UNIDROIT 1993
P.C. - Misc. 17
(English only)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

OF

THE MEETING HELD IN ROME

FROM 27 TO 31 MAY 1991

(prepared by the Secretariat of Unidroit)

Rome, February 1993

The fifteenth meeting of the *Working Group for the Preparation of Principles for International Commercial Contracts* was held from 27 to 31 May 1991, at the seat of the Institute. A list of participants is annexed to these Summary Records.

Professor Riccardo Monaco, President of Unidroit, opened the meeting. He welcomed Mr Patrick Brazil and Mr Yoshio Otani who participated in the work of the Group for the first time.

On the table for discussion was the examination of the revised draft and comment on Chapter 6, Section 4, Damages and Exemption Clauses, prepared by Professor Tallon (Study L - Doc. 49), and a proposal presented by Professor Lando for a provision on the supplying of omitted terms.

Tallon indicated that he had prepared the draft in French and had then translated it into English. He stressed the importance of having a French version of the Principles to cater for the needs of those who did not understand English.

Mr Malcolm Evans, Secretary-General of Unidroit, recalled that the question of the French version of the Principles had been discussed at the session of the Governing Council which had taken place the week before. Concern had been expressed by some of the members whose working language was French, at the fact that there was as yet no complete French text. They had wondered when a French version was to be expected. The Secretariat, and some members of the Council, had stressed the fact that what was under consideration was a French version and not a French translation. He regretted Fontaine had not been able to attend the meeting as he would have welcomed the opportunity to look at this question with all the French speaking members of the Group to see how best it could be approached. He reassured Tallon that the Secretariat and the Council were aware of this question and believed that it was essential to address it as quickly as possible.

Bonell recalled that the question of other language versions had also been raised at the meeting of the Council. Having the Principles in as many language version as possible was essential precisely because they were dealing with an instrument which was different from an international convention, i.e. from an instrument which once approved would become a binding normative text; what they were dealing with was an instrument which had to be voluntarily accepted in practice.

Introducing his draft, Tallon observed that his text had been prepared five years previously and had been discussed and modified at the meeting of the Working Group in Ivry-sur-Seine in November 1986 (see the report of that meeting, document P.C. - Misc. 10). He had not changed the comments or the references, some of which were out-dated. He had noticed the different styles of the different Rapporteurs, and hoped that uniform instructions would be forthcoming. Also the titles of the articles should

be uniformed in style - as it was some were long and some short.

Bonell recalled the advanced stage of work which the Principles had reached, and commented that it was quite reasonable to expect that at the next meeting the final reading of the text would be completed. Although the Rapporteurs were called upon to revise their papers following general criteria which the Group would work out. As to the finalisation of the text, an *ad hoc* Group would have to be set up for the "editorial" work. The Secretariat thought that it would be an excellent idea to follow the example of the European Contract Law Commission chaired by Lando and to establish a small editorial board composed of members of the Group. This editorial board would try to work out certain guidelines for the comments already in the course of the present meeting, and could then later supervise the work of those who were to do the actual editing.

Article 1 (Article 6.4.1 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 1 (Article 6.4.1), Tallon recalled that the provision had been extensively discussed at the Ivry meeting. What now had to be decided was whether or not what was in brackets should be kept ("either exclusively or in conjunction with other remedies").

Bonell recalled that at the meeting at The Hague, when the general problems of cumulation of remedies and the relationship between different remedies had been dealt with the Group had considered two alternatives: either having a provision dealing with the problem in general terms, or to address the problem remedy by remedy. Ultimately the Group had agreed on the second approach. This meant that with respect to damages, which could of course be taken as an exclusive remedy but which could also well be cumulated with all the other remedies, this had in fact been carried by the Group and that therefore the text in brackets could be considered to have been accepted.

Farnsworth observed in relation to the comment, that there was a specific reference to force majeure. Something which was mysterious to people in the United States was the notion of hardship and there was no reference to hardship. He thought that the answer was that in the case of Art. 6.2.3 if the court adapted the contract and the party performed in accordance with the adapted contract it was not a case of non-performance. Nevertheless, lawyers in America would wonder why there was a reference to force majeure and not to hardship. A sentence could perhaps be added to the comments explaining how the notion of hardship fitted in and why it did not have to be mentioned in the text.

The Group agreed with this suggestion.

Maskow considered that the problem was that the section on damages and exemption clauses appeared under the title "Non-performance", but there might be cases of damages also in other contexts. To a certain extent this was true also of the case of hardship: in the Principles hardship was not necessarily a case of non-performance as the section on hardship had been placed in the chapter on performance. It was thus not quite on the same footing as force majeure, even if it was closely related to it. There were also other instances where this problem arose, for example in Art. 3.17 which dealt with damages in case of avoidance as a result of mistake. For these cases damages had been mention, but only to exclude the negative interest. This Section was, however, the only part of the Principles in which the problem of damages had been further developed. He therefore wondered whether at least Art. 1 of the section on damages should not state that these rules did not apply only to cases of non-performance, but also to other cases where damages were foreseen. They further had to consider what they should do with the concept of negative interest. If it was to be kept in Art. 3.17 it would have to be considered here as well. If it was not to be considered here, then the possibility of deleting it in Art. 3.17 had to be considered.

Tallon disagreed with Maskow. There were no damages in cases of hardship.

Maskow indicated that then it was not necessary to mention hardship here as Farnsworth had proposed.

Tallon added that he disagreed also on the second point. When Maskow spoke of damages for mistake, or of damages in case of avoidance of the contract, the damages were not contractual damages. In French law it would be a case of damages under tort, and the rules were not the same. The problem of the distinction between contractual liability and delictual liability was a huge task he did not feel that they should embark upon. They should confine themselves to the case when there was non-performance of the contract. Precontractual liability was quite different. There was of course *culpa in contrahendo* and so on, but if such concepts were to be adopted then there should be a specific discussion on the point.

Bonell recalled that the question had been discussed at an earlier stage and at the time there had been an overwhelming majority in favour of the present approach. The present section was in the chapter on non-performance, it concerned damages arising out of non-performance while the other damages were differently framed. For example, Art. 3.17 which concerned the case of avoidance, where different language had been chosen deliberately to restrict it to the *negatives Vertragsinteresse*. There were other instances, such as the duty of confidentiality in the formation chapter (Art. 2.15), where the question was left open as to whether it was liability *ex delictu* or *ex contractu*. These were all questions they had thought could not be dealt with in the Principles. Here the intention was only to deal with damages connected with non-performance.

Crépeau commented that readers would wonder what the rules for the assessment of damages under Art. 3.17 were. Were the Principles to have a rule which would say that for the determination, or the criteria, or the assessment, of damages the reader would be referred to the articles on damages and exemption clauses? It was one thing to say "the party who knew or ought to have known of the grounds for avoidance is liable in damages" and quite another to say that the criteria governing the assessment of damages were, for example, full compensation or direct damages.

Bonell felt that Art. 3.17 already gave fairly precise criteria.

Drobnig observed that when Art. 3.17 had been drafted they had deliberately not gone into details because they had been waiting for the section on damages. He thought that the intention had been to leave open any details until the section on damages had been fully set out. It was not only a question of Art. 3.17, but also of the last sentence of Art. 6.1.5(3). As he had described it, in Tallon's view this would be more delictual than contractual. There might be other occasions on which they had mentioned damages without indicating what type of damages were concerned and how they should be calculated. He thought all these instances should be considered and a general answer found. That general answer could be that in certain respects the rules of the section on damages, those not specific to non-performance, could be applied by analogy.

Bonell thought that they all agreed that Arts. 3.17 and 2.15 did not fall under damages for non-performance, but with respect to the example Drobnig had quoted, he himself would have had no hesitations to consider it included, because they started from the general provision defining non-performance as the failure to perform any of the obligations, and the comments stressed the fact that with respect to damages no distinction was made between the main obligations and accessory obligations. He did however, consider Drobnig's suggestion to give some consideration to whether or not some of the provisions in Section 4 could be applied by analogy also to precontractual liability, or to damages not related to non-performance, to be worth taking up.

