concerned". He felt that the two might be merged to refer to "a meaning commonly given in a trade concerned or by an international usage". He felt that this would be more coherent and would avoid the difficult distinction between Art. 1.6 and this text. It was not the usage as such, it was the word used by a usage to which you may refer in order to determine the intention of the parties.

Drobnig disagreed with Tallon: (d) referred to terms and phrases whereas (e) was much broader and meant usages other than terms. In, for example, a stock exchange transaction it was the usage that the time of performance was determined by the usage of that particular stock exchange.

Tallon did not feel that this was interpretation: it was the filling of gaps but it was not Art. 3 on interpretation.

Farnsworth thought that usages could be taken out, which would mean that then Art. 1.6 would apply. If it were then desirable to remind readers that there was another provision on usages, the normal practice of cross references in the comments would suffice.

Huang wanted to know whether "usage" corresponded to "international practice" or "international customs".

Bonell stated that the meaning should be the same as that in Art. 1.6.

Huang wondered then whether that meant that not only international but also national customs could be included under usages.

Date-Bah felt that this was a moot point, as some, such as Hartkamp, felt that the formulation in Art. 3 was broader than Art. 1.6. The question was then whether language should be introduced to restrict the provision to Art. 1.6 or to broaden it explicitly.

To Farnsworth Art. 1.6 was not a definition of usages; it assumed that there were usages which the parties were not bound by, i.e. there were two kinds of usages: those the parties were bound by and those they were not bound by, and this provision did not necessarily assume the same distinction, and he did not see why it should. All that Art. 3 said was that due consideration should be given to these factors, and one might be giving consideration to a usage in order to understand what the parties had said, because what the parties had said had been designed to exclude the usage which otherwise would have applied. Art. 1.6 indicated what usages should be incorporated, whereas Art. 3 indicated how to decide what the parties meant, which was something separate.

Fontaine recalled that Art. 1.6 was inspired by Art. 9(2) CISG, which had been introduced because the developing countries had been afraid of being bound by any usages. Art. 1.6 of course did not relate to interpretation, but the guarantee the developing countries had got with Art. 9(2) and which was not reflected in Art. 1.6 might be lost with a much broader use of the reference to usages in the chapter on interpretation. Personally he favoured indicating a restriction of which usages could be taken into account also for interpretation.

Bonell recalled that usages were included in the present version of Art. 3 because they had been included in the former version, which had been taken word by word from Art. 8(3) CISG. In CISG the issue of which usages were intended had been left open. This had given rise to the same division of opinions as the Group was now experiencing, in that there were those who considered that the ambit of the usages referred to in Art. 8(3) could not be different from those later clarified in Art. 9

and there were those who maintained the opposite. He wondered whether they were really in a position to reach a conclusion and to clarify this in the text.

Fontaine felt that they should at least be aware that CISG had produced this problem of interpretation and if they could avoid it this would be advisable. In CISG the two provisions were placed close together, so it was normal that arguments could be raised to the effect that either the meaning of "usages" was obviously the same in the two provisions, or alternatively that it was obviously different. In the Principles, however, the problem of interpretation might be more difficult to solve because of the distance between the two provisions.

Komarov commented that as the list of factors in Art. 3 was not exhaustive ("due consideration shall be given to all relevant circumstances, including") the consequence was that in any case not only international usages, but also any other usage could be used as a source for interpretation. He therefore did not think it very practical to discuss what was meant by "usages".

Hartkamp agreed with Komarov: as the list was not exhaustive what was written down was not very important, but they should at least themselves know what they intended: if an explanation was to be made in the comments it was necessary to know what was intended.

Drobnig agreed that the list was not exhaustive. However, if usages were mentioned here, he did not think that it could ever enter into the minds of the parties or into that of a reasonable person that the interpretation of an unclear term could be made subject to a usage which the parties did not know of or which under the criteria of Art. 1.6 did not apply to their contract. That would certainly be against the interests of the developing countries, but it was just as much against the interests of developed countries, because why should a merchant in Hamburg who contracted with a merchant in London be bound for the interpretation of an unclear term by a usage which existed in Buenos Aires? Therefore the indication of relevant usages in Art. 1.6 fitted very well with Art. 3. The word "usages" must in fact be interpreted according to the rule laid down in Art. 5(1), i.e. that all the language of the Principles must be taken into account, including Art. 1.6. Usages outside this provision could not be relevant and would therefore not have to be taken into account.

Komarov instead felt there to be a risk that if a restriction were inserted it might not allow all relevant circumstances to be taken into account in the interpretation of the contract. Furthermore, the introduction of a limitation would introduce uncertainty in finding what was relevant or not relevant.

Maskow found no particular difficulties in combining the two concepts. He thought it possible to say "all relevant circumstances" and

if it was possible to list some of these circumstances it would be possible to say that these circumstances (e.g. usages) were only allowed to a certain limit. This could be done also with other circumstances and would not exclude that circumstances different from usages and from the others listed could be taken into account.

Date-Bah suggested that the rule could very well be limited to international usages and it could be left to judges and arbitrators to decide what they wanted to do with domestic usages. It would therefore not be necessary to go so far as to restrict the provision. If they were formulating rules internationally, he felt that particular authority ought not to be given to local usages.

Lando commented that there were international usages which should come under this rule, and there were the local usages, for which two situations were possible, i.e. the local usages of, for example, a stock exchange should apply when a dealer comes to that stock exchange and deals on it, but should not apply when the traders do not go to the place to deal there, but sit in their own countries.

Tallon felt Lando to be addressing a different question, namely whether a usage should be applied to the contract or not.

There were thus three alternatives: to delete usages all together; to bring in a reference to Art. 1.6 in Art. 3 such as "as referred to in Art. 1.6", or to leave the language as it stood. Voting on these alternatives the first was rejected as only 2 voted in favour, whereas the second two both totalled 5 votes, with the result that the language of the provision remained as it stood.

Farnsworth felt that there might be some advantage in combining lits. (d) and (e) so as to read "any usages and any meaning commonly given in a trade concerned"

Crépeau agreed with Farnsworth's proposal.

Maskow stated that he could also go along with the proposal to merge (d) and (e), if the order were changed, so as to have first the trade concerned and then usages.

Voting on the proposal to merge lit. (d) and (e) by stating "any meaning commonly given in a trade concerned or in any usage" the proposal was rejected by only one vote in favour. Voting on the proposal "any meaning commonly given in a trade concerned or any usages", 5 voted in favour and 5 against the proposal. The text therefore remained as it stood.

Drobnig considered it to be unclear to what the word "meaning" referred. He therefore suggested a wording along the lines "a term must be given any meaning commonly given in a trade concerned".

Furmston indicated that "terms" was an ambiguous word in relation to contracts - "expressions" was much more neutral. However, they did not mean quite the same thing: "expressions" referred to, for example, the expression c.i.f. - this was an expression but was not a clause or a term.

Bonelli commented that using the word "term" here would be consistent with its use in the rest of the Principles. In Art. 2.12 the word "term" had originally been used and this had been changed into "specific matters" because of considerations of consistency. In Art. 2.13 the heading referred to "Contract with terms deliberately left open", which had been adopted on the understanding that here clauses were meant. His understanding was therefore that what was intended by "terms" was clauses and expressions, which meant that it would fit into Art. 3.

Fontaine suggested "any meaning commonly given to terms and expressions in a trade concerned".

Furmston considered that if both terms and expressions were indicated it would be acceptable.

Voting on the proposed addition of "terms and expressions" to lit. (d), thus making it read: "any meaning commonly given to terms and expressions in a trade concerned", the proposal was accepted unanimously.

As regards the proposal to change the order of the list, the Group decided to move lit. (f) to before lit. (d).

The new text of Art. 3 as modified was therefore adopted and read as follows:

"In applying Articles 1 and 2, due consideration shall be given to all relevant circumstances, including:

- (a) any preliminary negotiations between the parties,
- (b) any practices which the parties have established between themselves,
- (c) any conduct of the parties subsequent to the conclusion of the contract,
- (d) the commercial setting and purpose of the contract,
- (e) any meaning commonly given to terms and expressions in a trade concerned, and
- (f) any usages."

Article 5

Opening the discussion on Article 5, Farnsworth introduced his written proposal which read:

"If the language of a contract is otherwise unclear,
(a) it shall be interpreted so as to give effect to all the language rather than to deprive some of it of effect,
(b) it shall be interpreted in a manner appropriate to the nature of the contract, and
(c) language proposed by one of the parties shall be interpreted in favour of the other party".

He stated that he had not intended to modify the substance of the article, but to avoid the repetitions which the original provision contained and also to use words other than "ambiguous".

Hartkamp favoured Farnsworth's redrafting of Art. 5, but felt that the rule in (c) (which was that of the original para. 3) was too rigid: "Contract terms proposed by one of the parties shall [...] be interpreted in favour of the other party". He felt this to be correct for the general conditions which a party uses in all of his contracts, but the rule was much broader than it now read. If, for example, during renegotiations one of the parties proposed a wording, perhaps after the parties had discussed the matter together, then that party ran the risk of always having the rule interpreted against him, and he felt this to be too harsh as a general rule. Either the word "shall" should be softened, or the rule should be restricted to specific terms proposed by one of the parties, particularly general conditions.

Bonell recalled that the first two versions of the draft had been along the lines proposed by Hartkamp, i.e. it had been a provision which dealt exclusively with standard terms, and the Group had then decided not to restrict it to standard terms, as it had felt that the same should apply whenever the term was suggested.

