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Unidroit

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 MIAMI

FROM 6 TO 10 JANUARY 1992

(prepared by the Secretariat of Unidroit)

Rome, May 1992
The sixteenth meeting of the Working Group for the Preparation of Principles for International Commercial Contracts was held from 6 to 10 January 1992, at the School of Law of the University of Miami at the kind invitation of that same Faculty. A list of participants is annexed to these Summary Records.

Professor Bonell opened the meeting, thanking the Miami Law School for having arranged the meeting in Miami. He welcomed Professor Richard Hyland, who had taught at the Miami Law School and who, together with Professor Farnsworth, had had the initiative of organising the meeting, who participated as an observer. Regret was expressed for the absence of Professors Crépeau and Date-Bah, who were unable to attend. Professor Bonell welcomed Professor Hisakazu Hirose of the University of Tokyo, Komaba, who participated for the first time in the work of the Group, Professor Kazuki Sono, former Secretary-General of UNCITRAL, who participated as an observer on behalf of the International Monetary Fund, and Professor Arthur Rosett of the University of California, Los Angeles, who in the past had submitted very interesting comments on some of the drafts and who was also going to participate as an observer.

On the floor for discussion were the draft provisions and comments on Chapter 1: General Provisions (Study L - Doc. 50) which Professor Bonell had drafted, and the comments the Governing Council of Unidroit had put forward at its last session in May 1991 on the draft of Chapter 5: Section 1: Performance in General (C.D. (70)22 pp. 9 : 37). Professor Arthur Hartkamp was asked to take the Chair for the discussion of Chapter 1.

Chapter 1: General Provisions (Study L - Doc. 50)

Article 1.1

Introducing Article 1.1, Bonell stated that as it was not self-evident what the Principles were and what their practical purpose was, this should be indicated at the very beginning of the Principles. As regarded the material scope of the Principles, para. (1) gave a very general statement of declaratory value. The emphasis of the provision was on "general rules" and on "international commercial contracts". Paragraph (2) laid down the criteria for the determination of the "international" and "commercial" character of a contract. The criterion adopted in lit. (a) for the determination of the international character of the contract was taken from the 1980 Rome Convention on the Law Applicable to Contractual Obligations and was only one of the many used in both international and national instruments, which spanned from the narrow criterion of the parties being located in two different countries to the most generic criterion developed by French case law and now adopted in the French Code of Civil Procedure with respect to international commercial arbitration according to which a contract or arbitration is international whenever it touches upon, or affects, the interests of international trade. Also the criterion chosen
for the determination of the commercial character of the contract was only one of several possible criteria. As stressed in the comments, it was not intended to reintroduce the old distinction between commercial and civil contracts which had been largely given up also at a domestic level and which international instruments such as CISG expressly got rid of, what was intended was to make it clear that consumer transactions were outside the scope of the Principles. The second part of the article highlighted possible practical cases of application of the Principles. Following the PECL model, a distinction had been made between the case where, according to the Principles themselves, the Principles would undoubtedly be applied (para. (3)), and those where they "may be applied" (paras. (4) and (5)).

Maskow had no special objections as regarded the text of Art. 1.1(1) With reference to the comments, he suggested that in addition to giving explanations for the terms "international" and "commercial", something should also be said as regarded the terms "general rules", as rules could be "general" in at least two different ways: first, there were rules of a general character, such as pacta sunt servanda, which were not operative rules but which only gave general principles; secondly, there were concrete operative rules which were intended to cover all contracts and not only special contracts such as sale. He felt that this should be stated in the commentary, so as to avoid giving the impression that the Principles were only general Principles which might be of some scientific interest but which could not determine the behaviour of the parties.

Tallon had trouble with "commercial nature". He agreed that it did not refer to the distinction between commercial and civil law, but he feared that there might be some confusion. When one spoke of "in the course of their trade or profession", profession was not commercial; there was a great tradition in France of the "profession libérales" and these professionals were not and did not want to be commercial. If a contract was made with a big international law firm that would not be a commercial transaction.

Bonell agreed with Tallon that the term "commercial" could in certain parts of the world have this second meaning. On the other hand, he wondered whether it really was possible to find anything better. This provision was intended to be declaratory and at international level "commercial" was universally being accepted as contrasted to consumer transactions.

Hartkamp observed that another possibility was just to delete the word "commercial" as international contracts usually were commercial, and to exclude international consumer contracts in an operative paragraph of this article. This could of course also be done in the comments, but it might be done in the article itself.

Tallon supported this suggestion.

Brazil stated that in Australia large law firms who operated internationally described themselves as commercial law firms. There was
therefore no problem where Australia was concerned as regarded the term "commercial" being applied to legal professional organisations. He saw some value in Bonell's observation that the use of the label "commercial" was important in identifying the nature and the thrust of the Principles and in marketing them once they were finished. He therefore favoured the retention of the word "commercial".

Lando was very much in favour of the Hartkamp-Tallon proposal to delete the word "commercial" and to exclude consumer contracts explicitly. This would avoid the contradiction he saw between lit. (b) and the comments: the comments said that the idea was to exclude consumer transactions, whereas the article stated that the contract was "commercial" when it was made "by both parties in the course of their trade or profession". There was a third group; i.e. those contracts which were made between two private persons who were not acting as consumers, and he could not see why they should not be covered by the Principles. CISG did not mention "commercial", it followed the same idea as Hartkamp, namely it stated that it applied to international sales (Art. 1(1)) and then excluded consumer transactions (Art. 2(a)).

Drobnig observed that the discussion reflected the different meanings different traditions attached to the word "commercial": for civil lawyers "commercial" had a very definite meaning and in Germany there was the same antipathy among the professions towards this word as there was towards being called merchants. He felt that as the thrust of the provision, of the word "commercial", was to exclude consumer contracts, this should be said. He would therefore also agree to the deletion of the word "commercial" in paragraph (1) as well as of the somewhat doubtful definition of "commercial" in para. (2)(b), with an express exclusion of consumer contracts.

Furnoston felt the definition to exclude a number of contracts which he would expect them to want to include: should not contracts where one of the parties is a State-trading organisation be included? Also contracts such as, for example, the contract whereby an English football club sells the services of one of its players to a Roman football club for many millions of pounds - was that trade or profession? It certainly was not a consumer contract. The word "profession" in English was totally devalued, everybody had a profession, the word no longer had a meaning, certainly not of the kind it had with the great liberal professions.

Bonell felt it important to link the Principles from the outset to what was known as the commercial "milieu", to international commercial (trade) transactions. Everyone nowadays knew, or at least believed they knew, what was intended by international trade transactions. If no mention of "commercial" or "trade" were made, his impression was that in many parts of the world people would become suspicious and ask what it was that was being dealt with. Thus, e.g. as regards the State contracts, many practitioners would wonder whether only contracts concluded jure gestionis or also jure imperii contracts were included, and they might think that what was being
offered were the general principles of law referred to in Art. 38 of the Statute of the International Court of Justice. As regarded Lando's point of two private persons acting in their private capacity, e.g. in the case of the sale of a house between two private persons, then he admitted that such cases would not be covered by the criterion as stated now. However, since the provisions of paras. (1) and (2), and to a certain extent of paras. (3)-(5), were a political statement, irrespective of whether they referred to "commercial" here, the rules would always apply only, if ever, because of the parties' choice. Private persons might therefore be so convinced of the value of the Principles that they could refer to them. What worried him was that the very title could be over-ambitious and the Principles therefore less easily sold. As regarded the football club example given by Furmston, both parties would be acting within their profession, if not trade. He had taken the word "profession" in the broad sense to mean acting in the course of one's professional activity, no matter what that was.

Hartkamp suggested that if one wanted to stick to the word "commercial" this could be done by turning the definition around to say that commercial contracts were all contracts except, and then define consumer contracts. Turning to the question of the contract between the two private persons, he indicated that he would find it illogical to include contracts when both parties were consumers when contracts where one party was a consumer were excluded.

Di Majo found the two concepts "trade" and "profession" to be very different - a lawyer was a member of a liberal profession. If a house was sold between two private persons that was not a commercial contract, but when the two parties were lawyers according to para. (2) it might be a commercial contract. He suggested that as the main characteristic of a commercial activity was speculation this should be indicated as a criterion in the definition of "commercial".

Huang agreed with Bonell that the word "commercial" should be kept, as otherwise the Principles would need to be rewritten: from the very beginning the intention of the drafters had been to draw up general rules for international commercial contracts and if the qualification "commercial" were taken out they would require rewriting. As regarded the definition of "commercial" in lit. (b), she also had a problem with "profession", and suggested a more general formula such as "whenever it is made by the parties for a commercial purpose".

Hylland observed that in American law what was intended here by "profession" was indicated as "trade or business".

Hartkamp observed that then the lawyers would definitely be out.

Furmston indicated that the relevant English Act states that "business" includes the activities of the professions.
Hartkamp considered that he would include lawyers and architects in commercial contracts, but not in trade or business contracts.

Fontaine also had hesitations about para. (2)(b) and favoured deleting the definition of "commercial". On the other hand, he saw the value in keeping the word "commercial" with reference to the scope of application of the Principles. He found Hartkamp's suggestion to define commercial contracts a contrario by stating that commercial contracts were all contracts which were not consumer contracts interesting, as the intention was precisely to exclude consumer contracts.

Tallon observed that "trade" would have to be translated into French by "commercial". This was why he preferred to have an exclusion clause excluding consumer contracts, and not to give a definition of a commercial contract. It was not true that a commercial contract was one which was not a consumer contract - in many countries there was still the contraposition of civil and commercial contracts and not consumer contracts, so there was risk of confusion. They were thinking of services and many service contracts (e.g. those of an architect or of a lawyer giving an opinion) would not be considered a commercial contract. He agreed on the general approach, he was against the division between civil and commercial law, but ordinary lawyers reading this would feel that it gave them a definition of an international contract, of a commercial contract. If one could avoid this kind of misunderstanding it was better to do so. He therefore felt that it was better to avoid the word "commercial" and went along with Drobnig's suggestion.

Furman suggested a formulation such as "international business contract", although he did not think that the expression "international commercial contract" would worry an English lawyer.

Bonnell suggested keeping "commercial" in the title and in para. (1) and then in para. (2) to say that for the purpose of these Principles a contract is not of a commercial nature if..., followed by the formula of CISG. This would avoid giving the impression of giving a definition of what was meant by "commercial".

Maskow felt that no real decision had as yet been taken on the policy question of whether or not it was desirable to include contracts with lawyers and other professionals. Most lawyers saw themselves as furnishing a service - he had not heard any lawyer stress the liberal profession aspect in contrast to the service aspect. If "commercial contract" were taken as a point of departure and then exclusions were made, this would broaden the scope of the provision, because if a straight definition was given anything else would be excluded, but if one said everything was commerce except consumer contracts, then those contracts which were doubtful would be commercial, and the provision would therefore be broader. This would also make it clear that for example contracts with State enterprises were also covered, even if he felt that they already were covered. As regarded private contracts, e.g. A and B decide to hire a car
together, then it would be a private contract with no commercial setting
and if one said all contracts except consumer contracts it would be clear
that this contract did not fall under the rules.

Brazil agreed with Maskov. He felt that the word "commercial" should be
retained as the label on the Principles, and should be kept in particular
in para. (1). As regard para. (2) he favoured dealing with the definition
by referring to consumer transactions as not being included. He suggested
that in the comments, in the list of the type of transactions which were
intended to be covered, also contracts with state trading organisations and
investment agreements be mentioned.

Drobnig observed that if, as it appeared, the majority of the Group
preferred keeping the reference to "commercial", he would plea that the
rapporteur specifically state in the comments that what was intended here
was not to be understood in the sense of domestic law for purposes of
jurisdiction, etc., but that the two words "international" and "commercial"
must be read together and that the word "commercial" as used here had no
reference to domestic concepts of "commercial".

Komarov suggested including a provision along the lines of Art. 1(3)
CISG, which stated that the civil or commercial character of the parties
should not be taken into consideration in determining the application of
the Convention, to meet the concerns of Drobnig and Tallon.

Hartkamp concluded that a number of options were open for lit. (b),
once it had been decided to keep the reference to international commercial
contract in para. (1): the approach currently in the provision, but turned
around, could be followed: "a contract is of a commercial nature unless one
of the parties has not contracted in the course of his trade or profession", but that would retain some of the difficulties they were faced
with now; something along the line of Art. 2(1) CISG which, however, was
intended for sales and in the reference to "goods bought for personal,
family or household use" at the very least a reference to services would
have to be inserted; thirdly, no definition at all, other than "unless at
least one party to the contract is a consumer".

Furmston suggested a formulation such as "A contract is not of a
commercial nature if it is made by one or both parties as a consumer".

Hartkamp favoured such a solution which would avoid questions of
definition of goods bought/services contracted for household use, etc. He
suggested phrasing it "A contract is of a commercial nature unless it is
[...]" which went better with the heading of the article.

Lando recalled that in CISG the word "commercial" did not appear, and
he felt that the same policy could be followed here. However, if the
majority wanted to retain the word "commercial", he also felt that a
positive definition should not be made, a negative statement to the effect
that consumer contracts were not covered was the only way around it and
would also be more in line with the comments. As regarded the private contracts, he came to the opposite conclusion to that reached by Maskow: he would say that if there was a private contract between two persons of some economic importance, and if the persons wished the Principles to apply, that would come in under para. (3). Why should the parties be prevented from using the Principles for a private contract?

Bonell felt this to be a false problem: no one had suggested that parties should be prevented from referring to the Principles according to para. (3), even if they were both consumers. The logic lay in paras. (4) and (5) and in the political message: once one did not indicate in the definition that the purpose was to deal with commercial contracts, the impression might be given that the Principles were in principle applicable to all kinds of contract, and this had never been their intention.

Hartkamp considered that two different problems were involved: first of all, the assumption had always been that they were drafting rules for commercial contracts and not for contracts in which two consumers were involved and he did not think that it would be wise to extend the scope of the rules at this stage; secondly, there was the problem of whether two consumers would be allowed to include these rules in their contract, or whether it would be possible to have arbitrators decide their dispute on the basis of these rules, but that was a matter of paras. (3) and (4).

Purkston wondered what difference it would make if paras. (1)(1) and (1)(2) were deleted. He observed that either one was going to have a political statement, and that was already contained in the title which referred to Principles for International Commercial Contracts, in which case the purpose was simply to have a descriptive, non-definitive statement, and whether it then was in the article itself did not seem to him to be very effective.

Tallon considered para. (2) together with paras. (3) and (4) and observed that as regarded para. (3), which stated that the Principles would apply when the parties had agreed that their contract would be governed by them, this was irrespective of who the parties were and there was no need for a definition of "commercial"; para. (4) instead provided that the Principles "may apply", and this was at the discretion of the court: the court could decide that even if the transaction was a civil or non-commercial one the Principles would apply anyway because they seemed to be more appropriate, so he saw no purpose in giving definitions which were of no help to the application of the Principles.

Fontaine felt that para. (1) should be kept. It was a statement of principle, an explanation and a justification of the work of the Group — when they had drafted the rules they had always done so for international commercial contracts and some of the rules might be very strange for other types of contract. He would, however, favour deleting para. (2), not only because of the difficulties involved, but also because of the problem of logic pointed out.
Sono observed that the Principles, even if it as yet was not clear in what form they would eventually be promulgated, were designed to re-orient the way of thinking of lawyers, and he therefore wondered why the scope of the rules should be confined by a narrowing of their general scope. Para. (2) might also present certain difficulties in application: lit. (a) defined a contract as being "international" whenever it involved a choice between the laws of different countries, but in para. (4) there was the unique idea of lex mercatoria. If the lex mercatoria was the law chosen by the parties, there was no conflict at all, no choice was involved: was a contract not international if the parties had chosen the lex mercatoria? Lit. (a) might therefore contradict para. (4). Lit. (b) referred to the trade or profession of the parties, but it was not clear whether or not it intended to cover all contracts - until the explanation that it was intended to cover ordinary commercial contracts, but one still did not know how to define them. In that situation he wondered why para. (2) had to be retained. With paras. (1) and (3) the purpose was clear. Furthermore, para. (3) stated that the Principles will apply when the parties have agreed that their contract be governed by them, but Article 5.2.3(4)(b) empowered courts to adapt the contract - how could parties empower a court to adapt the contract? This would differ from country to country, but the ideas were very good, and in such circumstances he wondered why para. (2), which confined the Principles to the ordinary scope of application idea was necessary.

Lando supported the deletion of para. (2).

Di Maio was against the suppression of para. (2). He felt that a definition was necessary for the definition of the purpose of the Principles. He supported Drobnig's suggestion to say that irrespective of the meaning in domestic law a contract is of a commercial nature whenever it is made by both parties in the course of their trade or profession, but felt that this should be stated in the article itself and not only in the comments.

Drobnig felt that lit. (a) could easily be dispensed with: he did not feel that the present definition was well taken. As to lit. (b), or its rewording in the form of excluding consumer contracts, he felt that in one way it would be good to make clear to national legislators who might be afraid of such a new instrument that their national policies on consumer protection were not affected in any way. On the other hand, national legislators in their consumer protection acts usually gave definitions of their scope of application and those definitions would certainly take priority as whatever was stated in the Principles was not relevant domestically. The definition they attempted to give here was therefore not very useful and whether or not to exclude consumer transactions expressly might be more of a political question, but that was done by the term "commercial" and this could be said in the comments. He therefore tended to think that also lit. (b) could be dispensed with.
Tallon suggested that the comments to Art. 1.4 on "Mandatory rules enacted by States" could refer to consumer transactions and so avoid the fear of national legislators.

Maskow was also of the opinion that the original idea of drafting rules for international contracts should be stuck to, even if the world had changed very much since work had begun and everything should be done to bridge the gap between international and domestic contracts. This was an additional reason to delete para. (2) because when the project had started there had not only been divisions in some countries such as the former GDR between the individual branches of national law but also very sharp divisions between national and international law. This distinction of course still existed, but the fact that it was becoming less important should be borne in mind and for this reason, and for the reasons put forward by Soni, it was not so important to have a sharp definition of the scope of application.

Komarov instead preferred to keep para. (2), because if only para. (1) were left, he feared that the terms "international" and "commercial" would be interpreted in terms of domestic law and he felt this to be more dangerous than having the definitions in para. (2).

Bonell felt that if para. (1) were kept, and para. (2) were to be deleted, the comments would specify what the Group had had in mind in terms of international and commercial, i.e. if the parties acted as consumers this was not considered to be a commercial transaction. The comments could then refer to CISG and to other similar formulas such as the one already in the Principles and the one of the UNCITRAL Model Law on Commercial Arbitration.

Huang considered that whether or not para. (2) were deleted the question still remained of how the international commercial nature of a contract was to be determined. Arbitrators and lawyers consulted had found the provision as it stood to be too general as they expected the Principles to provide more criteria to make this determination. If the provision were deleted, the principle would become even more general and abstract. She preferred there to be more indications for this determination, also because it would be made in different ways in different countries.

Voting on the suppression of para. (2), 7 voted for its deletion and 4 for its retention. Paragraph (2) was therefore deleted.

Furman suggested that the comments should indicate that the contract the Group had thought of in its deliberations was a contract with international commercial aspects, so that the Principles might not be suitable for contracts whereby English law professors sell Danish law professors chateaus in France, without prohibiting their use. That approach did not require going into over-sophisticated definitions, it was simply a question of communicating what the thrust of the discussion had been so that readers were aware that they had concentrated throughout on that kind
of transaction. Just as the reader needed to know that they had tried not to discuss international sales in detail because of CISG, but had instead considered contracts which were not primarily international sales but international service contracts.

Brazil agreed with Furmston. He considered it very important that if para. (2) were deleted, the comment as the very first thing state in the clearest terms how open-ended a concept of commercial contract had been adopted. With reference to the comments on para. (1) on p. 2 which stated that the Principles were not intended to unify existing national laws, but rather to "enunciate principles and rules which are common to the existing legal systems or, where such a "common core" cannot be established, to select the solutions which seem best adapted to the special requirements of international commercial contracts", he did not feel this to be a completely accurate description of what they were doing; they were not trying to find a "common core" and only then turn to the question of what solution might be best adapted for international commercial contracts, it was really an and/or situation, and the comments on p. 4 did in fact set it out as just that. He asked for confirmation that what was intended was what was stated on p. 4.

Drobnig felt that what had been said on the description of the term "commercial" in the comments essentially applied to the description of the meaning of the term "international". He suggested going in stages and to say first that they had thought of contracts between parties residing in different countries. He felt that Illustration 1 on p. 3 was far-fetched, at least if it wanted to explain lit. (a), but even in cases where both parties resided in the same country, if there was another international element the contract could be international for the purposes of this scheme. He would, however, also say that a purely domestic contract could be international. If para. (2) went out; Illustration 1 could be considered to be a relatively marginal case of an international contract.

As regarded Illustration 2 on p. 3, Hartkamp felt it to be highly artificial to distinguish between a room which the director has taken for himself and the conference room which he has hired for the conference. He himself would prefer to have the rule apply to both types of contract.

As regarded Brazil's observation on the comments, Bonell preferred to stick to the version on p. 2.

Hartkamp had never considered the exercise to be in the form of: first see whether all legal systems have a rule more or less in common and then, if not, look for something suitable for international commercial contracts. He himself had the impression that it was the other way around, that they looked at what was suitable for international commercial contracts. Of course, if a rule was common to more legal systems it was easier to reach agreement than if there is a sharp division between two or more legal systems.
Lando observed that it was well nigh impossible to state a common core — perhaps over 100 legal systems would have to be examined to state whether there was a common core and that was impossible.

Fontaine also felt that they had not been looking for the common core. He felt that they had followed the and/or approach, or even the reverse approach: they had looked at different legal systems and in some cases they had found out that they had reached a common core, but he did not think that most of the rules were common.

Tallon added that the rapporeurs had tried to find inspiration in the domestic laws and had tried to see which solution was the best for international contracts, but they had not discovered new rules for international contracts. Also contractual practice had been looked at for inspiration.

Hartkamp recalled further that the sets of general conditions which had been collected at the beginning of the project had also influenced the work.

Bonell felt that it should, however, not be forgotten that on a number of occasions no rule at all had been adopted because there had been no agreement within the Group and all had implicitly been thinking of what would be acceptable in their “countries of origin,” or alternatively internationally accepted rules had been stuck to (e.g. CISG) as they had deemed this to be the established common core and that they therefore could not depart from them even if they would have liked to do so. If they started the Principles with the statement that the Group had worked for years not to find a common core (taking “common core” to be a rather vague concept to mean generally accepted principles, etc., as it was not possible to examine all the legal systems of the world) but had instead first and foremost seen what was best suited for international trade, he would worry about the fate of the Principles. Even so, it was not his impression that all the rules reflected principally, or equally, the needs of international trade and not the so-called "common core", he felt the case to be quite the opposite.

Lando understood "common core" differently — when he thought of "common core" it was meant literally; i.e. one must see whether there was concurrence between the different legal systems and this would be impossible. He felt, however, that it could be "said" that the Group had worked out the rules it had felt to be best for international commerce. Secondly, many of these solutions were in harmony with the solutions of (many) legal systems.

Furmston thought that the question of what they said should be postponed until they reached agreement on what they had done. He did not himself see the way he himself thought, or the other members of the Group had behaved, as a search for the lowest common denominator or the highest common factor. Apart from anything else, very few national systems were
designed for international commercial contracts, they were designed for domestic contracts. Thus, if one looked for a common core by looking at text books on the different national legislations, each of them would be aimed at a whole body of contract, but primarily at domestic contracts. As they had searched for solutions for international commercial contracts, that had largely liberated them from any adherence to a particular system or to a combination. He had thought that what he was doing was trying to reach rules which were sensible in international commercial practice as applied by arbitrators and judges, and not some abstract exercise in comparative law. If that was what they had been trying to do, he could see nothing wrong in saying so.

Tallon observed that domestic law was a source of inspiration which, however, had a negative effect. The reason for this was that the solutions adopted were those best suited for international contracts, but these solutions had at the same time to be compatible with the major legal systems. It was not possible to introduce something, which might be the best solution and which might represent the common core of many legal systems if it was repulsive to one legal system.

Komarov referred to the "general rules" indicated in para. (1); the comments implied that by this should be understood "rules of law" and he felt it would be better if this were clearly indicated. The EBC Principles were entitled "Principles of European Contract Law" and in essence the nature of the two projects was the same.

Sono observed that his impression in reading the Principles was that the basic approach had been very much influenced by CISG, which now had 32 ratifications/accessions. He wondered why it should not be possible to state clearly that the Principles were based on an approach which had been widely adopted. Many provisions were either taken straight from CISG or had developed the ideas contained in that Convention. He felt it should be possible to say this, instead of going back to the consideration of whether a common core existed or not.

Maskow felt it to be impossible to explain all they were discussing by means of a subordinate clause. If it should be explained, they needed a general introduction to the whole project giving the historical background of the project, the underlying principles, etc. It would then make sense to discuss this matter, but where it was now was not a suitable place to develop this question.

As to an introduction to the Principles as a whole, Bonell stated that the picture which should then be given would be the following: the Group had wanted to lay down general rules for international commercial contracts; with this in mind, they had started from an overall consideration of existing national and international legal instruments; when there appeared to be a general consensus, for example in an international instrument like CISG which was an already existing body of rules covering a lot, even if not the whole, of the scope of the
Principles, then this instrument was taken very seriously into consideration and departed from only when this was felt necessary to meet the special requirements of other kinds of contracts. As regarded domestic legislation and case law, given the universal character of the enterprise they could not all be taken into consideration, and of those which were taken into account particular attention was given to the more recent ones as they were considered to be more in line with the current needs of international trade. What had always been borne in mind was that the ultimate solution which should be expressed in the Principles should meet the test of being in harmony with the needs and expectations of the international business community and practice, etc.

Drobnig commented that in the European Group the drafting of this introduction had proved to be extremely difficult. He therefore suggested that it might be appropriate if the whole committee participated in the discussion of the draft introduction. He felt it to be extremely important to strike a proper balance between the demands of international trade and national law.

Lando commented that the European Group had decided to draft an introduction not only for the whole project, but also for each chapter. He felt this should be considered also here, particularly, for example, as regarding remedies for non-performance: the Principles followed a system which was different from that of many legal systems and that would be explained.

Bonell felt this idea to be interesting, but hesitated to give a systematic introduction of two, three pages to, for example, the rules on non-performance highlighting the extent to which they are in conformity with existing national laws or international instruments, and the extent to which they differ from these, because once one started touching this aspect for one legal system, then why not mention all the others.

Brazil pointed out that both national and international systems were in a dynamic state so it was not merely a question of what the written law was today, it was also a question of trends as national laws might be changing very rapidly.

Turning to the point raised by Komarov regarding the terminology "general rules" or "general rules of law", Bonell did not see any discrepancy between the terminology of the title, "Principles for International Commercial Contracts" and the paragraph itself: he did not think that it was possible to say that the "Principles" were intended to lay down principles, and this was the main reason he had chosen not to use the word "principles" again, but had instead chosen to use "general rules", which was more or less synonymous. As regarded "general rules of law" or "general legal rules", he had felt that the text was clearly a legal text and so it was not necessary, but the decisive reason for not stating anything of the kind was that then one immediately had to discuss what was meant by "rules of law"/"legal rules".
Komarov felt that if "Principles" were spoken of, that was something of a more general nature and not strictly speaking rules of law, principles and rules could not be put on the same level.

Hartkamp suggested merely referring to "rules".

Furman felt that the problem was that English lawyers use the words "principles" and "rules" to mean different things and not the same thing. There was an elaborate body of doctrine, mainly elaborated by Dworkin, discussing the difference between principles and rules. Art. 1.2 was a principle, whereas Art. 2.2(1) was a rule; this had to do with the generality or specificity of the content. In Dworkin's analysis principles assumed exceptions and were at a high level of abstraction, whereas a rule was much more specific. It was not wholly clear to him where in this hierarchy "general rules" would come. On the whole, he felt it would be desirable to avoid language which would signal these things - it was actually not only theological as there were judgments which drew distinctions between principles and rules.

Hartkamp pointed out that in the codified systems of Europe "general rule" could mean a law of contracts in general as opposed to a law for specific contracts and he felt that this could be the meaning in which the word "general" was used in this text, in which case "general rule" would be something quite different from "principle", but that would not assist in the problem of using both "principles" and "rules" in the same paragraph.

Drobnig felt that this drew attention to a somewhat critical point: originally the European Group, and perhaps also this Group had departed from the idea of laying down abstract Principles which would not be applied in concrete cases. The work had developed in a very different direction, and he now thought that the word "principle" was no longer adequate for the whole body of the Principles. He found "general rules" to be more convincing, because they were rules as they had to solve concrete cases but they would not apply to specific contracts but to contract law in general. He therefore suggested replacing "Principles" by "General Rules".

Fontaines agreed with Drobnig. They had not considered the word "Principles" in detail, the project had in fact first been entitled "Codification of international trade law" and then it had been changed to "Principles", but thinking of it now, "Principles" was not the correct word, many of the rules were very precise. He would therefore also prefer "general rules" or "rules for international contracts" rather than "Principles".

Bonell recalled that they had started with "uniform rules", to which it had been objected that it definitely meant something of a normative character. Then, "rules" or "general rules" had been considered, and it had been objected that it appeared as if they were drafting rules for packaging or the like, and that they should be more ambitious and speak of "Principles". "General Principles" had also been discussed, and it had been
observed that in English "Principles" was sufficient, e.g., German one would definitely speak of "allgemeine Rechtsgrundätze" not of only "Rechtsgrundsätze". That was as regarded the title: para. (1) was a different matter, and here he saw Furman's point; but even in para. (1) there was no contraposition between "Principles" and "rules" since "Principles" were here used with a capital "p" referring back to the title, and therefore to this document. A solution would be to refer to both "principles and rules", but he wondered if that was really necessary. Otherwise, one could indicate that the Principles were intended to lay down "general provision". He questioned whether para. (1) was the correct place to introduce subtle distinctions between "principles" and "rules" as discussed.

Lando indicated that the PECL stated that "These Principles are intended to be applied as general rules of contract law [...]" (Art. 1.101(1)), i.e. a definition of what was intended by "Principles" was given, and he thought that if "general rules" were used every time "Principles" had been used there would be problems with the language. He therefore felt that the word "Principles" was very good, but he felt that at some point it should be stated that they were drafting general rules of contract law. Also the UNCITRAL Model Law on Arbitration stated that the parties may agree to apply such rules of law (Article 28) and by this was explicitly meant also rules belonging to the lex mercatoria and what they were trying to do was to create some "flesh and blood" for the lex mercatoria.

Maskow also felt that there were both principles and rules in the document; a majority being rules, so both the title and para. (1) should refer either to "rules" as that was the preponderant part, or to both "principles and rules".

Tallon stated that it would then be necessary to have a comment on the title, explaining the difference of "principles" and "rules". He felt that neutral language had to be arrived at because even if he had great respect for Dworkin's work he did not think that this distinction was universally admitted.

Hartnerm wondered whether the title of the PECL had been finally decided.

Drobnig observed that it had not actually been discussed in the Group.

Bonell stressed that the two Groups should not use different language.

Fontaine observed that although he in principle would favour "rules for international commercial contracts", he would stick to "Principles", first for reasons of harmonisation with the PECL, secondly because "Principles" sounded very good in a title, and thirdly, because if in para. (1) one referred to "rules of law" there would be no ambiguity.
The Group therefore decided to stick to the title as it stood for the time being.