Tallon stated that he intended to say that these rules applied only when there was breach of a contractual obligation, such as confidentiality etc., and to continue by stating that when there were damages which were not contractual damages it was possible to apply the provisions by analogy.

Maskow observed that there were obviously differences with regard to the question of avoidance because of, for example, mistake, but it was less clear whether the same differences also existed as regarded precontractual obligations.

Tallon did not think it possible to enter into so many details. There were systems in which precontractual liability was a separate contract and this provision would apply to this separate contract, but in many countries

precontractual liability was not recognised as a separate contract.

Bonell added that even where this was the cases it did not apply *in toto*. He concluded from the discussion that it was agreed that they should deal with damages only in relation to non-performance, but because other kinds of damages were envisaged elsewhere in the Principles, the Group should give thought to the extent to which single provisions of this section could be considered to apply by analogy to these other kinds of liability for damages.

Lando wondered whether it was then agreed to say that in cases of precontractual liability, or of other cases of tortious liability in contractual relations, it was possible to get reliance interest. In cases of contractual damages one could claim either the reliance interest (which was accepted in many countries) or more commonly the expectation interest. There were some instances of precontractual liability in the Principles, and he thought that most legal systems would say that in these cases one could only get reliance interest. He suggested that be drafted. Then another provision could also be drafted which would say that whenever one could claim expectation interest one could also choose to claim reliance interest.

Bonell commented that they would have the opportunity to come back to this in connection with Art. 6.4.3, where the so-called expectation interest was sanctioned. Whether at that point it might be considered appropriate to add a new paragraph stating that it was possible to ask only for reliance interest was open for further consideration. His main concern was finding a formula which would give the idea of what was meant by "expectation interest" and "reliance interest", which he thought would be quite difficult. They did have an attempt to do so in Art. 3.17 which could be expanded to other kinds of precontractual liability, but then they would have to reconsider what sort of precontractual liability they envisaged and he wondered whether that should not be left to the further development of the Principles in practice. He was thinking of national legislation, for instance the Italian Civil Code, where there were express provisions on precontractual liability (Arts. 1337 - 1338) where the reliance interest was laid down but then there was a separate section on damages relating to non-performance. He wondered whether it would be appropriate to enter into further details.

Crépeau suggested that it might be advisable to think of the possibility that whereever there was a mention of damages in parts other than Chapter 6 Section 4, a reference be made to the effect that the rules in Chapter 6 Section 4, could be applied by analogy. The comments could specify which provisions could be applied by analogy.

Bonell thought that for the time being they could disregard the question of whether or not there should be a reference in the text. In substance they agreed that when they examined the articles of the section

under consideration thought should be given to their applicability also with respect to the other instances of damages. At the end they could come to a conclusion of what the situation was and decide whether or not to express it in the text.

Drobnig thought that the loose ends which were spread out over the Principles had to be gathered up and this should be done in a discussion of each of the loose ends. Art. 3.17 was relatively far advanced because it indicated a measure of damages, but e.g. Art. 6.1.5(3) did not indicate a measure of damages. A distinction had to be made, and a certain supplementation was required. Certainly the comments had to be supplemented, even of those other damage provisions.

Lando pointed out that the comment to Art. 1 indicated that it had an introductory value, that it posed the principle of a general right to damages in case of non-performance of a contract except in cases where there was an excuse, such as the total impossibility to perform (force majeure) (*ainsi l'impossibilité totale d'exécution (force majeure)*). Then the comment went on to state that the creditor must only prove the non-performance and that this would be more or less easy to prove depending on the content of the obligation, with a reference to the two different types of obligation, the *obligation de moyen* and the *obligation de résultat*. In the situation of the *obligation de moyen*, there was in reality a hidden rule on fault which had nothing to do with force majeure. The comment therefore contained a strange kind of *non-sequitur*, as it stated that one could always claim damages except where there was force majeure, but on the other hand in cases of *obligations de moyens* this was really only fault liability. This could, and should, be explained more.

Crépeau also wanted to raise this point. He referred to the comments (p. 2) and the sentence which read *"Mais il n'est pas besoin de prouver en plus que cette inexécution est due à une faute du débiteur"*, and observed that where the obligation was one of diligence one had to prove absence of diligence in order to prove non-performance and, irrespective of whether that was under the civil law or under the common law duty of care, one would have to prove fault.

Tallon did not consider it to be a question of fault. The breach of an *obligation de moyen* was a non-performance of the contract without fault being involved. Fault added nothing to the non-performance of an *obligation de moyen*.

Crépeau indicated that whether or not fault was involved was a doctrinal question and to avoid that he suggested that the sentence he had referred to be deleted.

Hartkamp thought that the deletion of that sentence would cause a problem, because that particular sentence corrected the inaccuracy of the sentence *"ainsi l'impossibilité totale d'inexécution (force majeure)"*,

because in itself the *"impossibilité totale"* was not force majeure, it was only force majeure when it was not due, for instance, to the fault of the debtor.

Tallon agreed with Hartkamp and indicated that he would delete the reference to force majeure.

Komarov suggested adding "except where the non-performance is excused under Article 6.1.5 and under the contract" to the provision.

Furmston wondered why the provision said "except where the non-performance is excused under Article 6.1.5", why the provision did not simply stop after "excused", because it suggested that there might be some other provisions under which the non-performance might be excused, but for which the result was different.

Tallon felt this to be a question of translation because in the French version there was no problem.

Crépeau indicated that when he had read the phrase in question he had had a problem with reference to Art. 6.2.2, which stated "If a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is impossible in law or in fact [...]", and was this not just one other such instance?

Bonell felt this clearly to fall under the general formula of Art. 6.1.5. He would therefore not say that the reference in Art. 6.4.1 to the situation envisaged in Art. 6.1.5 excluded impossibility. It was on the contrary the first instance of an excuse under Art. 6.1.5.

Crépeau suggested that it might be better to say "except where the non-performance is excused under these Principles".

Farnsworth agreed with the suggestion to delete the last three words which inspired a common law reader to look to find cases other than Art. 6.1.5. One had already been pointed out, although a common law reader might not think of that as an example of Art. 6.1.5 but might think that the drafter had the intention of confining the exception merely to Art. 6.1.5. It one wanted to help the reader the comments were the ideal place to do so.

Komarov also supported this suggestion. Also the exemption clauses could be mentioned in the comments.

Brazil also supported the suggestion, and also that cross-references be dealt with in the comments.

Maskow indicated that if this suggestion were adopted the comments should also mention that national law could not be adduced as an excuse.

Drobnig also felt that the reader should be helped to find his way about the Principles and it would therefore be helpful if he were not merely led to look for excuses somewhere. An indication that these Principles indicated cases of excuse would therefore be helpful, and then the comments could give more detail. This was also appropriate to avoid readers thinking that this particular point was left to their domestic law. He therefore supported Crépeau's suggestion.

Huang also supported Crépeau's suggestion. She had a problem with the word "excused": did "except where the non-performance is excused" express the same thing as the word "where the damages are exempted".

Bonell indicated that the damages being exempted was a consequence of the non-performance being excused. Art. 6.1.5 stated "A party's non-performance is excused if [...]" and this was the concept which was taken over in this article.

Furmston observed that a party could be excused also by a provision in the contract. If "under these Principles" were inserted, people might be confused as to the effect of contractual excuses.

Bonell indicated that "under these Principles" meant both, *vigore proprio* under Art. 6.1.5, or under Art. 6.4.16 which provided for the possibility of a contractual exclusion. He did not think it a point of substance whether or not one decided to keep the original text, to modify it to read "under these Principles", or to delete the reference as suggested by Furmston.

Voting on the three alternatives, 3 voted in favour of the original version, 4 voted in favour of Furmston's proposal and 6 voted in favour of Crépeau's proposal. The text of the article as adopted therefore read as follows:

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

The Rapporteur was requested to open the comments with a more direct reference to the relevant provisions of the Principles.