Crépeau observed that he was surprised at not finding what was the basic rule of interpretation in Franco-Civilian countries, i.e. in dubio pro reo: a contract has to be interpreted in the final analysis in favour of the debtor of the obligation. The rule in Art. 5(3) was the contra proferentem rule, but he did not think that it was equivalent or analogous to interpretation in favour of the debtor, as sometimes a party could propose a clause in which he was either the creditor or the debtor. He therefore wondered whether they could not refine the rule by saying that if one party imposes a term in which he is the creditor, then it should be interpreted against him, but if there is a clause in the contract where a party is the debtor of the obligation then, irrespective of who proposed it, in the final analysis an interpretation should be given in favour of the debtor of the duty.

Drobnig commented that in the German civil law tradition such a rule of interpretation was not known, and he therefore could not go along with such a proposal. As regarded the scope of application of the rule, which had already been extended from dealing only with standard terms to dealing also with other terms of the contract, he felt that it should be extended even further to take into consideration also statements and conduct of the parties, as had already been done in Art. 3.

Furmston wondered what the rule which Crépeau had proposed should be added (in dubio pro reo) meant: in many bilateral contracts both parties were debtors.

Crépeau agreed that this was the case, so if one of the clauses imposing an obligation to A was ambiguous, then in the last resort, if there was nothing else to rely on, this rule would be resorted to and the clause would be interpreted in his favour. Similarly, if another clause imposing an obligation on B was ambiguous, that in turn would be interpreted in B's favour.

Hartkamp commented that the old Civil Code of the Netherlands had had the same rule. The rule had been abolished as it had been felt to have been superseded by modern developments, particularly general conditions and exoneration clauses, not to mention the fact that it was a rule which was really intended for unilateral contracts (gifts, etc.). If in a commercial context one split the contract into different obligations and decided for each who was the debtor and who the creditor, then it might be a very arbitrary rule to apply, because if the debtor was in a stronger bargaining position and forced the contract on the creditor, then the rule should not work in his favour. He thought that in modern commercial practices even Art. 5(1), which was a traditional rule regulated in the code civil, was not as good as it used to be. He thought that the rules laid down in Art. 3 were much more important nowadays than the old rules in Art. 5.

With reference to the rule proposed by Crépeau, Lando stated that it was known in Scandinavian law, but only applied to one-sided obligations, such as for example gifts. It was, however, to some extent mitigated by the contra proferentem rule. He did not think that the rule should be refined, as he thought that it should also apply to obligations of the debtor. The most common of these clauses were, of course, exemption clauses, and these clauses were generally debtor clauses and should certainly often be interpreted contra proferentem. Secondly, this rule was contradicted by the good faith rule, as if the interpretation contra proferentem ran against good faith, it would be unconscionable and, at least in Scandinavia, the contra proferentem rule would not be applied. Also, when one read Art. 5, one wondered what the situation would be if there was conflict between the three paras. in the same contract. He agreed that it was not possible to give rules on that, but perhaps it was not the best solution to put the three together in

the same article, also to avoid the impression of a hierarchy between the three.

Maskow agreed that it might be advisable to be more flexible, perhaps by stating, for example, "unless the circumstances indicate otherwise". He also felt that such an addition was justified considering the situation where one party proposes a clause and this clause is subsequently modified following discussions between the parties, but not where these very modifications are what made the clause unclear, in which case it was difficult to say which party actually could be considered to have made the proposal. He had no objections to including statements under this rule.

Farnsworth commented that, assuming that one wanted to keep the contra proferentem rule, one might want to introduce some further qualification. As far as the cases here considered were concerned, if one party suggested language on the negotiating table and the other party were represented also by a lawyer, it was unlikely that the contra proferentem rule would be applied in the US, and it might be possible to catch this by adding a few words along the lines "proposed by one of the parties without the opportunity for negotiation".

Furmston wondered whether Art. 5(2) might not be unnecessary, as now that the nature of the contract should be taken into account when construing the contract, another clause would not be necessary to state that one should take it into account when the contract is ambiguous. What certainly was needed was some guidance as to what should be done with Art. 5(1) and 5(3) if they pointed in different directions. In the case of exemption clauses they would in fact quite often point in different directions: Art. 5(1) would point to giving wide scope to the exemption clause whereas Art. 5(3) would point to depriving it of effect.

Hartkamp and Maskow agreed with Furmston's suggestion that, as the commercial setting and purpose of the contract had been introduced in Art. 3, the second paragraph of Art. 5 might not be necessary.

Voting on the proposal to delete Art. 5(2), the Group accepted this proposal by 9 votes in favour.

Turning to the proposal to separate Art. 5(1) and 5(3) into two separate articles, Lando and Crépeau supported the proposal by saying that the two provisions had very little in common and might even contradict each other.

Lando did not think that the contra proferentem rule should be restricted to standard form contracts: it should apply also to other contracts, particularly as nowadays it was at times very difficult to make a distinction between standard form contracts and individually negotiated contracts.

Drobnig did not think that separating the two provisions removed the contradiction. He was coming to the conclusion that the whole of Art. 5 should be omitted: the two remaining paragraphs would contradict each other in many cases and he did not see how that contradiction could rationally be removed. He had the impression that these rules were too mechanical.

Bonell disagreed. He saw the point in extending the scope of application also to individual terms, but if the language suggested by Farnsworth were introduced, he thought that then it would make sense that if a party not only suggested, but to a certain extent imposed a contract term then, whether that party was a creditor or a debtor, he should run the risk of his own ambiguity and should not be able to speculate on it because of the application of other rules of interpretation. He therefore preferred not to delete the two provisions.

Hartkamp stated that he wanted to retain para. 3 as modified by Farnsworth and to delete para. 1.

Maskow considered that the problem of contradictions could to a certain extent be solved by Art. 1.2, which related to mandatory rules of domestic law, as Art. 5(a) would in many instances relate to such mandatory rules because certain terms of the contract would be deprived of effect as a result of such mandatory rules. He felt this paragraph to be particularly important to uphold certain terms as such, even if certain effects were not allowed.

The proposal to delete Art. 5(1) received so little support that it was decided to consider the proposal rejected.

As regarded the contra proferentem rule in Art. 5(3), Farnsworth proposed that the formulation be changed along the lines "contract terms proposed by one of the parties for acceptance without negotiation shall in the case of ambiguity [...]".

Hartkamp agreed with this idea.

Crépeau wondered whether Farnsworth would be prepared to introduce the idea of imposition: "contract terms imposed by one party shall [...]". Such a formulation would bring out more clearly the idea that one party had no bargaining power and had to adhere to the terms as proposed (as in, for example, contracts of adhesion).

Farnsworth had no particular objection to this. In the USA the contra proferentem rule was not confined to adhesion contracts as such; the case Hartkamp had given he understood as being intended to distinguish the case when someone in negotiations put a draft on the table which is then discussed, and the case when someone put a draft on the table to be accepted as it was. The justification in the USA of the contra proferentem rule was less that there was an imposition, it was

that it was an efficient rule to require the party who drafts language for use without further discussion to be careful in doing so, and to make sure that that party's interests are reflected.

Lando commented that the contra proferentem rule should apply also in cases where a standard form contract was produced by one party and the other party negotiates and tries to get rid of some terms but is not successful in doing so. "Imposed" might therefore be preferable.

Bonell stated that the example given by Lando led him to the opposite conclusion: if the term had been the object of negotiation, why should then at a later stage ambiguity be claimed and it be considered that as A had suggested the term it should be interpreted to his disadvantage? What caused him problems was the concept of imposition: what did it mean? There already was a provision dealing with gross disparity which had the concept of imposition, of the taking advantage of the other party. What was dealt with here was only the contra proferentem rule with a rule of interpretation and not with a rule dealing with the gross invalidity of the term. How then should imposition be defined?

Crépeau observed that Farnsworth had suggested "terms proposed without negotiation", which meant that one party puts out a document saying that that was the contract or nothing - that was contra proferentem - but if someone provided the document as a mere basis for discussion, then he could not see the contra proferentem rule applying with as much rigidity as in the first case.

For Maskow and Hartkamp what was decisive was not so much what the intention had been or whether it had been imposed, as whether or not there actually had been any discussion. If there had not been any discussion, then the contra proferentem rule should apply.

Drobnig instead felt that this criterion was too vague, because of course the parties negotiated the proposal, but to establish only at a later stage whether or not a specific term introduced by one party had been sufficiently negotiated was not practical. He preferred to stick to the old rule which punished a party who introduced a term, independently of whether it was negotiated or imposed. He saw no reason to limit it beyond its traditional field of application. Even if the parties had negotiated they might not have clarified the term, and the risk of an ambiguity went against the party who had introduced it.

Hartkamp stated that the problem was that in the case mentioned by Drobnig the term would normally be interpreted against the proposing party. The rule in the Principles was, however, rather strict as it stated "shall be", and he felt that that was a formulation which should be reserved for the cases where the proposal really had been very "strong", i.e. if the term is proposed and then becomes part of the contract without having been fully negotiated ("ausgehandelt"). He had

made a tentative draft which read: "a contract term proposed by one of the parties and which has become part of the contract without negotiation with the other party shall [...]".

Bonell was attracted by the symmetry which could be established between this rule and Art. 2.17 which defined standard terms as being prepared in advance for general and repeated use and which are actually used without negotiation with the other party.

Drobnig did not feel that Art. 2.17 helped in the cases considered here, as these latter were cases where the language was otherwise unclear, i.e. where the terms were ambiguous. In his view this applied also to general conditions if the language was unclear and that was not covered by Art. 2.17. It also applied to individually negotiated contracts: if one party had introduced a clause then even if the parties had spoken about it but the ambiguity had not been removed, the clause must be interpreted against the proposer of the language.