Brazil felt it to be very important to adopt language which fitted in with the Model Law on International Commercial Arbitration. Similar language appeared in the ICSID Convention dealing with the settlement of international disputes, which was actually where the phrase in the Model Law came from. He therefore supported the idea of saying "general rules of law".

Maskow instead felt that it was not possible to say "rules of law" as in effect these were not rules of law. "Law" would require at least a confirmation by the State and this was lacking in the case of the Principles.

Bonell held views similar to those of Maskow, even if he saw the point raised by Brazil. As regarded the discussion which had taken place in UNCITRAL in relation to the Model Law on arbitration, he himself had been among those who had strongly urged the adoption of para. (1) in which this, to a certain extent new, concept of "rules of law" was introduced, but there were those who had said that whatever formula were used, arbitrators could only apply rules of law, meaning State law or other binding instruments. If here the terminology "general rules of law" was used, some could immediately ask where the authority of the Group to define its document as "rules of law" came from, and say that such a definition was misleading.

Lando felt that if UNCITRAL had been able to use "rules of law" in their Model Law to designate provisions similar to those which were being adopted here, this could also be done here.

Voting on whether to retain the present wording or to add "of law", 7 voted for the retention of the present wording and 5 for the addition of the words "of law". The present wording therefore remained as it stood.

Still with respect to para. (1), Furnston wondered what the force of the expression "lay down" was: he did not think that the Group was "laying down" as it was not legislating.

Brazil suggested saying that these Principles "set forth" general rules.

Sono wondered why a formulation such as "are intended to be applied as general rules for international commercial contracts" would not be acceptable.

Bonell explained that he did not want to give the slightest impression that the Group had the pretention of laying down objective rules of law, because they were not able to do so. "Applied", "is intended to apply", "govern" and the like went precisely in that direction.
In the end there was general agreement on "set forth", and the provision therefore read as follows:

"These Principles set forth general rules for international commercial contracts".

Turning to the content of the deleted para. (2), Lando observed that the comments were to a large extent satisfactory: they indicated that an international contract was generally a contract which has contacts, or links, with different legal systems and that even if there are no physical contacts, the contract could be made international by the presence of other elements. The only thing he might add, was that the French had stated in their case law (and this had been endorsed by the Code de procedure civil) that a contract can also be international, even if it has no physical contact with a foreign legal system if it "met en jeux des intérêts de commerce international", and Illustration 1 showed this.

Bonell stated that if the idea of defining "international contract" were abandoned, he might say in the comments that the basic assumption was that there should be such a limitation of the scope of the Principles, that it was not the purpose of the rules to give precise criteria to be followed in determining this, but that the basic assumption was that in addition to the typical cases of international contracts where parties are located in different States or the goods or services are rendered across the frontier, the Group felt that broader concepts and criteria should be followed, so as to broaden the scope of the Principles in practice. What was not to be covered was a purely domestic transaction. An additional sentence could of course be added, to the effect that, applicable law permitting, nothing prevented the parties from going beyond the expectations of the drafters of the Principles and referring to the Principles even in a purely domestic situation.

Lando pleaded for the avoiding of the expression "choice between the laws of different countries" used in Illustration 1, which he did not find adequate.

Hartkamp agreed with Lando.

Opening the discussion on para. (3), Sono observed that it dealt with the situation when the parties had agreed that their contract should be governed by the Principles, but did not require the parties to be engaged in international commercial contracts.

Bonell preferred mentioning the possibility that parties to contracts other than commercial contracts might choose the Principles to govern their contract in the comments to para. (1), rather than in connection with para. (3). In substance he agreed that this should be possible.

Drobniq felt that it should also be mentioned in connection with para. (3), which would be where one would look for the effects of party reference
Bonell felt that the effect did not depend all that much on whether the contract was an international one or not, but more on whether the case was brought before an arbitration court or a State court. Faced with a choice by the parties that the Principles should govern their international contract, 9 State courts out of 10 would consider it a contractual incorporation and would pass on to consider what the applicable law was. Arbitrators might instead already now act differently.

Drobnig felt that an express statement should be inserted in the comments to the effect that also contracts other than commercial contracts might be covered if the parties referred to the Principles, as reading para. (3) together with para. (1) could be understood in such a manner that only international commercial contracts were covered.

Sono wondered whether para. (3) was really necessary: it went without saying. Parties were free to make use of existing rules and if they incorporated the Principles into the contract the court would honour that incorporation as part of their contract. If para. (3) were kept as it stood, the possibility envisaged by Drobnig might arise that as the Principles were meant for international commercial contracts such an incorporation would be invalid. Furthermore, he considered that para. (3) might even weaken the applicability of the Principles instead of strengthening it, because parties may not specifically have agreed to the application of the Principles.

Bonell did not agree that such a provision might be self-evident. Why should they not indicate the only way in which parties could be sure of having their will to have the Principles apply to their contract respected, i.e. by a contractual reference? The comments further made it clear that, whereas before a State court this might only amount to a contractual incorporation, if parties together with such a contractual reference to the Principles agreed on an arbitration and indicated to arbitrators that in conformity with Art. 28(1) of the UNCITRAL Model Law the dispute should be settled in accordance with the Principles, at that point it would amount to a choice of law clause, and this was a novelty. He considered that this was the main purpose of para. (3); the second purpose was that it was important to have this contrast: i.e. to distinguish between "will apply", i.e. must be applied although on different level, and "may be applied" and for this contrast to be clear it must be contrasted in the text itself.

Maskow stated that this did not work if they only made rules which stated exceptions and did not say also the obvious. He therefore felt it necessary to state the main case even if it was obvious.

Di Majo had not clearly understood what the relation was between the Principles and the lex fori: when the parties chose the Principles, he assumed that they excluded the lex fori.
Bonell stated that it depended on what forum; if it was a State court, he did not think that at present these were prepared to accept the Principles as an alternative for an applicable law. The Rome Convention was very clear in this respect and elsewhere he could not see any other tendencies. The State courts would apply the Principles as lex contractus, subject to the possible limits of the applicable law.

Maskow observed that he could imagine the Principles being considered general conditions in Germany.

Furmanston suggested uniforming the phrasing of paras. (3) and (4) by stating "shall be applied" in para. (3). This suggestion was accepted by the Group.

Lando stated that it must be faced that para. (3) really meant quite different things in the context of State courts and in the context of arbitrators. If a court had to apply the Principles it could only be a type of incorporation, it could not be a choice of law, but if arbitrators had to apply the Principles, then he agreed that it practically amounted to a choice of law and in that case the public policy rules, the "ordre public international", and in some countries maybe the principles stated in the Rome Convention Art. 7(1), namely foreign rules of law which claim application may be taken into consideration under certain circumstances when they represent strong public policy. These were the only limits of the arbitrators.

Furmanston wondered whether if the parties made an express choice of these Principles they would not also make an express choice of arbitration. They would have very bad lawyers if they chose the Principles but did not rely upon arbitration.

Bonell felt it to be agreed that the proper approach was that the Principles should be chosen together with arbitration.

Lando suggested this could be said in the comments.

Drobnig had problems with the last line of comment (c) on p. 4 which stated that the parties would be free to choose the Principles as the "rules of law" according to which the arbitrators should decide the dispute "with the result that the Principles would apply to the exclusion of any particular national law". He felt that this went too far, certainly as far as public policy was concerned, but probably also as regarded mandatory law. He felt that this formula should be softened.

Bonell agreed with Drobnig. He had in fact tried to develop this thought in comment (c) on p. 9 in relation to the provision on mandatory rules, but felt that it should be stated also here.

Brazil also agreed, but commented that there was one system of arbitration where, in fact, that sentence was true, i.e. under the ICSID
Convention dealing with the settlement of investment disputes. That was an important instrument, not only in its own right, but because of the number of bilateral investment agreements which picked up ICSID arbitration. The ICSID system was set up as an autonomous arbitral system with the specific intent that issues arising in relation to those arbitrations cannot come before national courts at all. He suggested that the commentary should make a short reference to the ICSID Convention and to some of the connected matters.

Maskow doubted whether this example should be taken, as it was a special situation which was covered by the Convention.

Lando proposed that Article 1.1 be split into two articles, the first one of which would be constituted by the present para. (1), and the second of which would be the present paras. (3)-(5).

The Group decided to adopt this proposal and decided that the first article should then be entitled "Purpose of the Principles" and the second "Application of the Principles". (*)

Drobnig noted that paras. (1) and (5) started with "These Principles" whereas paras. (3) and (4) referred to "The Principles" and he wondered whether there was any particular reason for this.

Bonell indicated that para. (1) opened with "These Principles" as it served as an introduction to the instrument, but once that had been said in para. (1), he felt that all the following paragraphs, also para. (5), should speak of "The Principles". This was accepted by the Group.

Turning to para. (4), Di Majo wondered what the meaning of lit. (a) was. Was it a conversion of the will of the parties, or was it an imposition of the Principles in substitution for the lex mercatoria?

Bonell agreed that to a certain extent it could be seen as a deviation from the intention of the parties, but it was not: first of all the provision only stated that the Principles "may be applied", but, even more importantly, it was well known that in certain geographical regions and/or trade sectors it was common use to include choice of law clauses such as "This contract shall be governed by the lex mercatoria" or "by general principles" etc. Nobody really knew what was actually meant by these clauses, and certainly the arbitrators did not know, because if one looked at the decisions they rendered, one would find that either they had given no reason whatsoever for their decision except "This is in accordance with the lex mercatoria", or one would find a couple of quotations from text

(*) Note by the writer of this report: For the purpose of easier comprehension the provisions will hereinafter continue to be referred to by their original number.
books saying "stated in .... this clearly reflects a general principle of law". This was the way in which arbitral awards were very often drafted. If arbitrators in the future in cases such as the one envisaged were to refer to the Principles and apply them, he could hardly imagine anyone claiming that the arbitrators had betrayed the parties' original intention.

Di Majo objected that if the parties had decided that the lex mercatoria should apply and the arbitrators applied the Principles, then the parties could object.

Bonell considered that the the party/ies would have to show that the lex mercatoria was something different or would have provided different solutions.

Maskow felt that it was also a question of the interpretation of the will of the parties: if the parties had discussed whether or not to take the Principles and then decided that they would not take the Principles but would take the lex mercatoria it would be clear that the Principles were not intended as the lex mercatoria.

Bonell agreed, if it were possible to demonstrate that the lex mercatoria would provide a different solution from the Principles, but wondered whether it would be possible to show that - the lex mercatoria was like an empty box that one could put anything into.

Sono observed that Bonell appeared to have doubts on the acceptability of the Principles. He, however, as a newcomer to the Principles, saw their contents as being excellent, and saw it conform to the general principles of contract law which had been accepted through CISG. As regarded paras. (3) and (4), the first provided that to have the Principles apply parties must specifically incorporate them into their contract, whereas the second provided that in certain instances the Principles "may be applied": the "may" in para. (4) sounded very weak and this might be the consequence of the fact that at the beginning, before CISG was adopted, the success of the Principles project was uncertain. At present, however, in a rapidly changing world with CISG being accepted universally it was the right time for the Principles. He found Bonell's comment encouraging that even if the present formulation were to be retained, if the parties had chosen the lex mercatoria but had failed to prove it's contents, the Principles might provide the contents. He wondered whether they might not be a little more courageous: if para. (4) were placed immediately after para. (1) the implications would be quite different, i.e. para. (1) set forth the general rules for international commercial contracts and para. (4) said that the Principles may be applied when the parties referred to them; by saying that, one would be exhibiting confidence that the contents of the Principles was acceptable as lex mercatoria, i.e. if para. (4) were placed immediately after para. (1) the meaning of "may" would be strengthened.

Bonell did not agree with this suggestion. He felt that the parties should first be given an idea of what was certain: if they agreed, the
Principles would apply. Instead, he suggested incorporating the basic idea into para. (1), by adding a second sentence to the effect that "They may be referred to by the parties as lex mercatoria, general principles of law etc."

Lando supported the idea expressed by Sono because he felt that it would be much more frequent for parties to agree on the lex mercatoria and/or the general principles of law, than for parties, who might not even know of the Principles, to use the option of agreeing on them. He also agreed that the proposed changed word order would strengthen the meaning of the article.

Drobnig was sceptical as he did not feel that they should promote the use of references to the lex mercatoria or to general principles of law: what should be encouraged was references to the Principles. It was not certain to his mind whether these Principles could be identified with the lex mercatoria or general principles of law - he felt that that went rather far: parties may have other principles of law in mind and a party must be able to allege and to prove before an arbitral tribunal that they had something else in mind, or that one principle which is contained here is not lex mercatoria. It was not possible to claim that the Principles were always identical with the general principles of law or the lex mercatoria. Parties should therefore be encouraged to refer to the Principles expressly, and he felt that this was better expressed in the present sequence of the provisions.

Fontaine, Tallon, Maskow and Brazil preferred maintaining the present order of the provisions, and it was so decided.

Turning to para. 4(b), Di Majo wondered what was intended by "system".

Drobnig explained that "system" referred to national legal system, whereas "rules of law" would include general principles of law, lex mercatoria, or any other supra-national set of rules.

Hartkamp suggested it might be wise to explain this in the comments.

Bonell wondered whether it was suitable to put such a subtle distinction in the text. The idea was clearly "in the absence of any positive indication by the parties", so why not say "When the parties have not chosen any rules of law to govern their contract"?

Hartkamp suggested simply "any law", which Lando observed could refer to legal system.

Tallon wondered why the provision referred to "system or rules of law" and not simply to "rule of law".

Maskow referred to the possibility that parties agree to apply a convention of which their States are not members, in which case they would
have chosen certain rules of law but not a system, or when the parties chose INCOTERMS.

Furmanston wondered whether it were not possible for parties to choose rules of law which did not answer all the questions which arose: they may provide, for example, that their contract is subject to the Hague-Visby rules or to the uniform customs on letters of credit but that would still leave plenty of questions to be answered by other rules, such as these Principles.

Bonell agreed with Furmanston. As regarded the reference to INCOTERMS, if parties referred to INCOTERMS, he would never have understood this to fall outside lit. (b), because the reference to INCOTERMS clearly regarded only the qualification of the delivery terms, so if there was only a reference to INCOTERMS or to UCP, he would still maintain that this was a contract where parties had not chosen the law to govern their contract. Why should lit. (b) then specify "rules of law"? If, for example, the parties had chosen the Factoring Convention they were still within lit. (b) as the Convention left open almost all the problems dealt with in the Principles. He therefore favoured changing the text into "have not chosen any law to govern their contract", to make it clear that a mere reference to INCOTERMS or UCP or even to the Hague-Visby rules relating to the liability and to the limitation of liability, does not mean choice of law, at least not in a comprehensive manner, so there was still room for the Principles.

Hartkamp suggested that if the provision were rephrased "to the extent that the contract of the parties is not governed by a choice of law" this would make it clear.

Dobigny felt that if the limited nature of rules of law were referred to as distinct from systems of law they would be getting into a difficult field, because even if parties had chosen the law of a country such as e.g. Saudi Arabia, it was clear that Saudi Arabia had no rules for many Western commercial contracts and this would logically mean that it would be possible to apply the law of Saudi Arabia only to the extent that it had rules and that where there were gaps these Principles could be applied. "Rules of law", like the INCOTERMS, were very limited and it was obvious that they were limited. What was really intended was that the rules governed the contractual relations as far as they went, but beyond this the matter was left open and it was clear that the Principles here had a way to apply. The same problems arose if there were gaps in the legal system. He felt that the Principles could be applied also in this case but this was not stated so far. He would prefer to have, or at least to discuss, a rule which stated that both in the case of a reference to a system of law and in that of a reference to rules of law, if a gap arose the Principles could be used to fill the gap.

Bonell objected that he had always understood para. 4(b) to refer to the case where parties were silent as to the applicable law. It was not up to them to say that because Saudi Arabian law in this or that other respect
referred to non-written rules and customs it was possible to disregard it because it did not follow Western standards and therefore there was a gap and the Principles should apply. If the parties had said that the law of San Marino should apply, the judge or arbitrators would have to look at what the law of San Marino was and sooner or later they would find out. In fact, para. (5) deliberately deviated from the model of the PECL in that the suppletive and clarifying role of the Principles was limited to international instruments. His feeling was that it would go too far to allow at a universal level that possible lacunae in English law or Saudi Arabian law may be ex officio supplied by the Principles.

Lando disagreed. The experience of the European Group was that they had addressed many questions which were either not addressed in some legal systems, or the rules for which were very uncertain. There was therefore a general need to have principles which fill in the gaps. It was increasingly observed that a national judge who faced an international contract and applied a certain system of law, maybe his own, and could not find anything in his own law, would go to international sources - CISG was for example applied in some countries before it entered into force. If there was a rule such as the one in the PECL ("These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so" - Article 1.10(4)) lit. (b) could stand as it was, which would mean that if the INCOTERMS were chosen, INCOTERMS did not address many of the issues raised here and could consequently not be applied whereas the Principles could, but in certain respects INCOTERMS did have rules which would take priority over those of the Principles, for example the rules on place of performance. He thought that the Principles could be used by judges and arbitrators in the many cases where the national law did not provide an answer. Such a provision could be an addition to the one in para. (5).

Furmston observed that it was a highly debatable question whether in a very developed system of law there actually was such a thing as a gap. There were at least three different situations which one might consider: first where a case comes before, for example, an English court and the English judge decides that he does not know what English law is because the case has never arisen before, in which case there was nothing to prevent the English judge from reading the text and borrowing from it. The second case was where an English judge was applying a contract subject to for example Saudi Arabian law and the question was what was Saudi Arabian law? That was a question of expert evidence as to what Saudi Armenians would do and the real question was would a Saudi Arabian judge in this case fill in the gaps by reading the Principles? The third case was where there was an arbitration: the existing text clearly covered the situation where there is an arbitration and no express or implied choice of law, and the arbitrator might then decide to apply these rules. Alternatively, the arbitrator is persuaded that the standard choice of law rule which would normally be applied by most people is the law of, e.g., France, and in this situation he would not expect most arbitrators to apply the Principles even if they would presumably have a discretion and it would be up to them. All of these cases dealt with cases where there was no express choice of law, and was
different from a situation where there was a choice of law express or implied, but there were gaps. He thought that the existing provision was too broad to deal with all of these cases in one sentence.

Bonell observed that the Principles stated general rules to be applied at a global level, and all knew how often what could be called "legal imperialism" occurred in this respect. Thus, if, for example an arbitrator sat in Zürich, Milan, or London, even if parties have expressly stated that the law of a small country in an other part of the globe should be the proper law of the contract, the arbitrators could after a quick enquiry claim that nothing reasonable was laid down in that law and that the Principles should apply instead and this should not be encouraged, just as the lex mercatoria bia-bia should not be encouraged. Were they really sure that a legal system with true gaps existed? In Italy there was the provision that, if a solution could be found neither by analogy nor by a systematic teleological interpretation etc., then it should be found on the basis of the general principles of the law. Every system had the pretention of being self-sufficient. When he had selected the PECL formula he had in fact misunderstood the intentions of the drafters as he had understood it to refer only to the case where the parties had not chosen any law to govern their contract, i.e. where they had not chosen a proper law of the contract. Once they had chosen a proper law of the contract, para. 4(b) should not apply. In this respect he would never have thought of the case of a reference to INCOTERMS, because with a reference to, INCOTERMS one was still within para. 4(b), just as one would be within para. 4(b). If there was just a "Sonderanknüpfung", a "Spaltung", if parties said only that as far as non-performance was concerned the law of Russia should apply. Certainly as far as formation, interpretation, validity and performance were concerned the Principles may well be applied under para. 4(b), but if parties stipulated that the contract should be governed by the law of Russia, this should be outside para. 4(b) and this was the reason he had deviated from the PECL-in para. (5) by limiting this supplementing role to international instruments where it was fair to stick to international standards rather than to come back to national standards. His suggestion was therefore to limit para. (4) to the case where the parties had not chosen a law to govern their contract and to leave para. (5) as it was.

Sono was happy with para. 4(b). The misunderstanding as to whether a reference to INCOTERMS or UCP would come under para. 4(b) could be avoided by modifying the wording. The comments should not elaborate on why INCOTERMS were outside, because they were not rules of law. He preferred keeping the words "rules of law" because if only "law" were kept this might be understood as a reference to national law. "Rules of law" might instead also refer to a convention to which the country of the parties might not have adhered. Under CISG parties might of course refer to INCOTERMS, in that case INCOTERMS would not exclude the application of the convention, it would come under Article 1(5).

Drobnig felt that the present text should be maintained.
Maskow observed that he had misunderstood the present text. If he took it as it was meant it was actually dangerous, because it would mean that if parties chose a system of law everything was all right, but if they only chose certain rules of law, e.g. rules of Japanese law concerning the quality of the goods, and they said that the quality and the consequence of non-observance of the quality standards should be governed by Japanese law, then they had without doubt chosen rules of law, but in this case the Principles may not be applied, even to the other provisions. This was a situation which should be avoided, and therefore they should either delete "rules of law" or express it by "to the extent that".

Bonell had the same concern as Maskow. He felt that the provision as drafted was counter-productive, because if parties chose, e.g., a convention, and conventions were in general very limited in scope, according to the present text the Principles should no longer be taken into consideration and this was quite the opposite of what was intended. Either the language should be changed to "when the parties have not chosen the law governing their contract" or "to the extent that the parties have not chosen the law governing their contract".

Sono observed that if the parties had agreed that a certain law was to govern certain area of the contract, those provisions would become part of the contract, similarly, for international conventions, if the parties had agreed that a convention would govern the contract the rules in the convention would become part of the contract. If one said "rules of law" the contract would be governed by the provisions but not under para. 4(b). - para. 4(b) referred to the law applicable to the contract.

Drobnig stated that the first part concerned when there was a choice of a system of law, i.e. of a national domestic legal system, then the Principles should not come into play, unless something were added along the lines of the PECL. The problem was with the second part of the rule, namely, how a reference to "rules of law" should be treated, and their assumption that "rules of law" was either a limited reference to a legal system (e.g. Japanese law to govern the quality of the goods) or a reference to a convention which is not applicable to the concrete case, or to other pieces of international instruments. He felt that the Group agreed on the solution, i.e. if the rules of law to which the parties have agreed do not give a solution to the problems at hand the Principles should be applicable: the question was how to express this. One could perhaps in a separate sub-paragraph say that when the parties have referred to rules of law the Principles should not apply if those rules give a solution to the case.

Hartkamp suggested leaving the matter to the comments, as Drobnig's suggestion would make the paragraph longer and more difficult to read, only to cater for a case which really was not very frequent.

Bonell observed that as regarded "system of law" he could not recall any instrument which referred to "system of law" as contrasted to "rules of
law", one spoke of "law" as contrasted with "rules of law", if "system of law" were introduced that would need further explanation in the comments. More importantly, he wondered whether there was not an inconsistency with para. 4(a), because there they spoke of a possible interpretation of formulas such as "general principles of law, lex mercatoria or the like", so the intention was to leave it open, to cover also rules of supra-national validity or international usages and customs etc. Then in lit. (b) they went on to say "may be applied unless parties have chosen rules of law" intending something like that, "to govern their contract".

Drobnig objected that the words "or the like" referred an a-national set of rules which also claimed to be complete, in which case the Principles might well apply, whereas the "rules of law" referred to in lit. (b) were pieces of rules of law.

Tallon felt that the discussion showed that there was no agreement as to what was meant by "system or rules of law", and was therefore strongly opposed to the retention of these formulas.

Brazil would support lit. (b) if it were changed along the lines suggested by Bonell, i.e. "When the parties have not chosen an applicable law to govern their contract".

Hartkamp added that then the comments could point out that if the parties had not chosen an applicable law but only certain rules of law, the choice of the parties would take precedence in so far as this choice had been made, but that this provision would apply to conflicts not covered by this choice.

Drobnig wondered what in this case was intended by "applicable": applicable in order to solve the controversy before the court, or applicable under the conflict of laws rules?

Brazil stated that what was intended was the proper law of the contract as determined by the relevant conflict of laws rules, a choice of law clause.

Drobnig observed that "choice of law" as used in the Rome Convention meant a reference to a domestic system of law.

Bonell added that this meant that the Principles could still become relevant to the extent that such an express reference is consistent with the Principles. Furthermore, if a national law were chosen to govern only one aspect of the contract this would fall outside lit. (b).

Drobnig wondered what the situation the following case would be: if A and B agreed that Italian law should apply to the formation of the contract, the Principles would according to Bonell apply because the parties had not chosen the applicable law to govern their contract. Did that also mean that the chapter on formation of the Principles could be
applied? If not, how could this disagreement be brought in?

Hartkamp stressed that the provision would only deal with the case where the parties had chosen a law to govern their contract as a whole. As soon as there was a "Sonderanknüpfung" or a reference to a convention which did not apply to the contract, etc., lit. (b) would not apply, so the Principles could apply to the extent that the parties had not indicated the relevant rules to their contract. The comments would spell this out.

Lando observed that the provision in Brazil's proposal used both "applicable law" and "to govern their contract". He had never seen both used at the same time.

The Group decided to delete "applicable", so the provision would read: "when the parties have not chosen any law to govern their contract".

Turning to Lando's proposal to include the supplementing of national legislation among the possible roles of the Principles, Fontaine was reluctant to have such a role in the Principles. He understood that it was suitable for European contract law, but he could see the danger for developing countries which would perhaps negotiate very hard to have their own law as the applicable law and then find arbitrators having trouble getting information about that law and deciding to apply the Principles instead. He felt that that would betray the will of the parties.

Tallon disagreed with Fontaine. He felt it to be a real problem with Islamic countries which wanted to go back to religious law which had gaps and this danger was much more present than the imperialistic attitude which was losing ground.

Drobnig, Komarov and Hartkamp supported the proposal.

Bonell wondered whether it might be acceptable to everybody to deviate from the EEC formula by having two different sentences in para. (5). The first would emphasise the primary role of the Principles, which was clearly that indicated in Art. 7 of CISG, with the provision reading as at present, the second would add "The Principles may also" and develop the same idea with respect to the law chosen by the parties referred to under para. 4(b). Then, perhaps, one could have a proviso on the case when it was really impossible to find a solution, as he did not think that it was objectively possible to consider a national system to be insufficient.

Furman was interested in knowing whether there was anyone who could give examples of countries which had gaps which could actually be filled by the Principles. He did not think that these rules would help to fill the sort of gaps that they were talking about, unless they were going to have recourse to general notions of good faith and fair dealing. He did not think that they aspired to the level of detail which would actually fill gaps in developed countries.
Lando referred to the experience of the EEC Group, where it had occurred that members felt that a certain rule would help in their country because they had no rule: for example, the rule on hardship had been welcomed by the Belgian member of the Group for this reason.

Furnston felt there to be an ambiguity as to what was intended by gap. There was a difference between a situation where it was not possible to say what the law was and the situation where there was a gap. There had been many cases on this issue, in which it was claimed that the answer was found, but the answers were inconsistent and difficult to discern. There were other situations where the problem had never arisen. He did not think that he would characterise English law on economic loss in tort as a gap, nobody knew what the law was today, it would be different next week from what it was last week, it was changing all the time, but to describe it as a gap when there were 100 leading cases on it was a very eccentric use of the word "gap" - there was a difference between a gap and a swamp.

Brazil favoured the view expressed by Fontaine and Furnston. He had reservations about provisions of this kind going into the text. He understood the purpose behind it, but thought it might be misunderstood. It might affect the credibility of the Principles. He suggested dealing with this matter in the commentary, saying that these Principles can be drawn upon for other purposes as well, such as, etc.

Maskow did have certain doubts regarding the "legal imperialism" referred to, but stated that he had in fact himself acted as the majority were suggesting when he had acted as arbitrator: he had had to decide whether hardship was dealt with in the General Conditions of the CMEA. This question was very important as many contracts which were still governed by these conditions were affected by the recent changes. He had found some provisions in an article which could be interpreted as covering this problem, but some problems were not governed by these rules and he had not been able to find a solution, so he had proposed to use the draft of the Principles to fill the gaps and to solve these problems as this was usual in international trade, and so on. The CMEA General Conditions were of course a rather developed system of rules and only some aspects had been left open. If religious laws were taken to cover international commercial contracts this question was even more decisive. In the case he had referred to it was clearly not a question of imperialism.

Bonnell observed that the case cited by Maskow clearly came under para. (5) as the CMEA General Conditions were an international instrument which did present certain gaps. Also CISG was very elaborate but no one could argue that there were no lacunae and para. (5) was therefore quite important.

Drobniq observed that in the case law of some smaller or medium-sized European countries there were in the opinions of the Attorneys General very many references to foreign laws, because the domestic legal system was uncertain and inspiration was sought from other legal systems with
experience in the area. In larger countries such practices were not so frequent, but it did happen. What they really wanted was that in such cases reference should be made not to some selected domestic systems but to these Principles. He saw that there was a certain risk in the European provision, arbitrators might be lazy and claim that the law chosen by the parties did not provide an answer and that should be avoided, but that could be done by appropriate drafting.

Voting on the inclusion of a provision along the lines of the PECL Article 1.101(4), 9 voted in favour. The proposal was therefore adopted.

As regarded the proposal to add a proviso along the lines "provided that it proves practically impossible to find out what the solution according to the applicable law would be", Fontaine was not sure that this proviso would in effect soften the provision. People would argue about what "practically" meant, so he would prefer to say that there was a gap.

To Furmston it seemed logical to say nothing, because one could only apply Article 1.101(4) if one had already decided that the system or rule of law did not have an answer. He proposed the following wording, as a new para. (6): "The Principles may also be used to [interpret or] supplement the law chosen by the parties to govern their contract when it proves impossible to establish what the relevant rule of that law is".

Tallon found it illogical to say "to interpret or supplement" in both para. (5) and the new provision. It was natural to interpret an instrument of international uniform law by the Principles which were general rules of international creation, but if one had to interpret national law by international principles it did not work. He therefore proposed to say only "to supplement" and not also "to interpret".

Fontaine agreed with Tallon. It did not seem to be logical to interpret when there was a gap.

Lando wondered what the situation was when the court applied a law not chosen by the parties and that law was impossible to establish. He agreed with Fontaine that one could not interpret a gap. Here a question of costs was involved because often it was very costly and cumbersome for a court to establish the content of a foreign legal system and in many cases when the foreign legal system was difficult to ascertain and the value of the case was not enormous parties gave it up and the usual rule was than to apply the lex fori, but he found that in such a case it would be better to apply the Principles. He therefore preferred "impracticable" to "impossible".

Fontaine preferred "impossible" to "impractical" because he did not want to have a provision which would be applied as soon as there was a difficulty to find out what the law was. The requirement of not being able to find the relevant rule had to be strict.
Bonell agreed with Tallon on the question of the parallelism between para. (5) and the proposed para. (6), but wondered why one here should speak of "supplement" and not simply say "may also be applied if it proves to be [impossible][impracticable] to find the relevant rules of the law otherwise applicable". As regarded the point raised by Lando, he felt that it was hardly possible to go further than the law chosen by the parties. There was a huge variety of practices of national courts - even within one single country. In Italy, for example, on paper the principle iura novit curia was followed, the judge was obliged to find it out ex officio, but the actual practice was quite the opposite, they might even go so far as to ask the party to prove that the foreign law which in theory was applicable was different in content from Italian law, otherwise judges would disregard it altogether. Whatever they wrote in the Principles was not important as the courts would in any event follow their usual practice. Parties could simply be given a hint that if they chose a law they might choose the Principles as a suppletive source of regulation.