Article 2 (Article 6.4.2 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 2 (Article 6.4.2), Tallon indicated that it was the result of a long discussion on the question of whether they needed a formal notice of default or not and it had been decided that one was necessary. There was no such provision in the Principles of European Contract Law (PECL). The first question this principle gave rise to was the

place. It was further limited to damages for delay and he wondered whether this text should not be placed at the beginning of the chapter on non-performance, because a formal notice of default was needed not only for damages for delay, but also for every other remedy. He himself favoured the second of the two options. As concerned para. (3), he wondered whether it was well placed, as it related to the problem of the combination of the *Nachfrist* procedure with the notice of default. He wondered whether it should not be placed in Art. 6.1.4.

Bonell wondered whether para. (3) were not already contained in Art. 6.1.4(2), which stated "During the additional period the aggrieved party may withhold performance of his own reciprocal obligations and may claim damages but he may not resort to any other remedy [...]".

Tallon agreed that Art. 6.1.4(2) did cover para. (3).

The Group consequently decided to delete para. (3).

On the question of the necessity to have a provision of this kind, Lando had no great objections to such a rule, although he was not convinced that it was actually needed as one could not get damages unless one asked for them. He wondered when the right to damages accrued when no notice was required, as the first paragraph stated that the right to damages accrued on the day when performance was demanded. Secondly, what happened when one party terminated the contract? Was that case covered by the phrase "where it is certain that the contract will not be performed" in para. (2)? For example, if a person who is exposed to non-performance by the other party terminates the contract and does not claim damages at that time, has his right to damages then accrued?

Bonell indicated that what was meant here was not a request for damages, but a demand for immediate performance. Only thereafter, if nothing happened, could one ask for damages.

Maskow felt that the provision was concerned with a special type of damages, i.e. with damages for delay. The right to damages accrued when there was a case of delay and they had to indicate when there was such a case of delay. In general this was determined by Art. 5.1.6 and it was therefore not necessary to repeat it here. There was only one case, i.e. the case of Art. 5.1.6(c) ("in any other case within a reasonable timeafter the conclusion of the contract"), for which it was not quite clear when the delay started and for which it was necessary to have a clarification. It would be better to have this clarification in Art. 5.1.6 instead of here. It would then be clear that after the date has been fixed either by Art. 5.1.6(a), by lit. (b), or, in a special manner which required completion, by lit. (c), damages for delay could be asked for. This meant that this was the decisive date for the determination of the damages which accrued. Any damage which accrued after that date could be claimed. If the aggrieved party did not claim damages before the expiry of the period of limitation

he would not get them. Up until that time he could ask for damages.

Furmston indicated that this rule did not exist under English law. He was not at all sure what the thrust of it was. He wondered whether the purpose of giving notice was to let the wrong-doer know that he was late. What was the rationale behind telling a person who was in delay that he was in delay? Was it to clarify the question of whether he was or was not in delay? There would be a number of cases in which the contract-breaker knew he was in delay but the other party did not. If, for example, a ship was chartered to carry a cargo to the other side of the world, and the owner stopped at various intermediate stops in breach of contract unbeknownst to the charterer, the owner would know that he was late, but the charterer would not know. Why should that affect the rights of the charterer? When the provision said "The right to damages for delay accrues", did this mean that that was the date on which one calculated the loss? That would be highly fortuitous. If one were calculating damages for delay in carrying goods according to the price at which one was going to sell them on arrival, making the day of calculation the day of giving notice seemed not to have much to do with anything.

Drobnig felt that Maskow was correct in pointing out that there had to be a better connection between para. (1) and Art. 5.1.6, because he had the impression that the notice requirement related to Art. 5.1.6 and was intended to supplement it. He also agreed that whereas the cases of lits. (a) and (b) appeared to be relatively clear and therefore needed no supplementing, i.e. no notice was necessary, notice was necessary under lit. (c) and he felt that this connection should be brought out. He thought that it was probably correct, and that it would clarify matters if the whole of para. (1) were transferred to Art. 5.1.6(c). If this were done an Art. 6.4.2 would hardly be necessary.

Hartkamp stated that there was a problem of linkage also with Art. 6.1.4. He felt that the first paragraph would not be necessary if one had already given the defaulting party an additional period for performance, because then everything was certain and after this period had elapsed he would be directly liable in damages.

Tallon commented that the *mise en demeure* was a very well-known institution. The general idea was that time was not of the essence, i.e. when one fixed a date it was of course a date at which one had to perform, but if one did not, the other party might not ask for performance, might let things go, and the *mise en demeure* was there just to make sure that the aggrieved party actually wanted the performance, and that his loss arose at this point in time. It was therefore possible to have a fixed time, a mandatory date, which was compulsory (para. (2)), but there might also be a date which was not mandatory, which was just indicated in the contract as the date at which performance had to take place and when one did not perform the aggrieved party was presumed to suffer a loss only when he had formally asked for performance. It was a question of proof of harm.

Furmston commented that then there were three possibilities: there was a fixed date which was mandatory, there was a fixed date which was not mandatory, and there was a reasonable time. That was clear, but no common lawyer would get that out of the existing text. He had assumed that "mandatory date" referred to the date fixed by the contract.

Bonell stressed that the whole was to be considered not as a request for damages, but as a formal request for performance. It had therefore nothing to do with Art. 5.1.6(c) where only the reasonable time was concerned, nor did it have anything to do with the *Nachfrist* procedure, because formally speaking one still had to make this formal request for performance.

Farnsworth thought that it would be useful to explain that this did not deal with the problem of whether time was of the essence. The question of whether time was of the essence determined whether after a delay one could terminate the contract. As he understood the provision, it was an exception to Art. 6.4.1 which stated that any non-performance gave a right to damages; Art. 6.4.2 then stated that non-performance by delay did not give a right to damages, that in some cases one had to give notice. If one had a rule which stated that one had to give notice in order to terminate the contract when there had been some uncertain delay, that would be more easily understood by common lawyers, but the idea that one had no claim to damages for delay in some instances, and that one had to give a notice to start the period of damages running, was startling.

Crépeau referred to Art. 6.4.2(2) according to which no notice was required when a mandatory date had been fixed: was this more than simply saying "the debtor will deliver the oil into the Montreal port by the third of February"? Was this not a mandatory date? If not, what was a mandatory date? In commercial contracts, when a time was fixed in the contract that time was of the essence to the contract and if one did not deliver by the appointed date that was that, no notice was required.

Lando felt that one could live without this rule. He added that Scandinavian law, which in many respects was very strict on notice requirements, did not have this requirement.

Drobnig suggested that some research in the application of these concepts in the civil law systems would be useful. The result would probably be that the understanding differed from country to country. In Germany Crépeau's case would clearly be a mandatory date, but there were other cases where it was not considered to be mandatory, for example if one said "a fortnight from now", which was not thought to be precise enough. He suggested restricting this rule to the case of Art. 6.1.5(c) where only a reasonable period had been indicated, and then of course it was necessary to give precision by notice.

Tallon wondered what the difference was between saying on the 1st of July that one would perform on the 14th and saying that one would perform in a fortnight. He pointed out that case law had modified the requirement. A student of his in a thesis had examined this question and had suggested that the requirement was useful as a preventive remedy, that it could avoid a lot of litigation if one said that whenever there is doubt one had to give this notice.

Brazil suggested that if the present provision were kept, what was meant by mandatory date should be fixed very clearly. Personally he felt that the provision, particularly para. (2), should be done away with and Art. 6.4.1 be relied on, meaning that the basic principle would be that where there was non-performance there was a right to damages. He had assumed that "mandatory date" in para. (2) covered all cases where there was a date fixed in or determinable from the contract.

Maskow felt that what was at stake here was that there must be a precise date. He felt that, for example, indicating a fortnight after a certain date might be sufficient, whereas indicating a fortnight after an uncertain date would not be precise enough. This was, however, not the problem here, as Art. 5.1.6 said "is fixed by or determinable from the contract" and there was thus a certain limit, even if it was not precise. It might suffice for their purposes but only if even that were not possible did there have to be an indication and this had to be fixed.