Maskow stated that it was clear that it would be very difficult to establish subsequently the extent to which a certain clause had been discussed by the parties, but maybe this difficulty could be overcome by making it clear in the commentary that if the formulation originally proposed by one party had been changed in the course of the discussion, then the rule would not apply as the resulting clause would be the result of changes made in the course of negotiations.

Komarov supported Crépeau's suggestion to reformulate the provision in terms of imposition, because when one used the term "imposed" one really covered both individually negotiated terms and standard terms. He knew of many cases where one party had proposed a term which subsequently had been changed in favour of the other party. In such cases it would not be fair to apply the contra proferentem rule. The term "imposed" he felt could more fairly cover such cases as it would refer to the result and not to who formally had made the original proposal.

Bonell considered that cases where a clause was first proposed and then modified in the course of negotiations were outside the scope of the rule, because they were no longer facing a term proposed by a party. The difference between the present wording and the further qualification suggested orally by Farnsworth was not all that great. It would only attenuate the "shall" idea a little bit - now it "shall", i.e. it must, even if it was discussed in one way or in another, whereas by introducing the qualification one could give the idea that if the clause were proposed and for some reason not discussed, then it was the party who had proposed it who should bear the risk.

Furmston wondered whether the proposal relating to terms which were "imposed" was supposed to assume also that the terms had been proposed, i.e. were they both imposed and proposed or could they be

imposed and not proposed? A very common practical situation was where one party said that the contract was to be made on a particular set of terms which were not of that party's authorship, i.e. a charterparty was to be on the New York produce form of charter. Most of those standard forms were not at all clear - would it then be proposed or imposed? In that situation ambiguity should not resolve against the party who seeks to impose the use of that form.

Crépeau indicated that on this point there had been lengthy discussions in the drafting committee of the new Québec Civil Code and the question had come up of what the real basis of the contra proferentem rule was. The discussion had turned first on whether the mere proposal of a clause would suffice to change the basic rules of interpretation. It had been felt that it should not: the mere fact that one party proposes a contract that he has drawn up before and puts it as a basis for discussion should not be a basis for the application of the contra proferentem rule; it should only be a basis for the application of this rule when that document is not a basis for negotiation, but is a case of "take it or leave it". Then one could very well say that the rule should not be the ordinary rule of interpretation, but that there should be a specific rule to apply against the one who has imposed a clause upon the other. The provision which had resulted from these discussions was "[...] a clause drawn up by or for one party must be interpreted in favour of the person obliged to adhere to it" (Québec draft Civil Code, Book V, Art. 69).

Tallon observed that the word "adhere" would introduce the idea that the party was obliged to take it or leave it. It was a useful formulation as it recalled the "contrat d'adhésion".

Fontaine favoured either the use of "imposed" or a reference to adhesion, because "proposed" was too wide to define the field of application of the contra proferentem rule - one should not penalise a party simply because he is used to drafting and therefore comes with a form or a draft. If he just puts it on the table to be discussed, why should it be interpreted against him? Whether he himself or his professional association has drafted it does not matter, but if he imposes it, then in that case there is ground for interpreting it against him.

Maskow agreed with Fontaine. What was most decisive was whether the party who was proposing the clause had also invented it. If one invented a clause, it was often to hide the real legal consequences.

Bonell wondered what the term "impose", or that a party had been "obliged" to take it, really meant. In the Italian, and he thought also in the German, legal system the decisive test was not whether you had actually drawn up the terms, but whether you were the one to propose them even if they came from a third person.

Crépeau wondered whether, if one here said that the contra proferentem rule would apply only where there is a proposal without negotiation, that would not tend to prevent people from proposing anything as they would think that if they put out a document it would be interpreted against them. Would that not allow parties in negotiations to sit and wait until the other party proposes something?

Lando commented that there were different kinds of documents: if one considered only the "contrats d'adhésion", there were those documents which were imposed by a party or by an organisation, e.g. the agency contract, which was made by the industry and was meant to be used by the industry in its negotiation with agents. It was a one-sided document and there was no doubt that any judge seeing such a document would consider it to have been imposed by the industry and that the contra proferentem rule would apply. Then there were other documents: in Scandinavia there was an agency document, a standard form contract, which had been prepared in negotiations between the industry and the agents. This document was very fair and balanced, and was generally proposed by the agents even if it did take into consideration the interests of the industry. In these cases he was sure that the contra proferentem rule would not apply as it was a fair document, and there was no reason to use that rule simply because it had been proposed by the agent. He suggested that a more neutral wording might therefore be better and suggested that it might be better to stick to the original "proposed".

Hartkamp considered there to be much truth in Lando's remarks, and that was the reason why the contra proferentem rule had not been proposed for inclusion in the new Dutch Civil Code, because all rules of interpretation of this kind were in fact indirect ways of controlling unfair contract terms and if the rules were prima facie not unfair, such a rule would not be applied. The rule should therefore be limited to cases where one could expect generally that the clauses could be unfair.

Drobnig agreed that the formulation should be less strict, and suggested a formula such as "under all circumstances of the case can be" instead of "shall be". The mandatory character should be taken out of the rule.

Huang commented that in China the contract law stated that "Contracts should be made in conformity with the principles of equality and mutual benefit, and of achieving unanimity through consultations" (Art. 3 of the Foreign Economic Contract Law) thus, although admittedly these provisions only dealt with the interpretation of unclear language, what would the situation be if a contract term had to be interpreted in favour of one of the parties? How could Art. 3 of the Chinese law be reconciled with this provision in the Principles? Secondly, she wondered whether this provision should be applied independently or taking Art. 3 and Art. 5(1) into account.

Bonell commented that it was very difficult to establish a clear dividing line between the different rules. As regarded the first point, he saw no difficulty, as Art. 3 of the Chinese Law appeared to be more in the nature of an auspice, something which should be achieved, i.e. the model case. It could, however, not be excluded that contracts were concluded in a manner which was less balanced than Art. 3 envisaged, if, for example, the bargaining power of the parties was unequal, where only one of the parties produced the documents and the other had no means to do so, in which case the question was whether the party who had drawn up the documents should bear the risk of ambiguity.

Drobnig was becoming increasingly convinced that Art. 5 was based on a theory which was no longer tenable and which contradicted Arts. 1 - 3. The title "Interpretation of ambiguous terms" was in itself wrong, as there was interpretation only when there was ambiguity, so there was no special field of application for Art. 5. Any interpretation presupposed unclarity. Secondly, Art. 5 contained two old rules which were very strict and which only considered particular aspects of a case. The modern approach was to have a general formula for interpretation, such as that in Art. 3. It was not possible to give a rational explanation for the division between Arts. 3 and 5, and Art. 5 should therefore be deleted.

Farnsworth was not sure he would go so far as to delete Art. 5, but it did seem to him that the article, in its present, or even in any, form suggested, was not really satisfactory and might even not make sense. Suppose there was an ambiguous term or the language was ambiguous, this provision said that it was to be interpreted in favour of the party who had not proposed it, but that may not be right, there might be some other rule dealing with ambiguous language more compelling than this one - some members of the Group had in fact pointed out that the contra proferentem rule was a rule of last resort, so if one wanted to cast it as a general rule one would have to have a whole hierarchy of rules. He had some sympathy with the idea to soften the "shall" in the provision. In the US this would be done by a formulation such as "the following factors are to be considered", and he thought all could agree on one factor to be considered being the fact that one party has proposed the language and, indeed, even if it was not an adhesion contract one would want to consider that factor.

Furmston, Hartkamp and Crépeau agreed that the authorship of the contract could be one of the relevant circumstances, and suggested that it might be added to the list contained in the new Art. 3.

Crépeau, however, pointed out that the difficulty of adding another paragraph to Art. 3 was that Art. 3 provided indications of the intentions of the parties, to which the contra proferentem rule did not relate. It was an objective, modern criterion, because until recently parties had been deemed to be equal and able to negotiate freely, whereas in the last decades it had been realised that the parties were

unequal, that they had unequal bargaining power, and that therefore if someone had the power to impose a rule on someone else, then he should take the risk of ambiguity. That was objective and had nothing to do with the intention of the parties.

Tallon was against putting anything more into Art. 3. He agreed with Crépeau that it was a different kind of rule. He also agreed with Drobnig that "Interpretation of ambiguous terms" was a tautology: one only interpreted when there was an ambiguity.

Drobnig felt that Huang's question, i.e. that of the relationship between Arts. 3 and 5, still had not been answered. That relationship should perhaps be made clear, possibly in the form "in addition to the factors enumerated in Art. 3 the following [...]", as it otherwise would be unclear: did Art. 3 precede 5 as it came earlier in the sequence or did Art. 5 have precedence as it was more specific? In his view Art. 5 was on the same level as Art. 3. He did not think it possible to establish a hierarchy.

Crépeau suggested that Art. 5 was a special rule that applied in the particular situation where one party brings in the formula and imposes it on the other party who has to adhere to it, so from the point of view of a hierarchy of sources the rule specialia generalibus derogant would apply.

Maskow stated that he did not have much trouble with the relationship between the articles as the assumption was that the most decisive factor for interpreting the contract was the common intention of the parties. Art. 3 indicated criteria to be used to derive this common intention when it is not formulated. Art. 5 would only apply if it were not possible to find such a common intention by using the criteria in Art. 3.

Bonell did not think it would be possible to draft a provision which would cover all the cases discussed. He therefore suggested adopting a "minimal" approach, i.e. to have a separate article along the lines "Language proposed by one of the parties shall normally be interpreted in favour of the other party". The comments could then refer to the less controversial situations of application of the rule.