Farnsworth did not think that a very precise or elaborate provision was needed here because the Principles could not tell courts or arbitrators what they were supposed to do in these cases. It seemed to him that one could say that the Principles would apply when the parties have so agreed. Probably if Bonell's suggestion were followed, one would say "to the extent that the parties have agreed, because the parties might say that they wanted their contract governed by these Principles, or they might say that they wanted their contract governed by Italian law and if it is not possible to tell what that is then look at these Principles. When one got down to para. (5) it was simply being suggested that if a court would like to use these Principles the authors of the Principles think that that would be a good idea. He thought something like "These Principles may be used to supplement the otherwise applicable law" could be said.

Bonell reminded Farnsworth, who had just joined the meeting, that the discussion had evidenced that one thing was what was now expressed in para. (5) and another thing was a similar way of thinking with respect to domestic law which was applicable either because it was chosen by the parties or because it was considered to be applicable by the court, because if parties had chosen a particular domestic law there was a presumption that parties wanted that particular domestic law to apply to their contract and not the Principles. To say that even in this case the Principles should be taken whenever there was any problem, would be over-ambitious or even "imperialistic" because one should not encourage judges, and in particular arbitrators, to be lazy. If parties had chosen the law of Ruritania they knew why they had chosen it and if it turned out to be more difficult to find a solution according to that law than according to the law of Miami it would be up to the arbitrator to find out what the solution was according to the law of Ruritania, instead of to disregard the choice of law and to go immediately to the Principles. It was for this reason thought that a different approach should be taken with respect to international instruments, because if the parties had chosen CISG, or if CISG per se applied, under Article 7 it would not be an imperialistic attitude to say
that if CISG had a lacuna or a question of interpretation arose the Principles could be used to supplement or to interpret the convention.

Brazil supported the approach suggested by Farnsworth which he found to be more realistic. He observed that courts and arbitrators in Australia operated in a system which did not really recognize the existence of gaps in the law, with the consequence that, if applied strictly, the provision as it stood would say nothing to decision makers in Australia. If there was difficulty in ascertaining what the foreign law was it was presumed that it was the same as Australian law. It was true on the other hand that courts did from time to time look at what was done in other legal systems from the point of view of developing the law. In a recent decision of the High Court of Australia a great deal of attention had been paid to EEC directives as a source for developing Australian law in that particular area. He would be disappointed to end up with language here which seemed to exclude that sort of access to the Principles. He suggested a wording such as: "The Principles may also be used to supplement the applicable national law where that provides assistance in providing a solution".

To Furmston it seemed that it turned very largely on which group they thought they were addressing. If one thought one was talking to judges of the national courts of the chosen law he did not think it was necessary to say anything to them. He however thought that they were primarily concerned with talking to arbitrators. He could imagine an arbitrator sitting in Ruritania told to apply Utopian law and then the question was what use that arbitrator may make of these Principles in order to decide what Utopian law was. On the whole in his experience the zeal of arbitrators to carry out scientific research as to what the Utopian law was would not be that strong. Therefore if there was too weak a test they would simply persuade themselves that the Principles and Utopian law were the same.

Maskow saw two problems with the text proposed by Furmston: first, whether to say "supplement" or "applied" or the like; he thought they should say "the law otherwise applicable" or something like that, as it depended on the law which was to govern the contract, whether by choice of the parties or otherwise; secondly he found that the word "impossible" could be interpreted in flexible enough a way to cover also cases where it was "impracticable" to establish what the foreign law was. He thought that this paragraph would only apply if the judge or arbitrator had to apply a foreign law because if the domestic law had to be applied it would normally be possible to find a solution. Normally, if a judge or arbitrator could not determine what a foreign law was, the parties would be asked to establish what it was and if the parties were not able to do so, then then law cannot be established and this might be interpreted as being impossible even if in actual fact it was only impracticable, maybe because too expensive. The formulation of the provision would therefore be "The Principles may also be applied where it proves impossible to establish what the relevant rule of law otherwise applicable would be".
Tallon suggested merging paras. (5) and (6) to read: "[...] law governing [applicable to] the contract whether a national system or an instrument of international uniform law", because these were two rules which were the same, one for international instruments and one for national legal systems.

Bonell felt the crucial issue to be whether international instruments deserved a different approach from national law. As far as international instruments were concerned, precisely because they were fragmentary in character per definitionem, it should be clear without any further qualification or requirement that if there were doubts of interpretation or gaps they strongly recommended judges and arbitrators to consult the Principles instead of conducting their own research case by case. With respect to domestic law some members of the Group considered that perhaps a further qualification should be added: the so-called impossibility case - courts should look at the Principles only when it proved impossible to establish what the foreign law was. The result was that the two provisions could not be merged, even if a parallelism could be established.

Tallon did not agree: CISG was now national law, so then Bonell distinguished between national law of international origin and national law of national origin.

Drobnig felt that international instruments should be treated differently from domestic law because they were not as "dense" as domestic legislation and also the case law was less numerous than for domestic relations. It was therefore obvious to him that there was a need to be more liberal in applying the Principles to interpret terms of international instruments. There was further a general principle with respect to the interpretation of uniform law, i.e. in a comparative and internationally minded way, which would also be a pointer towards keeping the distinction.

Lando recalled CISG Article 7(2) which continued "or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". If, for example, there was a gap in this convention and they tried to use CISG's general principles which gave no answer, CISG said that one had to go to national law and the Principles said that in that case it was not necessary to go to national law, the parties could use the Principles. How was that antinomy to be solved?

Bonell stated that he would be content with a judge or arbitrator looking at the Principles when looking for the general principles on which the convention was based. For example, modes of payment: the Principles had a fairly detailed regulation of how the price was to be paid - nothing was said in CISG, they were still within the first part of Article 7(2). Thus, even if one was outside the scope of Article 7(2), the autonomous interpretation, the last sentence of CISG should be disregarded and the Principles looked at.
Tallon's proposal to merge the two provisions did not receive support from the other members of the Group and was therefore abandoned.

The questions to be decided were therefore first whether the word "interpret" should be included in the provision, secondly whether to say "supplement" or "apply"; thirdly "chosen law" or "any applicable law" and fourthly either "when it proves impossible [...]" or "impracticable" or "may provide assistance in reaching a solution".

Turning to the question of changing "supplement" to "apply", Bonell observed that there would be problems to explain if there were two separate provisions, one of which one had "interpret or supplement" and the other of which only had "supplement". He could imagine that faced with the law of Ruritania evidence could be given of three different rules, or of a very ambiguous rule, or a problem of interpretation faced, and at that point why should the Principles be excluded for that purpose? This was the reason for which he had suggested the more general language "apply".

Lando preferred the formulation "to apply", whereas Tallon preferred the EEC formula "may provide a solution".

Fontaine wondered why para. (4) used "applied" and para. (5) instead used "used".

Tallon felt that there was a difference, as one applied rules of interpretation and use the solution to interpret, there was a difference in nuance.

Brasil indicated that when making his proposal he was thinking more in terms of "to supplement" rather than "to apply".

Tallon felt the EEC formula to be better because there was less danger of ousting the municipal law. It indicated that resort was to be had to the Principles when there was an issue for which there was no solution, whereas "may supplement" indicated that the law was no good so it could be disregarded entirely and the Principles could be applied. The EEC formula drew attention to the fact that the supplementing function was limited to one issue.

Voting on whether to use the present wording, with the understanding that it might later be changed to "apply", or the EEC formula, 7 voted in favour of the first alternative and 7 voted for the second alternative.

In view of the draw, a second vote was taken including also the alternative of "to apply, 4 voted in favour of "to supplement, 5 voted in favour of "may be applied", and 5 voted in favour of the EEC formula.

Voting on the formulas "to be applied" and the EEC formula 5 voted in favour of "may be applied" and 9 voted in favour of the EEC formula. The EEC formula was accepted: "The Principles may provide a solution when it
proves [impossible][impracticable] to establish what the relevant rule of
that law is”.

Drobnig wondered whether the words "to the issue raised" of the EEC
draft were also included here.

Tallon agreed that this was important to indicate that the judge was
not being asked to disregard the whole national system.

Bonnell pointed out that contrary to the EEC formula the Principles
were going to adopt a qualification, where it was clearly said that only if
it was not possible to find out what the solution of the applicable law was
in a particular case on a particular issue the Principles may provide a
solution, so it might not be necessary to say it twice.

Turning to the alternatives "any applicable law" or "the chosen law",
the majority favoured "any applicable law".

As to the alternatives "impossible" or "impracticable", Huang
wondered what the difference was between "impracticable" and "impossible".

Lando indicated that "impossible" meant "absolutely impossible", in
other words no one could do it, whereas "impracticable" instead meant that
it was not absolutely impossible, it would just cost too much to do so, one
would go beyond the limit of reasonable sacrifice to do it.

Huang wondered whether it would be a case of impossibility or
impracticability if there was a contract to which Chinese law was
applicable and there was a case of hardship but hardship was not recognised
by Chinese law.

Farnsworth indicated that "impracticable" was probably an invention
of the UCC as until then the word used by common law commentators had been
"impossible" and then in § 2-615 "impracticale" had been introduced. It did
have the possible danger that one tended to think of "impracticable" in
terms of force majeure and hardship rather than in terms of looking around
for legal solutions.

Maskow analysed Huang’s question to mean whether the lack of a rule
in Chinese law would mean that hardship was not allowed or whether it was
possible to develop such a rule for the judge. If this question could be
answered according to Chinese law then the Principles would not come into
play; if it should turn out to be impossible to answer even this question
according to Chinese law as one did not know whether it was allowed or not,
then the Principles would come into play to determine whether hardship had
occurred.

Bonnell felt two questions to be mixed here: the problem Huang was
raising, i.e. there was no specific provision on hardship in Chinese law —
did it mean that in a hardship case one may notwithstanding this invoke
hardship on the basis of the Principles? This was a question of interpreting Chinese law and depended on whether the silence of the legislator was interpreted as a rejection of hardship or whether it was considered to be a gap. The alternative between "impossibility" and "impracticability" instead meant the following: for example, A has unfortunately no knowledge of Chinese law on a particular issue, but is asked to decide this particular issue, as an arbitrator for example. Neither A nor the parties have clear evidence on what Chinese law on this particular point is. If the text said "if it is impossible" to find out what Chinese law is on this point, one may interpret the text to mean that the rule will apply only if it is absolutely impossible for everyone in the world to find out what Chinese law is; if instead "impracticable" is used, this would suggest that it is not a question of absolute impossibility to find it out - after all, at least one person in China will be able to find it out, but for A in Miami it is extremely expensive to get such an expert evidence right now, and it is not necessary for it to be absolutely impossible for the rule to apply. It was a question of access to the foreign law, not of the content of the foreign law.

Voting on the alternatives "impossible" and "impracticable", 10 voted in favour of impossible and 3 voted in favour of "impracticable". The word "impossible" was therefore adopted.

Lando suggested explaining what was meant by "impossible" in the comments, as in actual fact what was intended was not quite the absolute impossibility it seemed to advocate.

Turning to the question of the inclusion of the "issues raised", the two alternative formulations of the provision were: "The Principles may provide a solution to the issue raised when it proves impossible to establish what the relevant rule of the applicable law is" and "The Principles may provide a solution when it proves impossible to establish what the relevant rule of the applicable law is".

Hyland suggested saying "The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law".

Bonall wondered whether the concept of "national" should not be included here as the "applicable law" could also be an international instrument. Alternatively, to avoid confusion with para. (5), he suggested speaking of "the law governing the contract".

Lando did not think that there was confusion and pointed out that international instruments were part of national law when they were applied.

Drobnig suggested inverting the order of paras. (5) and (6) and this was accepted by the Group.
Brazil hoped that the Rapporteur would consider inserting a sentence in the commentary indicating the possibility or expressing the hope that, quite apart from the test inserted in the provision, decision makers and legislators in looking at the law of contract and developing the law of contract would consider what was in the Principles.

Article 1.1 as amended by the Working Group was therefore adopted as two articles, the new Articles 1.1 and 1.2, which read as follows:

**Article 1.1**

(Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

**Article 1.2**

(Application of the Principles)

1. The Principles shall be applied when the parties have agreed that their contract be governed by them.
2. The Principles may be applied
   a. when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like; or
   b. when the parties have not chosen any law to govern their contract.
3. The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law.
4. The Principles may be used to interpret or supplement instruments of international uniform law.

**Article 1.2**

Introducing Article 1.2 Bonell recalled that in the discussion on the chapter on formation the fear had been expressed that it was not sufficiently clear that paramount in this system was the principle of freedom of contract, i.e. parties are free to enter into a contract if they want to do so, to the extent that they want to do so, and therefore by implication also not to do so if they decided they did not want to do so. The desire was expressed that it should be stated very clearly right at the outset that the principle was that parties were free to enter into a contract and to determine its content.

Sono wondered whether the provision really was necessary.

Lando stated that the PECL did not have such a rule. He did not think it did much damage and he did not think it did much good.
Drobnig observed that the PECL were limited to performance and to non-performance which was why this general aspect had not been considered. If they were going to enlarge the PECL they might then have to face the issue.

Sono stated that in a market economy freedom of contract was not the ultimate goal, it was a means to accomplish something of a higher value. Even if parties entered into a contract freely some contracts might be invalid. Elsewhere in the draft "valid contracts" or contracts "validly entered into" were referred to and he therefore wondered what this provision was intended to accomplish: all it did was to express the idea that there must always be mandatory rules beside Article 1.2, and that was already in Article 1.4. He therefore suggested deleting Article 1.2.

Drobnig commented that this provision, as also the following one even if more so, was of a political character. In view of the recent experiences in Eastern Europe he thought that this was a good and sound principle and it did no harm to enunciate it. It also did no harm as the counter-balance was subsequently spelled out in Article 1.4, namely the mandatory character of certain rules of law. It would not be so good if only mandatory rules were to be mentioned and not the starting principle of freedom of contract. He therefore preferred keeping this provision.

Di Majo considered that the principle in Article 1.2 was obvious and that it might therefore not be necessary to say so. The only question was the determination of the content of the contract and he suggested combining Articles 1.2 and 1.3 to read something along the lines "The parties are free to determine its content unless [there are] mandatory rules enacted by the State".

Furmston considered that this article might be saying any one of a number of different things. It could be a statement of the kind one found in constitutional documents saying that to agree on the contract is very important, but they were not in a position to confer freedom of contract to people who did not have it. What they were saying was that most of the rules which were to be found in the text assumed that there was freedom of contract, and in much of the text they did not discuss situations of non-freedom, the central concern was clearly the situation where there was a free market and open bargaining etc.. He had no problems either with the statement that freedom of contract was desirable, or that the Principles were aimed at a situation where freedom of contract actually exists, and therefore suggested to modify the formulation slightly to convey that meaning.

Brazil had no difficulty with the principle of freedom of contract, but thought it very difficult to capture that principle in the text of an article in the Principles as that freedom was subject to a number of exceptions as also indicated by the comments. He therefore had difficulty with a text which did not reflect that this freedom was subject to exception. On the other hand, the freedom to enter into a contract was
implicit in a number of other articles - the whole of the chapter on
formation said that this was how one formed a contract and proceeded on the
postulate of the freedom of contract. If there was to be a general
introduction to the Principles it might be appropriate to state the
importance of this principle there. At present, however, he would also feel
that it should be deleted.

Tallon stated that if one followed this reasoning there would be no
declaration of human rights either - there as well one knew that it was not
true in many cases, but it was a principle, something which ought to be the
normal rule. It was not the fact that there may be exceptions or that there
may be duress or economic pressure, the regulations afterwards in the
Principles were meant to maintain this freedom. When one said that a
contract made under duress was not valid it was because it had not been
freely entered into, and it was very important to have this general
declaration at the beginning.

Hirose agreed with Tallon. The Japanese civil code did not have a
provision on freedom of contract and they had difficulties as a result. As
to exceptions, there were also lots of exceptions regarding the binding
character of the agreement, and yet they still had a provision such as
Article 1.3. He therefore felt that this principle was necessary.

Maskow felt it necessary to state the obvious: it would be
unsatisfactory if the most important rules of law were not contained in the
Principles. On the other hand, he thought that in a set of rules such as
this one it was necessary to express principles in a realistic way, i.e. it
was not possible simply to announce solemn principles which in fact did not
correspond to reality. He felt that this principle should be kept, even if
with some additions indicating already in the text that there were
restrictions, maybe by reference to other articles or by including words
such as "in general parties are free" or "except as ...".

Huang favoured having this principle as freedom of contract was very
important. It might be obvious in Western market economies, but in some
countries this rule was not obvious. In China some companies did not even
know if they could sign a licencing agreement with foreigners, they would
ask the Ministry for permission to do so. In other words they did not
realise that they had this freedom. Also the fact that parties were free to
determine the content of the contract was important - in China again this
was not always clearly understood. The reference made in the comments to
mandatory rules was also very important. Not all enterprises in China had
the right to sign foreign trade contracts, only those who had foreign trade
trading rights, so she therefore favoured Maskow's suggestion to indicate
these exceptions also in the text.

Fontaine favoured this article. This group of Articles 1.1 - 1.4 was
an ensemble and if Art. 1.2 were suppressed it would delete a very
important part of something which went together. He preferred keeping the
article as it was, without mentioning that there were exceptions in the
article itself, as it was a political declaration, an expression of the main philosophy underlying the Principles and at that stage he felt that the principle should be affirmed as strongly as possible. The comments could indicate that there were exceptions.

Lando shared the emotional attitude in favour of freedom of contract. His question was whether it was really necessary to have it here. In the first article they were very modest as to the application of the Principles, than here suddenly there came a solid and sacred principle of freedom of contract. What did it really mean? Could they change any legislator in the world who wished to restrict the freedom of contract in the Principles? He did not think they could. What was the effect of the freedom of contract? The effect was that the contracts were binding and that was announced in Art. 1.3, which would be enough.

Tallon felt that the provision was necessary, particularly in an international context where some countries did not have this principle.

Komarov had nothing against this principle, but had some doubts as to its inclusion in the Principles. What worried him was a situation such as that of the Principles being chosen when a contract is made in the absence of freedom of contract, or where the freedom as to the content of the contract is limited to some extent: after the contract has been concluded one of the parties would be able to claim that they had incorporated the principle of freedom of contract into the contract and therefore to claim the revision of the terms of the contract itself. He was not sure that such a development would be excluded by the Principles.

Hirose drew attention to Art. 1.7 on good faith. If one had that principle and not the principle of freedom of contract, one would put more stress on the principle of good faith. Art. 1.2 had two aspects: one the formation and conclusion of the contract, the other the content of the contract. If both articles were retained there was harmony between these aspects, whereas if one only had the good faith principle it brought more of an interventionist attitude into the contract.

Bonell stated that the article was not intended to take a position on questions such as freedom of contract or not freedom of contract, market economy versus planned economy. These rules were intended to apply to international commercial contracts and in this context it was a prerequisite - either there was freedom in both the entering into a contract and in determining its content, or one could forget about international trade. The more one developed the ambit of freedom of contract the more one developed international trade and as they were dealing with Principles for international commercial contracts, he felt that it was quite reasonable to state it here, as it was not that obvious. Huang had shown that in many parts of the world it was far from logical, self-evident and taken for granted, so why should it then not be stated? As concerned the exception for mandatory rules, if Art. 1.4 were without Art. 1.2 there would immediately be a tendency to overestimate the impact of
mandatory rules and as they were speaking of international commercial contracts they all knew that in most legal systems there was a growing tendency to distinguish even the degree of the mandatory character of the rules depending on whether they applied to domestic contracts or to international contracts. Why should then not the message be launched that this was the rule and that anything contrary was the exception? He drew attention to the fact that many members of the Group had urged that such a general provision be inserted so as to make the situation clear as regards liability for the breaking off of negotiations. He also recalled that in the discussion of the performance chapter, where there now was a provision on the supplying of omitted terms, it had been said that this intended to cover only missing terms, to supplement inactivity on the part of the parties themselves. The principle should be that the parties should determine the content of their contract, and therefore a general provision should be inserted in Chapter 1.

Furmston did not believe it to be true that universally there was real freedom of contract as regarded international commercial contracts. He wondered if Bonell would be willing to accept a formulation such as "These Principles assume that in general parties should be free to enter into a contract and determine its content".

Sono stated that when he had proposed the deletion of the provision he had not done so because he denied the principle, he had merely felt it to be superfluous. Then he had heard Huang's observations on the utility of this provision in influencing stubborn bureaucrats, while it at the same time was true that in China there were many restrictions on international trade. He agreed with Lando that this was not the forum for constitutional declarations, but at the same time he realised that it might be important to state that in some parts of the world things might be different and that they were thinking of contracts freely entered into. If this was the case, he still suggested deleting Art. 1.2, and stating this at the very beginning, saying "These rules set forth [...] which are freely negotiated [entered into] by the parties".

Di Majo agreed that the provision was of a political, declaratory character, but he felt that the task of the Working Group was to lay down provisions of an operative character. When a State imposed a duty to conclude a contract in a particular field, e.g. in that of energy, what could the Group say to a State? Nothing; it was the State which imposed a duty to conclude a contract. When Tallon insisted on questions of frustration, fraud in the formation of contracts, that was another question. He therefore thought that this provision was unsuitable in this framework and insisted on combining Art. 1.2 with Art. 1.3, so as to read "The parties are free to determine the content of the contract with the exception of mandatory rules enacted by States which are applicable in accordance with the relevant rules of private international law".

Bonell stated that it was absolutely not the purpose of the provision to give a message to the States. The purpose was to make it clear that the
whole exercise could be forgotten if there was no freedom of contract, because if one was not free to enter into a contract with whoever one liked, and to determine its content, then the whole thing was useless. It was in fact a very important message in many parts of the world, to tell parties that they were free to enter into the contract and to determine what should later on be done. A formulation such as "the parties should be free", would be suitable for the GATT, but here there was no authority to say that parties should be free.

Furmo suggested a formulation such as "These Principles assume that in general parties are [should be] free to enter into a contract and to determine its content", which would render explicit what Bonell was stating.

Hartkamp observed that even in a case where a party was not free to enter into a contract without government approval, after having obtained this approval this party may be quite free to determine the contents of the contract, and he could not see then why the Principles should not apply to the contents of the contract.

Maskow observed that the usual exception would be to say "except as provided otherwise", which would not make it clear whether the obligation was imposed by international regulations, by national regulations or by general principles, but at least indicated that there were exceptions.

Voting on Furmo's proposal to state "These Principles assume that in general parties are [should be] free to enter into a contract and to determine its content", 2 voted in favour and 9 against. The proposal was not accepted.

Voting on Maskow's proposal to add "except as provided otherwise" to the text as it stood, 1 voted in favour and 5 against. The proposal was not accepted.

Turning to Sono's proposal to combine this article with Art. 1.1 to read "These Principles set forth general rules for international commercial contracts which are freely entered into by the parties", this proposal was not carried.

Di Majo's proposal to combine it with Art. 1.4, to read "The parties are free to determine the content of the contract with the exception of mandatory rules enacted by States which are applicable in accordance with the relevant rules of private international law" was also not carried.

Voting on the retention of Article 1.2 as it stood, 8 voted for and 5 voted against. The article was therefore retained as it stood:

The parties are free to enter into a contract and to determine its content.
Article 1.3

Bonell introduced Article 1.3 by indicating that it was intended to incorporate the Principle *pacta sunt servanda*: a contract as such is binding upon the parties on condition that it is validly concluded. What this meant, was that the formation of the contract had to have occurred in conformity with the rules on formation of the Principles, that the contract must not be affected by any grounds of invalidity provided for by the Principles, and that there might be further requirements established by applicable mandatory laws, whether of a national or of an international character. The second part of the provision was a corollary of the first part, with an addition referring to the exceptions listed in the Principles themselves.

Tallon found there to be a gap in the Principles, because there was freedom of contract, binding force of the contract and privity of contract. When one said that a contract validly entered into was binding upon the parties the question was who were the parties?

Fontaine recalled that when the section on performance in general had first been considered they had wondered whether to discuss all problems such as who can pay, etc., and it had been decided that all such problems should be dealt with in a chapter on assignment and similar problems. What Tallon said was important, privity was also one of the basic principles.

Lando felt that privity of contract did not belong in this chapter and that the discussion should be deferred.

Hartkamp wondered whether the Group would feel it to be sufficient if the comments mentioned privity of contract and that the first sentence as it stood did not exclude a third party deriving a right from the contract, or perhaps in certain circumstances being bound by the contract or by a certain clause of the contract, e.g. a clause excluding liability, but that the matter was not addressed in this article.

Tallon understood that it was very difficult to find a compromise between the narrow concept of privity of the common law and the broad conception of present French case law, but it had to be stated somewhere that this question was not dealt with and that it was left to national law.

Hartkamp suggested a remark might be inserted in Chapter 3 on the clause to exclude liability that this also is viewed between the parties.

Bonell felt that this was only one part, considering e.g. "Verträge mit Schutzwirkung für Dritte".

Purnstoa observed that the English Law Commission had recently produced a paper proposing the abolition of the doctrine of privity of contract, so it might not be so difficult to reach a compromise.
Tallon suggested that the comments indicate that the question of who is a party, etc. is not dealt with. Freedom of contract, binding character of contract and privity of contract were linked together.

Maskow felt that the commentary on the first line should explain what they had done, and not mention what they had not done. If the intention was to avoid misunderstandings, he felt that one sentence to the effect that this did not exclude that third parties were affected would be sufficient.

Lando felt that the principle in Art. 1.3 should be kept, but wondered whether the second sentence was necessary. He saw an agreement to modify or terminate as also being a kind of contract which was therefore covered by the rule in the first sentence. His proposal to delete "by agreement" was strengthened by Art. 3.1 which stated that "A contract is concluded, modified or terminated by the mere agreement of the parties": it was there, so why was it necessary to have it again?

Hartkamp wondered whether the sentence contained also the idea that a contract could be modified by mere agreement between the parties.

Fontaine felt that if the rule were different in that it did not use the word "agreement" this could create difficulties of interpretation as many provisions had the proviso "except by agreement" and if this rule was different the question would be why.

Tallon wondered whether there was a rule in the Principles for the contrats à durée indéterminée, because for these termination was not by agreement: the nature of the contract imposed the right of one party to terminate. Thus, the statement in the article was not quite right, unless there was a provision in the Principles to the effect that a "contrat à durée indéterminée peut être terminé par la volonté de l'une des parties à condition du respect d'un certain délai".

Brazil referred to Art. 2.16(3) which stated that "A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement": he was not sure that what was in this provision fitted in with this. He thought this would be covered by Lando's proposal, namely to say simply as "except as otherwise provided by these Principles".

Di Majo favoured keeping the present text. He thought that the specification "by agreement" was necessary for modification or termination. It was possible that without this indication the agreement might be considered to be without consideration.

Flyminton indicated that in English law certain kinds of agreement could be terminated by notice without there being any express provision. Furthermore, in English law they had got themselves into a terrible muddle because of provisions like this: there were many situations where the contract was in fact modified by the conduct of one party which was then
relied on by the other party without there being any agreement. Simply to say that there must be an agreement was, he felt, unduly restrictive.

Tallon indicated that in French law this was solved by saying that there was a tacit agreement between the parties.

Brazil added that the article on good faith would have relevance as well.

Bonnell agreed. If one construed the word "agreement" one might be able to include in it also Furstman's case on the basis of the provision on good faith, interpretation provisions and tacit agreement. As to the contrat à durée indéterminée, here he could see a true gap: so far they had not dealt with that case, but he could conceive that Art. 1.3 might be misleading without such an exception. He wondered whether it was necessary to mention it in the text, or whether it could suffice to mention it in the notes. The question of whether modification or termination by mere agreement was valid would come under Art. 3.1. He saw no inconsistency with Art. 2.16 was just a special provision.

Brazil found that some might argue that this particular provision in the introductory chapter would nevertheless prevail in that sort of situation.

Bonnell suggested mentioning in the comments that a simple agreement without formal requirements may not suffice in cases envisaged under Art. 2.16.

Bonnell asked the Group what it felt should be done for unilateral termination for contracts for an indefinite period.

Lando and Tallon drew attention to Art. 2.109 in the Chapter on Performance of the PECL which stated "A contract for an indefinite period may be ended by either party by giving notice of reasonable length".

Brazil felt that the Principles should have a provision on this.

Bonnell felt that it would be an excellent solution to have it as a second paragraph. He felt that it went together with the binding character of the agreement, because what parties were interested in was whether or not they could get rid of the contract.

Fontaine also felt that it should be inserted as paragraph (2) to Art. 1.3.

Maskow felt it to be necessary to have a proviso in this rule such as "as foreseen by the contract" because the rule concerning termination might also be contained in the contract.

Bonnell felt this to be included in Art. 1.5.
To Farnsworth it seemed as if at least some of the problems which had been raised with respect to Art. 1.3 would be met by language such as "according to its terms", because in the case of the contract of indefinite duration the essence was that duration being indefinite it was some sort of an "at will" contract, that is the term of the contract itself. One could also think of instances in which a party was empowered under a contract to make unilateral modifications of the contract and if one put in some general qualification like that it would capture those situations as well. He suggested something along the lines "It cannot be modified or terminated other than by its terms except by agreement".

Drobnig wondered whether this was necessary. He would have interpreted "It cannot be modified or terminated except by agreement" to include also the instances Farnsworth had mentioned. This was another reason for maintaining the words; this should be said in the commentary.

Hirose felt that if the rule for long-term contracts was to be different from the rules for short-term contracts then this should be indicated in a more general way.

Brazil suggested turning around the second sentence to read "It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles". This would also cover long-term contracts.

Tallon suggested that the comments should mention in relation to long-term contracts that there is a rule on hardship which is a very important exception.

Drobnig doubted that it was possible to say that there was a right to terminate the contract by its terms with reference to long-term contracts. He did not think that it would be understood generally. He preferred inserting a special provision such as the one in the PECL.

A majority of the Group agreed with Drobnig. It was therefore decided to insert a provision along the lines of Art. 2.109 of the PECL.

Bonell stated that he preferred having this principle as a second paragraph of Art. 1.3, as the principle was the binding character of the agreement, meaning that it was not possible to do away with it unless the parties agreed to do so, and then would come the exception. He did not think that practitioners would look for it in the performance chapter.

Drobnig instead felt it to be inappropriate to put it here. It would be covered by the last clause of Art. 1.3 ("or as otherwise provided under these Principles").

Lando did not support this view entirely. He felt it would be difficult for this Group to put it in the chapter on performance. In the PECL there was a chapter called "Terms and performance" and this was really
a kind of term in the contract, just as there were other terms in the
contract. He suggested putting it in the first chapter because he thought
it was a general principle. He did agree with Drobnig that it should not be
put as a paragraph in Art. 1.3, he thought it could be put later in the
same chapter.

Maskow supported Drobnig. The best solution would be to have a
chapter on the ending of the contract, on termination (the present section
only referred to termination for non-performance), but as there was no such
chapter the second best solution was to have it in the performance chapter,
possibly as a separate section.

Tallon also agreed with Drobnig. He felt that it could be placed
somewhere in Art. 5.1.7 or 5.1.8, so one would have performance at one time
or in instalments and then performance for an indefinite period.

Di Majo agreed that the question of an indefinite contract was a
question of performance.

Fontaine preferred having the provision as para. (2) of Art. 1.3. He
understood the objections, but even if it was not a perfect solution it was
the solution which was least bad. It was not a question of performance so
it did not fit in the chapter on performance and there was no chapter on
termination except for non-performance.