Komarov agreed with Drobnig. He thought it made sense to make such a demand only when no date was fixed in the contract. If there was no fixed date it was only the creditor's demand for performance which made it accrue. Even if there was a reference to a "reasonable time" in Art. 5.1.6(c), and that was a date, a notice requirement should be provided for. This would make the regulation more certain, especially for commercial relationships.

Hartkamp agreed with Komarov. The Netherlands had had the French system of the *mise en demeure* also for cases where the contract contained a date, but this provision had given rise to a lot of litigation and there had been a tendency for the courts to construe cases in such a way that the *mise en demeure* was not necessary, especially in commercial cases. The rule had therefore been turned around in the new Civil Code, so that if there was a date in the contract there was no need for a *mise en demeure* unless the contract should be construed in such a way that a *mise en demeure* was still possible, and the comments to the provision indicated that this exception did not refer to commercial transactions but to cases where, e.g. consumers were a party to the contract. In general, however, the *mise en demeure* requirement had been done away with in the commercial context.

Bonell concluded that the formal notice of default as traditionally conceived within certain civil law jurisdictions did not get much support. On the other hand, it was felt that a notice requirement might serve a very

useful purpose whenever the contract did not fix a precise date. If this was so, they should move the provision back to the provision on time of performance, where they could warn parties that if this particular instance occurred they would have to make up their minds, they would not e.g. on 1 August be able to say that the reasonable time had elapsed on 1 April and ask for damages starting from 1 May. This notice had then to be given on 1 May. The place for this provision would therefore be Art. 5.1.6(c) and not here.

Furmston took it that if the contract provided for performance within a reasonable time, or implicitly did so by not providing expressly for any time, there would be disputes from time to time between the parties as to whether or not a reasoable time had elapsed. Was then part of the purpose of the notice to inform the other party that you thought that he had had a reasonable time?

Drobnig, Crépeau and Bonell agreed that this was so.

Tallon pointed out that the *mise en demeure* was useful when one just let things go and then, on purpose, three or four months later claimed performance. Without the mise en demeure they would be saying that it would be possible for the party three or four months later to ask for performance and for damages for delay. He stressed that they were considering the international field, where there were many powerful companies which did not always act fairly.

Drobnig pointed out that this was already settled in Art. 6.2.2(e) which provided that in such a case the party entitled to performance must require performance within a reasonable time or be precluded from requiring performance.

Tallon pointed out that this was only for specific performance.

Bonell recalled that termination had a similar rule.

Maskow stated that in this case one could invoke good faith. Furthermore, there was an obligation to mitigate damages and this case would fall under this obligation. On the other hand, a party who did not perform in accordance with the presuppositions here would know that he was in delay. There was therefore no reason for the other party to ask for performance repeatedly. The general rule should be that the party had to pay damages from the moment in time when he did not perform on the due date of performance.

Lando wondered how anyone could ask for immediate performance when he was not able to get it. Para. (1) stated that "The right to damages for delay accrues on the day where the aggrieved party has given notice [...] of his demand for the immediate performance of the contract". Take, for example, the case where a party lets a year pass before he demands specific

performance: under Art. 6.2.2(e) it would not be possible to get specific performance because notice had not been given in time, but from Tallon's point of view he should be able to demand damages by asking for the immediate performance he is not able to get.

Crépeau wondered whether it would be possible to keep the general principle in para. (1), which he thought was a good one, with a first specific modification in para. (2): "No notice is required where a specific date has been fixed for the performance". That should be quite enough to have a right to damages accrue where a specific date had been fixed for the performance.

Tallon thought it too abrupt to state that where a date had been fixed no notice was required. He suggested using the text of the new Dutch Civil Code, and to say "When a term which has been set for payment lapses without the obligation having been performed unless it appears that the term has another purpose".

To Farnsworth it seemed that none of the solutions proposed met Furmston's case of the situation in which the aggrieved party was not aware of the delay of the other party. He also had a problem with para. (1): he could imagine someone looking at Art. 6.4.2(1) and the contract says nothing about a mandatory time or a specific time, and the party asks what he should do to make sure that the other party does not delay too much. The answer would be that he should give a notice, which is fine, he could send a notice immediately and say "by reasonable means I am notifying you that I want immediate performance". Would that be effective? Could the other party say that he had sent the notice ten days too soon, that if he had waited ten days maybe enough time would have passed for him to have been able to send the notice? Why was it not possible to avoid this article simply by saying "No time has been specified, I want immediate performance today", or "I want immediate performance as soon as the law requires you to perform".

Bonell indicated that the intention was not to have the party send a notice as soon as the contract was signed. The basic assumption was that the obligation must have come to maturity.

Maskow considered that this problem could be covered by an addition in Art. 5.1.6 stating that the parties may fix a reasonable time for performance.

Hartkamp partly shared Tallon's fear that the debtor did not know what the creditor would ask of him, whether he should continue to prepare for performance or undo his preparations and wait for a claim for damages. In the Netherlands a distinction was made, i.e. if a term was fixed in the contract there was an immediate right to damages but that concerned only damages for the delay in performance. If, however, one wanted to do more, and either terminate or do away with the right to the performance and ask for damages instead of asking for the performance as such, in that case a

notice still had to be sent to the debtor.

Bonell felt that in this respect the Principles were more advanced than other systems in which this formal requirement existed, because in respect of specific performance they had Art. 6.2.2 according to which performance had to be requested within a reasonable time. Such a provision did not appear in, for example, the Italian Civil Code, and therefore the reason for having a *mise en demeure* was a valid one. As regarded termination, the Principles did have a specific provision (Art. 6.3.2(2)) which stated that one lost the right to terminate unless one exercised it within a reasonable time. Thus, the concerns of Tallon and Hartkamp might no longer be all that valid under the Principles.

Tallon objected that one had a general duty of notice because when the aggrieved party had a choice of remedy he had to indicate his choice in the notice.

Lando recalled that under Scandinavian law a demand for performance was not a prerequisite for damages. Under CISG one could of course not get damages unless one asked for them, but one did not have to go through this procedure. He thought that under German law the *Mahnung* applied only to certain special cases, and as he understood it common law was like CISG and Scandinavian law in that there was no such requirement. Lastly, the Principles of European Contract Law (PECL) did not have the rule. It was therefore quite possible to live without it and he agreed with the suggestion to delete it.

Tallon suggested incorporating the solution adopted in the Netherlands' code, and say that a fixed date was, as a rule, mandatory and that there was no notice requirement, unless circumstances indicated otherwise.

Crépeau suggested that from a policy point of view it was quite reasonable, when there was no fixed date for performance, for the creditor to put the other party on notice in order to obtain and to start the period when damages accrued, to inform the other party that he was in default as from then. However, when the contract had specifically provided for a specific date for performance that constituted notice, in the sense that when that day came that was automatic notice.

Brazil wondered whether Crépeau, when he referred to the date fixed in the contract included also the cases where a fixed date was determinable by reference to the contract.

Crépeau indicated that this was correct, i.e. Art. 5.1.6(a) and (b) were both intended. When commercial people gave a precise date for, for example, volatile products such as oil, then that was the date at midnight, not ten minutes or six hours after midnight. It therefore seemed to him that whenever the parties had not provided any time then a formal notice

putting the party into default seemed to be quite reasonable, but that in commercial matters if a fixed date had been provided under the contract then that should be the law of the parties.

Hartkamp agreed with Crépeau, particularly as regarded the ship with oil expected in the port on, e.g. 3 February, which would be a case where the date was of the essence. On the other hand, in the Netherlands when there was a term in a building contract to the effect that, for example, the contractor had to finish the building at the end of August of the following year, if the contractor was three days late no judge would consider that date to be of the essence under the contract. Despite this he did not know whether an exception, such as the one suggested by Tallon, would be suitable under the Principles, because it might create considerable uncertainty and could give rise to litigation.