Drobnig pointed to the two different interpretations of the relationship between Arts. 3 and 5, i.e. firstly lex specialis derogat generalis and secondly, Art. 3 should have precedence. He felt it to be impossible to arrive at a formulation when the members of the Working Group were not in agreement as to what was intended. He thought that it should be explicitly stated that Arts. 3 and 5 were on the same level.

Lando agreed with Drobnig.

As Tallon read the text there was no relationship between Arts. 3 and 5. Art. 3 said "In applying Arts. 1 and 2", i.e. in looking for the intention of the parties, and in Art. 5 one did not look at the intention of the parties, so the two were quite different rules and there was no hierarchy between them. He did not see how the two could be related to each other.

Drobnig recalled that in their new formulation Art. 1 used the subjective test of the intention of the parties but Art. 2 used the objective test so the reference in Art. 3 was actually to both the subjective and the objective test.

Tallon felt that the presumed intention was relevant in both cases: whether one used a subjective or an objective test the intention was to look for the intention of the parties.

Komarov agreed with Tallon. He felt both the contents and the structure of the chapter to imply a hierarchy. In the first articles one dealt with the intention of the parties, whether real or constructed, and Art. 5 had nothing to do with finding out what the intention of the parties was. It was a rule which was to be resorted to if it did not prove possible to find the intention of the parties (real or constructed as the case may be).

Farnsworth agreed with Tallon and Komarov. The Restatement put the proferentem rule together with a number of other rules (Unconscionable Contract or Term (§ 208) and Interpretation Favoring the Public (§ 207)) which were rules which had nothing to do with the real or constructed intention of the parties.

Voting on the proposal to make the contra proferentem rule apply only when a party has imposed the terms, this proposal was rejected by only two votes in favour.

Turning to the proposal to make the rule apply when a party proposes the terms, whether or not he himself has drafted them, Hartkamp suggested that para. 3 be retained with as only modification the changing of the word "shall" to "will".

Tallon did not like the way the provision was drafted, as the real idea behind it was not that the terms should be interpreted in favour of one party but rather against the other. He therefore preferred the formulation to be the other way around.

Bonell and Hartkamp did not feel this to be a problem.

Date-Bah recalled Bonell's suggestion to soften the language of the Farnsworth proposal by stating "shall normally".

Farnsworth felt that the trouble with "normally" was that it suggested a statistical analysis. He was not sure that it normally was against the draftsman: only when there was no other applicable standard was it against the draftsman and he thought one could say something like "there is a preference for interpretation against" that party.

Tallon suggested a wording which in French read: "Ce qui est ambigu s'interprète par préférence contre celui qui l'a proposé".

Farnsworth suggested that this could be rendered in English as "In case of ambiguity there is a preference for interpretation against the party who has proposed the language".

Maskow felt that "proposed" gave the idea of a party being more active and therefore having taken part in the drafting of the terms. He therefore preferred "supplied".

Tallon recalled that it had been observed that it was obvious that the language had to be unclear or there would be no need for interpretation.

Farnsworth suggested that if it was not necessary to refer to ambiguity a formulation could be "If one party has supplied the language to be interpreted there is a preference for interpretation against that party". In this case all that was asked was whether one party had supplied the language to be interpreted and not some other language - it may be only one paragraph.

Drobnig preferred the opening language as originally suggested by Farnsworth ("If the language of a contract is otherwise unclear") as it made clear the one question which had been left open, i.e. the hierarchy: it said "otherwise unclear", which indicated that interpretation first had to be made according to Art. 3 and then if the language was still unclear one proceeded with Art. 5.

Voting on the opening words "If the language of a contract is otherwise unclear", the Group decided to retain these words by 8 votes for and 2 against.

Lando wondered whether the word "language" should be used as the words "contract" and "contract term" were used throughout the Principles. The word "language" might further create problems as it might be understood in different ways in an international context. He suggested that the words "contract" and "contract term" be reverted to.

The proposal for Art. 5(3) before the Group therefore read:

"If language [contract terms] supplied by one party is [are] otherwise unclear, there is a preference for its [their] interpretation against that party".

Drobnig commented that "contract terms" would narrow the meaning by limiting it to the terms of the contract, to the exclusion of those in statements or notices or declarations. He suggested "terms or expressions used in a contract or statement".

Lando gave the example of an open unilateral letter of credit - in this case he did not think that the imposition rule should apply; on the contrary, he felt that the in dubio pro reo rule proposed by Crépeau should apply.

Farnsworth suggested that if the word "language" were used it would be broad enough.

Lando observed that there seemed to be a majority for extending the in dubio contra stipulatorem rule to all unilateral declarations or statements made by a party - he agreed that this should be so if they became part of the contract, but for other notices or statements in some cases this should be so and in some cases it should not. He therefore preferred to stick to "contract terms".

Maskow commented on the example of the open unilateral letter of credit: if the bank drew up such a document which was unclear and the public felt that it was broader than the bank wanted it, then it should be interpreted against the bank.

Komarov and Maskow preferred "contract terms" to "language" as "language" could refer to a foreign language. Furthermore "contract terms" had been used throughout the Principles.

Bonell stated that in view of the fact that the language problem was going to be considered with the article proposed by Crépeau, it might be confusing for the readers if "language" were used in one sense in one article and in another sense in another article.

There were therefore three alternatives: "language", "terms, statements and expressions" and "contract terms". Voting on the three alternatives, "language" received one vote, "terms, statements and expressions" 4 and "contract terms" 6 votes.

Crépeau and Lando expressed some doubts as to the present wording of the provision, in particular since it was not clear to them who should decide whether or not preference should be given to the meaning against the supplying party and on the basis of what criteria.

Tallon raised the more general question of the nature of all the provisions on interpretation to be found in this chapter: were they legally binding rules or mere guidelines?

Bonell recalled a previous exchange of views on this point, as a result of which the Group came to the conclusion, as he recalled, that

at least some of the provisions in question, e.g. Arts. 3 and the article now under consideration, in fact did not represent hard and fast rules but rather were flexible in their application and that this should be reflected in their wording by using different language.

Furmston, Farnsworth and Date-Bah also recalled that a decision had been taken as to the substance of the provision in question, i.e. that the interpretation against the party which supplied the term should be only one possibility, it depended on the circumstances of the case whether another criterion should be followed for the clarification of the ambiguous term. This all the more so as the scope of the provision had been considerably broadened as it was no longer restricted to standard terms.

The Group eventually adopted the text of the new Art. 5(3) which read:

"If contract terms supplied by one party are otherwise unclear, there is a preference for their interpretation against that party".

It was further decided that Art. 5(1) and 5(3) should be separated into two independent articles. Art. 5(3) would therefore become Art. 5 of the chapter as the old Art. 4 had been merged with Art. 3.

Turning to the text of Art. 5(1), the revised version proposed by Farnsworth was taken as a basis for discussion and read: "If the language of a contract is otherwise unclear, it shall be interpreted so as to give effect to all the language rather than to deprive some of it of effect".

Drobnig suggested that both articles should open the same way, i.e. "If the language of a contract is otherwise unclear". He also felt that the rest of the provision would have to be redrafted: it was not possible to say "to give effect to all the language". The redrafting had to take into account that a notice or statement had to be interpreted so as to give effect to all of its terms or words.

Bonell felt that a rule stating that a unilateral notice which was unclear had to be interpreted so as to give it effect was very far reaching.

Drobnig did not feel this to be the case, as it was clear that the person wanted to achieve something even if he used contradictory terms in his notice, so an interpretation had to be found which would give effect to the whole notice.

Lando commented that then, in a case where a party wished to end the contract and made an unclear declaration, according to Drobnig his

declaration would have to be interpreted in such a way as to give it effect. He himself felt that the contrary should be true: if a party made an unclear declaration or notice of termination it should be interpreted against him.

Drobnig instead took the case of a party stating that he wants to avoid a contract when in actual fact what he intends is that he wants to terminate it. It was not possible to say to that party that the meaning of the notice was unclear so it was ineffective.

Tallon stated that they were drafting rules for the interpretation of contracts. The comments could state that the rules could be applied to notices, unilateral declarations etc., but he did not feel that they should be drafted so as to apply to every kind declaration of intent.

Hartkamp agreed with Tallon. They had made a rule in Art. 2 on statements made by a party which stated that they should be interpreted according to the party's intention and if not, then they should be interpreted according to the understanding a reasonable person would have as the other party, so in a sense the other party was protected. In this case, if one gave as much effect as possible to unilateral statements one did not protect the other party - one protected the party who made the statement, and he was not sure that this would be right in all cases. He had problems applying this rule to contracts, but he would at any rate prefer to limit it to contracts than to apply it to other kinds of statements as well. He thought that in a sense it was contrary to what had been laid down in Art. 2(2).

Bonell observed that he had understood Drobnig's intentions as being not generally to interpret unclear statements so as to give them effect, but rather that when in a statement which clearly goes in one direction there is a term which contradicts this direction, then it should be interpreted so as to make it fit into the rest, instead of depriving the rest of effect.

No support being forthcoming for the proposed extension of the provision to include statements, it was decided to use the words "terms of the contract" instead of "language".

The new text of Art. 5(1), which would become a separate article (Art. 4 of this chapter) in conformity with the decision taken by the Group, therefore read:

"If the terms of a contract are otherwise unclear, they shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect".

Article 6

Opening the discussion on Article 6, Fontaine expressed his surprise at finding in the comments, in the discussion on the hierarchy between the contract terms, the phrase "the declarations of intent which are possibly made in the preamble, though not being without relevance for the interpretation of the operative provisions of the contract, can by their very nature only be of limited use in the determination of the exact meaning of the latter". He thought that in the practice of international contracts what was in the preamble was in many cases very important and very carefully negotiated and was intended to express the intention of the parties and to be used later in the interpretation of the contract. He thought it a little inconsistent to state in the text that the preliminary negotiations could be used to interpret the contract and then to state in the comments that what is in the preamble will be of limited use for interpretation.