Voting on whether to place the provision in Chapter 5, Section 1
(Performance in general), 7 voted for and 6 against.

Brazil brought attention to a contract which he understood as not
being for an indefinite period: a contract for 40 years certain and then
for terms of twenty years unless before the end of any particular term one
or other party gave one year's notice of termination. He himself would
consider such a contract to be a contract for a definite period, but he
asked for clarification as to how the word "indefinite" in the new
provision would be understood by the Group, with reference to such a
contract.

Maskow felt that the problem raised by Brazil was not adequately
treated, as it might also be a question of long-term contracts, i.e. of
contracts the performance of which took a long time or contracts with
repeated performances, and not only of contracts for an indefinite period.
In such cases it was necessary to have the possibility of one-sided
termination.

Hartkamp felt that in Brazil's case it was a matter of a contract for
a definite period which was renewable, whereas the point raised by Maskow
concerned a different definition of the concept of contract for an
indefinite period".
Brazil commented that his case was not one of a renewable contract, but of a contract which continued to run unless notice was given.

The Group agreed that such a contract would not be for an indefinite period.

Turning to the question of the definition, Maskow proposed that contracts directed at a long period or at performances which have to be made repeatedly, should be able to be terminated by either party for important reasons.

Bonell, Lando and Di Majo felt that this was a different matter.

Drobnig had sympathy for a rule along these lines, even if he saw the difficulties and wondered whether the rule on change of circumstances would not take care of the majority of the cases which would come under this rule. Perhaps the comment to that rule could indicate that in the case of long-term contracts it may more easily find application.

No further support was for Maskow's proposal was forthcoming from the Group.

Drobnig recalled the point raised by Furmston on conduct being treated as creating an agreement to modify or terminate an agreement and felt that it would be helpful to reflect this discussion in the commentary as it was not understood everywhere.

As regarded the placing of the new provision on contracts for an indefinite period, Pontaine supported Maskow's suggestion to have it in a separate section, even if this were the only article of the section, because he felt it to be totally separate from the section on performance in general.

Bonell did not feel this to be suitable.

Hartkamp suggested that this proposal should be sent to the drafting group.

Hirose wondered why the comments to Art. 1.3 did not directly refer to Art. 1.7. He wondered whether the reference "as otherwise provided in these Principles" included also Art. 1.7.

Brazil supported the suggestion of having a direct reference to Art. 1.7 in the comments on Art. 1.3.

Bonell indicated that in the comments he had tried to list cases in which it was expressly stated; he distinguished between cases of imposed modification of the original terms and cases of imposed termination. If one made a reference to Art. 1.7 here, one could make it almost everywhere.
Hartkamp did not consider it necessary to have a specific reference to good faith here, because good faith could enter into all articles.

The Group agreed with Hartkamp and the suggestion to include a specific reference to good faith in the comments to Art. 1.3 was not accepted.

Turning to the final wording of the second sentence of Art. 1.3, the Group adopted the proposal made by Brazil. The final wording of Article 1.3 (Art. 1.4 in the new numbering) was therefore as follows:

"A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided under these Principles".

**Article 1.4**

Bonell introduced Article 1.4 by stating that the article attempted to solve the complex problem of the impact of mandatory rules on the Principles in an indirect way, by way of "renvoi", because it did not give a clear and definite answer to the question of what mandatory rules could come into play and therefore affect the validity of these Principles. The main purpose of the article was to draw parties' attention to the fact that there are a number of restrictions to parties' autonomy. This meant also that the Principles themselves might encounter limits and suffer a number of exceptions. He had tried to highlight that a variety of different problems might be involved right from the outset, as it very much depended on the kind of effect one intended to recognise the Principles in a given case. As to the mere incorporation of the Principles into the contract, which according to the traditional and still prevailing view would clearly be the case whenever State courts were faced with the Principles chosen by the parties to govern their contract, in which case mandatory rules of the applicable law would come into the picture and there could be no doubt at all that in such cases the Principles would be held valid only to the extent that they were consistent with the mandatory rules of the applicable law. In other words, the Principles may only occupy the space which was granted to the freedom of contract by the applicable law. The situation might be quite different if one were prepared to consider the Principles as the applicable law itself, and this might be the case if, together with a choice of the Principles as applicable law, parties agreed on arbitration. For such cases there was a growing tendency also in international instruments to expressly recognise that arbitrators may (must) recognise the parties' choice of national rules of law as the law applicable to their contract. In this case it was no longer a question of finding out what the applicable law was in addition to the Principles, so as to determine the limits to the Principles, but it was a conflict of law situation where only a limited number of mandatory rules would come into play, namely those of the lex fori (what this meant in international arbitration was another open question) and the rules of the lex contractus, and possibly of third States which claimed to be applied irrespective of
the law governing the contract. He had only wanted to draw attention to the fact that the situation might be different depending on whether the relationship between the Principles and mandatory rules was considered from the point of view of the State courts or of arbitrators. Finally, the admission that it is not possible to go further in this context by saying that it will ultimately depend on the relevant rules of private international law, meaning that as long as one is speaking in terms of State courts one can take it for granted that these will be the conflict rules of the forum, quite different is the situation from the point of view of the arbitral tribunal - it is generally held that arbitrators were free to determine their own conflict of laws rules. He had deliberately left all these hot questions open, because he doubted whether it would be possible to agree on a generally acceptable solution and above all because it was clearly outside the scope of the Principles.

Drobnig agreed on the general approach, especially that they could not establish the relevant conflict of laws rules in this area. One point on which he felt that the text was too narrow was that the text was limited to mandatory rules enacted by States, and did not include mandatory rules of supranational organisations and of international organisations. He suggested deleting the reference to "enacted by States" and instead of merely speaking of "mandatory rules". Also domestic mandatory rules were not necessarily enacted by States, but could be enacted by local authorities, not to speak of the mandatory rules enacted by the European Communities.

Di Majo wondered what the relationship was between the "rules enacted by States" and the concept of ordre public; was ordre public included in the reference to mandatory rules?

Brasil wondered whether the reference to international law should be limited to private international law or the possibility should be allowed that there might be some public international law that might have some bearing. In New Zealand there had been an ICSID arbitration and the New Zealand Parliament stood to enact a mandatory rule that would have invalidated that particular arbitration. The question was taken to the New Zealand court and they so interpreted the legislation that that purported mandatory rule could not apply in that particular situation. The ICSID Convention indicated that the arbitration should be governed by the initial agreement in relation to the investment in question and on that approach they so interpreted the New Zealand legislation so that it did not override the legislation relating to ICSID. That was a case where the obligations under a treaty, which was a matter of public international law, did have a relevance. Another example where some people might think that the question arose was that of the purported extra territorial application of anti-trust laws but in a way that might be argued might to be contrary to public international law: were the Principles saying here that that was all right? He wondered whether one should not have a principle indicating that when there were public international law rules that were relevant it should be in accordance with them as well.
Sono agreed that the restriction to the law applicable according to the relevant rules of private international law might be too narrow, particularly when the mandatory rules of the law of the forum were applied, in many cases it would not be because of the rules of private international law, but because of the administrative or other mandatory character of the law of the forum. Secondly, this provision stated that nothing in the Principles should restrict the application of mandatory rules: it talked of the application of mandatory rules, but the purpose of the provision was to ensure that if performance could not be made because of mandatory restrictions this should not be considered to be non-performance, but in the case of the act-of-State doctrine it had nothing to do with the application of mandatory rules, it concerned the respect to the implementation of mandatory rules. The restriction in the provision might be modified slightly to accommodate such instances.

Lando understood and approved of Bonell's approach. He agreed that the words "enacted by States" should not be retained, because other rules, e.g. the EEC mandatory rules, would not be covered. What puzzled him was that two quite different situations were put into this provision, namely the situation of the arbitrator sitting in a non-national arbitration court having before him the Principles with the mandatory rules they contained, maybe the "règles d'application immédiate", necessary applicable rules of a certain country which claimed application to the issue irrespective of which law was applicable to the contract, maybe also some ordre public rules: was this in accordance with the relevant rules of private international law? He could go along with Bonell if he said yes. Then there was quite a different situation, namely that of a State court sitting: the State court had a law which it must apply and if, e.g. English law was applicable by a State court, then even if the parties had agreed that the Principles should apply, the English court would always say that the proper law of the contract was English law, and that English mandatory rules applied. He had understood that in England the doctrine of consideration was a mandatory rule, but the Principles had ousted the doctrine of consideration and what would an English court do then? What puzzled him was that in the words "which are applicable in accordance with the relevant rules of private international law" which englobed both these very different situations. He wondered whether the businessman or the average lawyer who knew nothing about private international law would really understand that.

Bonell indicated that he did not think that the problem was settled by Art. 1.4: it could only serve as a warning that the Principles would be overridden by mandatory rules. As regarded the words "enacted by States" he agreed with the substance of Drobnig's observations, there were obviously mandatory rules of an international origin, not only those enacted by an international organisation but directly applicable and which therefore did not pass through national parliaments, which if this rule were taken literally would be outside the rule and this should not be the case. He had nothing against going along with Drobnig's suggestion. States were mentioned because it was of political value to show that the Group was
realistic enough not to forget about the existence of States, which he thought was important, because a reader who merely read the text would wonder to what mandatory rules reference was being made.

Tallon suggested that reference could be made to "mandatory rules, whether of national or supranational origin".

Furmston's problem was that the article was just a truism: a mandatory rule was one which applied despite the existence of the Principles and as the Principles had no legislative effect this must be true by definition. One could do something more if one wanted to: what was quite common in English standard form contracts was a statement to the effect that "Nothing in these Principles is intended to restrict the application of mandatory rules". All that was ousted was that part which was ousted by the mandatory rules, everything else applied, which it was quite useful to say.

Bonell felt that this was what was said by the article, whereas Furmston felt that there was some difference.

Drobnig wondered whether in case of partial nullity due to mandatory rules, the contract would remain and what the effects on the Principles would be.

Bonell had some reservations for that case, as he felt that that would be considering the Principles on too low a level, as mere contractual rules. The language used indicated that the Principles might at least to a certain extent be considered a system of rules of law, and instruments such as the Rome Convention was full of provisions like this. He would have some hesitations to adopt exactly the same language as that adopted in general conditions as it would appear to indicate that the Principles were nothing more than general conditions.

Furmston felt that it depended on what kind of mandatory rules were encountered in real life, because in English law some of the mandatory rules were mandatory rules about for example reasonableness and not simply rules stating something could not be done. Then there was an interface problem which was more complex, because these rules could perhaps be used and fitted in with the mandatory rules. He thought one would want to accommodate them as closely as possible.

Bonell stated that he would deduce the same from the present language. He supported Tallon's suggestion which made it clear that they were here referring to "outside" limits, while in Art. 1.5 they referred to "inside" limits, meaning mandatory rules laid down in the Principles themselves, so he felt that a qualification in Art. 1.4 along the lines suggested by Tallon would be extremely helpful to avoid misunderstandings. As regarded the question of rules of private international law, this was simply a renvoi, one would then have to define case by case what was actually meant by this. As regarded Brazil's reference to ICSID, he would
have thought that this was rather Drobnig's point, meaning that one should not only mention national mandatory rules, but use language to cover the possibility of an interference of international or supranational mandatory rules. It was therefore not so much a question of the final closing words but more of the "enacted by States" formula. As to Sono's reference to the act of State doctrine, he would say that the expression "in accordance with the relevant rules of private international law" could be construed broadly enough to cover the particular technique followed in recognising foreign sovereignty acts as being relevant also as mere data in the forum. There were two possible reservations to the relevance of foreign mandatory rules or measures, first whether they were in conformity with international law, secondly whether there were mandatory rules to the contrary in the forum. These details had not been included on purpose because the Governing Council had already decided against the inclusion of such details. As to ordre public, if the words "mandatory rules of a national or a supranational or international origin" are used then he thought that this concern would be met.

Furnston wondered what the difference in meaning would be if the article stopped after "mandatory rules".

Di Majo wondered whether the word "relevant" was necessary.

Bonell felt that stopping after "mandatory rules" would be to say the absolute minimum. What was added in the article would give more assistance to parties in becoming aware of the fact that notwithstanding their desire to enter into a self-sufficient contract, or into a contract governed only by the Principles, there were mandatory rules which might interfere. In most cases parties would only think of the mandatory rules of their own legal system, whereas this was not sufficient at international level. As to "relevant", this gave an additional warning to parties that they might be sued before a foreign court meaning that rules other than their usual rules of private international law would solve the issue. If they chose arbitration for the settlement of possible disputes, the question would be which rules would then be relevant.

Furnston felt that all this was explained in the comments. A superficial reader would not be adequately instructed by the following two lines.

Drobnig felt that the last part of the rule was useful to warn parties to ask for expert advice on this question. What was set out in the comments was an additional help.

Turning to Tallon's suggestion to insert "whether of a national or supranational origin" after "mandatory rules", Maskow commented that he thought that "international" would include "supranational", and that therefore "international" should be used instead of "supranational".
Lando observed that rules such as the EEC and ICSID rules had become national when the countries had acceded to them. Parties who were not members of ICSID, or who were not members of the IMF were not bound by these international rules. They only operated as national rules. The supranational rules instead operated directly, without any acceptance. He therefore preferred having "national and supranational".

Drobnig admitted that Lando was correct in his analysis, but nevertheless thought that in following up the pedagogical purpose of the provisions which was also being pursued it should be made clear that apart from national mandatory rules, also international mandatory rules were covered by this provision. He therefore felt that all three should be mentioned: "whether of national, supranational or international origin".

The Group agreed to mention all three.

Tallon observed that the comments would have to define all three types of mandatory rules.

Lando and Hartkamp agreed.

Lando added that Bonell had made a very good analysis in his oral presentation of the different situations of the arbitrator sitting in an international or national court who is bound only by the "règles d'application immédiate" and maybe also by some of the supranational and international mandatory rules, and the situation of a national court with a judge applying a national system of rules. He did not really find it in the written comment, which he consequently asked should be revised to include it.

The text of Article 1.4 (Article 1.5 in the new numbering) as finally adopted read as follows:

"Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law"

The title of the article was modified to read "Mandatory rules".

**Article 1.5**

Introducing Article 1.5 Bonell stated that it dealt with a problem similar to the one addressed in Art. 1.4, but limited to the Principles themselves. The principle within the framework of the Principles was that of parties' autonomy, i.e. these rules were not intended to be mandatory, but suppletive in character. There were, however, exceptions to this, and Art. 1.5 intended to draw parties' attention to this fact. As there was not only the possibility to exclude something but also that of modifying its
effect, of derogating from it, he thought it could be useful in the comments to draw the attention of the reader to the fact that sometimes it might be advisable for parties to derogate from the Principles because they were necessarily framed in a fairly generic and vague manner. Without diminishing the importance of the Principles, they themselves should advice parties to adapt them to their special requirements and needs.

Furman suggested rephrasing the provision to read, "Except as otherwise provided herein, the parties may exclude or derogate from any of these Principles".

Di Majo objected that parties could not derogate from general provisions such as the general provision of good faith.

Bonell observed that this was expressly stated in Art. 1.7 itself. Furthermore, he had tried to list the mandatory provisions in comment (d) to Art. 1.5.

Di Majo found there to be a lot of rules where the impossibility of the parties to derogate was implicit, such as Art. 1.6.

Lando stated that parties may derogate from Art. 1.6 if they were silly enough to do so.

Bonell stated that Art. 7 CISG, by which this provision had been inspired, implicitly may not be derogated from. He could imagine that it would violate public international law, according to which if one accepts and applies a convention, one has to interpret it as much as possible in accordance with the interpretation given in other countries, if one admitted that parties could state that the Convention shall be construed in accordance with e.g. the English rules on interpretation, Clearly in this context he would have some hesitations to think of an implicit impossibility to derogate from Art. 1.6, because the Principles were not a convention.

Furman wondered how one could stop parties from ousting the duty of good faith. Suppose the parties said expressly that they had adopted the Principles, but that they did not like the principle of good faith and fair dealing, would the choice of the Principles or the attempted ouster be ineffective?

Bonell definitely thought the attempted ouster would be ineffective.

Furman wondered whether that would not depend on the view taken by the court or arbitrator and not on the view of the Group.

Bonell agreed that this would ultimately be the case, even if this more or less applied to everything, but if the arbitrators were prepared to adopt the Principles it would only be fair if they abided by what the intention of the Principles was.
Maskow observed that it was a contradiction for there to be such a rule in a set of rules which in general were not binding. He understood that such a rule was necessary, but he felt that at least in the comments this problem should be addressed in a clearer way. The idea was of course that if parties had agreed that these rules should be applied to their contract they were not allowed to exclude certain rules, which would be possible if the rules were only of a supplementary character. It should be clearly explained why a rule such as this had been inserted in the Principles.

With reference to the comments Hirose observed that they did not distinguish between standard form contracts and individually negotiated contracts, whereas in Chapter 2 this distinction was made. He wondered whether there was any difference in this case between standard terms and individually negotiated terms. If no distinction was thought necessary he wanted to know why.

Bonell understood Hirose to mean that the Principles should be considered a sort of jus dispositivum and, at least in some jurisdictions, parties would be permitted to derogate from or exclude provisions of a non-mandatory character by individual terms but not by standard terms. He felt that such a distinction would go too far for the Principles. As regarded Maskov’s argument, it was again a political message, i.e. those who have drafted these Principles consider that some of them are of a particularly strong nature and therefore it was a package deal, but within this system they considered, e.g. that it was not sufficient only to lay down that good faith is an operative principle, but it was even more important to state that it cannot be excluded by the parties. Of course parties were able to exclude it, just as they were able to evade the application of the Principles, there would be no doubt about that, but he felt there to be some merit in giving such a message.

Komarov referred to the situation where the parties agreed to apply only part of the Principles and not the Principles as a whole. He thought that there would be a problem as to whether the parties would be bound by the rules which could not be derogated from. In his view this article was written referring to the case when the Principles were applicable as rules of law, but when one thought of the possibility of their being applied by a reference by the parties, one should think of the possibility of the parties providing for only certain parts of the Principles being to apply to the contract.

Hartkamp felt that it would not be possible to exclude the operation of the good faith clause, even if one only chose a part of the Principles, but he did not know whether it would be wise to put that into the comments.

Drobnig felt that the function of the general part was that they applied to all parts, so if only Chapter 2 on formation was applicable that was an implied reference to Chapter 1 as well. He did, however, think that this should be set out in the comments.
Maskow felt that something should be said in the comments about the delicacy of this problem. The Principles did have Art. 1.4, but there were certain contracts which were independent from any national law, because the parties had agreed on the Principles. This rule, which stated that certain parts of the Principles may not be derogated from, was therefore necessary and it should be explained in the comments why this rule was necessary.

Lando wondered what the situation would be with regard to a provision in a contract according to which "This contract is as far as formation and validity is concerned governed by the law of Ruritania, as far as interpretation and performance is concerned it is governed by the Unidroit Principles". He agreed that as far as performance and non-performance were concerned the relevant general provisions would apply, but what about the mandatory provisions of Chapters 2 and 3 which were now under the law of Ruritania? He thought that the Principles would not apply to these, the rules of law of Ruritania would apply. He felt that this should be said in the commentary.

Bonell observed that Lando's reasoning moved from the assumption that the Principles were on the same level as the law of Ruritania and the law of Utopia and that then a division was possible. This article was more in the nature of a recommendation and he did not feel much more could be said.

Furnston suggested that the comments could explain that the principle of good faith could not be excluded because many of the problems which were dealt with by express provision in the single legal systems were presumed to be dealt with by this requirement.

Di Majo referred to comment (b) to the article, which cited Arts. 5.1.2 and 5.1.3 which he felt to refer to another question, i.e. to the question of the adaptation of the provision to each single case. He felt that these articles had nothing to do with derogation or modification.

Fontaine was not happy with comment (b). He had been surprised to read that some of the provisions cited were not operative rules, such as the price determination and hardship and force majeure clauses, which he would certainly consider to be operative rules.

Bonell explained that by the word "rather" he intended "more than", he did not intend totally to exclude that the provisions might be operative. For example, the rule on price determination clearly stated that the price was best dealt with by the parties themselves, then reference was made to the market price and then to the reasonable price. He would not suggest that such a provision was the best solution; he saw the merits of such a provision mainly in the drawing of the parties' attention to the fact that they were best served if they expressly stated the price.

Fontaine agreed, but stated that the provision then went on to give rules of an operative character in case the parties had not made any choice. Also Art. 5.1.3 he would definitely say was of an operative
character. He would prefer to have a passage in the introduction to the Principles stating that some of the rules may be derogated from, perhaps choosing some different examples.

Bonell referred to the provisions on hardship: if he had a client who wanted to choose the Principles, he would point out that the Principles did not settle everything and that they should sit down to draw up a very precise clause, because the Principles were more of a stimulative nature, in that they made you think of all the implications, than of a conclusive nature.

Fontaine observed that also the provisions on place of performance and time of performance could also make people think of other possible solutions.

Maskow felt that what Bonell was trying to express was probably not rendered by the word "pedagogical" used in the comments. There were two kinds of dispositive rules: first, rules of a supplementary character, i.e. where parties normally should make individual agreements which only applied if they had forgotten to say something about, e.g., the time of delivery, the quality of the goods and of the price. In his view hardship and force majeure did not belong to these rules to the extent that they were normal dispositive rules which should not incite parties to change something. It might not be appropriate to refer to them as "pedagogical".

Drobnig increasingly wondered whether comment (b) was properly placed under a provision the title of which was "Exclusion or derogation by the parties", because the comment did not concern exclusion or derogation, but implementation of the Principles by the contract. He therefore thought that comment (b) should be moved to Art. 1.6 on the interpretation of the Principles. One could of course say that certain of the rules of the Principles were of a rather general and vague nature and that the parties were invited to supplement them in their contract. Furthermore, the words which implied that certain rules were not of an operative character were misleading.

Brazil also found that "pedagogical" was perhaps not the right word here. As he understood the intent of what was in comment (b) it would be more appropriate to say "The role of the Principles in identifying issues". He had also queried the reference to the operative character of the provisions.

Tallon felt all of the rules in the Principles to be both pedagogical and operative. It was not only to call attention to specific points that the provisions had been made, with the implication that what was actually said was of less interest. Even on price determination they had tried to give the best rule if the parties had not decided anything.

Di Majo agreed that the Principles had a pedagogical role, in the sense that the purpose of the Principles was to assist parties in
identifying the legal issues involved. However, when it came to, e.g., the
duty of diligence and the duty to achieve a specific result, this was
quite different. It was a question of the adaptation of this general clause
to the circumstances of each single case.

Hyland pointed to a divergence he saw between the text of the
provision and comment (a): the text said "the parties may exclude or
derogate", and to his understanding those two terms were almost identical,
whereas the comment referred to "exclude or modify" and he thought that
that was what they were trying to get at, excluding or modifying. If one
used "modify" the purpose of comment (b) became clear.

With reference to the difference in language pointed out by Hyland,
Bonell's preference lay with the terminology used in the comments and
suggested changing the text to "The parties may exclude or modify [...]".

Hartkamp suggested that in this case the text of Art. 6 CISG and Art.
1.102 of the PECL could be followed, because otherwise people would
question why the texts were different. The text would therefore include
"exclude the application [...] or derogate from or vary the effect of".

No further comments being forthcoming, Article 1.5 (Article 1.6 in
the new numbering) was adopted with the wording:

"The parties may exclude the application of these Principles or
derogate from or vary the effect of any of its provisions except as
otherwise provided in the Principles".

with the title "Exclusion or modification by the parties".

Article 1.6

Introducing Article 1.6, Bonell stated that it was taken literally
from Art. 7(1) CISG. The objection could be raised that it was difficult to
conceive of a rule for the interpretation of the Principles as opposed to
the interpretation of the contract when there were rules for the
interpretation of the contract and the Principles were intended to be
incorporated into the contract. Such an objection would be correct to a
certain extent, unless one were prepared to consider the Principles as
having force of law in some cases, or at least to consider them a separate
set of rules which, even if only incorporated contractually, should in any
event be interpreted differently from the individually negotiated terms of
the contract, or from attached standard terms. This because of the nature
of the Principles, which had been elaborated with a view to providing
parties with a, to the greatest extent possible, internationally uniform
instrument for the regulation of their transactions. This implied that they
should also be construed by the parties, or by the judges or arbitrators,
taking into account the international flavour, if not the international
origin, of the Principles. He could imagine a number of objections or
questions, such as what did the "observance of good faith in international trade" matter here - in CISG this final clause appeared because of the necessity to find a compromise but CISG had no Art. 1.7 so this phrase in Art. 1.6 might not be necessary in the Principles. On the other hand it might be felt that mentioning good faith also in this context might be important. Secondly, there was as yet no provision in the principles on the filling of gaps such as Art. 7(2) CISG. He hesitated to include a reference to municipal law in the Principles, but wanted to know whether the members of the Group favoured including such a gap-filling technique to be used in the framework of the Principles.

Di Majo had no objection as concerned the first part of Art. 1.6, but had some doubts about the reference to the observance of good faith in international trade. He wondered what the real meaning of this was.

Tallon was not satisfied with the coordination between Arts. 1.6 and 1.7, because the good faith in Art. 1.6 was addressed to the courts, whereas Art. 1.7 was addressed to the parties. He referred to Arts. 1.104 and 1.106 of the PECL, which made this distinction clear: there was a difference between good faith in the interpretation of a contract, and good faith in the formation and performance of a contract. He preferred to have provisions along the lines of the PECL.

Lando agreed with Tallon on this point, but he did feel that it was useful to have a reference to good faith in the interpretation of the Principles, because the more one read cases of interpretation of different legal systems, the more one was convinced that the courts very often were guided by reasonableness and good faith in their interpretation of rules of law. Even in countries where the general principle of good faith was not accepted the legal provisions were interpreted in accordance with good faith. This was very clearly brought out in the new Dutch Civil Code in which it was said that courts will derogate from rules if they are contrary to good faith.

Maskow felt it to be self-evident that courts should interpret any rule in accordance with good faith, and that it was important to state this principle only in relation to the parties. The parties had conflicting interests, and one should say that the parties had to observe good faith and not pursue their interests without reflecting good faith.

Farnsworth agreed with Maskow. The reference to good faith in Art. 1.6 did not make much sense other than as an attempt to follow an historical compromise reached in UNCITRAL.

Fontaine agreed with Maskow and Farnsworth.

Hartkamp also agreed, on the understanding that also rules of law should be interpreted in accordance with good faith. This could however be dealt with in the comments to Art. 1.7.
The Group finally decided to delete the words "and the observance of good faith in international trade" in Art. 1.5.

Turning to the question of whether a specific rule was needed on filling gaps in the Principles such as there was in both CISG (Art. 7(2)) and the PECL (Art. 1.104(2)), Lando favoured such a rule, which had a parallel in the rule on the supplying of omitted terms in contracts.

Maskow favoured the inclusion of such a provision. He wondered whether there would be immediate recourse to national law if there were no such provision.

Bonnell indicated that he had no such intention. He had just had some hesitations in say it expressly, but he thought that since Maskow was expressing doubts of this kind this could be an added reason to have it stated expressly here as it was in the PECL.

Drobnig also favoured the inclusion of an express provision, all the more so as otherwise an argumentum e contrario from the PECL and the CISG rule would be possible. The first paragraph indicated that they had followed very closely the precedent in CISG and then the second paragraph was missing and the question would be why.

Furnston wondered what happened where the reason why the Principles were being applied was that the parties had agreed that the contract was to be governed by general principles of law and the Principles were being used as evidence of general principles of law. Were there no other sources of general principles of law? Did they have to go to national law? At the moment when there was an arbitration subject to general principles of law since these Principles did not exist arbitrators were presumably finding other sources of general principles of law other than these Principles and other than the system of national law as the parties had chosen the general principles of law in order to avoid getting entangled in some particular system of national law.

Fontaine did not think that the matter would go back to the national legal system, because in the case referred to the application of the Principles was merely optional, so that if the arbitrators did not find a rule in the Principles they would not apply them at all.

Farnsworth agreed with Furnston that what one did in a situation of gaps required one to go back to Art. 1 and to ask why the Principles were being applied. If one said that one wanted the law of Rutania as supplemented by the Principles to apply one would get one answer, if one said that one wanted general principles or lex mercatoria to apply and the arbitrators consulted the Principles to help them, one would get another answer. This was not at all like the case of CISG.

Bonnell found the arguments in favour of the inclusion of a provision on gaps to be valid, but suggested omitting the last sentence of Art.
1.104(2), to make the rule read: "Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles". One would leave open the case when it was not possible. He had become convinced that one should not state positively that one had to go back to national law.

This suggestion was accepted by the Group. Article 1.6 (Article 1.7 in the new numbering) therefore read:

(1) In the interpretation of these Principles regard is to be had to their international character and to the need to promote uniformity in their application.
(2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles.

The title of the article was modified to read: "Interpretation and supplementation of the Principles".

**Article 1.7**

Introducing Article 1.7, Bonell stated that there were two main problems involved. The first was whether the Group was prepared to adopt such a principle which was rather unfamiliar in some jurisdictions. It was well known that with respect to formation common law jurisdictions traditionally did not generally accept such a principle - even the United States Uniform Commercial Code restricted the operation of the principle to performance and non-performance. It could, however, be too late to object to such a principle as throughout the chapter on formation there were a number of provisions which were clearly an expression of the general principle of good faith and he wondered whether it made all that difference if it were then stated here in an even more general manner. The second question related to the qualification of good faith and fair dealing in this context: reference was made not only to good faith and fair dealing, but to good faith and fair dealing in international trade. The standard should be higher, to a certain extent different from that commonly used within the different jurisdictions, because at international level it could be argued (and CISG was a precedent in this respect) that it should not be possible to invoke every single application of good faith in this or that other country against a foreign trade partner. In order to invoke a given application of the principle one should prove that this corresponds to an international standard. More or less the same happened with usages: not every usage could be invoked in an international context, but only international usages, i.e. usages commonly used and known to parties engaged in international transactions.

Furmston wondered whether for the qualification of international trade it was intended that one should take into account the nations between which the trade is taking place, i.e. he could imagine different norms of
good faith applying in a contract between a Sicilian and an Egyptian than between an Englishman and a Frenchman.

Bonell referred to comment (d) on Art. 1.5, the last sentence of which stated that "current standards of business practice are far from being uniform in different parts of the world, so that a particular line of conduct, which may reasonably be expected from businessmen operating within the same region, could hardly be imposed on a party belonging to a region with a different economic and social structure". What was meant by good faith and fair dealing in international trade was not just that it must be universally observed and be the current practice universally, which would narrow the scope of the provision considerably, what was meant was that if it is common and well accepted within a particular area or region, and both parties belong to that particular area or region they should abide by it, but if the transaction concerns parties from different regions where such a common standard does not exist, the situation changes.

Hartkamp commented that in the Netherlands there had been cases of a contract between two Chinese living in Holland when the standard of good faith was employed in a different way than if the same contract had been concluded between two Dutch people living in Holland; the court had allowed other standards to apply between these foreign people. Therefore he felt that a fortiori Bonell's remark would be well taken for international trade.

Furman felt that it was not clear what the answer ought to be: were they saying that if one did business in the Middle East one had to expect to pay bribes because that was normal practice there? If one was not importing local business practices something should be said in the comments to illustrate this.