Farnsworth observed that when Hartkamp stated that no Dutch court would consider that date to be of the essence what that meant to a common lawyer was that one would not be allowed to terminate for a slight delay, but any common law court would say that if one had agreed to perform at a certain date and then were three days late, one would at least have to pay damages for the three days. That was probably confirmed by what parties put in their building contracts, in which it was quite common to have a provision for liquidated damages. Similarly, in the case of the oil in Montreal, the question in the common law vocabulary would be whether one could terminate. What they were considering here was whether one could have damages for delay and to a common lawyer it would be very strange if one had to perform by a certain date, one was three days late, and then it was said that it was not possible to have damages for the three days.

Bonell concluded that the question was then whether for the case indicated under Art. 5.1.6(c) a notice requirement should be provided for in order to produce clarity between the parties, and if so, the question was where this rule should be placed.

Hartkamp wondered whether if so, a reasonable time should be given to the debtor within which to perform.

Lando observed that if such a rule were introduced any possible repercussions on the other remedies should also be considered.

Bonell added that also with respect to other rules Art. 5.1.6(c) might cause some problems. On the one hand one had this reasonable period of time for performance, on the other one had a provision saying that one lost the right to terminate the contract if one did not exercise it within a reasonable period of time. One had to sum up two different reasonable periods of time and he could imagine that difficulties would arise in practice and disputes could ensue. He therefore suggested that an additional paragraph should be added in Art. 5.1.6 stating that in order to have non-performance under Art. 5.1.6(c) the creditor has to give notice

asking that performance be made within a short period of time.

Hartkamp suggested that then it would be better to have a provision in the general section of the non-performance chapter, as this would cover all remedies.

Furmston had trouble understanding the provision. There were no provisions saying that one was excused from all other promises which one did not really mean, and that it was generally all right to do nearly as well as one promised, but here they had a general principle which stated that being late entitled one to indulgence - a sort of *mañana* principle - which did not seem to have any relevance to international commercial life, when people actually wanted to have things performed when they said they wanted them performed. Art. 5.1.6(c) started out by saying that a party must perform its obligations, but it actually did not have to perform within a reasonable time, it only had to perform within a reasonable time after the other party had said it should.

Farnsworth wondered whether it were possible for the creditor to say ten days after the contract had been signed "you have a reasonable time, ten days have already passed and we are getting worried, we will consider if you do not perform within twenty days total that you have not met the requirements and you will be liable for damages", or did the creditor have to wait? Furmston and he had assumed that the rule would be that the creditor had to wait until there was a default and then had to give some more time for some more default. That was not only different from the common law it would probably also be offensive.

Hartkamp indicated that his proposal went in the first sense. Even in the system of the *mise en demeure* one could send a *mise en demeure* before the date fixed by the contract, so that one could make it effective in advance, and he felt that this should be the system also here.

Maskow felt that both possibilities could be considered: the first that the creditor could ask for performance within a reasonable period or, if he waited, that he could ask for immediate performance after the reasonable period had elapsed.

Bonell thought it went without saying that one could ask for damages without any further requirements immediately after the reasonable period had elapsed.

Lando referred to the article on the *Nachfrist* (Art. 6.1.4) which said that if one set a *Nachfrist* one could terminate, but now they were saying that one could claim damages during the time of the *Nachfrist* and he wondered how this was possible.

Maskow indicated that this article dealt with the determination of the time for performance whereas the *Nachfrist* came into play only after

the date of maturity.

Bonell indicated that their concern was how to render an uncertain date of maturity certain for the purpose of damages, but maybe also for other remedies.

Drobnig observed that if no term had been agreed in the contract Art. 5.1.6(c) said that a party had to perform within a reasonable period, and it would be against good reason to give yet another reasonable period. The creditor could of course request immediate performance if he gave this notice after the reasonable period had expired. If he gave it before he would have to indicate that he considered the reasonable period to have expired on such and such a date.

The first alternative was to delete Art. 6.4.2 and not to add anything elsewhere, the second alternative was to try to draft a new provision in the general section on non-performance, stating that in cases where the contract did not fix a precise date of maturity the right to exercise the remedies accrued only after the creditor had given notice asking for performance.

Five members of the Group favoured the first alternative, seven the second.

Proposal for an Article 6.1.3A (new)

Hartkamp put forward a proposal for a new provision (Article 6.1.3A), to be placed in the general section on non-performance, which read as follows:

> "In case of delay in performance the aggrieved party may exercise his remedies according to this chapter
> (a) if a time for performance is fixed by or determinable from the contract, at that time;
> (b) if a period of time for performance is fixed by or determinable from the contract, at the end of that period of time;
> (c) in any other case, when the aggrieved party has given notice to the other party of his demand that the performance be made within a reasonable time after the conclusion of the contract".

Introducing the proposal Hartkamp indicated that he had tried to follow the structure of Art. 5.1.6 and had therefore followed the cases indicated in that provision. In the third case, if the reasonable time had already elapsed before the creditor sent the notice he could demand immediate performance. If he sent his notice in advance he had to set out in the notice the reasonable time he was allowing the other party. This was subject to cases of anticipatory breach which were dealt with elsewhere in the draft.

Lando wondered whether it would be possible for the creditor to say in the notice that he was giving the other party a *Nachfrist* under the *Nachfrist* procedure, or whether two different times were involved, in the sense that first one had to give notice for a reasonable time, and then, when the reasonable time had expired, if the breach was not of essence one had to give a new notice.

Hartkamp thought that only one notice was necessary, so that when the reasonable time set out in the notice had lapsed one would automatically be entitled to claim damages or to terminate. It would in other words have the same effect as a time fixed in a contract.

Bonell indicated that precisely for this reason his conclusion was diametrically opposite to the one reached by Hartkamp: precisely because they were here trying to equalise the three situations in relation to certainty of the date of maturity it had nothing to do with the *Nachfrist* procedure. Thus, one would still have to determine whether the delay amounted to a fundamental breach and if it did not then one would have to give a second notice.

Drobnig felt there to be a discrepancy between lit. (c) and the comment which was really only directed at lit. (c), because lit. (c) meant that the reasonable time would not start to run until notice had been given, but the comment stated that it depended whether the reasonable period had already expired in which case one could demand immediate performance, but if the reasonable period had not yet expired one could fix the end term. He agreed with the comment.

Bonell agreed with Drobnig.

Hartkamp indicated that this had already been discussed, and that in his draft he had tried to accommodate the common law view that the creditor should be able to give a notice in advance because otherwise he would first have to wait for a reasonable time to elapse and then to give the debtor another period of time.

Bonell wondered whether the Group agreed that in a case where the contract did not fix a date and such a date was not determinable from the contract, with the consequence that the case would fall under lit. (c), the creditor could e.g. two months after the conclusion of the contract write to the debtor saying that it was reasonable to presume that the reasonable period of time which according to the Principles would be due lapsed at the end of July - please perform before the end of July so he could make the arrangements. Secondly, whether they agreed that at the end of July, always given that *de facto* the reasonable time had elapsed, the creditor could write to the debtor saying that even if nothing had been agreed in the contract, a reasonable time had elapsed so please perform.

Crépeau observed that in this case it would be preferable to separate the two. They were here in non-performance, and they had to suppose that the contract had not been performed within a reasonable period of time. It could easily be said in Art. 5.1.6(c) that the creditor had it within his right to determine or to tell the debtor what period of time he considered to be reasonable before the delay has started, because that was quite a different problem.

Bonell had doubts whether one could state positively that if nothing was said in the contract the debtor had to perform within a reasonable period of time determined by the creditor.

Brazil observed that the problem arose as a consequence of the fact that they were really looking at a notification which one party may give and they were going close to saying that that person would specify a time and that that time, despite the fact that it was a time which was given unilaterally by one of the parties, could bind the other party, and he did not think that that was what they meant. On the other hand he found the idea that in the sort of situations they were talking about one should give the other party some sort of notice attractive. He wondered whether it were not appropriate to return to lit. (c) of Hartkamp's proposal and to say "after" in that sub-paragraph rather than "when" ("after the aggrieved party has given notice to the other party of his demand that the performance be made within [what he claims to be] a reasonable time after the conclusion of the contract").