Turning to the text of the article, Hartkamp had the impression that it stated the same thing twice: if one interpreted each term by reference to all the other terms one said exactly the same thing as when one said that in determining the meaning of a term one should make reference to the contract as a whole.

Farnsworth commented that his proposal obviated exactly this, by stating "Contract language shall be interpreted by reference to the contract as a whole".

Bonell instead felt that two steps were involved, that there was a difference in nuance. As long as "terms" were spoken of, it might be preferable to proceed in two steps: first each term with reference to the others, then to the contract as a whole. If the "language" expression were chosen, then he could understand that the two steps would no longer be necessary.

Farnsworth suggested that also here one could say "terms or expressions".

Crépeau indicated that when the question was discussed in Québec the result was Art. 65 of Book V of the draft Civil Code which stated that "The clauses of a contract interpret each other, and the meaning of each is derived from the entire contract". In other words, there was the horizontal interpretation term by term so as to make sure that they are not inconsistent, and then the meaning of one is derived from the entire contract.

Tallon stated that it was not a question of interpretation of words, it was a question of interpretation of parts of the contract. If one spoke of language one spoke of words.

Furmston could not understand why the same thing had to be said over and over again. It was all a question of looking at the contract as a unity, so the shorter the formulation the better. He wondered whether there would be any objection to saying that "a contract should be read as a whole".

Hartkamp suggested keeping only the first two lines of Art. 6, so that the article would read "Each term of a contract shall be interpreted by reference to all the other terms of the contract".

Bonell saw this as involving a change in substance. What ultimately mattered was the contract as a whole, and he had understood Farnsworth's proposal to use "language" as indicating precisely that what mattered was the entire contract, whereas if one spoke of "terms" one followed a Thomistic concept and therefore if one simply said that one term had to be interpreted with the others one lost the whole. He suggested that instead the second part of Art. 6 be kept, stating "in determining the meaning of [the terms of] the contract, reference shall be made to the contract as a whole".

Drobnig suggested that statements of the parties be included and a formulation such as "Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear" be adopted.

Voting on Drobnig's proposal, the Group adopted the proposal by 8 votes for to 4 against.

The new text of Art. 6 therefore read:

"Terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear".

Article on linguistic discrepancies

Crépeau submitted a proposal for a new article dealing with the problems which might arise from discrepancies between the two or more linguistic versions in which a contract may be drafted and which read as follows:

"A contract drawn up in two or more linguistic versions being equally authoritative shall be interpreted, in case of discrepancy between the versions, according to the version in which it was originally drawn up.

If there is no original version, the contract shall be interpreted according to the version which, in the light of all relevant circumstances provided for under Article 3, is deemed best to express the common intention of the parties".

Introducing his proposal, Crépeau mentioned the frequency in international trade practice of the problem addressed by the provision. The ratio of the solution laid down in para. 1 was to be seen in the Italian proverb "traduttore - traditore". The solution laid down in para. 2 for the case where no original version existed, was different from what was provided, e.g., by the Interpretation Act of the Province of Québec, i.e. that between an English text and a French text preference should always be given to the French text: in his view, however, it was much more convincing to adopt a different approach and to let that version prevail which best expressed the common intention of the parties since in the interpretation of contracts the question was not one of preferring one language to another, but of searching for the intention of the parties.

Bonell, Maskow Farnsworth and others expressed their interest in the new proposal.

Farnsworth, however, wondered whether the rule in para. 1 really reflected the intention of the parties in a case where the contract was negotiated and drafted in one language before being translated into another with the express clause that both versions should be equally authoritative.

Bonell thought that, notwithstanding the parties' intention to consider both texts equally authoritative, an objective criterion for solving discrepancies between the two texts was necessary.

Komarov drew attention to the fact that there might even be cases where the parties did not say anything about the authority of the two versions and that the rule envisaged in para. 1 could equally apply to these cases.

In this respect Bonell expressed some doubts: if the parties negotiated and drafted the contract in one language and later on one of the parties showed up with a translation without insisting on the inclusion into the contract of a clause stating the equal authority of the two versions, such a conclusion might seriously be questioned.

Drobnig wondered whether a provision of the kind contained in para. 1 did not belong in the chapter on formation.

Tallon thought it might be necessary to have an additional provision addressing the preliminary problem of what the language of the contract was.

Lando drew attention to the possibility that still in the case where two equally authoritative versions existed, with respect to specific issues it might happen that in one instance the expression used in one version was more accurate in reflecting the intention of the parties whereas at another time the expression used in the other was

more accurate. In this respect he recalled the experience made with some of the existing model rules such as INCOTERMS or FIDIC contracts: nobody would question the possibility of referring to, say, the French version if it turned out to be clearer than the original English version.

Furmston agreed and referred to a similar experience made with existing international conventions: English courts were more and more prepared to rely on other language versions of such instruments if, by doing so, the obscurity of the English text could be overcome.

Hartkamp found the provision to be too rigid and proposed to soften it by using the language "there is a preference for the interpretation according to the version in which [the contract] was drawn up".

Huang wondered about the relationship between this article and Art. 1.

Crépeau pointed out that the present article was intended to solve a preliminary question, i.e. which of two or more equally authoritative texts had to be chosen in case of discrepancies. Once this question had been settled, any question of interpretation which might arise with respect to that text would have to be solved in accordance with the general provisions to be found in Art. 1 and following.

Asked by the Chairman to express its preferences for either a rigid rule or for a more flexible one, the Group favoured the second alternative.

Tallon suggested combining the two paragraphs so as to read: "A contract drawn up in two or more linguistic versions being equally authoritative shall be interpreted, in case of discrepancy between the two versions, according to the version which in the light of all relevant circumstances provided for under Article 3, is deemed best to express the common intention of the parties. Preference may in particular be given to the version in which the contract was originally drawn up".

Hartkamp suggested to reword para. 1 in the following manner: "If a contract is drawn up in two or more linguistic versions being equally authoritative, in case of discrepancy between the versions there is a preference for the interpretation according to the version in which it was originally drawn up", and to delete para. 2, which in his opinion was in substance nothing more than a repetition of what was already laid down in the previous articles on interpretation.

Lando also suggested to combine the two paragraphs in the following manner: "A contract drawn up in two or more linguistic versions [...] according to the version which in the light of all relevant circumstances would be the most appropriate. Reference may be

given to the version in which the contract was originally drawn up".

According to Bonell there was no difference in substance between the proposals of Hartkamp and Lando so the alternative was therefore between their proposal and that of Tallon.

Put to the vote, a large majority of the Group was in favour of Hartkamp's proposal. It was therefore adopted. The new article, which would be Art. 7 of the Chapter, read as follows:

"If a contract is drawn up in two or more linguistic versions being equally authoritative, in case of discrepancy between the versions there is a preference for the interpretation according to the version in which it was originally drawn up".

Lando proposal for a provision on the supplying of omitted terms

Lando raised the question of a provision to be included either in the chapter on interpretation or elsewhere dealing with the supplying of omitted terms.

Maskow and Fontaine were of the opinion that such a provision was unnecessary since the chapter on performance already contained a number of provisions intended precisely to supply, whenever necessary, terms of the contract on which the parties did not expressly agree (e.g. time, place and mode of performance).

Lando insisted on the need to deal with situations where omitted terms had to be supplied on a more individual basis and in this respect he recalled the excellent explanation given on the topic of supplying of omitted terms in Farnsworth's book on Contracts or that of Mayer-Maly in the Münchener Kommentar ("ergänzende Vertragsauslegung").

According to Bonell the chapter on performance already contained a number of provisions (Arts. 5.1.6, 5.1.10, 5.1.11, and 5.1.12) where an approach similar to that of § 204 of the Restatement was adopted, i.e. in addition to so-called suppletive rules the possibility was seen of supplying the omitted essential term of the contract on the basis of the reasonableness test which should allow the taking into account of the special circumstances of the case. As far as the reference to the "ergänzende Vertragsauslegung" was concerned, it was in his opinion something different from what was discussed here: although opinions were divided as to whether it belonged to the interpretation of the contract or to its implementation, it was generally intended as a device for supplying omitted terms mostly of a non-essential character on the basis of the typical or hypothetical intention of the parties. As a result the terms found in this way prevailed over the suppletive provisions of law. In his opinion within the Principles there already existed the basis for such a way of interpreting the contract and this was Art. 1.5 on the

need to observe the principle of good faith in the interpretation process.

While Fontaine agreed, according to Farnsworth at least for common lawyers who were less accustomed to making such a use of the general principle of good faith, a more specific provision on the supplying of omitted terms of the kind envisaged by Lando was to be recommended, this all the more so since the provision of the chapter on performance which had been mentioned seemed tailored in particular for the sales contract, while in other kinds of contract it may well be that other terms which were essential to determine the rights and duties of the parties were to be supplied.

Crépeau and Tallon expressed their agreement on having a general provision on supplying missing terms but, with reference to the kind of provision contained in § 204 of the Restatement, argued that in their view a judge or arbitrator should not be allowed to supply an "essential" term since the absence of such a term implied by definition that there was no contract at all. What could be envisaged was a provision of the kind to be found in Art. 1135 of the French Civil Code.