Also Fontaine was not too happy about the passage on p. 13, because if one accepted the idea that each party had to act according to his good faith the criteria could be contradictory. They were talking about good faith in international trade, so the comments could of course mention that good faith may have different contents in different regions or in different sectors of the economy, but it should still be stressed that they meant good faith as understood in international trade on a more global basis.

Lando wanted to see good faith and fair dealing distinguished in the comments. He agreed that both elements should be there, but the comment to the provision of the UCC said that good faith meant honesty and fairness in mind, which was a subjective test, and fair dealing meant observance of fairness in fact, which was an objective test. If these two words were used one should convey to the reader what they meant.

Tallon objected that there was no translation of these two different concepts in French. It had been agreed that what was "good faith and fair dealing" in English would be "bonne foi" in French. It was not possible to give specific importance to a terminology which was not uniform.
Bonell confirmed that also in Italy the concept of "good faith" covered both. He wondered whether the English-speaking colleagues wanted to have both good faith and fair dealing mentioned. To him it would be sufficient to speak only of good faith, as CISG did. It would cause tremendous difficulties for the French text or other language versions if good faith and fair dealing were to be developed in the English text, unless one just said more clearly in the comments that good faith as such may have both subjective and objective implications. He had not done so as he had wondered how he could do this if the English text referred to both good faith and fair dealing.

Lando felt that it would be possible to explain in a French version of the comments that "bonne foi" had these two connotations and that it was not necessary to make a literal translation of the text.

Tallon pointed out that it was not a matter of translation as the French and English versions were to be just as authoritative. He felt that it would be interesting to have a remark on the terminology in the comment, to the effect that the general idea of good faith is expressed by various formulas in the various systems and in the English version this formulation is used, and in the French version this other formulation is used, but in all these countries under all these terms the two aspects, both the subjective and the objective aspect, are understood, and not to reason only in terms of good faith and fair dealing.

Lando agreed with Tallon.

Maskow agreed that no distinction should be made between good faith and fair dealing, but on the other hand, there were differences between good faith and usages, and to this extent he had doubts whether it was really well taken to say that good faith could be different in different regions of the world and for different parties. He fully agreed that this was a case concerning usages: usages depended on the trade concerned and also on the region, but was it really the same as good faith? Should there not be the same standard of good faith all over the world for international trade? He felt that instruments such as CISG and the Principles should promote such uniform standards, and not stress the possibility that this could be dealt with differently.

Farnsworth observed that as regarded good faith and fair dealing and usages, at least in the USA "fair dealing" had not only an objective connotation, but one that was not very distinct in some respect from usages. If A considers that B is not dealing fairly with him, he may bring in expert witnesses who will testify as to what is considered to be fair in the trade in the particular region and to the extent that there is case law, the one case he knew of confirm what one might suspect that usages are the usages at the time the contract is made, but if the contract lasts over ten years, and the patterns of fair dealing change over the ten years the relevant practice with respect to fair dealing is the practice at the time of the particular act or omission in question. He did not know how much of
that needed to be elucidated in comment, but if it was correct it ought to be pointed out that one could establish what was fair by the same kind of evidence that one used in establishing what was a usage - otherwise he had no idea how one would establish what was fair. He had some discomfort with respect to the end of comment (d) on Art. 1.6. The illustrations to Art. 1.7 would confirm the opinion of the common lawyers that this was not a novel principle, it just restated the obvious. He thought that there were examples that could be given which would perhaps be a little more enlightening to the common law world, and they related to the use of discretion, when it was conferred upon a party to determine for example what the parties' requirements were under a requirements contract; notice requirements which were imposed as a matter of law rather than as a matter of agreement, were another example.

Tallon remarked that comment (d) to Art. 1.6 should be moved to Art. 1.7 now that the reference to good faith in Art. 1.6 had been deleted. There was, however, another drafting problem: did they want to leave the reference to interpretation in Art. 1.7?

To Bonell the answer was a definite "yes", as here interpretation meant interpretation of the contract.

Tallon instead felt that the answer should be a definite "no", because the rule on interpretation was addressed to the court, whereas the rule of formation and performance was addressed to the parties. In the PECL the formulation was "In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing" (Art. 1.106(1)), so it was a duty imposed upon the parties. He did not like that formulation, interpretation, performance and enforcement were put on the same level.

Drobnić also wondered whether one should stick to the enumeration of different aspects of the contract in para. (1). He found it to be somewhat heavy and despite this even insufficient because it did not cover all aspects even of what was in the Principles - good faith and fair dealing should also be exercised in connection with Chapter 3 on substantive validity. For example, in the case of mistake where one would have a right of avoidance under the Principles, in the concrete circumstances good faith might prevent one from exercising that right. He wondered whether the alternative version of the PECL, which did not enumerate different aspects of the contract but spoke more generally of the rights and duties of the parties, had been considered. He preferred that formula, as it was both shorter and more exhaustive.

As regarded the unitarian conception of good faith, Tallon thought that one should not look only at the different regions or trades; the good faith of a very large company was different from the good faith of a small trader. Bad faith was often a question of knowledge, you know or ought to have known something and you act as if you did not know, and the possibility to aquire this knowledge is greater for a large company than
for a small one. It was very difficult to give a definition of good faith. If one tried to be a little more precise one had more problems and then one had to try to give more details and so on and so forth. One had to rely on the judge, it was impossible to give a precise definition.

Komarov observed that there were countries which had well established notions of either good faith or fair dealing, but there were other legal systems which did not have such notions and it was very important in the Principles to imply that it was not national standards of fair dealing and good faith in international trade which were concerned, but instead to impose some kind of international standard and for this reason, he suggested, indicating that the standards here were universally supported standards. This would also permit those countries which did not have these standards to make use of the international standards. He realised that it was difficult to ascertain what these international standards were, but taking into account the pedagogical value of the Principles he felt it would be better to give an orientation to those who were supposed to apply this document.

Brazil commented that while the High Court of Australia had not as yet adopted the principle of good faith in the Australian common law on contract, they kept getting very strong signals from the Chief Justice of their High Court that his court was moving very firmly in that direction and observers discerned an intention to move to the doctrine of good faith, broadly along the lines of the American doctrine, and his own feeling was that as soon as a suitable case came along they would embrace the doctrine. He felt that the enumeration approach in para. (1) should be maintained. The situation where there was no contract as yet was not addressed in the European draft. It also meant that there would be a clause on the matter which spoke not only to the parties to the contract, but also to arbitrators and to the court. He felt it very important to embrace all those stages and all those persons in the exercise of the doctrine of good faith. As regarded the appearance of interpretation in the list, he had no difficulties in including interpretation here: the exercise of interpretation, whether it was interpretation of the party in identifying its obligations and rights or of the third party decision maker in enforcing and declaring those rights, in terms of the interpretation of contracts interpretation in good faith seemed to be a very basic composition.

Huang felt that it did no harm to have interpretation here. She recalled that when the chapter on interpretation had been discussed the Group had insisted that it should be mentioned here. She felt it to be good as an indication that the principle covered the following three chapters: it was then clear that it was a general principle covering the whole text. She suggested that the comments give one example of the application of the principle for each chapter, as in some countries it was very difficult to know what it meant.

Bonell wondered whether by adopting good faith common lawyers would really enter into an entirely unknown and unexplored field where some
strange rules arose which would lead to some entirely unknown results? He thought that the discussion on good faith between common law and civil law systems was to a large extent a nominalistic one. In other words, solutions which common lawyers would justify on this or that grounds civil lawyers tended to justify by the use of the concept of good faith. What did good faith mean? So far nobody, at national or international level, had even tried to indicate this (except the UCC with questionable success). He did not think that they could go much further in defining it here. He had in comment (a) given a list of the provisions which could to a certain extent be quoted as being applications of the principle of good faith as many of the rules in the Principles were. As regarded formation, it was up to the common law lawyers to say whether they were prepared to accept an express reference to it in the context of the present article, taking into account that the chapter on formation already contained a number of the provisions which represented an application of good faith. As to interpretation, what had been said, i.e. that it was intended only for a judge whereas a party had to act in good faith, could be interchanged: one could say that what a party should have done on 1 December but did not do has to be ultimately decided by the judge, and that how a contract clause should be interpreted if the party is going to exercise its right has to be determined first of all by that party. As to performance and enforcement, he asked Farnsworth to explain briefly the meaning of the language as it was language which had been taken from the UCC and the Restatement: he had always understood it in the sense of performance and the exercise of remedies in non-performance.

Farnsworth stated that Bonell’s understanding was quite correct: it was in the exercise of remedies; there were in American law a number of self-help remedies, the simplest of which were withholding performance, suspending performance and the like. He did not know whether one would call that performance or enforcement, but it could cause no harm if one added enforcement.

As regarded “international trade”, Bonell felt that it clearly emerged that the Group was of the opinion that one should be much less flexible in this respect. Good faith was different from a usage and practice which they could not, and should not, influence, but good faith was an ethical standard in a broad sense, and therefore it very much depended on which level one put it on.

Furnston asked whether it was envisaged that parties would be allowed to bring evidence as to what good faith required, or was this something which the arbitrator or judge was supposed to know? If one did not permit parties to bring evidence, it was not clear to him how one was going to establish what good faith required in non-universal situations. How would one tell what good faith required in a particular country or in a particular trade if the arbitrator or judge was not a national of that country or a member of that trade in the absence of evidence?
Hartkamp commented that in Holland, as in most civil law countries, the question of what good faith included was a matter of law, but, in order to decide the matter of law one had to be informed of the factual situation, about usages in the branch, about what this or that other person had done, and that was subject to the presentation of proof. In several systems of law it might be possible to bring proof, the judge might even ask for proof, in order to know what the law in a distant branch of activity would be.

Tallon observed that the generally accepted rule was not that one had to prove good faith; one had to prove bad faith, because good faith was presumed. In France good faith was a question of fact, the qualification of the fact as good faith or bad faith would be a question of law.

Maskow had the impression that for the colleagues of common law good faith and usages were at times mixed, and he had the impression that using the notion of "fair dealing" might support this assumption and therefore he felt that it would be better to leave it out. In his view good faith would come into play in cases where no usages existed; if it was possible to establish a usage, a common behaviour, then it was clear that one had to apply that usage, but there might be instances where this was not clear, e.g. in an arbitration case where there was a contract with a penalty clause without any limitation; he did not think that there was any usage stating that there must be a limitation, but in this case the arbitration found that there must be such a limitation and it was taken from good faith that penalties cannot increase year after year ending up exceeding the sales price by quite a bit. For cases which had not yet occurred, but where the observance of a certain behaviour by the parties was required, good faith would come in.

Farnsworth felt that there was a problem both as to the inclusion and as to the exclusion of fair dealing and the same was true as to "enforcement". The problem was that at least in a good part of the common law world in the context of "good faith" "enforcement" was used together with "performance" and the concept of "good faith" included that of "fair dealing". Not only American lawyers, but also Canadian and Australian lawyers, who did not have their own developed doctrine, would look at the UCC and would see that the provision in the Principles was narrower than the Code as this did not have enforcement and did not require fair dealing. If one excluded words that were used in the one system which had developed this in the common law world the negative inference was fairly strong. They were talking about arbitrators and to him it was inconceivable that arbitrators would not hear evidence as to what was done by fair people in the trade, which was not the same as usage: for example when the energy crisis came in 1973 and long-term uranium contracts began to pinch the sellers, it was claimed that habits had developed according to which buyers gave sellers concessions. The arbitrators did hear evidence of what fair uranium traders were doing, and concluded that those were not usages because they did not exist at the time the contracts were made. Thus, if one had a usage provision, and no fair dealing provision, and imagined that
...good faith was merely general nice behaviour in the abstract, it would be unclear what the relevance of other standards of behaviour would be under the Principles. If the Principles did not admit that kind of evidence, it seemed to him that parties were not going to want to incorporate the Principles. There was therefore a problem in leaving out fair dealing: it was not a question of what one should put in the other language versions, it was a question of what one should do in the English version where the one developed system included it in its notion of good faith for merchants.

Bonell observed that what in the continental European legal systems were known as the subjective and objective aspects of good faith more or less corresponded to the common law distinction between good faith and fair dealing. An application of good faith in an objective sense of course needed evidence and civil law courts would enquire to find out what the current fair dealing in this or that other trade sector or branch was, while in a more subjective, individualized and moralising application of a good faith clause, evidence might be out of question.

Drobnig did not think that the Group could do anything to influence the decision of a judge or arbitrator in considering it either a question of law, in which case they might not wish to hear evidence, or as a question of fact, in which case they might wish to hear evidence. As regarded the question of enumeration or no enumeration, it depended on what should be in the enumeration. Issues of substantive validity, especially the exercise of the right of avoidance, were clearly not covered by formation although under a civil law approach one might say so. Under the Principles one clearly could not say so, because on the one hand there was a chapter on formation and on the other there was one on substantive validity and they were clearly distinct from each other.

Bonell considered that there were no doubts whatever that formation would cover this, because this was the decision-making process in the mind of both parties. If it was vitiating by defects then of course it was a pathology but it would still fall under formation. A reference here to formation would therefore indicate that it applied also in the case of a defective formation of the contract.

Tallon wondered whether the present scheme of six chapters had been definitively established - he could not recall any formal decision on the plan of the Principles and he was not at all pleased with the distinction between formation and substantive validity. This was an argument against enumeration: either the enumeration followed the plan of the Principles completely, or one had a formula such as that of the PECL, which he thought would cover also the negotiations because of the duty of the party in the negotiations to negotiate in good faith.

Considering what phases of the contract should be covered by the good faith clause, Furmison observed that he was not sure of the content of the requirement to negotiate in good faith, but thought that they ought to stop requiring people to be in good faith the moment they stop negotiating.
The Group agreed that formation and substantive validity should come under good faith.

As concerned interpretation, Farnsworth stated that he would more comfortably discuss this question if it were decided whether to recast the first sentence to make it clear that this was a duty of the parties, which could be done very simply by saying that "In the formation, interpretation, performance and enforcement of a contract a party shall act in accordance with the standards of good faith".

According to Hartkamp the present text was quite acceptable. It stated that the interpretation of the contract, or of the Principles, should be made in accordance with the principle of good faith. In for example the Dutch system of law that meant that the court or arbitrator was obliged to interpret the clauses of a contract in such a way that good faith came in.

Also according to Maskow it was not so much a question of who should interpret, but of how the contract should be interpreted, i.e. it should not be interpreted literally but in accordance with good faith, which might actually run contrary to the literal meaning of the contract.

Farnsworth observed that if the provision meant what Maskow said it meant, it was a very different rule from what it appeared to be, i.e. it was a rule relating to the interpretation of contracts and of the Principles and not a rule relating to how the parties were to behave. All the other words related to what the parties did, interpretation was ambiguous. He felt that it was important to solve this ambiguity, and stated that he would oppose any list unless this was solved.

Bonell drew attention to Art. 4.2, which stated that "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"; did this mean only the judge? He would say that it was first of all the other party who had to make this interpretation. If A made a statement, it was first of all up to B to apply Art. 4.2. Only if A and B entered into a dispute and deferred the dispute to a third instance was it then up to that third instance.

Furman could see situations in the rest of the Principles where the requirement to perform or enforce one's rights in good faith qualified the text, but he could not see how a requirement to interpret in good faith qualified any of the rules on interpretation in Chapter 4. He could not see a bad faith interpretation which would survive the requirements which were set out in Chapter 4.

Farnsworth agreed with Furman. In so far as the parties were concerned, he found it difficult to think of cases where bad faith interpretation would have any consequences apart from bad faith performance. If A and B have a contract and B is to deliver a ton of pasta
to A and B says to A that he thinks that the pasta he has to deliver is of a certain quality and A says that he does not think that this is a correct interpretation of the contract, and asks B what he is going to do about it, but B says that he has not decided even if that was his interpretation. If B has not refused to perform and has not failed to perform it made no difference if B's interpretation was in good or bad faith - at least under American law a great many kinds of protestations by parties were tolerated unless they actually announced that they would not perform except in accordance with their interpretation. It had no legal consequence and if a party said he was not going to perform, it was bad faith in connection with performance.

Drobnig referred to Bonell's statement that 50% of all the rules were based on good faith: that might be true in one sense, but he felt that it completely distorted the function of good faith and fair dealing as set out in Art. 1.7. In his view good faith and fair dealing came into play where the fixed rules, including the rules on interpretation, gave a result which in the concrete circumstances of the case were not equitable, and therefore some adaptation was necessary under the principle of good faith. For this reason he felt that also interpretation should fall under it, because the rules on interpretation were hard and fast rules but might not be adequate in certain circumstances. By taking the general formula in the PECL all this trouble would be avoided, and the American idea that there was no division between interpretation and performance would be complied with.

Lando stated that if the parties were made the addressees of the rules, which he thought they should be, then courts and arbitrators would follow suit: if one made a procedural rule for the parties the courts would see whether the parties had behaved in accordance with this rule and if they had not, then they had violated the rule. He felt that the parties should be the addressees, and that interpretation should be in.

Hirose observed that the interpretation of contracts in good faith was quite a big law in Japan, so if it were excluded, this would give rise to doubts. He therefore preferred to keep it in.

Voting on the question of whether interpretation by the parties should be covered by good faith in one way or another, 8 voted in favour. It was decided that the comments should spell out that if the parties had to interpret in accordance with good faith the arbitrators and courts would have to take this into account.

As regarded the difference between performance and enforcement and whether or not one should speak only of performance, enforcement according to some being included under performance, Drobnig pointed out that the system of the Principles distinguished between performance and non-performance, including remedies for non-performance, and he would have understood performance as referring to the voluntary performance as distinct from the sanctions for non-performance. He found that it would be necessary to mention both.
Di Majo agreed that performance referred to voluntary performance as opposed to the right to performance, and the question was how the principle of good faith could be applied to the right to performance. The difference was logical but he found it excessive to split the two.

Lando agreed with Drobnig.

Furmston stated that he had been assuming that the requirement of good faith would apply to the exercise by somebody of their contractual remedies; in other words, if one had a right to terminate under the contract one could not terminate in bad faith, and that would not be captured in English simply by saying "formation, interpretation and performance", there had to be some word such as "enforcement". It was captured by the PECL formula.

Lando suggested that if it were possible to say "In negotiating the contract and in exercising his rights and performing his duties each party must act in good faith" everything would be covered. The PECL formula which did not have the negotiation process would be unsatisfactory.

Furmston indicated that the negotiation was already in Art. 2.14.

Lando pointed out that Art. 2.14 spoke of bad faith. Art. 2.14 was not enough because there were other aspects of formation than the breaking off of negotiations in bad faith. If one acted in bad faith in negotiations one was liable in damages; Art. 2.14 did not cover the question of whether the contract was in fact concluded despite the fact that there was some defect in its formation, because good faith required this contract, e.g. in the case of mere silence by the addressee of a "kaufmännische Bestätigungsschreiben" (in a recent writing Lord Munday supported the same doctrine in England).

Brazil suggested putting them all together: "the formation, the interpretation, and the exercise of the rights and performance of the duties under the contract by the parties of the contract must be in accordance with good faith".

Maskow suggested that "The formation, interpretation and execution of the contract" might cover all that they wanted to cover.

Hyland agreed that a formulation such as "In the course of the formation and execution of the contract each party must act in accordance with good faith and fair dealing" would cover everything.

Lando observed that in English texts he had seen "executed" used in the sense of "made".

Furmston and Farnsworth agreed that this was the case.
Furmanston suggested simply saying "Each party must act in accordance with good faith and fair dealing".

Tallon supported the idea of a broad formula.

Drobnig had some difficulties as in the common law there was no duty of good faith in negotiating, so if only the parties were spoken of, the argument could very easily be made that that presupposed a concluded contract. He therefore felt that negotiations should be covered expressly, if that were covered expressly the rest of the sentence was all right.

Fontaine stressed that if a broad formula were adopted, the comments would be very clear in stating that the negotiation process was included.

Lando could see no real reason for not including negotiations.

Furmanston had no objection to Lando's formula, although it suggested that there were some circumstances in which one did not need to act in accordance with good faith and fair dealing. It all turned on the assumption that arbitrators were going to read the word "party" as being devoid of meaning before there was a contract, but that was not the sense in which "party" was being used in the Principles, the word "party" was repeatedly used in the Principles to describe parties to negotiations. He thought that it would be sufficient and much more elegant if the comments were to explain that the word "party" here included also the negotiating process.

Voting on the formula proposed by Furmanston 9 voted in favour. Voting in favour of the formula proposed by Lando 4 voted in favour. The formula proposed by Furmanston was accepted.

Turning to the question of whether to include both good faith and fair dealing or only good faith, Bonell indicated that if it were decided to have only good faith, the comments could state that some jurisdictions attached a more subjective meaning to good faith and therefore used it together with fair dealing, whereas some others used good faith in a broader sense, and that the text here was meant to cover both aspects.

Furmanston observed that it would not make any difference to an English lawyer. As he understood it, however, the use of both good faith and fair dealing would be helpful to American lawyers and independently of whether they said good faith and fair dealing or only good faith the French and other language versions would be the same, so everyone would understand it.

Voting on whether to have only good faith in the text, 7 voted in favour. Voting on whether to have both good faith and fair dealing, 7 voted in favour.

Fontaine and Tallon felt that this was a question which should be decided by the English speaking common lawyers as it made the greatest
difference to them.

Bonell on the other hand, felt that in general concepts which were of importance only to some national systems should not necessarily be adopted by the Group, he felt it necessary to promote a national language in order to promote the uniform application of the rule. The English version of the Principles would very often be used by non-English speaking lawyers and businessmen and these might have some problems with this provision.

Tallon observed that it would be useful to have a note on the terminology in the comment and that this would help solve any problems.

Lando observed that in Scandinavia both expressions would probably be used ("god tro och redelighedshandelåde" in Danish).

Sono agreed with Bonell that in this kind of exercise the members of the Group should try to divest themselves as much as possible of their traditions. Farnsworth's comments had been very useful, but if one started thinking of what kind of notion it was, and thought in terms of one's own legal system, they would not be able to support uniformity in interpretation from the very beginning. To drop "fair dealing" in the English version, even if both good faith and fair dealing were intended, and to have only one word in the French version, would be very dangerous and would create confusion, because in CISG there was only "good faith". If fair dealing were to be added here in the English while the French were to keep the one word, this would be confusing. He did not think it should be important how the common law lawyers voted; national experiences were important, but here they were trying to reach a compromise.

Fontaine observed that good faith was a concept which had already been borrowed from some legal systems and it was not their intention to translate literally into all the languages. He was not convinced that in this case there would be an inconvenience in using the longer formula.

Drobnig thought that if one only spoke of good faith, one take note of the fact that good faith meant different things in different countries. The impression he had from the discussion was that especially in the Anglophonic world "good faith" meant something different from what they intended to say here, so if they left only good faith they ran the risk of a different interpretation being given to the concept. Furthermore good faith was applied with several meanings in different countries - in the acquisition of movables it was also used and had a different meaning. He wanted to make it clear that a uniform meaning was being attached to the concept and this could be achieved by being a little more explicit and adding the words "fair dealing", as this would cover both the subjective and the objective elements.

Bonell felt that unless there were strong feelings on the part of the Group the formulation "good faith and fair dealing" should be retained, on the understanding that the comments would make it clear that what was here
expressed by this formulation was in many systems expressed by only "good
faith".

Nyland felt that the issue was not so much the number of words to use
in one language or another - often in translation what needed one word in
one language needed several in another language - the issue was to what
extent they wished to tap in the developments that were taking place in all
the legal systems in the area of good faith. As he read the Principles the
concept of good faith was really the motive behind the whole project and
politically it seemed to him wise to encourage courts to develop the notion
of good faith, because it would almost always have a positive result for
international trade when it was developed and made more precise. What one
did by using the concepts of good faith and fair dealing, was to tap into
what was a very wealthy tradition in recent commercial law in the United
States, which could then have interesting and important implications, just
as the word "bonne foi" tapped into the French tradition and "Freu und
Glauben" into the German tradition. These were simply channels that allowed
systems that were currently working through these concepts to influence
international trade.

Furnston thought that it was naive to assume that there would be a
mechanical, exact application of these concepts in the same way - the
concept was open-ended however one described it and there would be quite a
lot of fluidity and different interpretation. There was quite a significant
political point, and English lawyers would have to explain to their
colleagues why this provision was not exceptionally heterodox and if one
was able to say that it was in the UCC so it was not very dangerous, this
would be helpful. Since the American concept of "good faith and fair
dealing" did not appear to be that different from the French concept of
"bonne foi", he could not see what harm it would do to handle it this way.

Tallon felt that they should not be too triumphant with good faith
and say that it is a major mechanism. Many lawyers and many businessmen
were not so enthusiastic about good faith because it gave the judge a huge
power, and they did not like this. When the European Group had discussed
the provisions on hardship with businessmen all over Europe, especially in
England, they had said that they did not like to give the judge the power
to modify the contract when there was an unforeseen event etc. They must
therefore be a bit prudent. If everything was governed by good faith they
should have only one article in the Principles saying that the contract was
governed by good faith, full stop.

The Group finally decided to include both "good faith" and "fair
dealing".

Turning to the question of whether or not to include "in
international trade", Tallon could not see what these words added to the
 provision, as the very first article stated that the Principles applied to
international commercial contracts.
Brazil also had reservations about keeping these words, as he felt that they might be limiting and a little hard to interpret.

Drobnig on the other hand was very much in favour of the retention of the expression because, as the commentary to Art. 1.6 had quite correctly pointed out, good faith in international trade did not have to be identical with good faith in domestic trade. The autonomy of the parties was greater in international trade and there were not only international usages of trade, but also certain expectations and requirements which the parties would observe in international trade but not in domestic trade. As to comment (d) to Art. 1.6, what the rapporteur really should turn his mind to was not the geographical differences but differences between the various branches of international trade, as good faith in one branch of international trade could mean something different from good faith in another, and this could only be brought out if the words "in international trade" were retained.

Lando agreed with Drobnig.

Farnsworth sympathised with Drobnig's views on the particular trade concerned. Most of the interesting questions under this article were not going to be questions like what does everyone do in international trade, but what does everyone do in, for example, the international uranium trade. Since they went to such lengths in the following article to limit things to the particular trade, it seemed to him that if they just put "international trade" in this article readers were going to assume that it meant something much broader and something different from what had been said in connection with usages. It seemed to him that what they had was not right and that either "international trade" should be dropped and dealt with in the comment, or that they should add some words to "international trade" which would parallel the words in the following article.

Tallon agreed with Farnsworth. He could not see why good faith would be different if Electricité de France bought oil from Total which was a French company, or from an American company - it was the trade branch which was important. He did not see that for similar contracts there should be a different notion of good faith depending on whether the contract was national or international. The words "in international trade" therefore did not mean anything, they only indicated that the contract was international, and that was already stated in the first article.

Di Majo felt that the words "international trade" related more to fair dealing than to good faith. He agreed with Tallon that with respect to good faith it was difficult to think in different ways depending on whether national or international trade were concerned. This difference between national and international trade he found to be more acceptable with respect to fair dealing, fair dealing included usages and usages were very different depending on the different fields of trade. The reference to international trade was misleading for good faith.
Moscow felt that it was very important to stress that what was intended was good faith in international trade. For example, in Germany there was a special law on general conditions (HGB-Gesetz of 1977) and the basic criterion for the assessment of general conditions was good faith. A very elaborate case law had resulted which clearly stated what good faith in this respect was. This should of course not be used for international trade because it was oriented towards national requirements and in international trade the requirements were less stringent and the presuppositions were different: in international trade mainly big and strong firms were active which needed less protection than small firms.

Bonell observed that the reference to international trade should properly be understood in a two-fold sense: first, place the emphasis on international, meaning not all standards can and should be taken into account, but only those which meet an international standard, meaning those which can be considered to reflect an international feeling. Furthermore, they spoke not of "international good faith" but of "good faith in international trade" and this immediately implied that trade was not a homogeneous framework but was divided into so many trade sectors besides the geographical areas. These two aspects should, whenever appropriate, be taken into account. Once one had established that this corresponded to an international standard one might find it necessary to differentiate not only between trade sectors, but also according to the particular condition in which that particular party is operating - the size of the enterprise, the technical means at its disposal - but then one would never end: One had to evaluate a lot of things before saying that this or that was, or was not, in accordance with good faith. Although the phrase "in international trade" could and would cause some difficulty in interpretation and application, it did also provide a means for the further development of these general clauses. Perhaps without such further qualification one could think that everything experienced at national level could automatically be transposed to international level.

Voting on whether to leave out the words "in international trade", 5 voted for the leaving out of the words and 7 voted against. The words "in international trade" were therefore retained.

Turning to Komarov's proposal to include a reference to the fact that the principles of good faith should be internationally supported or widely recognised, the suggestion was not accepted.

Turning to paragraph (2), Fontaine wondered whether, as the wording of Art. 1.5 had been changed, also the wording here should be changed to include "exclude the application, derogate from and vary the effects of the principle".

Lando wondered how one imagined the varying of the effect in this case. He thought that it would do no harm to leave the words as they were.
Hartkamp wondered whether this was the only rule in the Principles which was mandatory.

Bonell referred to Art. 3.18, which with reference to the chapter on validity stated that "The provisions of this chapter are mandatory, except insofar as they relate or apply to mistake and to initial impossibility".

Hartkamp suggested that then Art. 1.5 one could say "Subject to Articles 1.7 and 3.18" before the rule, as then one would not need the second paragraph in Art. 1.7.

Sono felt that the danger with such a course of action was that the application of some provisions, such as Art. 1.6, might be excluded.

Fontaine suggested simply stating "This provision is mandatory" in Arts. 1.7 and 3.18.

Byland saw a difference in the situations of Art. 1.5 and 1.7, in that one might be willing to have parties increase the duty of good faith. What one was really concerned with was that one did not want them to eliminate the duty.

Drobnig thought that it added to the value and weight of the provision if it were stated immediately that it was mandatory. He therefore preferred to leave the provision in.

Di Majo instead preferred to delete the paragraph, as he found it theoretical; he had never in his practice as a lawyer come across a provision which excluded or limited good faith.

There were three alternatives: the present wording, the wording as contained in Art. 1.5 and the wording of the PECL which stated that "The parties may not exclude or limit this duty" (Article 1.106(2)).

Farnsworth wondered whether to assume a similar change in Art. 1.5 if the PECL formula were adopted here. He wondered what was meant by "derogate" in Art. 1.5 that was not meant by "limit" in the PECL formula.

Hartkamp indicated that it was different, as in Art. 1.5 it was a question of excluding or derogating from or varying the effect of a provision, while in Art. 1.7 it would probably be more clear to state "may not exclude or limit this duty".

Voting on having the second paragraph read as the PECL formulation, 14 voted in favour. The formula of the PECL was therefore adopted.

Sono observed that then Illustration 1 on page 14, Illustration 2 and 3 on page 15 and Illustration 2 on page 16 should be modified, because the problems they dealt with could easily be solved also without having recourse to the good faith principle.
Drobnig also had a question regarding Illustration 1 on p. 14, in the sense that the "If B had given A assurances that A would always be able to leave a message, [...] B could not in good faith object [...]" was obvious. In his view a case of good faith would be this case without the assurances given by A.

Bonnell objected with the example of A telling B that B has 24 hours more time and they both know that this means an extension over Sunday. At that point, if A keeps silent, would he then have to accept that B phones him and gives him his answer at 4 in the morning, and if in the factory nobody answers would this be against good faith?

Hartkamp pointed out that the example covered also the case of the normal working day.

Bonnell felt that this would then have to be specified.