Crépeau agreed that "after" was to be preferred to "when". He wondered whether, in the logic of the system, a formulation such as "in any other case, after the aggrieved party has given notice to the other party that the performance be made within a specified reasonable time after the giving of notice" would be acceptable. The creditor would in other words have it within his power to say that in view of the fact that a certain time had elapsed, he now required performance within twenty-four hours or a week or whatever. That could of course be disputed later on, the other party could say that that that was not reasonable.

Maskow felt that the majority was of the opinion that delay occurred if the time for performance was not observed. In German law it was different, because one had additionally to give a reminder in certain cases, but they did not want to have such a reminder if the time for performance had come and performance had not been made, in which case there was delay. It was therefore only necessary to have a date for performance in cases where this was not clear, and for this Crépeau's formula of a specified reasonable time might answer, but indicating that this was in general and not after notice. The comments could then make it clear that the reasonableness of the time-period given depended on the time which had elapsed after the conclusion of the contract. If notice was given a long time after the conclusion of the contract immediate performance might be required by that notice, and the time would have been fixed by this notice.

On the other hand, if notice was given immediately after the conclusion of the contract the term "reasonableness" would permit both cases to be considered.

Bonell indicated that members of the Group had strong reservations as to the proposed solution according to which even after the reasonable period of time for performance had lapsed one could not just ask for performance.

Crépeau indicated that he was prepared to put a full stop after "within a reasonable period".

Drobnig wondered when it started to run if one stopped after "within a reasonable period": from the conclusion of the contract or from the giving of the notice?

Hartkamp indicated it would be from the notice.

Bonell thought both.

Crépeau indicated that he would think that it was from the notice, but that in certain fact patterns it might be before.

Bonell indicated that if, after a reasonable time had already elapsed, the creditor gave a notice saying that he considered that the debtor should perform so "please perform immediately", otherwise he would ask for damages the following day, it was not a question of reasonable time as the creditor asked for immediate performance, but one could do that only on the assumption that one had the reasonable time behind one in accordance with Art. 5.1.6. Alternatively, one gave that notice earlier, and then one could say that one esteemed the reasonable time to lapse on 1 July, so please perform by 1 July. On the other hand, if in a given case a reasonable period were to be three months, and ten days after the conclusion of the contract the creditor were to demand immediate performance, the creditor could not do so because he could not fix the time unilaterally.

Crépeau added that in a case where the notice was given ten or twenty days after the conclusion of the contract the period of time would run from the moment the creditor had said that that would be the period for a reasonable time to elapse.

Drobnig found this to be unclear. A natural reading when one spoke of a reasonable period and of a notice before that, would be that it could be counted from the giving of the notice and that should really be excluded. He would therefore prefer it if the Hartkamp version were retained, as it would then be clear that it must be from the conclusion of the contract, but either the reasonable period had already expired, or, if the notice was given before it expired, then it would expire.

Date-Bah thought that an explicit reference should be retained, because otherwise one intentionally created an ambiguity.

Lando observed that if one could give notice before the reasonable time provided in the section on time of performance, then one could not say "In case of delay in performance" in the provision. This was going to give the grounds when one could exercise the remedy and if one wanted to retain the special rules on termination, then one had to state also "subject to the rules on termination" because otherwise one created an analogy with the other sections. He felt that the situation had come to a dead-lock and that the article was best deleted.

Crépeau wondered whether, as Hartkamp had made the provision relevant for the exercise of any of the remedies, it was necessary to keep the words "In case of delay".

Hartkamp had thought them to be necessary, because of the case of defective performance: if the performance was made before the end of the period within which the debtor had to perform and his performance was defective, he felt that the creditor should immediately be entitled to exercise his remedies. He could, however, see the point made by Lando that if the reasonable time of Art. 5.1.6(c) had not elapsed one effectively could not speak of delay.

Bonell suggested saying that "A party may exercise his remedies for the case of delay in performance according to this chapter only [...]".

Maskow suggested transferring lit. (c) of the proposal to Art. 5.1.6, make it into the first paragraph of the article and to say in para. (2) "Whether there is a reasonable time after the conclusion of the contract may be determined by the creditor in giving notice to the other party that the performance be made within a specified reasonable time after the conclusion of the contract" and to delete the chapeau and lits. (a) and (b) of the proposal.

Voting on the deletion of Art. 5.4.2 with nothing being added elsewhere, 5 voted for this proposal.

Voting on having something along the lines suggested by Hartkamp, Crépeau and Maskow, 8 voted in favour of this proposal.

Lando felt it to be dangerous to leave it to the creditor to decide what was a reasonable period of time. All the commentaries to CISG and to laws which had the provision on reasonable time said that it was commercially best in the cases of a reasonable time to leave that to the debtor as it was the debtor who had an outlook over when he would be able to perform and of the production conditions which determined what would be a reasonable time. To leave this to a creditor who was outside the business milieu of the debtor was dangerous.

Hartkamp observed that if lits. (a) and (b) of his proposal were omitted in this chapter lawyers in Belgium, France, Holland and other civil law countries would wonder whether they meant the *mise en demeure* in the case of a time fixed in the contract or not, so he therefore felt it better to leave lits. (a) and (b) and to make that clear.

Maskow thought that if this were the problem, the comments could indicate that the Group did not think it necessary to have such a notice. One of the problems of the discussion had been that from time to time they had mixed up the *Nachfrist* procedure with the procedure for determining the time for performance. Here they were only determining the time for performance, while the *Nachfrist* procedure which had other consequences (avoidance of the contract, etc.) should remain in the non-performance chapter.

Furmston wondered why it was being suggested that a provision might be inserted in the first section of chapter 6 instead of in the section on damages, which was where it had begun.

Bonell recalled that it had been felt that if one should say something about the lit. (c) case of Art. 5.1.6 it was better said in general terms, because the rules on termination, for example, or on specific performance, at a certain point said that the creditor would have such a remedy but had to exercise it within a reasonable time after the date of maturity. Since under lit. (c) the date of maturity was uncertain, it was felt that the necessity to introduce more certainty accrued not only with respect to damages, but maybe also with respect to the other remedies.

Furmston asked whether it was proposed that the right to terminate depend upon the giving of a prior notice.

Bonell indicated that this was not being proposed, but that according to Art. 6.3.2 "A party's right to terminate the contract is to be exercised by notice to the other party" (para. (1)). Para. (2) stated that "If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose his right to terminate the contract unless he gives notice to the other party within a reasonable time after he has or ought to have become aware of the offer or of the non-conforming performance" which implied that one knew when a performance was late or when it was not late. Here one might also need to establish when, in the past weeks, the date of maturity occurred in order to determine whether or not today's request for termination fell under Art. 6.3.2(2).

Furmston observed that surely the right to terminate depended on showing that one had a right to terminate under Art. 6.3.1 and that one had given a notice to the other party under Art. 6.3.2. If one put the proposed provision in the first section of the chapter, the inference would be that that qualified everything which followed in the rest of the chapter as it spoke of exercising remedies according to this chapter, whereas if it were

put in Section 4 it would be clear that it was simply a qualification of the right to damages.

Bonell referred to Art. 6.2.2(e), according to which the creditor lost the right to specific performance if he did not "require performance within a reasonable time after he has, or ought to have, become aware of the non-performance". In the case of delay, when did one act within a reasonable time after one knew or ought to have known of the other party's delay?

Furmston indicated that common lawyers would have no problem with Art. 6.2.2 because they were of the notion that specific performance was a remedy which one needed to pursue with dispatch. One could of course not pursue it until one had it. In the Art. 5.6.1(c) situation this would depend on the circumstances, but in most of the cases they were talking about specific performance was not a real life remedy in the common law - one would not seek specific performance of contracts for the carriage of goods by sea, but if they were talking about specific performance of contracts for the sale of land there would usually be a date for performance and if it was a reasonable time one would presumably notice that the other party had not conveyed the land and then one would act swiftly.