In support of Lando's proposal Drobnig pointed out that the presence in the performance chapter of several provisions permitting the supplying of particular missing terms, far from being an obstacle for the adoption of a provision of a more general character, on the contrary seemed to be a good reason in favour of it. He also would, however, hesitate to limit the scope of such a provision to essential terms only.

Hartkamp first of all pointed out that the qualification of "essential" in § 204 had nothing to do with the traditional concept of essentialia negotii. In other words, in § 204 reference was made to terms which were necessary for the determination of the rights and duties of the parties on the assumption that notwithstanding their absence in the given case there is a sufficiently definite agreement between the parties to be considered a contract. However, in order to avoid misunderstandings, he, like Drobnig, would also prefer not to limit the scope of the envisaged provision to "essential" terms. As to its proper location, in his opinion it should be placed in the introductory chapter after the general clause on good faith.

Bonell preferred to have such a provision, if any, in the chapter on performance, maybe immediately after Art. 5.1.1 according to which "The contractual obligations of the parties may be express or implied". He had always understood that provision as being intended to make it clear that contractual terms may be implied either by law (by the so-called suppletive rules, such as Art. 5.1.6(c), 5.1.10(1), 5.1.11 and 5.1.12) by usages in accordance with Art. 1.6 or by applying the general principle of good faith (Art. 1.5). If this was now to be the content of a special provision to be added to Art. 5.1.1, he would foresee a need to coordinate such a provision with Arts. 1.5 and 1.6.

Farnsworth agreed with Hartkamp as to the opportuneness of avoiding the use of the word "essential" in the context of a rule on supplying missing terms and with Bonell as to the location of such a provision. On this latter point also Crépeau and Drobnig agreed.

The Group eventually decided to ask Lando to prepare a draft provision dealing with the supplying of omitted terms and to defer the discussion on its content and location to a future session.

Lando proposal for a provision on interpretation serving the public interest

Lando proposed to discuss the possibility of having a rule similar to that of § 207 of the Restatement according to which in choosing among the meanings of a contract term preference should be given to a meaning that serves the public interest.

There was not sufficient support for this proposal.

Having finished its examination of the chapter on interpretation, the Group proceeded with an examination of Chapter 6, Section 1: General provisions on non-performance. Professor Bonell took the chair for this part of the proceedings.

Chapter 6, Section 1: General Provisions on Non-Performance (Study L - Doc. 45)

Article 6.1.1

Introducing his draft and comment on Chapter 6, Section 1 (General Provisions on Non-Performance, Study L - Doc. 45), Furmston explained his hesitations to attempt to define non-performance at all, since he was not sure what the purpose of such a definition would be.

Fontaine stressed the necessity of avoiding possible misunderstandings, in the sense that it should be made clear that in the Principles the concept of non-performance was not restricted to a total failure to perform only, but covered also delay and cases of partial or defective performance.

Tallon and Maskow agreed, while Lando recalled the opening article of the EEC draft where, though only in an indirect manner, a similar broad concept of non-performance appeared.

As to the wording of the envisaged definition, Hartkamp suggested to use language similar to that of Arts. 45 and 61 CISG

(non-performance = failure to perform any of the party's obligations under the contract)....

As to the question whether the concept of non-performance should cover all cases of a failure to perform irrespective of whether or not it was excusable, Hartkamp, Maskow and Farnsworth favoured such an objective approach on the assumption that there were a number of remedies (such as withholding of performance and termination) which were granted to the aggrieved party even if the defaulting party was excused.

In the light of the discussion, Furmston proposed the following wording of Art. 6.1.1:

"In these Principles "non-performance" means failure by a party to perform any of its obligations under the contract, including defective performance or late performance".

This formulation was accepted by the Group.

As to the advisability of a further provision, to be placed immediately after the definition, stating in general terms along the lines of the corresponding provision of the EEC draft which remedies were available to the aggrieved party, the majority of the Group preferred not to adopt such an operative provision. It was felt that the questions of which remedies were available and under what conditions, were better dealt with in an analytical manner in special provisions within the corresponding sections on the different remedies. Within the context of the present article, a reference to the following provisions dealing with the different remedies granted to the aggrieved party should of course be made in the comments.

Crépeau raised the question of burden of proof. He favoured the adoption of a general statement according to which non-performance has to be proved by the party intending to avail itself of one of the remedies, while it was up to the defaulting party to prove the existence of a possible excuse.

Without arguing on the substance of such a provision, the majority of the Group was, however, of the opinion that it would lay down little more than common sense leaving all the difficult questions of detail to the relevant national rules on evidence, whether substantive or procedural.

New article on the other party's interference

Furmston drew attention to his remarks on p. 6 of Doc. 45 concerning the advisability of including a provision of the kind to be found in Art. 80 CISG or in Sec. 2.101A(3) of the EEC draft ("A party may not exercise any of the remedies set out in chapter (4) to the

extent that the other party's failure to perform was caused by his own act or omission"). He himself confessed to have some difficulties in fully understanding the precise implications of a provision of this kind: in particular he wondered whether in addition to the cases dealt with in Art. 6.1.4 ("Right to withhold performance") and Art. 6.4.8 ("Non-performance due in part to the aggrieved party") there were others which were not covered and would therefore require a special provision of the kind under consideration.

Lando gave the example of a tennis player asked to give a lesson to a young girl who fails to perform because that girl does not show up on time at the tennis court.

According to Farnsworth this would fall under Art. 6.1.4 but Lando recalled that the provision under consideration was concerned only with the position of the girl making it clear that she could not rely on any remedy against the tennis player for his failure to perform.

Also Crépeau supported the provision and gave the example of a buyer who prevents the seller from delivering the goods in its own premises because it does not open the gate at the agreed time.

Maskow gave the example of a construction contract where the constructor fails to deliver a proper construction because it was done following indications by the purchaser which turned out to be wrong. The envisaged provision was important not only because it made it clear that the purchaser had no remedy whatsoever against the constructor notwithstanding the fact that the delivery of the defective construction on his side represented a case of non-performance in objective terms, but also because such a consequence was entirely independent of whether or not there was any excuse for the act or omission of the purchaser which caused the constructor's failure to perform.

Tallon agreed and pointed out that another consequence of the rule was that the creditor's remedies against the non-performance of the debtor were excluded only "to the extent" that such non-performance was caused by his act or omission, i.e. if the non-performance was caused only in part by him then his remedies would only be proportionately "reduced" (no matter what such a reduction would mean in practice with reference to the different remedies).

Farnsworth came back to the case of the seller who was prevented from delivering the goods because the buyer did not open the gate of the factory and wondered why this case should fall under the present article, while the case where the seller did not deliver because the buyer failed to make the promised partial advance payment should fall under Art. 6.1.4 ("Withholding Performance").

According to Hartkamp the reason was that at least in many civil law countries the creditor was not under a contractual duty to accept

the performance tendered by the debtor. He admitted that as soon as one assumed the existence of such a duty, as appeared to be the case in the common law systems, the two cases might well deserve the same solution, i.e. be settled in accordance with Art. 6.1.4, thus rendering the article under consideration superfluous.

Bonell pointed out that the article in question also applied to cases where the debtor's performance was prevented by an act or omission on the part of the creditor which was not related to the contract.

Furmston wondered whether this was the case of, e.g., a constructor who was prevented from finishing the building in time because a fire negligently caused in a neighbouring factory belonging to the contractor destroyed also part of the building under construction. Since the Group agreed, he wondered whether the same rule would apply also to the case where there was no negligence on the part of the contractor.

Lando and Hartkamp pointed out that it was a question of allocation of risk. In other words, it all depended on whether it was the constructor or the contractor who at the time when the fire broke out had to bear the risk of such an event with respect to the construction.

Farnsworth suggested to deviate from the approach of the EEC draft, where this provision was part of an article dealing in general with the remedies available for non-performance, and to have it as a separate article placed close to the one on withholding performance.

Furmston proposed the following wording: "The obligee cannot complain of the obligor's non-performance so far as the obligee is himself the cause of such non-performance".

Hartkamp and Farnsworth expressed some doubts on the proposed wording which in their view did not make it sufficiently clear that the provision did not cover those cases where the obligor was prevented from performing by an event for which he did not bear the risk.

Tallon criticised Furmston's opening words which in his view were too vague.

Bonell suggested they be replaced by the opening words of Art. 80 CISG.

The Group eventually agreed that the text of the article on "Other party's interference" should be placed immediately after the definition contained in Art. 6.1.1 as a new Art. 6.1.2 and should read as follows:

"A party may not rely on the other party's non-performance to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk".

It further decided that the order of the remaining provisions should be changed so as to have this new Art. 6.1.2 immediately followed by the article on withholding performance and then the one on force majeure.

Article 6.1.2

Introducing Article 6.1.2 as contained in his draft ("Cumulation of remedies"), Furmston stated that the provision was taken literally from the EEC draft. A question which was not addressed in the text but which had bothered some systems, was whether there were any limits to the right of the plaintiff to change his mind about which remedy he regarded as his primary remedy.

In this respect Cr peau recalled that the draft Qu bec Civil Code contained a provision according to which the exercising by the creditor of one remedy does not entail the renunciation of any other, but before exercising such other remedies it must discontinue the pursuit of the first, if incompatible.

With respect to the proposed text Farnsworth wondered who was entitled to cumulate the remedies under para. 1, i.e. only the claimant or also the court? Since this latter solution could hardly be accepted, he suggested to make it clear also in the text.

With respect to Cr peau's point, both Hartkamp and Furmston argued that there must be some limits to the creditor's power of election: thus, after having had recourse to the remedy of termination it seemed difficult to admit any change of mind in favour of, e.g., specific performance, and also with respect to specific performance there must come a point where it is no longer possible to ask for damages only.