Tallon gave two examples of French case law, the first of which was one in which A knew that B had gone away to ski in the mountains and sent B notice of termination saying that B had to reply during the week and when B returned the week was over. This was bad faith, as A knew that B was away. Another case was that of a contract clause to the effect that if the lessee did not give an insurance certificate the owner was allowed to terminate the contract, and the lessee forgot to send the certificate but the owner knew of the insurance because they had the same insurance company. In this case the owner nevertheless terminated and the decision of the court was that this was not possible.

Hartkamp gave the example of A who is injured and has to make a claim within seven days after the accident and asks the insurance company to send him the conditions and the insurance company does not send him the conditions speedily enough and then claims afterwards that he has not claimed in time. He felt that it would be interesting to have examples along these lines, which were less obvious than the ones presently used as illustrations.

Article 1.7 (Article 1.8 in the new numbering) was therefore finally adopted to read:

(1) Each party must act in accordance with good faith and fair dealing in international trade.
(2) The parties may not exclude or limit this duty.

Article 1.8

Introducing Article 1.8, Bonnell stated that it was the text of Art. 9 CISG. The purpose of the article was first of all to better qualify the term "usage" whenever it was specifically referred to here and there in the Principles, and secondly to make it clear that parties were in general
bound by usages, always provided that the usages in question met the tests laid down in the article, both in the course of the formation process and as far as the effects of the contract were concerned. These usages, if applicable, prevailed over the Principles.

Sono had no difficulty at all with the text of Art. 1.8 as it was in exact conformity with CISG. As regarded the comments, he referred to comment (c) on p. 17, which began "By stating that the parties are bound by usages to which they have agreed, paragraph (1) of the present article merely applies the general principle of freedom of contract laid down in Article 1.2". He thought that Art. 1.8(1) had something more to it, i.e. even if the parties did not specifically refer to a usage and agreed to it in the negotiation for a particular contract, if in previous transactions they had already agreed to the existence of a usage, in the absence of an indication to the contrary that usage should prevail. In that regard para. (1) could be useful. In the other case where parties agreed to make a reference to the usage to which they agreed, even without this kind of provision that would prevail. Perhaps the comment could be expanded to explain this point.

Bonell referred to comment (b): "Practices established between the parties" which already did take into account what in the text was referred to as "practices established between the parties" and what in the title was referred to as "courses of dealing".

Tallon observed that Art. 1.8 used "courses of dealing and usages", "standard trade practices" which might be a bit different, and PECL Art. 1.103 just spoke of "practices". He thought that it would be good to agree on a uniform terminology. Secondly, he was not happy with the second paragraph, and preferred the PECL formulation, firstly because a usage may be bad or unreasonable so the control over the reasonableness of the usage which was in Art. 1.103(2) PECL was important. Secondly, the reference to a usage "which in international trade is widely known to, and regularly observed by, parties [...]" was not sufficient to ensure that the usage was reasonable and there may in a certain market be companies with a superior bargaining power which imposed usages on the smaller companies. He therefore felt that the formula should be modified as to what was a usage and a judicial control of the reasonable character of the usage, along the lines of Art. 1.103(2), be set up.

Bonell agreed that the language of the different provisions of the Principles should be aligned. As to the question of the appropriateness of having here, in Principles intended to be applied at a universal level, exactly the same formula as that in CISG, personally he did not like the formulation of Art. 9(2) CISG but it had been a hard-won compromise. To suggest a new formula which in substance was the same could cause some unease around the world, and he wondered whether it was worth doing this. Secondly, there was the question of whether the reasonableness test should be added. If he had not done so this was not only because it would be a deviation from CISG, but also because he had difficulties in conceiving of
an unreasonable usage. A usage could hardly develop if it was unreasonable, and "regularly observed" meant something more than permanently stipulated with company A: the fact that corporation A permanently succeeded in imposing unfair contract terms on all its customers would not mean that this was a usage regularly observed in the trade sector concerned.

Di Majo felt the text to be too complicated, and considered that what was said in para. (2) could be included in para. (1). Furthermore, he saw nothing in the article with reference to usages which might be used in the interpretation of contract clauses - the "usi interpretativi" which were very important in business contracts; i.e. usages to interpret contracts clauses and not as a source of law.

As regarded the argument that para. (2) should be retained because it came from CISG, and the reference to its compromise nature, Drobnić felt this to be absolutely unconvincing, because that was a political compromise of the States, but the members of this Group were not State parties, they were academics and if they came to the conclusion that that version was bad they were not bound at all. He agreed that this formulation was bad and that every effort should be made to produce a better version. The PECL version was better and achieved practically the same result, covering in addition also the point of unreasonableness. He thought that there were unreasonable usages: in Germany usages had been held to be unreasonable and therefore not binding. He could imagine that such usages would also appear in international trade. As regarded the "usi interpretativi", that would be covered by para. (2) of both this draft and of the PECL draft, because they really amounted to the establishing of duties of the parties and merged with the general duties and rights under the contract.

Bonell commented that when he had stated that it was a political choice to stick to the formulation of Art. 9(2) CISG, he had not intended to say only that the mere fact that they adopted the same text was a political choice; this could already be considered to be of some importance, but here much more was involved: the PECL text was more or less the ULIS formula, and ULIS had been criticised on this particular point by both South and East as being too Western-oriented, too favourable to Western trade partners. Those countries had made it almost a condition for their adherence to the new Convention that, among others, the provision on usages be changed in order to render it more balanced, and the outcome had been the new text of Art. 9(2). If they here came back to the formula of ULIS this was a clear message, it was not just a question of academic taste or of personal preferences, in the South and in the East it would certainly be understood in the sense that a Group of very sophisticated people had now again tried to change the cards on the table by coming back to a formula which for years had been discussed and considered to be unacceptable at international level because too favourable to a certain part of the world. The political implications on this particular occasion were quite significant.
Maskow stated that Bonell was quite right, but the situation had changed substantially since then. The time CISG had been made was the heyday of the new economic order which reached its highest point in 1980 and then collapsed. In his view this ideology had collapsed before socialism. Of course this did not change the differences between North and South, but the special ideology which was connected with this concept had in his view collapsed. As regarded Eastern countries, these had been divided already at that time. While in the GDR there had been no objections against usages, they even had them in their Code, some of the other countries had been opposed but might currently have given up their opposition. The situation had therefore changed and he saw no need to stick to this old formula. A formula along the lines of the PECL would solve certain problems, in his view it was not possible to take the formula of CISG and to add something about reasonableness, because the precautions which were taken in Art. 9(2) of CISG represented the question of reasonableness and the result of the addition of reasonableness would be that the same thing were said twice in very different ways. If, on the other hand, the EEC formula were taken, then it was also clear that it was not a definition of usages, it presupposed what a usage was, and only said under what conditions usages became part of the contract. Normally the criteria for defining a usage were that it was observed, and that it had a certain duration, and this was missing in the PECL. Therefore, if the PECL formula were taken, they should consider whether such a definition of what a usage was, was needed. If this were not done, it would at least be necessary to take up the knowledge problem, because this was one of the problems discussed in Vienna where especially Southern countries had been afraid that they would not know what a usage was and would be surprised by certain usages.

Fontaine came back to the question of usages for interpretation and referred to Art. 4.3 which had an express reference to usages. As to Art. 1.8, he did not like para. (2) either, but considering what Bonell had said, he felt that it should be kept, because it would certainly be interpreted badly: it was true that there had been changes, that Eastern European countries had changed their regime, that one did not talk so much of the new economic order any more, but developing countries would not be able to help noticing that they had changed the formulation, especially if para. (1) which came from CISG were retained. He also felt it should be kept because it contained the knowledge element. As to the reasonableness test, he was not sure that it was implicit here, and felt that if it was desirable it should be said expressly.

Lando was unhappy with having the CISG formula in Art. 1.8(2). Firstly he felt that the reference to the parties impliedly having made a usage applicable to their contract to be something of a fiction: there were two theories on the basis of usages, one of which stated that this was an expression of the will of the parties and this was reflected in para. (2), the other of which was that usages were just like other sources of law, irrespective of whether parties have willed it so or not, and he felt that the second point of view was the more realistic one. He understood that the
idea of people from developing countries that they were afraid of being bound by usages of which they had no knowledge, but if a person enters a market and acts there and there is a usage in that market, or if there is an international usage when the market comprises the whole world, and a party from Ruritania does not know of the usage, should he then be allowed to invoke this lack of knowledge? He did not think so. If they tried to have international usages they must also say that these usages bind in so far as they are usages, whether a newcomer on the market knows them or not, otherwise world trade would be very much hampered. He did not think that this political issue was serious enough for them to take it into consideration. Another question was whether parties were bound by usages to which they had agreed and by a practice they had established between themselves if the practice or usage was unreasonable. This question had not been addressed in the PECL, but he thought that it was not so unlikely and his question was whether parties might establish between themselves, or might agree upon, a usage which was unreasonable?

Komaroff referred to the comments: the conclusion that usages would always prevail over the Principles appeared to be based on the premise that the Principles were applied as rules of law, but if they were applied by express reference in the contract, thereby becoming terms of the contract, it seemed to him that it would not be correct to say that usages would prevail over the Principles. This confusion appeared to have arisen because the provision was taken from CISG which was always rules of law. He therefore felt that the text of para. (2) probably should be rewritten along the lines of the PECL.

Furnston observed that under English law usages which were unreasonable were not binding, and there were certainly cases holding that usages were unreasonable. He believed it to be perfectly possible for cases to arise where there were market practices which upon examination actually proved to be unreasonable, and people who did not know about them should not be treated as having agreed to them. He therefore felt that they should say that if a usage is unreasonable people are not presumed to have agreed.

Drobnig asked Bonell whether he thought that using a formula such as the second paragraph of the PECL article would be harmful to South-North trade relations. The usages referred to would be usages which were considered to be applicable by persons in the same situation as the parties, so if one party was in a developing country and the other in an industrialised country, the arbitrator might conclude that a particular usage was only widely used in trade between industrialised countries, in which case it was of course not binding between these two parties. The PECL was made in such a way that it could easily avoid results which Bonell would consider unreasonable, which were considered to be unreasonable in Vienna, and which he also would consider to be unreasonable.

Bonell indicated that personally he had always found the battle for or against Art. 9 ULIS on the part of the developing countries to be a false problem, because in substance there was no difference between the
ULIS formula and the present formula. If one said that parties were considered to have impliedly made applicable usages of which they ought to have been aware, one was in a legal fiction, one no longer required a direct link between the parties' intention and the usage. In his view the substance coincided with the PECL formula. This was therefore not the relevant issue. What he wanted to remind the Group of was that, notwithstanding what any or all of them might think, for years in UNCITRAL, and now also in comments appearing in different parts of the world, precisely the contrary was maintained. Art. 9 of ULIS had been the red flag (in his opinion wrongly, as the party autonomy provision was much more dangerous for developing countries as it permitted the implicit exclusion of everything for which they had struggled for years), and if they discovered that they had just taken the hard won formula of CISG out and inserted the so heavily criticised ULIS formula, the message was clear. He would therefore consider it to be of extreme importance not to deviate from CISG here.

Huang stated that the CISG formula was very clear to her as it stated "which in international trade is widely known to, and regularly observed by, parties", whereas the PECL stated "would be considered generally applicable by persons in the same situation as the parties", which left her in doubt as to the kind of persons, because persons in the same situation might consider matters differently. Thirdly, as to the reasonableness test in the PECL formula, she wondered whether the usage as such was unreasonable, or whether it was its application in the particular case which was unreasonable. She requested this to be explained in the comments and for more examples to be given.

Hartkamp referred to the statements made by both Drobnig and Bonell, who felt that the contents of the two paragraphs would be identical, except where the reasonableness test came in.

Brazil pointed to one difference, and that was a usage that was more or less confined to a local market into which a foreign party came for a one off transaction; under the PECL formula one might conclude that a person coming in would be bound by the rules. It seemed to him that under CISG that local usage would not be included.

Drobnig referred to the comment on p. 13 on good faith; it was really the same general principle: if one came into a market one had to accept the good faith and usages prevailing there, but there may be situations where one need not accept them, so it depended on the circumstances.

Sono felt that the point raised by Bonell was very important. The States which had already ratified CISG would try to maintain a reasonable and uniform interpretation under Art. 7(2) of CISG, and they would try to do so also with respect to Art. 9. If Unidroit came up with a modified version of ULIS, these States might think that this was a resistance to CISG on the part of Unidroit, which was not the case. If the difference was not that great and the same conclusions could be reached through
interpretation, why should then this Group modify the formulation? The drafting might not be all that great, but it was a formulation which had been accepted as a workable compromise. Secondly, there was a danger of confusion: if one deviated from the UNCITRAL text, people would start wondering how different the two versions were, the interpretation would differ and the result would be confusion. Thirdly, as to the reasonableness standard, of what reasonableness was one thinking? This test might be dangerous.

With reference to the reasonableness test Lando referred to commentaries on CISG, amongst which the one by von Caemmerer and Schlechtriem, which stated that although it is not provided in CISG it must be assumed that unreasonable usages would not be acceptable. As to usages of a local character, Bonell had on p. 18 given an illustration about a shipbuilder from country X who cannot rely on usages regularly observed with domestic customers when dealing with customers from other countries. Was this really very convincing, because if one thought of a ship-building yard in a developing country which had a special usage for local customers which were the majority, if then a foreigner comes to have his ship built there, was it acceptable that the foreigner should be given special treatment? He did not think so. Everyone who comes into a local market will or should know that there are local usages, will have to respect them, so illustration I should have the opposite result. He was impressed by the comment Maskow had made on the changes which had occurred world-wide and did not feel that they had to be bound by the formulations used by CISG.

Farnsworth felt pulled in both directions: he had been a member of the working group of UNCITRAL which had developed the present formulation, but the language was awkward and he felt that it ought to be possible to say what had been said in a better way.

Furnston wondered what it was that was present in Art. 1.8(2) which was not present in the PECL draft which would make the inhabitants of Rutania and Utopia more comfortable.

Farnsworth felt that it was the language "which in international trade is widely known to, and regularly by, parties [...]" the idea being that at that time Eastern European countries, for example, felt that they were not particularly experienced in trade and might be unpleasantly surprised by usages that for example European and African traders were aware of but that were not easily accessible to them.

Bonell stated that he would definitely add also the "knew or ought to have known" and even "are considered to have been agreed", because one extreme view was that only usages on which parties had agreed should be relevant, while the other side reacted to this and the compromise was to use the technique "parties are considered to have agreed if etc.", which was a legal fiction.
Hartkamp suggested that Farnsworth and Furmston get together to draft a revised version of the provision.

Farnsworth had some difficulty with this suggestion because while he agreed with Bonell, if his remarks were followed to their logical conclusion it was not possible to make any changes whatsoever. He found however that the "knew or ought to have known" could be read into the PECL draft, in that if parties in the same situation would have considered a usage generally applicable, then at least part of the "ought to have known" would be captured.

Furmston stated that it was actually quite difficult to envisage why if the parties knew or ought to have known this usage, that would not satisfy the requirement that it was widely known and regularly observed.

Maskow proposed the formulation "The parties are bound by any usage which they knew or ought to have known and which is regularly observed by parties to contracts of the type involved in the particular trade concerned except where the application of such usage would be unreasonable".

Bonell stated that once they changed the formulation and felt free to adopt what to him was convincing language he would stick to the PECL draft which was more concise. He came back to his earlier observations and wondered what they should say when presenting the Principles if this rule were changed: if the new rule adopted was equivalent, then why was it being changed? If this was positive law, not only in Rutania or Utopia but also in Germany, in Italy, in France, in the United States, in China, in Russia, why did they adopt a different formula if they considered it to be the same in substance? Secondly, the obvious conclusion was then that there was a difference - he himself would have difficulties with both Maskow's formula and the PECL formula as the international element was no longer there. Was this really only an omission or a question of cosmetics? He wondered whether it was worthwhile going through the whole procedure of finding a new formulation if the fate of the Principles did not depend on whether or not they themselves were convinced of having produced the most elegant text, but on whether or not trade partners all over the world would accept them.

Voting on whether to stick to the CISG text or to make changes in this text, 6 voted for the first solution and 8 for the second.

Proposals Article 1.8

Two proposals were on the table, the first prepared by Farnsworth and Furmston (hereinafter referred to as "FF"), the second by Maskow.

Introducing the proposal Farnsworth and he had made, and which read: 
"(2) The parties are bound by a usage that is widely known in international trade, regularly observed by parties in the trade concerned and considered generally applicable by persons in the same situation as the parties,
except where the application of such a usage would be unreasonable", Furmston stated that no significant change in substance was intended, nor was it very different from Maskow's proposal. It was designed to be more elegant. The change was in the exception which was not set out in the existing text, but the factors which ought to be taken into account were set out.

Introducing his proposal, which read: "(2) The parties are bound by any usage which they knew or ought to have known and which is regularly observed by parties to contracts of the type involved in the particular trade concerned except where the application of such usage would be unreasonable", Maskow stated that it avoided the complicated introductory phrase of CISG by saying directly that the parties are bound, which was the same as in the FF proposal. The proposals diverged to the extent that he had stressed that the parties had to know, i.e. either positive knowledge or at least ought to have known, while the other proposal was more objective and only required that the usage was widely known, on the other had it had added that it was considered generally applicable by persons while he had only mentioned the fact that it was observed, i.e. that the usage was regular in the trade. The fact that he had required that parties knew or ought to have known was in a certain sense counter-balanced by the fact that FF had another requirement which went in the same direction, as it required that the usage was generally applicable and that was more or less the same as the requirement that the parties ought to have known the usage. He saw no great difference in substance between the two proposals.

Hyland wondered whether there was a difference between the two proposals as far as what happened when parties actually knew about a usage. In the Maskow version it seemed to him that if the parties actually knew of a usage regardless of how widely known it was then it was included in the contract, whereas in the FF version it seemed to him that that may not be the case.

Furmston did not believe that that was correct, because the usage still had to be regularly observed. An unusual usage would not do, because it would not be regularly observed even if they knew about it.

Tallon wanted to know what was meant by the "trade concerned" because as a rule there would be two trades concerned: the trade of the seller and the trade of the buyer, and these two trades might not be the same trade.

As regarded Tallon's point, Farnsworth could think of at least two interesting American cases that coped with this problem, but he did not think that by changing the language one could eliminate the problem. What the trade concerned was, was at times going to be a difficult question of fact.

Lando commented that the proposals read much better than the original CISG, but he thought that the task of drafting something was almost impossible because they had wanted what they thought would satisfy the
"outside protesters" Bonell had referred to. As it stood now, it was not perhaps very elegant either, because what was a usage? A usage was by definition something which was regularly observed by parties in the trade concerned. The proposals had made the fact that it was regularly observed by parties a requirement of the usage, and he did not feel that this was really necessary, because how could they define usage unless they stated that it was something regularly observed by parties in the trade concerned? Then the requirement that it be widely known in international trade and the third requirement that it be considered generally applicable by persons in the same situation as the parties: how could a usage which was considered generally applicable by persons in the same situation as the parties be one which was not widely known in international practice?

Brasil pointed out that the phrase "in the particular trade concerned" was in CISG and he wondered what the meaning was there.

Bonell drew attention to the fact that CISG not only referred to the trade concerned, but spoke of "contracts of the type involved in the particular trade concerned". A similar formula was to be found also in the UCC.

Farnsworth indicated that the UCC said "the [...] trade in which they [the parties] are engaged" (§ 1-205(3)). He did not think that that was any better or even any different from the "trade concerned".

Bonell commented that the German "Verkehrssitze" also had the meaning of this particular kind of trade. As regarded the question raised by Lando as to whether there was any real difference between EEC formula and the proposals, particularly the "widely known in international trade" of the FF proposal, he would say that there was a difference. To emphasise that it must be a usage which was widely known in international trade meant that, in particular with regard to so-called local usages, it was not sufficient to say "by persons in the same situation as the parties", because one might well tell a foreigner that any other person in his situation would have known that usage and should therefore be bound by it. At that point the foreigner might object that it was not internationally sufficiently widely known.

Tallon objected that a foreigner would not be in the same situation as a local contractor.

Drobnig had a slight preference for the FF proposal, but had difficulties with the phrase "widely known in international trade": what did this mean? In a case where the other two conditions were fulfilled, i.e. the parties were in a trade where this usage was regularly observed and it was applicable to persons in the same situation, could one really bring forth the argument that it was not widely known in international trade? To him it was irrelevant whether it was widely known, it was quite sufficient if persons in the trade concerned knew it, that it was regularly observed and that they ought to know it. To whom should it be widely known?
To outsiders? It did not make sense. He would therefore regard the first element as superfluous and dangerous. With respect to "trade concerned", a very great part of international trade was done in the same trade, people dealing in oil, the exporter and the importer, the wholesaler and the retailer, were in the same trade, and it was more frequent that usages existed in these trades than not. The problem raised by Tallon, of people being in different trades, also existed and he supposed that the answer was that there may be cases where this was so frequent that usages had developed for that particular cross-trade, although more frequently usages would not have developed, because they were in different trades. If for example a ship-builder bought oil for the trial trip of the ship it was buying from a different trade and there may not be usages for the buying of oil by a ship-builder and then this did not come under Art. 1.8.

Farnsworth stated that in including the words "widely known in international trade" Furrmon and he had thought that they had been encouraged to do so by the foregoing discussion. If he were to start with a clean sheet of paper it would probably not occur to him to put that in, but they did not start from the beginning and it had seemed to them that by putting these words in they were not totally abandoning the language of CISG.

Komarov shared the doubts expressed by the previous speakers. Nevertheless he thought that the international character of the usages had to be stressed and that was why if the words "widely known in international trade" were left out one should introduce the concept in the next passage and say "regularly observed by the parties in the international trade [...]", because if a usage was regularly observed it was widely known.

Sono observed that in CISG "widely known in international trade" was qualified, it was very much restricted by the wording "widely known to [...] parties to contracts of the type involved in the particular trade concerned" (Art. 9(2)) so with similar wording one might overcome the objection raised by Drobnig.

Fontaine also thought that that formula had to be taken in its context. He had also thought that the FF proposal was defining usages, but he had come to the conclusion that it did not: it was usages that satisfied certain conditions - "widely known in international trade": not all usages were widely known in international trade. He favoured that part of the first proposal but on the other hand, keeping in mind that he was concerned not to depart too much from the CISG provision, he would also like to incorporate the reference to the knowledge requirement in Moscow's proposal. It might be possible to find a common text, such as "The parties are bound by a usage which they ought to have known and [...]" going on with the "known in international trade and regularly observed by parties [...]". He did not completely understand the discussion which had taken place with reference to the "trade concerned", with the oil sold to the shipyard example: the trade concerned was the trade of sale of oil to technical consumers. He did not think that "trade concerned" was the oil business between oil companies or the shipyard business, but the special
business of selling oil to customers.

Tallon stated that the problem would concern the transport of oil: was it the usages of the oil trade, or would it be the sea usages of transport by tankers?

As Bonell recalled the discussion it had been decided to deviate from the text of CISG but to attempt mainly to improve the language without touching the substance of the provision. He felt that they were not likely ever to reach consensus on the precise implications of all the formulas suggested. He supported Fontaine's proposal to combine the two proposals.

Huang thought that the proposals changed the substance of the text, because in the CISG formulation it was possible to see the relation between the two paragraphs of the article whereas this was not possible in the proposals. Para. (1) stated that the parties were bound by any usage to which they had agreed; para. (2) in CISG introduced a condition with "unless otherwise agreed", and this condition was not incorporated in the proposals, which made it appear as if parties were bound by everything. She therefore preferred to keep the CISG formulation, perhaps with only a slight language change.

Hartkamp observed that this aspect had been touched upon in the discussion, and the conclusion had been reached that the "unless otherwise agreed" would fall under Art. 1.5, in which it was stated that parties were always free to derogate from the Principles, which included derogating from Art. 1.8, so he did not think that this was the main problem.

Furmanston observed that if the parties had agreed that a usage was not to apply its advocacy would surely be unreasonable. He thought this was implicit in the definition. He would agree that there was a significant coincidence between the three requirements "widely known in international trade", "regularly observed by parties in the trade concerned" and "considered generally applicable", he could even believe that one could manage with only two rather than the three of these, but they were put there in order to tell those who were worried about provisions of this kind that they would be adequately protected.

Farnsworth put forward a redraft of the FF proposal which read "The parties are bound by a usage that is widely known and regularly observed by parties in the international trade concerned [...]".

Tallon felt that the fears of the civil law countries would be allied by the reasonability control and this was the difference with CISG. The "widely known in international trade" could be dispensed with, because it did not mean anything: there were usages in the international diamond trade which were only known to those who traded in diamonds and could not be considered to be widely known in international trade.
Hirose agreed with Tallon that "widely known in international trade" was too restrictive: if there was a usage in small trade between Indonesia and Japan and if this usage was not known to the rest of the world but if there was reasonableness in that kind of usage he thought this local usage should be respected. He felt that the Principles should be flexible enough to absorb the variety of the rules of different peoples and especially with reference to usages he wanted to have room for the variety of usages which existed. He supported the introduction of the knowledge criterion which had been proposed by Maskow.

Bonell observed that it was hardly possible to disagree with those who had pointed out that in no case should the application of usages be restricted to those usages which were widely known in international trade - full stop, because of these there were very few and of no importance or utility whatsoever. This was, however, not what Art. 9(2) CISG said, because it had to be read all at once "and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". This meant that the emphasis lay on the second part of the sentence ("parties to contracts of the type involved in the particular trade concerned") and the qualification of "and which in international trade is widely known to, and regularly observed by" just meant that it must not be a purely local or national usage. The decisive test was still the particular trade concerned: in that trade it must be internationally sufficiently known. He wondered whether Farnsworth's revised formula could meet this point, because he felt that it might be misunderstood. To strike out "international" at the beginning and then to say "observed by parties in the international trade concerned" would change the meaning, as here one would mean "branch", "trade sector" - what did within the international trade sector mean? What was intended in CISG was that in a particular trade sector it must not be a purely local or national usage, but a usage widely known and regularly observed in an international trade.

Fontaine put forward a proposal which read: "The parties are bound by any usage which they know or ought to have known, and which is widely known and regularly observed in international trade by parties in the particular trade concerned, except where the application of such a usage would be unreasonable".

Lando proposed the formulation of Art. 1.103(2) PECL for consideration, which read as follows: "The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable".

There were thus six alternatives: the original CISG version, the Farnsworth/Furnston proposal, the revised Farnsworth proposal, the Maskow proposal, the Fontaine proposal and the PECL formulation proposed by Lando.
Voting on a choice between CISG on the one hand and any of the other five on the other, 4 voted for CISG and 8 expressed a preference for the adoption of any one of the other five.

Voting on the five proposed texts, each member of the Group being allowed two preferences, the Farnsworth/Furmston formulation received 4 votes, the Maskow proposal received 2 votes, the Fontaine proposal received 7 votes, the revised Farnsworth proposal received 10 votes and the PECL version received 3 votes.

With reference to his revised proposal Farnsworth observed that he had introduced the qualification "international" before trade to accommodate Komarov's concern, but that he did not feel that it made much difference.

Bonell had some difficulties in understanding how "international" could be switched from the first "trade" to the second "trade", because in the two instances "trade" meant different things. The French version of Art. 9(2) CISG spoke of "dans le commerce international" in the first instance, and of "dans la branche commerciale" in the second.

Drobnig preferred the Fontaine text which referred to "observed in international trade by parties in the particular trade concerned", and suggested that it be brought into the Farnsworth proposal.

Lando would also be relatively happy if "international" came out.

Hyland suggested a modified version of the Farnsworth formula which read "The parties are bound by a usage that is widely known to and regularly observed in international trade and considered generally applicable by persons in the particular trade concerned".

Lando felt that "regularly observed by parties in international trade" narrowed down the scope of the provision as there were not many usages of this kind.

Fontaine instead liked this formula, because it had all the elements. He regretted the deletion of the reference to the "know or ought to have known", but if the usage was widely known the parties probably ought to have known it, so it amounted to the same thing.

Furmston suggested that the fact that the existing proposal referred to persons in the same situation as the parties brought in the international element.

Farnsworth felt that it would not be so difficult to resurrect the notion of international trade in the way in which it was done in Fontaine's proposal. He had himself wanted to avoid "which they know or ought to have known". He would not have any strong feeling either way if his revised proposal were accepted and it then were modified to include the language in
Fontaine's proposal.

Voting on the revised Farnsworth proposal and on the Fontaine proposal, 9 voted for the Farnsworth proposal and 5 for the Fontaine proposal.

In the end the following wording was adopted: "The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable".

Article 1.8 (Art. 1.9 in the new numbering) as a whole therefore read as follows:

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable".

Article 1.9

Introducing Article 1.9, Bonell recalled that on previous occasions the Group had felt it desirable to include a provision in the introductory chapter dealing with notices: first, with the form of notices (requests, declarations, demands, etc.), secondly, with the effectiveness of such communications, i.e. to what extent should the so-called receipt theory be adopted and to what extent should the so-called mail-box theory be adopted. This had been done in Art. 1.9. The PECL had once again been a very useful model, the only departure from that text being in para. (2) where, with respect to the mail-box theory, the last sentence of Art. 1.110 of the PECL was missing. He had not wanted to include this provision in the Principles because he felt its practical application to be questionable. "The notice shall have effect from the time at which it would have arrived under normal circumstances" - was that really consistent with the Principles when they expressly provided for the dispatch theory? He had the impression that particularly in the formation process the effect was with dispatch and not when it should normally arrive.

With reference to para. (2), Sono referred to Arts. 2.8 and 2.10(2), which although they did not relate to non-performance did relate to some faulty action by the other party. He asked for confirmation that Arts. 2.8(2) and 2.10(2) would automatically be operative to accomplish the same effect as that contemplated under Art. 1.9(2).

Brazil referred to the citation of Art. 6.3.4 in comment (b): it seemed to him that this was a situation where the unfairness might not be on one side only. Art. 6.3.4 dealt with the situation where a party
reasonably believed that there would be a fundamental non-performance by
the other party, and in that situation the article said that he might
demand adequate assurance of due performance. If Art. 1.9 were applied to
that sort of situation, as he understood it, that would mean that even
though the other party had not got that demand of full performance
nevertheless the clock would begin to start running against him and he
would be in risk that, even though he never learnt about the notice but did
not answer within a reasonable time, Art. 6.3.4 would operate against him.
He wondered whether in such a situation both parties were being given fair
treatment.

Bonell thought that also Art. 6.3.4 would fall under the dispatch
principle, because if a party reasonably believes that there will be a
fundamental non-performance it is fair if it is sufficient for it to
dispatch notice in order to have the right to withhold performance, because
the other solution would be that the party has to prove that the other
party received the notice. This was ultimately a question of policy. He
agreed with Brazil that this was a borderline case.

Fontaine suggested that if the last sentence of the PECL draft had
been suppressed it should be replaced by something else, because Art.
1.9(2) stated that a notice had effect despite problems in transmission,
but did not say when it had effect, and then para. (3) went on to say that
in any other case the notice had effect at the moment it reached the other
person, so there must be a solution in para. (2).

Bonell saw the point, but on the other hand neither CISG nor ULIS had
any such provision, and he had always understood their relevant provisions
in the sense that the answer followed from the general rule in para. (1):
if it was a dispatch situation and one gave a notice which was appropriate
in the circumstances it was effective from the time one dispatched it,
provided the means was appropriate, and appropriate meant that one had to
take into account, for example, postal strikes. By implication he would
have thought that it followed from para. (1).