Farnsworth was also troubled as to why the provision was being moved. Originally there had been a proposal by Tallon which related to the right to damages for delay. Despite the fact that there were 6 members of the Group who had not liked it at all, it was going to be generalised so that it not only applied to the right to damages for delay, but also to termination and specific performance in a way that at best was unclear.

Voting on whether or not to deal with this question somewhere in Chapter 6, 7 voted in favour. Voting on whether or not to deal with this problem in Chapter 5 (Art. 5.1.6), 5 voted in favour of this alternative.

Voting on whether to deal with it in the general section on non-performance, 5 voted in favour of this solution. Voting on whether or not to have it in the section on damages, 4 voted in favour.

In view of the divided opinion of the Group, it was decided not to have the provision at all. Art. 6.4.2 was therefore deleted.

Bonell suggested that the comments might indicate that no *mise en demeure* was required by the Principles contrary to what was the case in certain legal systems, and, secondly, that problems as to the precise date at which the right to damages and to the other remedies accrued might arise in the case envisages under Art. 5.1.6. The comment to Art. 5.1.6 could then also mention to parties that in order to avoid uncertainty a notice was best given, that they should try to clarify matters in advance.

This suggestion was agreeable to the Group.

Tallon suggested indicating somewhere that the principle of good faith could cause the creditor to give notice in some cases.

Lando pointed out that the Principles already had provisions which stated that one had to give a notice within a certain time in the sections on specific performance and termination, so this would really only apply to damages. He could think of cases where for example a party had speculated on the other party's non-performance, where he did not want performance or to terminate, he just wanted damages and could come with such a claim after a couple of years.

Tallon still felt that it was necessary also for specific performance and termination.

Drobnig felt there to be some confusion. Two notices were really necessary: one was where no time for performance had been agreed upon in the contract the purpose of which was to specify when the reasonable period terminated, after which one could claim the remedies; the other was if one claimed specific performance or if one wanted to terminate in which case then one had to give notice simply saying that one wanted specific performance or that one wanted to terminate the contract. These were two different notices.

Lando was not so sure, as one had to give notice within a reasonable time if one wanted specific performance and one had to give notice within a reasonable time if one wanted to terminate.

Bonell pointed out that in these cases the reasonable time was a reasonable time after the date of maturity. Here they were considering a notice the purpose of which was to determine the date for performance. He agreed with Drobnig that two different notices were concerned, and he therefore was even more convinced that a special mention under Art. 5.1.6 would be of great help.

Article 4 (Article 6.4.3 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 4 (Article 6.4.3) Tallon stated that it was the result of a long discussion. The Group had arrived at a compromise agreeing on para. (1) which used the rules of the United Nations Convention on the International Sale of Goods (CISG), i.e. the loss suffered and the gain of which the party was deprived. The idea of full compensation was necessary to explain a lot of rules, e.g. the date of assessment of the damages, the indexation of the damages when it was given in instalments, etc. Paragraph (2) was in brackets because they had had hesitations about whether it was necessary to speak of non-pecuniary loss and to include physical suffering

or emotional distress. Personally he felt it would be good to keep it.

Drobnig observed that the English version of the provisions in the section on damages used different terms to decribe the damage: "harm", "loss", and "damage", and he felt that this should be unified. Secondly, the report on the Ivry meeting indicated that a decision had been taken to replace the words at the end of para. (1) by a different formulation ("[...] taking into account any gain to the aggrieved party resulting from his avoidance of cost or loss", in P.C. - Misc. 10, p. 6), and he did not find those words here.

Brazil observed that the normal way to take into account any cost or loss would be simply to deduct it, so he was interested in hearing what other possibilities were introduced by the formulation decided upon in Ivry.

Drobnig felt that the two formulations came to the same result. The technical way of taking account was to deduct it, but it was thought that "taking into account" was a more flexible formula.

Hartkamp pointed out that "taking into account" did not mean that one had to deduct, one could do so, but did not have to. Under special circumstances one might decide not to deduct, or one might decide to deduct the advantage from one kind of damage and not from another kind of damage. If one had, for example, material damage of e.g. 10,000 and non-material damage of e.g. 20,000, and a gain which exceeded 10,000, one could say that one deducted from the 10,000 material loss but the compensation for the non-material loss was entire and one did not deduct it from that. As a judge or arbitrator one was in other words much more free to decide whether, and to what extent, to take into account any gains on the part of the aggrieved party.

Tallon agreed that the Ivry formulation was more flexible.

It was decided to replace the last words of para. (1) by the words adopted in Ivry.

Turning to the second point raised by Drobnig regarding the use of different words in the English version to signify harm, Tallon pointed out that whereas "préjudice" in French could be used everywhere, in the English version it was not possible to say "loss" because "loss" had two meanings: the "loss avoided" and the loss in the sense of general damage. "Damage" was a bit difficult for people who were not English-speakers, because they might confuse "damage" and "damages".

Crépeau referred to Art. 6.4.5 as an illustration of this, where the English version referred to "loss" and the French version to "préjudice", but they were in a section dealing with damages and he felt that the English version should refer to "damages", because they were dealing with

the assessment of damages that were foreseen or foreseeable.

Furmston observed that the problem of "loss" and "damage" was that they were often used as antithesis, in the sense that "loss" was financial loss of money whereas "damage" was physical damage. "Harm" was a wide general word which had no particular connotations for an English lawyer.

It was therefore decided that "harm" should be the general term to the greatest possible extent.

Crépeau wondered whether there was not a contradiction between Art. 6.4.3(1) ("is entitled to full compensation") and Art. 6.4.5 which introduced the rule of foreseeable damages. Under the civil law the general rule was the *restitutio in integrum*, but despite this under the French civil code, under the Italian and Québec codes, in contractual matters full compensation was refused to foreseen or foreseeable damages. When one read in Art. 6.4.3(1) that "The aggrieved party is entitled to full compensation [...]" and then one read in Art. 6.4.5 that "The defaulting party is liable only for loss which he foresaw [...]" was there not some contradiction?

Tallon stated that the system was such as to put a limit on full compensation when the debtor was in good faith and that one returned to full compensation when the debtor was in bad faith, when the non-performance was deliberate or reckless.

Bonell added that he had always understood that Art. 6.4.3 was intended to lay down the principle of full compensation, and that all further qualifications followed thereafter. One could, for example, also see a contradicition with Art. 6.4.4, but that was to be understood as a qualification, Art. 6.4.3 had therefore to be read subject to Art. 6.4.4, 6.4.5 etc.

Crépeau observed that in the civil codes from which this was taken Art. 6.4.3 was a rule which applied to all types of damages, contractual or extra-contractual, whereas here they were dealing only with contractual damages and he was inclined to think that in the context of the Principles it would not be necessary or essential to use the words "full compensation" in Art. 6.4.3 and suggested instead to say only that "The aggrieved party is entitled to compensation for harm" and that this compensation was determined *inter alia* by Art. 6.4.5 which stated that the debtor was only liable for foreseen or foreseeable damages unless the harm was caused with intention or gross negligence in which case the creditor received full compensation.

Bonell indicated that the Italian civil code adopted a system which was more or less similar to the one adopted in the Principles. There was first the general rule in Art. 1223 and then there was the further qualification of the foreseeability in Art. 1225.

Tallon indicated it was the same in the French civil code.

Crépeau indicated that what he was referring to was the fact that full compensation was only due for foreseen or foreseeable loss and not for reckless non-performance.