Bonell wondered whether it was really necessary to state these limits expressly, since they seemed to derive from the very nature of the different remedies, except perhaps as far as the relationship between specific performance and termination was concerned.

Hartkamp proposed the adoption of a rule making it clear that if the creditor remained uncertain, the debtor had the right to ask it to decide which remedy it intended to exercise, with the consequence that once the creditor had declared its intention it would remain bound.

Farnsworth produced a new text which read as follows:

- "(1) A party may ask for any available remedies alternatively but may not ask for incompatible remedies cumulatively.
- (2) A party is not deprived of a right to damages by asking for or exercising a right to another remedy".

While having no objection as to the substance of the provision contained in para. 1, Furmston wondered about its utility since in his view it expressed what was more or less obvious.

Crépeau on his part questioned para. 2, which he thought constituted only a particular application of the rule laid down in para. 1.

Bonell drew attention to the fact that, for instance, in German law the cumulation of termination and damages was not admitted.

The Group finally decided to delete the whole article and to take care of the rule laid down in para. 2 in the section on damages. It was agreed to change the wording of Art. 6.4.1 so as to read as follows:

"Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under Art. 6.1.3".

It was also agreed to include in the section on specific performance a new article dealing with the right of election reading as follows:

Article 6.2.6
("Specific performance and termination")

"A party which has declared the contract terminated may no longer ask for specific performance".

Article 6.1.3

Introducing Article 6.1.3 ("Exemptions"), Furmston pointed out that the text corresponded literally to that of Art. 79 CISG, but that he himself had some problems with it. With respect to para. 1, he stated that, while e.g. according to English law the cases of pre-contract impediments were treated differently from the post-contract impediments, this article seemed to cover both. If this was the case, why not say it expressly?

Bonell recalled that with respect to Art. 79 CISG opinions were divided as to whether or not it covered both cases.

While Crépeau read the provision in the sense that pre-contract impediments were excluded, Maskow reached the opposite conclusion.

Farnsworth recalled the discussions which had taken place on this point within UNCITRAL and expressed his doubts as to whether the Group would be able to reach a better result. For the sake of uniformity with a legislative text which had already been adopted by so many countries, he recommended the adoption of the same text.

The Group so decided, and para. 1 was adopted as it stood, with the only change relating to the opening words, where, in order to avoid the use of the somewhat ambiguous formula "a party is not liable for a failure to perform", it was decided to replace it with the words "a party's non-performance is excused".

Fontaine wondered whether the article should not expressly mention what appears in international contract practice to be the most common consequence of a force majeure case, i.e. the suspension of the contractual obligations and the duty of the party affected by the impediment to do its very best in order to overcome its consequences.

With respect to this last aspect, the Group felt that this already followed from the present wording according to which a party was excused only to the extent that "[...] he could not reasonably be expected [...] to overcome [the impediment] or its consequences".

As far as the suspensive effect was concerned, it was decided not to state it expressly, since the question as to whether, subsequent to the occurrence of an impediment, the contract should at least for a certain period of time be considered to be merely suspended, or might be immediately terminated, very much depended on the nature of the contract and/or the circumstances of the case and should therefore be left to be regulated by the parties themselves by means of a special "force majeure" clause to be included in their contract if so desired.

Furmston raised the further issue of the relationship between this article and the article on hardship.

According to Crépeau the two cases should be kept clearly distinct, the first being characterised by an absolute impossibility to perform while in the second the performance was excessively burdensome for the debtor only.

Bonell drew attention to the fact that neither Art. 79 CISG nor the present article were expressly confined to cases of absolute impossibility but deliberately used a more flexible language with the result that in practice there might well be cases of "impediments" which could fall under both the article on exemptions and that on hardship.

Tallon agreed, but recalled that CISG had no express provision on hardship, while the Principles did. Consequently, one might well consider the possibility of adopting a more rigorist version of the exemption provision, i.e. expressly delimiting it to cases of absolute impossibility. When preparing the corresponding provisions of the EEC draft he had made such an attempt, but it did not find favour with the majority of the members of that Group.

Bonell and Lando saw no problem in the fact that there might be cases which could be equally qualified as cases of exemption and of hardship. In such "grey zones" the aggrieved party was free to invoke either the one or the other provision, obviously with different consequences.

Komarov was also of the opinion that it was a sensible solution to allow a party to invoke first the "force majeure" provision and to fall back on the less far reaching hardship provision, should it not pass the test of the former.

A similar position was also taken by Huang.

Fontaine proposed to change the title of the article and to speak of "force majeure" instead of "exemptions", since the former expression was far better known and extensively used in practice.

The Group agreed and recommended that the comments should explain the reason for the change and draw attention to the fact that the scope of the provision did not coincide with the concept of "force majeure" as traditionally known within certain legal systems, since it covered a much wider range of cases of exemption.

Introducing para. 2, Furmston wondered why in the corresponding EEC article the provision had been dropped.

Tallon explained this deletion by stating that the case where a third person is engaged to perform the whole or part of the contract was rather rare and that the solution provided for in para. 2 already followed from the general rule.

Bonell instead understood the purpose of the provision as being that of increasing the debtor's liability whenever he avails himself of a sub-contractor.

Maskow recalled that the discussion which had led to the adoption of Art. 79(2) CISG had been rather confusing and expressed his preference for not providing for any special rules for the sub-contractors but to apply the general rule also to them.

Huang and Crépeau on the contrary expressed their support for the rule.

Also in view of the fact that opinions were divided as to the precise meaning and implications of the provision, the Group finally preferred to delete it.

Turning to the question of temporary impediments dealt with in para. 3, Furmston expressed some reservations with respect to both the present provision which was taken from Art. 79(3) CISG and the corresponding provision of the EEC draft. In his view neither provision took account of the fact that the length of the interruption might have no precise causal relationship to the extent to which performance of the contract was dislocated. He gave the example of a contract to dig and lay pipes across Siberia which was delayed for a month due to an unforeseen impediment out of the party's control and the effect of which was that work would have to be carried out in the Siberian winter and not in the Siberian summer.

Maskow and Farnsworth agreed and gave the even simpler example of a seller who is prevented for two days from shipping the goods but since the ship leaves only on the first of each month he is able to perform only the following month. According to the rule in para. 3 as it stood the impeded party was excused only for two days, while given the circumstances it would be more appropriate to extend the period during which the contract is suspended over the whole month.

Furmston produced a new text which read as follows:

"When the impediment is only temporary, the excuse shall have effect for such period as is reasonable taking into account the effect of the impediment on performance of the contract".

The Group finally decided to adopt it.

Bonell raised the question of whether or not also the situation should be dealt with where, notwithstanding the fact that the temporary impediment has ceased to exist, the impeded party is permanently relieved of its obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract (cf. Art. 74(2) ULIS).

Fontaine felt that the problem equally existed with respect to the creditor who may well have lost any interest in the performance.

Bonell agreed, but pointed out that the creditor appeared to be already sufficiently protected since he may, if the delay amounted to a fundamental non-performance, terminate the contract.

Farnsworth recalled that a provision similar to that of Art. 74(2) ULIS was contained in § 269 of the Restatement.

The Group eventually decided not to include a provision of this kind on the understanding that in the cases under consideration the debtor may rely on the provision on hardship, which were not foreseen in ULIS. In the comments to the present article a reference to the problem and to its possible solution should be made.

With respect to para. 4, Komarov raised the question of the case where the creditor did not receive the notice within a reasonable time after the debtor knew or ought to have known of the impediment, but knew or ought to have known of that impediment from sources other than the debtor. Should the creditor still remain liable for damages resulting from the non-receipt of his notice?

Lando referred to the corresponding provision of the EEC draft which deliberately used a different language: "The excused party must ensure that notice of the impediment and of its effect on his ability to perform is received by the other party [...]. The other party is entitled to damages for any loss resulting from the failure to receive such notice" (cf. s. 2.101B(3)).

Bonell wondered whether in the case referred to by Komarov the debtor's impossibility to claim damages would not derive from the application of the general rule on mitigation of damages.

The Group finally decided to keep the text as it stood.

With respect to para. 5, Bonell recalled the difficulties caused by the same provision in Art. 79(5) CISG. In other words, should the provision be understood in the sense that the right to ask for specific performance was not necessarily excluded in cases of "force majeure"?

Hartkamp referred to a provision contained in the new Dutch Civil Code according to which there might indeed be cases in which the debtor was excused from performing (e.g. the payment of the price after the issuing of a governmental prohibition of transfer of funds abroad) and the creditor nonetheless may ask the court for an order to perform (e.g. an order to seize the property of the debtor situated in the creditor's country).

Tallon found it illogical to admit any coexistence between the case of excuse and the right to specific performance.

Hartkamp replied that first of all the present article did not restrict the cases of excuse to absolute impossibility and that secondly para. 5 did not positively grant the right to specific performance but only said that "nothing in this article prevents either party from exercising any right other than to claim damages", thus leaving it open that the exercising of the remedy of specific performance may well be prevented in application of other provisions, e.g. the one which excludes this remedy if performance is impossible in law or in fact (cf.

Art. 6.2.2(a)).

Furmston and Farnsworth proposed a new formula intended to make it clear that termination as well as withholding of performance were the two remedies which in any case could perfectly well coexist with a "force majeure" situation:

"Nothing in this article prevents a party from exercising a right to terminate the contract or withhold performance".

Fontaine proposed the addition of the words "under these Principles" in order to make it clear that the right to terminate the contract or to withhold performance, which this article was intended to preserve, was subject to the relevant rules provided for in the Principles. Thus, the rule according to which termination was possible only in case of fundamental non-performance of course remained, irrespective of whether or not under certain legal systems termination was an automatic consequence of force majeure.