Drobnig had the same difficulties and thought that in this regard the
model which had been used, namely the PECL, was also faulty. In the PECL it
was unfortunate to use "has effect if given" because another "effect" was
mentioned in both para. (2) and para. (3), but in the present text the
interpretation could also be that the effects started at the moment of
dispatch and he would regard that rule as somewhat unfortunate because he
thought that the aggrieved party must allow as much time as a notice would
require to reach the other party under normal conditions, and this was what
was achieved by the sentence which had been omitted. He did not clearly
understand why it had been omitted.

Maskow stated that very often in these cases what would be decisive
was whether a notice had been sent on time so as to preserve rights and for
this purpose he felt it would suffice if the date of dispatch were taken as
the decisive date - it was not necessary to have the additional period
required by the transmission of the message.

Fontaine wondered if the principle was not actually stated in para. (3); he suggested changing the order of the paragraphs to have para. (1) on the form of the notice, para. (3) on the principle of the receipt theory and then para. (2) with a special case.

Turning to the proposal to include a second sentence such as the one in the PECL, Drobnig observed that if this was done para. (1) would have to be redrafted to read "Notice pursuant to these Principles shall be given by any means [...]."

Hyland found para. (2) incomprehensible.

Drobnig observed that if the notice was not given by appropriate means the notice should not have effect.

Hyland stated that if this was the case the provision required rephrasing "must given by means appropriate in the circumstances", i.e. it may be given by any means as long as those means were appropriate in the circumstances.

Farnsworth wondered why it was necessary to specify "pursuant to these Principles" as they were only speaking in the context of the Principles.

Furmanston suggested saying merely "Notice may be given by any means appropriate in the circumstances".

Bonell thought something more was necessary as otherwise one did not know what notice was referred to.

Drobnig stated that it must also cover the case where the contract provided for notice.

Furmanston observed that if the contract stated that notice must be given by standing on the head that would be what was appropriate in the circumstances.

Farnsworth observed that the contract might for example say in a force majeure provision that in order to trigger the force majeure provision notice must be given. If the contract did not say anything about standing on one's head and the contract was subject to these Principles Art. 1.9(1) would govern, so he saw no reason to limit it to notice given pursuant to the Principles. In para. (2) one wanted to make reference in some way to the articles of the Principles. For para. (1) he supported Furmanston's suggestion.

The Group decided to adopt the formulation suggested by Furmanston.
As to para. (2), Furmston suggested they would need to say something like "If one party wishes to give notice in exercising its rights under Art. 6.3.2 or 6.3.4 [...]", i.e. the provisions concerned should be listed.

Tallon suggested that it would be better to reverse the order of paras. (2) and (3) and to begin by "Notice does not have effect until" and then to continue with "Nevertheless, if under Art... notice is given". Para. (3) should therefore be the rule and para. (2) the exception.

Drobnig did not think it practical to enumerate the cases in which notice must be given under the Principles because the contract may provide for notices for non-performance. What they wanted to catch were cases of existing non-performance and of anticipated non-performance. Any notices given in these two situations should be under the special regime of para. (2).

Proposals Article 1.9

Furmston put forward a proposal for the redrafting of Article 1.9 which read as follows:

"(1) Where notice is required it may be given by any means appropriate to the circumstances.
(2) Except as provided in paragraph (3) a notice is effective when it reaches the person to whom it is given.
(3) A notice properly dispatched by a party in order to exercise rights under Chapter 6 is effective even though there is a delay or failure in transmission.
(4) For the purpose of paragraph (2) a notice "reaches" a person when given to the person orally or delivered to that person's principal place of business or mailing address or (if there is no such principal place of business or mailing address) habitual residence.
(5) For the purpose of this article, "notice" includes a declaration, demand, request or any other form of communication."

Hartkamp observed that para. (1) had already been accepted.

With reference to para. (3) Fontaine could see a problem in that it did not say when the notice became effective, which was often particularly important.

Rossett observed that the underlying assumption appeared to be that the parties either dealt with each other orally, face to face or that they would send each other letters, and he felt that in the modern business world that was a very unrealistic assumption: the parties would deal with each other telephonically or electronically by fax or some similar means. He wondered whether "orally" would include "telephonically" and "mailing" would include faxes. There were recent cases on both, particularly on faxes. That was a major issue with notices, because in the commercial world
notices would not be face to face, and they would not be by letter in most contracts, they would be electronically and if they were electronically, the matter that was dealt with in Art. 1.9, which was when it became effective, was a non-issue - it happened at 186,000 miles a second and space was not significant - it was significant if one sent one another letters.

Furmston did not think that that was actually true. In his experience it was extremely common for fax messages to be garbled in transmission and if they were garbled in transmission and they were transmitted between continents at a time when the receiver was not at work, then there was certainly a possibility to question whether the message was effective.

Bonell felt that one had to distinguish the two questions of who was to bear the risk of the non-arrival of the message or of a false transmission, and when it became effective. Rosett's remarks appeared to address the second question, while they had so far mainly considered the first question.

Furmston wondered whether before getting on to para. (3) they should not make sure of what para. (2) was saying as that was the general rule. He had read para. (2) in both the original and his revised version as meaning that notice was effective both as to time and as to effectiveness, i.e. it had to be a notice which arrived in a non-garbled form. Bonell's comment had suggested to him that that was not what they were trying to say.

Hartkamp observed that as he read the original paragraph (3) it stated that it was necessary for a notice to have effect when it reached the other party, and that it had effect the moment it reached the other party, but it said nothing about a notice arriving in garbled form.

Furmston commented that to him "notice" would mean a notice which actually said what one was trying to give notice of. If A writes out on a fax "The contract is terminated - Happy Christmas" and all that arrives is "Happy Christmas" that would not be a notice.

Bonell observed that he had always understood the receipt principle in the sense that the notice became effective only if it reached the recipient, so if it did not reach the recipient, or reached the recipient in an improper manner, it would not be effective. The dispatch principle, on the other hand was particularly important, apart from the occasion when it never reached the recipient, as it meant that as soon as one had dispatched the notice, or after a certain period of time, even if it arrived in an altered form it would be a notice. Illustration 1 was made under the dispatch principle and not under the receipt principle.

Furmston observed that he read para. (2) to mean that the general rule was that notice was effective on receipt and he regarded it as implicit within that general rule that the notice clearly stated what it referred to.
Drobnig referred to Art. 3.4 because that provision dealt with garbling in transmission: "An error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated". Bonell had said that the message was ineffective if it arrived in garbled form, and he thought that that was not quite true. If it was a mistake it could be taken care of under the rules on mistake.

Lando observed that he would combine the formulation of the proposed Art. 1.9(3) with the formulation of Article 1.110(2) of the PECL: "A notice properly dispatched by a party because of the other's non-performance or because such non-performance is reasonably anticipated by the first party is effective even though there is delay, error or failure in transmission".

Furnston wondered what the reason was for having a special rule for notices of this kind.

Fontaine stated that the reason for shifting the risk was that there was non-performance on the part of one party.

Hartkamp observed that in that case the exception rule would not apply because there was no non-performance.

Furnston did not think that either version of Art. 1.9 said that. It was actually dependent on the other party's non-performance. They ought to decide just whether the notice is effective, not whether the other party had indeed not performed.

Rosett thought that the notion that notice is effective when received sounded attractive. He saw that they were not talking about the timing issue so much as they were about problems of improper transmission or ineffective transmission, or electronic hitches in transmission, and of who bears the risks of such damages and one certainly did not want to get into a position where the party receiving a notice had to confirm it back. Art. 6.1.5(3) seemed to place the risk on the party who sent the notice. He felt that there was a substantive question here which was not resolved by the draft as it stood. The risk of non-transmission and for imperfect transmission should be on the person who does not transmit it.

Furnston commented that in practice it was often very difficult to establish whether the message had been garbled by the transmitter or the receiving fax machine. If one received a garbled fax the only prudent course was to call for retransmission.

It was Hyland's understanding that the dispatch rule applied principally for accepting offers, i.e. the general rule in comparative law was that communications of all kinds had to be received to be effective, with the exception of the acceptance to an offer in the common law system for which the rule was reversed. He wanted to know whether in comparative law there was any other example of a rule like para. (3) outside of the
context of the acceptance of an offer.

Hartkamp indicated that in the new Dutch Civil Code they also had the system of avoiding or setting aside the contract by a written notice, but they had not introduced this rule, it was still the receipt theory, except for the acceptance of an offer.

Hirose observed that in Japan the receipt theory was adopted also for notices of termination, with the exception of the formation of the contract for which the dispatch theory was adopted. He proposed the deletion of para. (3).

Hartkamp asked Furmston to what extent the dispatch rule applied in Britain.

Furmston remarked that he had never seen it applied in the situation in which it was applied here. The dispatch rule did not apply to telephone, telex or fax, it only applied to the post. The rationale of the dispatch rule was that there was a gap between transmission and receipt. Even in relation to the postal system, twentieth century cases actually indicated some retreat, because courts had invented a rule saying that the parties can expressly or impliedly exclude it. The postal rule had had a very strong existence in nineteenth century Britain which had had an exceptionally efficient postal system where letters were normally delivered on the same day throughout the country. Now that the system was worse the rule was not so attractive.

Bonnell observed that CISG had already adopted the receipt theory instead of the dispatch theory. He felt that they should concentrate on the Chapter 6 situation; did they want the exception from the receipt theory for that situation, because for all the rest they had already more or less stated the receipt theory (para. (2)).

Lando observed that the PECL followed CISG.

In Maskov's view the exceptions from the receipt rule should be as few as possible and he did not find it justifiable to make an exception for termination. Art. 26 of CISG stated that a declaration of avoidance was effective only if made by notice to the other party; had this not been interpreted to mean that the other party had to receive the notice?

Bonnell, Hartkamp and Lando did not think so. Lando referred to Art. 27 CISG which provided for the dispatch principle "Unless otherwise expressly provided in this part of the Convention".

Bonnell pointed out that Art. 26 was intended to lay down the principle that a court intervention was not necessary.

Brazil felt that they ought to deviate from CISG, or at least exclude Art. 6.3.4 from any exception they would adopt. What they were saying was
that a person who had a long-term contract involving enormous sums of money could have that contract terminated, not because he had committed a fundamental breach or fundamental non-performance, but simply because he had not responded to a demand for assurance that he has not received. That seemed to him to present a problem. The article itself was quite exceptional, he found it very acceptable particularly in terms of the Uniform Commercial Code which did proceed on the receipt basis.

Maskow felt para. (3) to go too far in referring to the whole of Chapter 6. In his view it would suffice to cover only cases where it was necessary to fulfill certain conditions concerning the period, where notices must be given in time. For instance, if there were defects, such notices should be held valid even if they did not reach the recipient, but for such far-reaching actions as termination the notices should instead actually reach the recipient.

Bonell observed that there was a time limit also with respect to notices for termination, so Maskow's proposal would have to cover also notice for termination, notwithstanding his preference to the contrary.

Voting on whether or not to delete the exception in para. (3), 5 voted in favour of the deletion and 6 voted against.

Furnston wondered what the position was under CISG or under the PECL about giving a notice of termination which was despatched at a reasonable time but which was delayed and took much longer than expected - would it be an effective notice?

Lando stated that it would be an effective notice and referred to Art. 27 CISG.

Furnston wondered whether it made any difference for this purpose whether or not it was reasonable for the person sending the notice to use the means of communication he had used.

Lando indicated that the "means appropriate in the circumstances" in para. (1) would cover that: if the postal service was very bad it would not be an appropriate means.

Byland and Rosett wondered why CISG and the PECL had chosen to depart in this way from what they understood to be an almost universal principle of law.

Sono had found the discussion on the dispatch or receipt theory to be confusing, because para. (3) of the present article as well as its predecessor in CISG had nothing to do with dispatch or receipt theory, it only talked of who bore the risk of transmission. If a notice was given and it did not reach the other party, should then the party who had given the notice bear the risk? This was the question and it had been said no, in such a situation the risk should be borne by the other party if it was the
other party who induced the need for such notice. In other words, if the notice became necessary because of the fault of the other party, then why should the first person bear the risk of transmission? This was the only place in which the risk of transmission was imposed on the party in breach. He had thought that the second sentence of Art. 1.110(2) of the PECL had been accepted by the Group. He had actually thought that it was implicit even in the CISG formula. They were therefore still keeping the receipt theory, but making some adjustment.

Bonell added that in the debating in Vienna it had been observed that at international level communication might prove to be more difficult and/or consequently much more risky. It had been considered that if there was non-performance it was only fair to place the risk on the defaulting party, all the more so as one was speaking of communication and if a party was in breach it was only obvious that he had to expect a reaction on the other side, so to a certain extent that party was already "informed" by his own behaviour that the other party would terminate. He asked whether the Group was really certain that in the systems which adopted the dispatch theory in case of an erroneous or delayed transmission, or even of a loss of the communication, the same result would not be arrived at on the basis of the principle of good faith. If a party was in breach, and the notice of the other party got lost or was delayed, and not because he had chosen an inappropriate means of communication, would not the principle of good faith lead to the same result?

Hyland was not convinced by this argument. It seemed to him that it was almost a kind of moral responsibility which was being adjudged. The real question was not who should bear the risk of the fault of the party in fault, because in all the contracts he had been involved with it had never been admitted by the party in fault that he was in fault and the breach usually had to be litigated. The question was who had the duty to make sure that the notice really arrived. If one put the risk on the person who was communicating he would take great pains to make sure that the notice would actually arrive and that was what should be encouraged. The whole issue of moral fault seemed to him to be absolutely irrelevant in this context.

Furnston wondered whether it was not relevant that the forms of business communication had been transformed since the adoption of CISG. He thought that Hyland was absolutely right. In real life what one did was to send a fax and then a registered letter so one could prove that one had sent it.

Maskow proposed a formulation which started from the receipt principle and made the following exception: "but a party may not invoke the delay of the other party in sending a notice for the exercise of his rights according to Chapter 6 if this notice has been duly dispatched".

Farnsworth wondered what the purpose of this was: was it to distinguish delay on the one hand from non-arrival and from incorrect transmission on the other?
Maskow stated that he was thinking of effects and there were certain periods for claiming effects and if somebody had sent such a notice in time but the notice did not reach the other party, then the first party would be entitled to send this notice again even if the time-limit had elapsed.

Fontaine did not feel that the drafting conveyed this idea: it was not delay in sending a notice, but delay in receiving a notice.

Huang wondered whether there was any substantial difference between this proposal and the former Art. 1.3(2).

Bonnell pointed to the fact that no mention was made of the loss of the notice which therefore apparently was at the sender's risk, and the erroneous transmission was also at the sender's risk.

In view of the discussion, a second vote was taken on the proposal to delete para. (3): 7 voted in favour of this deletion and 6 voted against. Para. (3) was therefore deleted.

Turning to para. (4), Furnston suggested simply referring to "that person's place of business or mailing address" and to delete the reference to "principal". The paragraph would then read "For the purpose of paragraph (2) a notice "reaches" a person when given to the person orally or delivered to that person's place of business or mailing address".

Fontaine supported the deletion of the last phrase because he felt it could be presumed that people governed by the Principles would have a place of business or at least a mailing address.

The Group decided to delete the last phrase of para. (4), which therefore read: "For the purpose of paragraph (2) a notice "reaches a person when given to the person orally or delivered to that person's principal place of business of mailing address".

Turning to para. (5), Farnsworth failed to see how the rules in the chapter on formation could be consistent with it, because para. (5) seemed to apply this rule to an acceptance. It seemed to wipe out the dispatch rule for the purpose of any communication whatsoever.

Hartkamp failed to see why para. (5) had anything to do with receipt or dispatch, it just said what a notice included, it said nothing as to the effect of the notice.

Farnsworth pointed out that under para. (2) a notice was effective when it reached the other party, and if one defined a notice to include an acceptance in para. (5) then the substantive rule applying to acceptances was the rule in para. (2).

Brazil suggested saying in para. (2) "except as otherwise provided in the chapter on formation".
Bonnell observed that this would presuppose that everyone agreed that Arts. 2.8 and 2.10 did actually mean the adoption of the dispatch theory in this respect. Personally he had some doubts on this point.

Furnston indicated that as the Principles should be read as a whole, and as general rules did not derogate from special ones, he did not think that the general rule in Art. 1.9 defining what was meant as a notice would reverse the effect of the specific statements about offer and acceptance.

Bonnell indicated that the rule of offer and acceptance was the receipt rule, the only point raised related to Arts. 2.8 and 2.10 where the text spoke of "or dispatches a notice". Personally he had some doubts that there they had intended to adopt the dispatch theory. The language was misleading.

Farnsworth suggested that following what Bonnell said Arts. 2.8 and 2.10 should be read as if they said "gives notice".

Drobnig suggested that it might be wise to add to para. (2) of Art. 1.9 "unless otherwise provided in these Principles", perhaps putting it into brackets.

Huang supported this suggestion.

Bonnell could not remember at any point a clear statement to the effect that in the very marginal case of Arts. 2.8 and 2.10 they believed that mere dispatch was sufficient. He reminded the Group that there would be no further session devoted to chapter 2 so either a decision had to be taken, or only these two articles discussed at the next session of the Group.

The Group agreed to change "dispatches" to "gives" in Arts. 2.8 and 2.10.

Komarov stated that he understood the enumeration in para. (5) to concern the contents of the notice but not the form, so the use of the word "form of communication" was not correct. He suggested deleting this word and only to speak of "any other communication".

Bonnell asked for guidance as to how to justify the departure from CISG and the PECL as to the dispatch principle for the notices. He asked those who had advocated the suppression of the exception to give their reasons to him.

**Article 1.10**

Article 1.10 was adopted as it stood.
As to the possibility of including more definitions in the Principles, Fontaine felt that reasonableness should not be defined. It was one of those standards which were there for the judge or the court to make use of, just like good faith.

Drobnig thought that both reasonableness and good faith were general clauses which according to the businesspeople and lawyers contacted were considered to be dangerous by the possible customers of the Principles. He thought that they should not on prima facie refuse any effort to give some meaning to them. He would therefore not rule out making at least an attempt to make a definition in order to indicate at least which factors should be taken into account, because otherwise the risk was that the Principles might be understood very differently.

Furnston did not support having a definition of reasonableness in the introductory chapter. He would however not be opposed to a statement which said that in deciding what was reasonable one could take into account amongst other things the following factors.

Drobnig felt that what Furnston said was very reasonable with reference to national law because there was a community of opinion and standards within the nations, but here they were considering an international situation and there was no such community of standards, and therefore he felt that it was reasonable and made sense to try to indicate factors which should be taken into account.

Hirose referred to Art. 5.1.2, which stated that implied obligations stemmed from inter alia good faith and reasonableness, whereas another article referred to only reasonableness and yet another to only good faith, and in yet another there was good faith and fair dealing: it was very difficult for people in for example Japan to discern the real meaning of these terms.

Bonell recalled that this provision was a fairly new provision, so the Group had not paid too much attention to each single term, in particular "good faith and reasonableness", he could well imagine that in the light of the general framework of the draft there would be some rewording, just as might be the case with Art. 5.1.2(b) which referred to "usages and standard trade practices", which so far did not appear elsewhere, the wording of which might be aligned with the general provision on usages and practices.

There was no further support for the idea of having a provision on reasonableness in Chapter 1.

Sono referred to Art. 5.1.11 according to which performance had to be rendered at the place of business: CISG had a definition of the place of business whereas there was not one in the Principles. Since the importance of the place of business was less in the Principles he was not sure that a definition was actually necessary, but some qualification might be
necessary, either by adding Art. 10(a) of CISG ("if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract") to Art. 5.1.11(1)(b). He felt that the notice provision was very important because notice was provided for in many places, but as for the definition of the place of business it could be done by means of an addition of two clauses to Art. 5.1.11.

Fontaine felt that such a rule should rather go in Chapter 1 as a definition, as it was needed also for the notice requirement.

Tallon indicated that it was not a definition, it was a rule and should therefore be in a special article.

Hartkamp also felt that it would be more logical to have it in the first chapter if they were to have it, because in the first chapter there was an article on place of business.

Tallon felt that it would be difficult to have a provision stating "if there is no place of business" without giving a definition of place of business.

Drobnig had a certain sympathy for Sono's proposal because although it would not be a very important provision it might clarify matters.

Voting on the proposal to have in Chapter 1 a provision incorporating Art. 10(a) CISG, 12 voted in favour and the proposal was therefore accepted.

Maskow suggested that a provision along the lines of Art. 13 CISG ("For the purposes of this Convention "writing" includes telegram and telex") might be introduced into the Principles.

Sono wondered why Maskow felt such a provision to be important for the Principles - in CISG it had been important because the writing requirement was subject to reservation, but in the Principles no distinction was made, the contract could be agreed by any means.

Maskow felt that it was important because very often contracts stated that modifications could only be made in writing.

Sono observed that if the parties had agreed that modifications could be made only in writing, the interpretation of the contract was involved and not the interpretation of the Principles.

Bonell referred to the recent Convention on Terminal Operators in which this problem had had to be faced and it had been felt not to be too easy a task in view of the gigantic developments which were taking place in the field of computerised and electronic messages, so one could hardly end
up with a more precise formula than, e.g. "and any other means which preserves the record of the message" or something like that. What this then precisely meant, nobody except a few technicians knew, and certainly in five years time it would again be out of date. Personally he agreed with Sono's remarks that after all it was not necessary here.

No further support was voiced for the proposal.

Lando wondered whether Art. 10(b) of CISG should not be in, because there were businesspeople who had no place of business and they would generally use their home. Of course one could say that in that case it was the home which was the place of business, but he felt that it would do no damage to have such a provision.

Drobnig felt that that should be taken care of in the comments.

Bonell instead felt that if a person was doing business on the street or door by door, and claimed that his home address was not his place of business he would say that by law that was his place of business if he had no other address. It was very difficult to tackle all this without having a precise notion of what was meant by place of business.

Bonell requested that the Group consider whether or not to include a provision such as Art. 1.109 PRCL.

Farnsworth wondered whether there were other than Art. 6.4.4 where the foreseeability was mentioned, so that they would see the context in which a definition such as Art. 1.109(1) would go.

Bonell indicated Art. 6.3.1(2)(a), force majeure, hardship, etc.

Hartkamp was not happy with the idea of inserting articles without having any written separation and seeing the context and saving references to other parts of the Inciples.

Farnsworth felt that it would help him if he could have a complete list of all the provisions that this would impact. As regards force majeure, there was a concept in Art. 6.1.5(1) that was analogous to foreseeability but did not use the term. It was very hard for him to talk about a definition without knowing all the ways it would affect.

Comments of the Governing Council of UNIDROIT to Chapter 5, Section 1: Performance in General (C.D. (70) 22 pp. 9 - 37)

Bonell took the Chair for the discussion of the comments made by the Governing Council on Chapter 5, Section 1 (Performance in general) at its 70th session in May 1991.
Tallon drew attention to the insistence of the Governing Council on having a French version of the Principles as soon as possible and asked what was expected on this.

Bonell regretted the absence of Professor Crépeau whom he understood had already undertaken a "translation" of the draft in a more systematic manner. He did not know what the latest developments were in this respect. On the part of the Secretariat, some work had also been done, but unfortunately not too much, as a result of limited human and other resources. Thus, so far there was no French version, not even of the text alone. Everybody agreed that such a French text was absolutely necessary as soon as possible, and he would consider that given the nature of these rules it was almost equally important to have as soon as possible also other linguistic versions, Spanish, German, etc., because one could hardly expect parties all over the world to adopt Principles which were not in a language with which they were familiar. This would, however, take more time. As regarded the French version, the question was should an absolute priority be given to it. To a certain extent this was both necessary and advisable, the Governing Council had expressed its opinion in this respect, but then the question arose of whether they intended to link the two versions so as to make the final adoption, publication and distribution of the Principles dependent on the existence of both language versions. Personally he could give no precise answer. Of course in theory this would be the ideal solution, in practice, however, he had to admit that under the present circumstances he was not in a position to promise that within the next year or year and a half such a French version would be ready. The Secretariat was not in a position to do it.

Tallon observed that he was stressing the French version because from the experience in the EBC Group it was extremely important to establish a version in the other language for the substance of the rules. They had discovered when working that a mere translation of the English version was not understandable for French-speaking people. Secondly, he suggested that they should agree on some kind of procedure, so, for example, there could be a first draft made by Crépeau and his team, which could then be sent to all those who wanted to collaborate, such as he himself and Hartkamp, who had experience in this kind of exercise. He felt that they should say to the Governing Council that they did not know how long it would take, but there was a way to proceed.

Bonell expressed his gratitude for this encouragement. Also, in view of the fact that at the last session of the Governing Council Ms Trahan had very enthusiastically stated that the Canadian Ministry was giving all assistance, the Group could agree to contact Crépeau as soon as possible telling him what had been decided in this respect, i.e., that with the support of the Canadian Ministry of Justice and under the direction of
Crépeau a first draft of the French version should be prepared which could then be submitted to the French speaking members of the Group who, if so felt necessary, could arrange a meeting after examining the draft and could then work together with the drafting committee entrusted with the polishing up of the final English text.

Tallon pointed to the attempt to have the terminology harmonised with the PECL and suggested that he could send the French version of that draft, which he was looking into together with Isabelle de Lamberterie and Georges Rouhette, to Crépeau.

Fontaine agreed with Tallon. He understood the practical difficulties, but he could not imagine a text being published in only one language if there were a certain number of official languages in an institution, also because it might be necessary to modify one language version in the light of the other.

Bonell agreed with Fontaine in theory, but in practice things were slightly different. As regarded Unidroit the official languages were not only English and French but also Spanish, German and Italian. On the other hand, other important world languages were not among the official languages of the Institute. English and French were the working languages of the Institute.

Farnsworth observed that as an English speaker he could remember the time when Tallon would present his drafts in French. That had been abandoned, but he thought that in this instance French had a special status and that all efforts should be made as soon as possible to prepare a French text which, if not perfect, would at least be a working text. He added that as an English speaker he had taken special advantage of the English text to circulate it among people in his country, and he had been somewhat affected by the point made by Mr Plantard in the Governing Council that he was unable to do the same in his country because he did not have a text to circulate.

Maskow had difficulties in understanding why it would be so difficult to translate 30 pages. There were three French speaking members in the Group, if each of them translated ten pages there would be a French version.

Bonell concluded that there was general agreement on giving the French version the priority it deserved. Secondly, they should right from now think of producing as many other linguistic versions as possible and here he urged colleagues representing other languages to think of the possibility of providing a translation of the text. Thirdly, as far as the French version was concerned, Crépeau would be informed of this decision and asked what stage of work he was in now, and would be informed of the kind offer of Tallon and Fontaine to assist him and to work together with a view to finalising the French version as soon as possible.
Lando wondered whether they were talking of a translation of the text alone, or of the text and comments. He supported the idea of a quick translation into French. He confirmed what Tallon had stated as regarded the experience of the European Group. They had found it very useful to think in a continental language at the same time as in English.

Furmston wondered how many of these translations would be official.

Bonell had some hesitations in saying that only English and French would be the official versions, and that the others could be done privately. This no longer reflected the situation in the world and certainly would not properly reflect the intended use of the Principles. He nonetheless thought that they should immediately use their best efforts to produce at least the French version as soon as possible, possibly together with the English version. This as regarded the final text, a provisional text could be ready in the near future. As to an official imprimatur, what he had in mind was something along the lines of the texts of the ICC. He wondered whether there were official versions of these, such as for example INCOTERMS.

Lando confirmed that this was the case, there were different official versions.

Maskow indicated that the INCOTERMS were adopted in English, and that if there were uncertainties between the different language versions the English version was decisive.

Bonell could imagine something similar for the Principles, a statement to the effect that the English, and possibly the French, version was official.

Furmston pointed out that the more languages one had the more likely it was that there would be divergencies.

Drobnig wondered whether, if a Spanish, Japanese and German version of the text were to be established, Bonell would trust that a faithful translation would be rendered by the colleagues of the language group concerned. He also wondered who would publish these versions. Would that be done in the respective country or in Rome and in what way would the Institute wish to have a last word on these versions?

Bonell stated that as far as the translations were concerned he would certainly trust the respective members of the Group. At diplomatic conferences the delegates adopted official versions in languages which they did not speak at all, so why should not the qualified members of the Group be trusted to produce a new language version? He could foresee a proviso similar to the one of the ICC to the effect that if there are divergencies this or that other version is to be considered the authentic version. Publication was another issue. He could imagine that the ICC precedent
would be interesting in this context, not too expensive, not too difficult to be done, so he did not exclude that also the other language versions could be published in Rome.

The Group then proceeded to examine the comments made by the Governing Council at its 70th session in May 1991 in relation to Chapter 5, Section 1: Performance in General (document C.D. (70) 22). Unfortunately Fontaine, who was Rapporteur for that Section, had been unable to attend the meeting.

Fontaine expressed his regret at not having been able to attend the meeting of the Governing Council and appreciation for the way in which Bonell had taken his place in answering the questions of the Council. He was worried by the method followed by the Governing Council in examining the draft provisions. The Working Group had devoted lots of efforts to prepare the draft. The Governing Council would take ultimate responsibility for the product of their work so it was quite normal that they could review everything, but to go into such detail, and to restart the whole discussion to come back to some argument which the Group had considered long ago, he did not find an efficient method to get the draft through. It could go on for ever and ever.

Tallon asked what the position was if the Governing Council stated that something should be changed, was the Group obliged to do so, or was it free to disagree?

Bonell felt that as regarded this last point it was best faced when the occasion arose, which he did not think would be the case all that frequently. As to Fontaine's remarks, he had come to the conclusion that this was a shortcoming of having a popular subject. Within Unidroit there had been drafts which had even led to the adoption of conventions, such as the ones on leasing or factoring, and not one single word had been spent in fifteen years on the merits of these draft conventions. All had said right from the outset that their experts back home had said that something marvellous was being done, that they were very happy, congratulations. Here, instead, if one looked at performance, it was too tempting to say something and of course the members of the Council had raised the interesting objections which they must expect anybody who read the text with proper knowledge of the subject-matter would raise. Then of course the problem arose of what should be done with these interesting objections and remarks. Here again, looking at the points which had been discussed in more detail, precise operative indications had been given only on very few occasions, more isolated views or doubts had been expressed, and he thought this was legitimate for a body like the Governing Council when it was asked to give its overall advice on an important and complex draft such as the Principles.

Farnsworth dissociated his own comments as reflected in the report from the comments of the other members of the Council. He thought that he was the only member of the Council who had had a discussion in his own
country with a significant number of experts, of whom Rosett was one, and he had consequently prepared a series of written suggestions. The additional comments he had presented to the Council were thus not actually his, they were the virtually unanimous consensus of the group which had met in America. He realised that Unidroit had a tradition which was somewhat more autocratic than other bodies but certainly as far as the Restatement was concerned, never had there been a Restatement with as little consultation from the outside as they had had from the United States on this, and certainly there had never been anything which had been done in UNCITRAL on which there was less discussion in the United States than this. This was not unusual for them, and he should also mention that there had never seemed to be an appropriate time to supply views of experts in his country to the Working Group directly. The procedure had been such that it had seemed that that was not to be invited until the Council and it was really only the Council that had invited such input.