Farnsworth objected to the proposed addition, since in his view it could give rise to misunderstandings in the sense that contractually stipulated cases of termination or withholding performance could also be considered to be excluded, while this was certainly not the case.

The Group finally decided to adopt the proposed formula without the addition, on the understanding that in case of temporary impediment termination was admitted only if the delay amounted to a fundamental non-performance. It was recommended that this should be made quite clear in the comments.

Before closing the discussion on the article on force majeure Crépeau raised a new question. Reading this article together with Art. 6.4.1 it emerged that in the context of the Principles a party's liability for its non-performance was excluded whenever that party was excused according to the criteria laid down in Art. 6.1.3. Did this mean that according to the Principles in addition to the obligations of diligence and of result there was no room for so-called "absolute obligations" or warranties ("obligations de garantie"), i.e. where the party was liable for its non-performance without any possibility whatsoever to be excused? In order to fill this gap, he suggested to add somewhere in Art. 6.1.3(1) the proviso "subject to the situation where the contract provides for an absolute performance".

Bonell felt that the present formula was sufficiently flexible to cover the case where a party had assumed such an obligation of warranty. Indeed, by referring to impediments "beyond [the party's] control" and which "it could not reasonably be expected to have taken [...] into account at the time of the conclusion of the contract" the provision made it clear that the parties to the single contract may well expressly, i.e. by a special "force majeure" clause, or impliedly, i.e.

by stating certain of their obligations in absolute terms, include in their sphere of risk events which were normally outside it, just as they may derogate from the rule in the opposite sense.

The Group appreciated the importance of the point raised, and recommended that the Rapporteur make it clear in the comments that the parties to each single contract, just as they may broaden the concept of "force majeure", are of course also entitled to restrict it or even to eliminate any possibility of excuse for their non-performance.

Article 6.1.4

Introducing Article 6.1.4 ("Right to withhold performance") Furmston pointed out that this remedy was closely related to the right to terminate, since in practice the same events may first of all entitle a party to withhold performance and subsequently to terminate. Nevertheless, the right to withhold performance was analytically distinct from the right to terminate given its close connection with the rules on the order of performance (cf. Art. 5.1.8).

Lando objected to the placing of the article among the general provisions on non-performance: he would prefer to have it among the articles dealing with the specific remedies. As to the content, he referred to a similar provision contained in the EEC draft and pointed out that contrary to that provision the present article did not deal at all with the case where the parties had to perform simultaneously.

According to Furmston cases of simultaneous performance were very rare in practice: he agreed, however, that if they occurred the rule should be like that laid down in the EEC draft, i.e. that either party may withhold performance until the other party tenders its performance.

Fontaine and Crépeau also favoured the adoption of such a rule which would represent the exact corollary to Art. 5.1.8(1).

Farnsworth raised the question of the scope of the rule. He considered it necessary to make it clear that the remedy of withholding performance was not an absolute one, but should be admitted only where the non-performance was sufficiently serious.

Tallon agreed and referred to the EEC draft where it was expressly stated that the aggrieved party "may withhold either the whole of his performance or a proportion of it, as may be reasonable given the nature of the obligations and the seriousness of the non-performance, until the other party tenders performance or has performed" (cf. s. 2.301(1)).

Hartkamp and Bonell quoted similar provisions to be found in the new Dutch Civil Code and the Italian Civil Code (Art. 1460(2)).

Huang felt that Furmston's draft did not make it sufficiently clear that there must be a non-performance on the part of the obligor.

Furmston agreed to avoid the use of the word "conditional" and to have a provision dealing with the two cases of simultaneous performance and consecutive performance, but, contrary to the corresponding provision in the EEC draft, he would prefer to deal with the two cases separately, since in the former case a party's right to withhold performance did not depend on an actual non-performance of the other, it being sufficient that there had been no tender of performance.

As to the necessary proportionality between the performance which may be withheld by one party and the nature of the non-performance by the other, Fontaine urged that this should be stated also with respect to the case of simultaneous performance and in this respect he gave the example of a buyer who should not be allowed to withhold the whole price simply because the seller had tendered delivery of eighty percent of the goods.

Furmston objected by pointing out that if a party tenders a defective performance, the other party may reject the tender in its entirety and consequently in turn withhold the whole of his performance.

In view of the fact that the Group was unable to agree on the precise implications of the proportionality criterion in the different cases, it finally decided not to mention it expressly in the text neither with respect to simultaneous performance, nor with respect to consecutive performance, but to mention in the comments that the remedy of withholding performance had to be exercised in the light of the general principle of good faith, which, according to the circumstances, might well imply the necessity of establishing a reasonable proportion between the performance which may be withheld by one party and the nature of the non-performance by the other.

The text of the article as finally adopted by the Group read as follows:

- "(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance.
- (2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed".

In closing the discussion on the draft Chapter 6, Section 1, Bonell thanked the Group for the excellent work done during this session which had made it possible to adopt a final version of the draft.

Bonell also expressed gratitude to Lando for his willingness to prepare a draft provision on the remedy of price reduction or quantum minoris for one of the next sessions.

Comments by the Governing Council to Chapter 2 (formation) and Chapter 3 (validity)

Bonell reported on the discussion which had taken place within the Governing Council of Unidroit on the various issues indicated in document C.D. 69 - Doc. 7.

With respect to Art. 2.13 ("Contract with terms deliberately left open") the Council had suggested a slight change in para. 2(b) to the effect that after the word "alternative" the words " means of rendering the term definite" should be added in order to better explain what was meant by alternative.

Maskow wondered whether this was not a change in substance, as in his view according to the new formulation the gap could no longer be filled by having recourse to the rules laid down in the Principles themselves, e.g. with respect to quality of performance or the price.

Farnsworth did not agree.

Furmston wondered whether under the new formulation it was still possible simply to do without the term on which the parties were not able to reach an agreement or the third person did not determine. In his view it was important that such a possibility existed since in practice it may happen that a party raised the question of the missing term not because its determination was of importance for the actual performance of the contract, but because it wanted to get out of the contract.

The Group agreed that this should be mentioned in the comments.

Bonell then recalled that with respect to Art. 2.14 it had been suggested to change the language "knowing that he is not able or willing to make an agreement" into "knowing that he intends not to make an agreement" so as to restrict the cases where a party would incur in liability for breaking off negotiations.

While Lando and Hartkamp expressed their preference for the present text, Farnsworth and Maskow supported the amendment suggested by the Council.

Fontaine and Furmston felt that the change was only a cosmetic one.

In view of the fact that the majority of the Group had no strong objections against the change proposed by the Council, it was agreed to

modify the present text so as to read as follows: "(3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to make an agreement with the other party".

With respect to Art. 3.1 Bonell reported that the prevailing view within the Council was in favour of the deletion of the words within square brackets, but that views had also been expressed in favour of putting a full stop after "requirement".

Lando expressed his preference for the first solution, while Farnsworth preferred the second.

Crépeau proposed to go even further by deleting all words after "parties".

The Group finally decided to change the text of the article so as read as follows: "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement".

LIST OF PARTICIPANTS

Mr Paul André CREPEAU, Professor of Law, Director, Centre de recherche en droit privé et comparé du Québec, 3647 rue Peel, MONTREAL, P.Q., H3A 1X1

Mr S.K. DATE-BAH, Professor of Law, Special Adviser (Legal), Technical Assistance Group, CFTC, Commonwealth Secretariat, Marlborough House, Pall Mall, LONDON SW1 5HX

Mr Ulrich DROBNIG, Professor of Law, Director, Max-Planck-Institut für ausländisches und internationales Privatrecht, Mittelweg 187, D - 2000 HAMBURG 13

Mr E. Allan FARNSWORTH, Professor of Law, Columbia University in the City of New York, Law School, 435 West 116th Street, NEW YORK, N.Y. 10027

Mr Marcel FONTAINE, Professor of Law, Centre de droit des Obligations, Université Catholique de Louvain, Collège Thomas More, Place Montesquieu 2, B - 1348 LOUVAIN-LA-NEUVE

Mr Michael P. FURMSTON, Professor of Law, Faculty of Law, University of Bristol, Wills Memorial Building, Queens Road, BRISTOL BS8 1RS

Mr Arthur S. HARTKAMP, Advocate-General at the Supreme Court of the Netherlands, Postbus 20303, 2500 EH 'S-GRAVENHAGE

Ms HUANG Danhan, Researcher, Department of Treaties and Law, Ministry of Foreign Economic Relations and Trade of the People's Republic of China, 2 Dong Chang An Street, BEIJING 100731

Mr Alexander S. KOMAROV, Professor of Law, Head of Law Department, USSR Academy of Foreign Trade, Pudovkina Street 4A, MOSKOW 119 285

Mr Ole LANDO, Professor of Law, Institute of European Market Law, Copenhagen School of Economics and Business Administration, Nansensgade 19, 3, 1366 COPENHAGEN K

Mr Dietrich MASKOW, Professor of Law, Director, Institut für ausländisches Recht und Rechtsvergleichung der Hochschule für Recht und Verwaltung, August-Bebel-Strasse 89, 1520 POTSDAM-BABELSBERG 2

Mr Denis TALLON, Professor of Law, Director, Institut de Droit comparé de Paris, Université de Droit, d'Economie et de Sciences Sociales (Paris 2), 28 rue Saint-Guillaume, 75007 PARIS

Mr Michael Joachim BONELL, Professor of Law, University of Rome I; Legal Consultant, Unidroit (Group Coordinator)

Ms Lena PETERS, Research Officer, Unidroit (Secretary to the Group)