Lando supported what Farnsworth had said. In the EEC Group they had had meetings with practitioners from six different countries. In his view this had been a partial success, as he had had the impression that the practitioners who had come to these meetings had not been sufficiently prepared and had not had well-considered opinions, but on the other hand many of the comments made had been quite good and had also been quite well received by the Group. One thing which it might be possible to arrange, although it might be too late, would be to invite experts from many countries and to let them convene to comment on the draft. Furthermore, in the EEC Group the draft had been divided between the members of the Group and they had been invited to make a comment on whether the general principles were suitable for some specific contract (agency, banking, transport, etc.). He found that the Unidroit exercise perhaps lacked some of these elements which they had had in the EEC Group.

Bonell reminded the Group of the symposium which was to take place at the end of the meeting of the Group, for which he expressed gratitude to the Law School in Miami for having organised, and suggested that similar initiatives could be envisaged elsewhere for this last stage of the work.

Rosett suggested that it was very important institutionally for Unidroit to find a way to involve a very broad number of people, not just academics, to get these comments and to get some input on how these general principles would affect practice, not only because it would improve the work, but also because it was the only way one could sell the document to be used. As he understood it the intention was not to adopt the Principles as positive law, so they would have to be something which people looked at as something they wanted to use. He would have thought that there was a reason in the UN Convention process for involving a broad audience at an early stage, and he did think that Farnsworth had done a good job both to move along the State Department in creating these meetings and in making people aware of this at a much earlier stage. He knew that as there was no direct contact between the drafters and these national Groups it was very
easy for these comments to be seen as critical, but they were comments by 
people who had not been able to share the process. The people the Group 
recognised would have to be involved and they were therefore a very 
important step in the educational process which the success of the project 
depended upon. The questions raised were questions by first meeters to whom 
it was not immediately apparent what the best approach was, what this 
document meant. He thought it was very important to build this in 
institutionally at a fairly broad level.

Bonell thought all would agree that the more input they were able to 
receive from the outside, particularly from practitioners in addition to 
academics who had not participated in the exercise, the better it was. It 
was not that easy to institutionalise this. He would prefer to keep it as 
informal as possible. He could see some difficulties in some countries in a 
formal creation of national groups. On the other hand, he reminded the 
Group that the text had already begun to be distributed among the 
corresponding collaborators of the Institute, which were more than 100 from 
all over the world and included practitioners, judges and lawyers as well 
as academics, and their reactions were being received by the Secretariat. 
The overall reaction was a very positive one, even if there were critical 
remarks here and there. To a certain extent the comments related to points 
which had been extensively discussed, but this did not diminish their 
value.

Hartkamp stated that he had also been unhappy with the procedure 
followed. He was not opposed to having these comments, he would like to 
have as many as possible, but he would like the comments to be transmitted 
directly to the Working Group and to be discussed by the members of the 
Working Group who were more familiar with the subject than the members of 
the Council. This also touched upon the proceedings for the future, because 
there were not supposed to be many more meetings of the Working Group. He 
would propose that if many more of these comments were received the Council 
could perhaps be requested to authorise another meeting of the Group to 
discuss the comments.

Farnsworth entirely agreed that it would be more efficient to have 
comments of the kind submitted by his colleagues in the United States sent 
directly to the Working Group. The fact, however, was that if one 
circulated the draft one got comments on everything, one had no control. 
The only useful kind of a document was the kind Bonell had prepared that at 
least directed comments as much as possible in a constructive way. That 
invitation had been issued not by the Working Group but by the Council. The 
Working Group had never asked for help and it seemed to him that it might 
be possible to make some revision of the procedure. There was the problem 
that there were no more meetings of the Working Group after the next 
meeting that was scheduled, so the Council would discuss the remaining 
chapters and make suggestions and there would be no corresponding meeting 
of the Working Group to discuss these, at least as far as the schedule 
went. It might be useful to think of one final meeting of the Working Group
to deal with comments made in various countries or by corresponding collaborators and not have the comments go directly to the Council.

Tallon felt that it was necessary to distinguish between two issues which he felt were being confused. The first was outside help to prepare the text, and the second was to sell the text once it had been prepared. The first, getting comments from national groups, to have the advice of the Governing Council, etc., was one thing but there had to be a deadline because it could go on and on. Then the second action was when they presented their text, at which time they could state that they had done their best and these were the advantages of using it. The two issues did not address the same people and did not have the same intention.

Brazil observed that as the Principles began to be exposed people were going to make comments, and that got them to the matter raised by Farnsworth, i.e. they did need to have a sort of procedure that was structured for that sort of situation. What Farnsworth had mentioned appeared to be a very good way of doing that. He himself was a member of the Governing Council and the last thing they would want would be for such comments to be channelled into the Governing Council. On the other hand, there had to be a limit to the time in which these comments could be taken into account at all. He was planning in Australia, in conjunction with others, to have a work shop later in the year. For various reasons they might limit attendance to people who were invited, they would certainly aim to include people like the Chief Justice of their High Court, very senior judges and other people who were experienced in the field of contracts. He would envisage that Bonell and other members of the Group might be speakers. As far as the Governing Council comments were concerned, as he understood it there was no direction in many of them to the Working Group, and he did not think that this was likely to arise at all.

Bonell also felt that two aspects should be distinguished, first, the relationship of the Working Group with the Governing Council: they were a Working Group, the Governing Council had always had trust in the work of the Group, but it was only fair that before giving its final imprimatur the Governing Council would want to take a more careful look at it, so he would not be so critical as far as the current practice was concerned. As to the more general question of how to involve outsiders, all that had been said was very pertinent, but he would have thought that even in an informal manner all the members of the Group in one way or another already followed such an approach, be it by just reading what was going on at home - they came from very rich national or international experiences and whatever they suggested would be the result of an experience gained from many different sources and inputs. On the other hand the necessity of trying to finish it as soon as possible and to publish the final text was not to be questioned. Of the many points Rosett had raised in his critical remarks on CIGS the one he had appreciated the most had been the warning not to overlook the danger of CIGS becoming scleroticised because no revision process was foreseen in it. With respect to the Principles they were in the happy
position of not having to face such a problem. He was not saying that as soon as the Principles were published they should reconvene and start all over again, but he would certainly take it that within a reasonable period of time, just as the ICC did with INCOTERMS or UCP etc., in the light of the experience gained and of the comments received, in ten years' time a new edition could be issued, so it was an on-going process. To receive too much input now would, he thought, involve the risk of never finishing. The comments received so far had been extremely positive. He was of course prepared to prepare a paper on their comments, but he did not consider them to be of such a kind as to urge the Group to reopen the discussion. Obviously if a certain point gave rise to the concern of a number, if not all, of the replies then the discussion would have been reopened, but so far they had been of the nature of one small remark here and another there. It was not that the comments were not taken into account, they just were not very strong on any particular point, but the very fact that there were no very strong comments was also important. He preferred not to suggest to the Council to change the procedure on which it had agreed. If the Council was prepared to give its final approval to the draft this was precisely what they wanted to achieve and not to delay the whole exercise too much.

Furnston did not think that an arithmetical approach should be applied to assessing the value of comments. He could well imagine one person making a comment which was worth taking seriously even if no one else had made that comment. Secondly, it seemed to him that all of this was driven by the time-table, which to his mind was not wholly clear, because if they had already decided how many more meetings they were going to have and when they were going to have them, then that was itself going to decide what possibilities there were for considering other views.

Bonell expressed surprise at the discussion, as it seemed as if this was a new development to some of them. So far some of them had had these consultations, whether with a view to the meetings of the Working Group or whether only with a view to the meeting of the Governing Council. Some others had perhaps done this informally. The consultations among the corresponding collaborators of the Institute had been announced already two years previously and so far no one in the Group had stated that it was necessary to revise the draft in the light of the comments received, quite the contrary: the Council itself had expressed some reservations here and there and some of the members of the Group had wondered whether that was a fair procedure as they would have to reopen the discussion. If the Group wanted the Secretariat to prepare a full over-view of the comments received not only from the Council but also from the corresponding collaborators and if they felt that it was useful to examine the comments in the course of a session of the Group this could be done.

Hartkamp indicated that also the comments of the American Group should be considered in the course of such a meeting, and not only their comments on the section with general provisions on performance, but also on the other chapters.
Farnsworth suggested that it would be very useful and efficient if the Secretariat could give the American Group the comments it prepared for the Governing Council on the remainder of entire draft, because it was certain that unless the reader had some guidance the reader would find problems that were not of interest to the Group and which most of them would probably not consider.

Purnston observed that if the response of the corresponding collaborators had been that indicated by Bonell they could not have been asked specific questions, e.g. whether they preferred solution A, B or C.

Bonell did not think that he could ask corresponding collaborators whether they preferred one of alternative solutions if the Group had arrived at a solution after several years' work. What he had tried to do in the documents was to high-light problem areas and to indicate why a certain solution had been chosen.

Tallon did not feel that individual consultations would lead to any good result. The only effective method was the one adopted by Farnsworth, and this was where the Governing Council should strongly recommend its members, and the rapporteur of the country concerned where there was one, to convene such a meeting. For France, for example, Mr Plantard and he himself could be asked to do so. He did not feel that it would be necessary to wait for a French version: they were consulting people who ought to be experts on international trade and as a rule they would know English, so they could work on the English version.

Bonell expressed his gratitude to Tallon for this comment which in fact was in agreement with what the Governing Council had decided: it had requested the Secretariat to prepare the document well in advance to allow these consultations on the part of the Governing Council. The members of the Governing Council would then send in the written observations to the Secretariat so as to allow the Council at the next meeting to discuss only the written observations of each member of the Council which he/she had obtained from such a consulting process. The result had already been recalled: only Farnsworth, and also Prof. Loewe who had sent his comments in German, had sent any written observations. On the other hand this lack of action could be seen in a positive manner, in the sense that the members of the Governing Council had felt that what they represented was reflected in the texts. In conclusion, he wondered whether the Group would agree that they themselves undergo whatever procedure they thought appropriate depending on the circumstances of the case in order to receive as many reactions and as much input as possible.

Hartkamp asked for assurance that these comments would then be passed directly to the Group and not to the Governing Council.
Farnsworth stated that this procedure assumed that the appropriate documents on all the remaining chapters would be prepared before. They would need to have that. It would not be possible in the United States, even if he were to be given the document here and now, to have a meeting and to have the comments ready for a Working Group session in June.

Fontaine was concerned about the time-time. He favoured consultations, but they had to think about finalising their work within a decent time, and consultations took time. If they decided to proceed with consultations he felt that they should have a very precise time-table.

Brazil came back to the event planned in Australia, which he did not see as primarily, or only, an event to invite comments, the primary purpose would be to explain and to inform people of the Principles. He felt this to be the proper process at this stage. On the other hand there could be questions and comments and the problem would still arise on what to do with them, and he felt that they should come back to the Working Group. He felt that it was important to label this exercise not as an exercise of "now we are going to go ahead to receive comments", but it was a question of labeling the exercise "now we are really going out to tell people what we have been doing, this is the product produced and we want to tell you about it and discuss it with you".

Introducing the points raised by the Governing Council, Fontaine stated that a few observations had been made on Arts. 5.1.1 and 5.1.2 on express and implied obligations but had not resulted in any actual proposal. Arts. 5.1.3 and 5.1.4 ("Duty of diligence Duty to achieve a specific result") had led to a lengthy discussion based on the proposals by the American group. It had not been proposed that the provisions should be deleted, but that the order of paras. (1) and (2) of Art. 5.1.3 might be changed and that the expression "duty of diligence" might also be changed. There had been a proposal to bring Art. 5.1.13 closer to Arts. 5.1.3 and 5.1.4. There had been discussions on partial performance and on performance at one time and in instalments.

Bonell added that what was now Article 5.1.2 ("Implied obligations") had been introduced by the last meeting of the Group which had taken place immediately after the meeting of the Governing Council, which confused the numbering of the provisions, and that it was with respect to the only article which existed at the time, Art. 5.1.1 that it had been said that it was either self-evident or not sufficient. The Group had in fact included Art. 5.1.2 the following week for precisely that reason. The remarks of the Governing Council had therefore already been met.

As to the proposed change in order of the paragraphs in Art. 5.1.3, Fontaine did not mind. If it was justified by the fact that the obligations to achieve a specific result were more frequent he disagreed: he did not think that that was the case. But that did not matter - he had no objection to changing the order.
Tallon had no objection either.

The suggestion of the Governing Council to invert the paragraphs was therefore followed.

The second issue was the proposal made by the American Group to change the wording "duty of diligence" to "duty to attempt to achieve a specific result" which the Council had agreed should be sent back to the Working Group.

Fontaine was not happy with the suggested amendment. He did not think that it would change much if the formulation were changed, but his preference was to keep "duty of diligence".

Farnsworth observed that it was not as common by any means in common law countries to dwell on the obligation of best efforts in contraposition to the obligation to achieve a specific result that was more in the civil law tradition. If they were bracketed in the same paragraph any common lawyer was likely to think that this was rather novel and interesting and would wonder what it meant. If one had a duty of diligence, without saying a diligence to do what, and then had a duty to achieve a specific result it did raise the question of diligence to what end. If A agrees to use diligence to get B to the Everglades and as A is driving along B observes that it seems a strange route and was he not going to the beach, A answers yes he is going very diligently so B should not worry, B objects that he wants to be taken to the Everglades and A says that diligence is the standard, he thought that B would be entitled to say that A was not being diligent in achieving the end in question. The problem the American group had had was not with diligence, but with diligence to what end. That was prompted by the fact that immediately afterwards there was the paragraph on duty to achieve a specific result.

Drobogj observed that in Germany the distinction between duty of diligence and duty to achieve a specific result as such was not known, so also Germans would have some difficulty in understanding it. The contraposition between the two made them seem to be on two different levels. To some degree it was a question of language, but he would prefer to replace "diligence" with something which expressed the object of the duty. He suggested "best efforts" or "reasonable efforts" but not to introduce the concept of "result".

Farnsworth thought that if "reasonable" or "best efforts" were used that would help because in the common law they did talk of "best efforts" and "reasonable efforts" and would understand that more easily than the duty of diligence which suggested that one simply should not act with a lack of care.

Lando also felt that "reasonable efforts" was better than "diligence". Otherwise, if one wanted to indicate efforts to what, one
could say as in Art. 5.1.4 "in the performance of an activity". He agreed with Drobnig that the word "result" in this context seemed somewhat inadequate.

Tallon would accept "reasonable efforts" only if in French it would be translated by "obligation de diligence".

Rosett thought that it would be necessary to check back because at the discussion of the American group none of the participants had had the UCC in front of them and there was a UCC section which drew a distinction between those situations where "reasonable efforts" were required, he was thinking about exclusive contracts.

Farnsworth observed that the section referred to "best efforts". He had looked for American cases and had found none that suggested that there was a difference between "best efforts" and "reasonable efforts". He suggested that "best efforts" might be a little confusing to people who were not native English speakers.

Furmston was not sure what "best efforts" meant in English English as opposed to American English. He could see that some English lawyers might think that it was a subjective standard, i.e. I do the best I can, which might be well below (or above) reasonable standards. "Reasonable" was a classical word which described an objective standard. He would therefore be happy with "reasonable". As far as he could see "diligence" and "reasonable efforts" meant the same thing, both in English and in French.

With reference to the rendering of "best efforts" in English as "diligence" in French, Sono wondered who these texts were addressed to, were only lawyers being addressed or not rather non-lawyers, people in business? Moreover, did they have to know the contents of French law to understand the meaning of duty of diligence? There were French-speaking people outside France and they were using French and English to cover as much as possible at a global level, but if they started to use legal terms which only lawyers in particular regions used, it was dangerous, because what was the purpose of that language?

Rosett commented that this was where Reporter's Notes came in.

Sono recalled the preparation of CISG, where of course there had been a problem of translation. It took time to translate properly, and there had been long debates on what word should be chosen. Some words had no corresponding words in English law, others had no corresponding word in French law, but in the text of CISG they had tried to use the same word as much as possible even if some words had no meaning at all under a particular national law.

Fontaine preferred not having any reference to result in the provision. As to the choice of the expression to use, "best efforts" or
reasonable efforts", he had a preference for "best efforts". He had recently had the opportunity to study "best effort" and "reasonable effort" clauses and in the English language contracts he had had the impression that "best efforts", or "best endeavours" mainly in England, was more frequent. He preferred "best" to "reasonable" also because "reasonable" came in the definition given immediately afterwards. As to Soeno's comment on the French translation, the French speaking "juristes d'entreprise" sometimes used "les meilleurs efforts" when translating from English, but they were perfectly used to "obligation de diligence".

Farnsworth suggested that if "best efforts" were adopted they might want to put "efforts" rather than "diligence" in the definition in a formulation such as "[...] that party is bound to make the efforts that would be made by a reasonable person [...]".

This suggestion was accepted by the Working Group. The text of the provision therefore read:

"To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make those efforts that would be made by a reasonable person of the same kind under similar circumstances".

The title of the provision would therefore be "Duty to achieve a specific result Duty of best efforts".

Tallon requested that it be put in the minutes that the French title would have "Devoir de diligence" for "Duty of best efforts".

Turning to the suggestion made by the Governing Council to move Art. 5.1.13 closer to Arts. 5.1.3 and 5.1.4, Fontaine had no objection if it only meant changing the order of the articles. He added that he would also move Art. 5.1.5 ("Cooperation between parties") to the beginning of the Chapter, as the third article.

The Group agreed to move Art. 5.1.13 to immediately after Art. 5.1.4 and Art. 5.1.5 to immediately after Art. 5.1.2.

Turning to the discussion on Arts. 5.1.8 (5.1.7 at the time) ("Performance at one time or in instalments") and 5.1.5 (5.1.6 at the time) ("Partial performance"), Fontaine stated that he would go along with the conclusion reached by the Council. The Group had discussed the relationship between partial performance and performance at one time or in instalments many times. The provision of performance at one time or in instalments had in fact been adopted at a rather late hour. It was a typical case of two provisions, one inspired by the civil law which was not familiar to the common lawyers, the other a common law provision on a similar, but different, problem and they had tried to see the relationship between the two, had in the end adopted both and they did not fit together. A proposal
had been made in the Council to replace the two provisions by something simpler which would merge them, to the effect that the party must in principle perform at one time unless the circumstances indicated otherwise.

Farnsworth wondered whether the suggestion was that what was Art. 5.1.8 would be retained and Art. 5.1.6 would be deleted.

Fontaine had understood that the solution to be kept was the one in Art. 5.1.6 and not 5.1.8.

Bonell had understood the discussion in the Council in the sense that the common lawyers simply did not accept the kind of questions that the civil law systems were used to addressing with the provision on partial performance, they were unable to consider the way in which the civil lawyers approached this particular question and therefore introduced the offer and promising to perform later on. He had also understood the outcome of the discussion as being that they should forget about having a provision on partial performance and just state what was already stated in the other provision.

Farnsworth commented that that was not what the common lawyers he represented thought, they simply did not understand whether the opening phrase of Art. 5.1.5 assumed that the offeror of performance proposed to render the rest of the performance at some time, or if it was that he simply was going to do only what had been performed in that part. Their problem was that they had not known what was being said, not that they had had some conceptual notions that would make it difficult to accommodate it.

Bonell observed that Farnsworth was now introducing an element which for the civil lawyers just did not make sense.

Fontaine added that it concerned the situation when the obliged party came with partial performance at the date of maturity, it was a breach situation.

Rosett commented that then there was no right to make instalment deliveries.

Fontaine said that that was possible if the parties agreed in advance or at the moment delivery was due, and then for each instalment the problem of partial performance would have to be considered. If one was supposed to delivery 20% today and only delivered 15% then it was a problem of partial performance, but these were two separate problems. First the instalment problem had to be decided and then if something was promised at a certain moment, whether it was the whole performance or only a part of it, the problem of partial had to be considered.

Farnsworth indicated that what he understood was that if, for example, he was to deliver 100 widgets on a certain date, case 1 was that he came with 90 widgets and that was it; case 2 was the he came with 90 widgets and
said to the other party that the other 10 would only be there on the following day. The civil lawyers would see no difference between those cases and that surprised him.

Fontaine indicated that it was breach, it was a situation where the receiving party could refuse to accept it.

Bonell added that this was subject to the proviso "if there is no legitimate interest", if one said that the 10 missing widgets were arriving and were just around the corner the receiving party would have no legitimate interest to reject the 90 widgets.

Fontaine stated that the rule could of course be softened and that exceptions could be made, but the rule was present in almost all civil law codifications as something obvious.

Rosett wondered what the situation would be with a manufacturer who had to deliver 10,000 things in three months and did not want them to keep accumulating but wanted to make 4000 a month, so the first month he delivered 4,000. Would then the buyer not have to take those 4,000?

Bonell stated that that was different: one had to distinguish between the cases where there was a fixed date for performance and those where, as in Art. 5.1.7, there was a period of time over which performance could be rendered. If there was a period of time one was outside Art. 5.1.6 until one arrived at the final date of the period. If one said that one would deliver 10,000 pieces within three months and nothing else was said in the contract, they took it that within reason one could decide on delivery as one wanted, and this had nothing to do with partial performance. If the content of the contract was a little more precise and it said that 3,000 pieces had to be delivered by the end of this month, another 3,000 by the end of next month, if one then at the end of the month showed up with only 2,000 it was partial performance.

Rosett had the impression that the results to specific instances seemed to come out the same in the system Bonell was describing and in the system he knew. He suspected that it was a problem of vocabulary.

Farnsworth referred to the comments of both Professor Goode and Professor Enderlein which to him seemed to indicate that they were not clear that Art. 5.1.6 covered those situations. He felt that his point would be met if one added in Art. 5.1.6 language saying "whether or not coupled with an assurance as to the balance of the performance". To him it would then be clear that in determining whether the receiving party had no legitimate interest in rejecting this offer of part performance one would take into consideration whether or not the offer was coupled with some assurance that the rest would come later.

Fontaine wondered whether in the common law it would make a difference whether partial performance alone were offered or whether partial
performance was offered with a promise to perform the rest later.

Farnsworth stated that it would certainly make a difference in the ultimate decision on the facts of the case.

Rosett was pretty sure that it would be consistent with the standards in § 241 of the Restatement as to what breach would be material because it went to the question of whether the disappointed party could reasonably expect to get performance and under the UCC rubrique it would go to the question of cure. So if one took common law or if one took the UCC as the standard, in both cases it would make a difference.

Hartkamp commented that a proviso such as the one suggested by Farnsworth would not actually change the rule, but would make it clearer.

Tallon felt that the formula suggested by Farnsworth was typically a formula for the comment.

Bonell indicated that as there appeared still to be very real problems for common lawyers to understand what was meant by this provision, and in view of the stand taken by the Governing Council, it might be more appropriate to adopt the additional language, also because it made no difference to the civil lawyers. Both articles could then be retained.

This was agreed, and Art. 5.1.6(1) (Art. 5.1.10(1) in the new numbering after the moving of the articles) therefore read:

"The obligee may reject an offer to perform in part at the time performance is due, whether or not coupled with an assurance as to the balance of the performance, unless he has no legitimate interest in doing so".

Lando came back to the comments made by Professor Loewe in the Governing Council that Arts. 5.1.5 and 5.1.7 were in contradiction to each other, others had expressed the same idea in different ways and Bonell had given a long explanation. He himself did not quite understand Bonell's explanation, but even if it were correct, he wondered whether the average businessman would understand this subtle explanation.

Farnsworth considered that perhaps Loewe's problem of the relationship between these two articles might be helped if Art. 5.1.6 were moved closer to Art. 5.1.8, to follow it for example, because Art. 5.1.8 told you that you must perform at one time, and Art. 5.1.6 told you what happened if you did not perform all at that time. He also had no objection to merging the provisions as had been suggested in the Governing Council.

Pontaine did not like to merge the provisions because they dealt with two different problems, but he considered that to put Art. 5.1.6 after Art. 5.1.8 might perhaps make sense, because the problem of Art. 5.1.8 came first.
It was therefore agreed that Art. 5.1.6 would follow Art. 5.1.8.

Turning to the discussion on Art. 5.1.9 ("Order of performance") and 5.1.10 ("Earlier performance"), Fontaine commented that this was another example of trying to put together a civil law rule and a common law rule. The provision on order of performance had a long story: it had been adopted in Potsdam, deleted in Rome and reintroduced in Bristol. Personally he was not much in favour of the provision because it seemed in some cases either to state the obvious or just to state general principles that were hard to apply. In both cases they had also "unless the circumstances indicate otherwise" and he had the impression from the discussion in the Governing Council that there were so many cases where the circumstances would indicate otherwise that as drafted now the provision was not very practical.

Bonell indicated that also many other points had been raised. He recalled previous discussions in the Group on the rule and the exception and on which provision should be the rule and which the exception. What had mainly been questioned in the Council was the concept in the second paragraph: "To the extent that the performance of only one party requires a period of time that party is bound to render [it] first".

Fontaine recalled the issue raised by Mr. Sevón of who had to go first in a case of simultaneous performance, which was very important and was not covered by this article. If the provision were kept, he did not feel that any clear directive had come out of the discussion of the Governing Council which would permit them to make any changes.

Bonell had had the same impression. He added that one of the reasons for the insertion of this article was its pedagogical value, so precisely because of Sevón's observation he thought it preferable to keep it, as when parties read the article they would become aware of the problem and would make the necessary provisions in the contract.

Maskow thought that the article should be kept.

Furnston felt the article to be quite useful. Most of the supposed difficulties raised by the members of the Governing Council he did not experience as difficulties himself and he could quite easily see what the solution was for virtually all of them.

Farnsworth felt that the argument of the pedagogical value of the article had some force. Particularly para. (2) said that the person whose performance was to take time must make some provision for early payment if there was to be any early payment and it was usually the person who was to perform over time, not the person who was to pay, who was responsible for drafting the agreement. For this reason it was good to announce that under these international general Principles one must put something in the contract unless one was willing to wait until the end to get the money.
Bonell further drew the attention of the Group to the interventions by Mr Sen (India) and by Mr Ajala (Nigeria) who had referred to important cases within their experience, which to a certain extent touched upon the withholding of performance situation in Art. 6.1.3, but the withholding of performance remedy presupposed that the problem of who was actually to perform had been solved.

Brazil felt that the article did serve a useful purpose in making the issue a solvable problem.

The Group finally decided to keep the article as it was.

Turning to the discussion in the Governing Council on Art. 5.1.11 ("Price determination"), Fontaine concluded that no precise recommendations had emerged.

Tallon pointed out that the this text was the same as that of the PECL.

As to Art. 5.1.13 ("Payment by cheque or other instrument"), Farnsworth indicated that in the United States it was possible to have an instrument that was the direct obligation of the bank and it took the form of a cheque, the bank was the drawer and the bank was the drawee and it was called a "cashier's cheque" and if such an instrument were given in payment it was generally understood that this rule in Art. 5.1.13(2) would not apply, it would apply only to the case where a personal cheque was given. There were two problems as to that: one was that none of the American readers knew what was meant by "cheque" here, whether only a personal cheque was intended or whether also a cashier's cheque was included. If it were made clear that a cashier's cheque should be included, there might be some question as to whether that was the correct rule. The American group had further been curious as to the language in para. (2) line 3, "or a promise to pay", because nobody could think of a case in which a promissory note as such was given in payment. He thought that that might be deleted unless they had something particular in mind.

Furnstond stated that the American rule appeared to transfer the risk of the bank going insolvent to the payee. Certainly in England banks not infrequently went insolvent and he thought that that was not unknown in the United States.

Farnsworth confirmed that that was correct. Professor Goode had commented that the rule should apply to all cheques. If one took that position, it would perhaps be enough to explain in the comment that one did mean all cheques. It was true in the United States that if one took money or a cashier's cheque it was generally understood that one took the risk of not being able to sue the other party.

Drobnig explained that they had had in mind not only other obligations of the debtor but also of third persons, so a "bank cheque" or even a "confirmed bank cheque" (the same thing as the American "cashier's
cheque"), would fall under the rule, because the risk should remain on the debtor. He thought it would be quite sufficient to point out in the comments that additional obligations or promises by third parties were covered by the rule.

As to the promises to pay and promissory notes, Bonell indicated that it did happen that they were given in payment.

Farnsworth indicated that it was possible in every legal system to have an understanding that in return for releasing A completely B would promise to pay what A owed and that kind of promise to pay did not fall within this rule. He would have thought that one was talking about negotiable instruments only. He asked for an illustration of this from the real world.

Bonell indicated that in consumer transactions in Italy it happened that one paid with a promise to pay: A delivers the promissory notes to the creditor who is then entitled to collect them at the date of maturity.

Farnsworth observed that this provision was entitled "Payment by cheque or other instrument", and he would think that if one gave a promissory note that was the promise to pay in the future, but then when one paid one did not give another promissory note, one gave a cheque or arranged payment in some other means.

Fontaine wondered whether, as this was not usual in the United States but was in other parts of the world, Farnsworth would have any objection to having those words in the provision. It could be said in the comments that if a promise to pay was used then it would be subject to that provision.

Farnsworth felt that it was hard enough to write rules for real cases without having to write them for cases one could not imagine. It did seem to him that the rule as to cheques was pretty well understood but the rule as to accepting promises from third parties he did not think was so clear, and that there may well be what they would call a novation which would release the original debtor in exchange for the third party. The only point here made was that the usual institution of a cheque did not have this consequence, even if it was a third party cheque. He could not think what harm was done by deleting it if cases could not be thought of.

Bonell observed that promissory notes and bills of exchange were both cases which were quite frequent.

Farnsworth thought that noone had thought of a case where a promise was used as a means of payment. A promise was sometimes used as a substitution for the obligation and then there might be very difficult questions as to whether this rule applied or not. It seemed to him that if the rule were stated as broadly as it was stated it was at least possible to misinterpret it and if it were eliminated no real case had been eliminated because noone had as yet recalled an instance where a promissory note was used as payment.
Hartkamp saw no harm being done if those words were deleted. He suggested the comments could explain that for those parts of the world where it was customary to pay by promise this was included under the rule. The provision would therefore refer to "a cheque or any other instrument".

Drobnig felt that "instrument" implied "negotiable instrument", it certainly implied a written form. Drobnig felt that the words did not harm.

Voting on the deletion of "promise to pay" in para. (2), only 2 voted in favour, so the text remained as it stood.

Turning to the comments on Art. 5.1.15(1) and to its phrase "[...] any of the financial institutions in which the creditor has made it known he has an account" with which the American group had had problems, Farnsworth indicated that one of the problems was the question of the correctness of this rule: if one gets payment to the financial institution but the institution does not get it into the right account, who should bear that risk? The American group had proposed to modify the language to read "[,] any of the financial institutions authorised by the creditor for that purpose".

Sono pointed out that Arts. 5.1.15 and 5.1.16 contained a lot of problems which were not discussed at all. First of all no distinction was made between payment into account (account transactions) and payment in cash. Also currency of payment and currency of account were not so clearly distinguished and also "payment" and "money" were not defined at all. Would, for example, the ECU be money? Also questions of legal tender seemed to be completely ignored, even if it was the basis of each nation's currency. He pointed to the work done within other organisations with reference to the finality of payment between two parties (ILA) and with regard to the conclusion of the credit transfer (UNCITRAL).

Farnsworth suggested that Sono prepare an informal letter on these questions to be circulated to the members of the Group. Sono agreed to do so.

In view of the time constraints it was decided to postpone discussion on this point and on the other points raised by the Governing Council to the next meeting of the Working Group.
UNIDROIT WORKING GROUP FOR THE PREPARATION OF PRINCIPLES FOR
INTERNATIONAL COMMERCIAL CONTRACTS

16TH MEETING, MIAMI 6 – 10 JANUARY 1992

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