Lando referred to p. 7 of the comments, which stated that *"Il n'a pas été jugé utile de suivre les solution de certains droits [...] qui accorde au juge le pouvoir de modérer le montant des dommages-intérêts compte tenu des circonstances"* the argument being that uncertainty would ensue. If they followed an approach in line with the recent developments of the new Scandinavian Sales of Goods Act where, except for certain cases it had been decided that very large damages, though forseeable, could be reduced in cases where it would be against justice to award the whole, they could get judges into difficulties. They could of course in principle use good faith and fair dealing, but he was thinking of cases which there was a small contract with a foreseeable huge amount of damages: for example, one had to deliver a spare part to a machine, the spare part was either defective or did not arrive and as a result milions of dollars in loss were caused the manufacturer. In this case this was foreseeable and there was no rule in the Principles, except perhaps the good faith principle, which would permit the reduction of the damages.

Tallon observed that when judges were granted this right (the *"pouvoir moderateur"*) they very seldom used it. This was the case, for example, in Switzerland, where it had never been used.

Brazil asked for confirmation that with the sentence "This loss includes both any loss which he suffered and any gain of which he was deprived" no suggestion was intended here of giving any room at all to a requirement of election between reliance loss on the one hand and expectation loss on the other, that one could claim both.

Bonell confirmed that this was so.

Turning to para. (2), Drobnig asked for clarifications as to the relationship between this paragraph and Art. 11 (Art. 6.4.10) which also dealt with the same subject.

Tallon indicated that one was the definition and the other the remedy for this kind of compensation.

Drobnig wondered whether it was necessary to have the definition in addition to the remedy.

Tallon thought that it was good as there were very different conceptions in the various systems. In many instances it was important to state what one included, especially emotional distress as there were a variety of positions on this issue. Of course para. (2) could be merged

with Art. 6.4.10.

Drobnig favoured this solution.

Farnsworth also favoured a merger. He felt that common lawyers would not make the distinction between the definition and the operative section and would ask the same question Drobnig had asked.

Bonell did not think that there was only a definition in para. (2). Coming from the Italian legal system in which it was highly controversial whether non-monetary loss could be compensated in cases of non-performance of a contract - the rule was that they could not and exceptions had only been introduced step by step into the case law - he would have welcomed having such a rule here, because it said that such loss "may be non-pecuniary", so the rule was that they were included, whereas if one introduced them only when speaking of the possible way of compensating them, as was the case in Art. 6.4.10, one took it for granted that they were included under damages. The purpose of having this stated in the opening section was for the benefit of those who were not accustomed to having them included.

Brazil indicated that to him the idea of compensation for emotional distress in relation to breach of commercial contracts was novel. He wondered what the position of the civil law was in relation to commercial contracts.

Tallon indicated that under some civil law systems it was possible to get damage for emotional distress under commercial contracts. In French law it was possible but not in German law. He indicated that the administrative courts and the ordinary courts in France had held different positions, but now the administrative courts had adopted the position of criminal law in business.

Furmston took it that corporations did not suffer emotional distress.

Tallon indicated that even if they did not suffer emotional distress their reputations could be harmed.

Furmston observed that typically that would be pecuniary.

Tallon indicated that it might be a borderline case, which was why this rule had been adopted.

Huang preferred to delete para. (2), because physical suffering and emotional distress was not necessarily the subject of a commercial contract.

Lando indicated that he instead preferred to keep the paragraph. He however thought that it could be merged with Art. 6.4.10. He indicated that

an illustration might be appropriate here.

Tallon indicated that he would introduce illustrations when he revised the comments. He had not reelaborated the comments all that much as the texts had not been final, but would do so after this meeting. He also indicated that he wanted to harmonise the comments which had not been harmonised as some bits had been introduced at a later stage to accommodated modifications.

Crépeau observed that there were two distinct ideas here: Art. 6.4.3(2) was a substantive rule which indicated that non-pecuniary loss could be compensated. The other provision instead indicated that non-pecuniary loss could be compensated either by damages or through some other method. They were therefore dealing with two different things, and in view of the fact that a number of countries did not allow compensation for non-pecuniary loss the substantive rule in Art. 6.4.3 should stand.

Drobnig indicated that if it was thought that for pedagogical reasons the substantive rule, which was also implied in Art. 6.4.10, should be expressed already here, it would be sufficient to include a couple of words in para. (1), to the effect that "[...] full compensation for harm (including non-pecuniary loss) [...]" which would avoid having a separate sub-section.

Voting on keeping para. (2) as a separate paragraph here, 7 voted in favour. Voting on merging para. (2) with Art. 6.4.10, 4 voted in favour.

Furmston indicated that the English formulation and needed to be reconsidered, possibly by the editorial committee.

Article 4 (Art. 6.4.3 in the consolidated version, Art. 6.4.2 in the new numbering) as adopted read as follows:

"(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. This harm includes both any loss which he suffered and any gain of which he was deprived, taking into account any gain to the aggrieved party resulting from his avoidance of cost or harm.
(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress".

<u>Article 5 (Article 6.4.4 in the Consolidated version in Study L - Doc. 40 Rev. 7)</u>

Introducing this article, Tallon indicated that it dealt with very controversial issues. It was the result of a debate at the Ivry meeting. The issues it treated were: future loss and a reasonable degree of probability (the problem of causality) in para. (1), the problem of the

loss of chance in para. (2) (which was also a controversial issue), and the assessment of damages at the discretion of the court when the amount could not be established with a sufficient degree of probability in para. (3). The provision on nominal damages had been deleted, and the third paragraph of this article had been a way of taking up the question of the nominal damages of the common law. They had to decide whether or not to keep the future loss, and as to the reasonable degree of probability, they had had in Art. 6.4.1 a reference to "directly" ("The object of an award of damages is to give the aggrieved party compensation for the loss or injury which resulted directly from the delayed or defective performance [...]") which had been deleted. It had been decided to have another formula somewhere else and he had used the "reasonable degree of probability" of the Dutch New civil code which he hoped was an acceptable formulation.

Date-Bah pointed out that so far the Principles had not spoken of evidential burdens and he wondered whether this provision was not tantamount to requiring a burden of proof and consequently whether this was consistent with the Principles.

Lando wondered whether the rule was needed: there was already Article 6 (Art. 6.4.5) and he wondered whether that did not take care of the situation. Neither the Scandinavian law nor CISG had it.

Tallon indicated that in many legal systems there was a difference between certainty of damage and foreseeability. Foreseeability in French law was not considered to be a question of causality, it was considered to be a question of limitation of compensation. One therefore had one rule which stated that there was full compensation except when the damage was foreseeable. Then there was another rule on the reasonable degree of probability of the occurrence of the damage.

Bonell recalled the history of the provision, in that the original wording had used the concept of "direct consequence" which was the classical approach. Then the Group had discovered that at least with respect to future loss, which was clearly covered, there was no point speaking of "direct consequence", one had to be more flexible. This had led to the adoption of a new formula which he seemed to recall was based on the United States Restatement (Second) on Contracts, possibly the "proximate cause".

Farnsworth indicated that "proximate cause" was used for warranty and tort damages. They used both the certainty and the foreseeability tests. The English tended not to make the sharp distinction that Americans did, but Americans did make a clear distinction between certainty, which was what was spoken of here, and foreseeability.

Crépeau drew attention to a possible discrepancy between the French and the English texts, in that para. (1) of the French version spoke of "*un degré raisonnable de probabilité*" which in English was rendered by "a

reasonable degree of probability", which concerned the establishing of the kind of harm which would be compensated; and then para. (3) spoke of "*degré suffisant de certitude*" in the French and of "a sufficient degree of probability" in the English. He therefore wondered whether the French version wanted to impart a particular idea which had been missed in the English.

Tallon stated that he had not wanted to give any particular indication in the formulation chosen; he thought that the degree of probability was the same as "certitude". He was not sure of the English "certainty" which was why he had not used it.

Farnsworth indicated that an American reader would be a little confused by "probability" in the first paragraph, especially in the light of the fact that both the English and the French used "certainty" in the title. He thought that at least what Americans thought of in connection with their comparable rule was the certainty with which one proved the loss or harm that had already occurred. They might use "probability" with respect to something which was to occur in the future or in connection with the "chance" of para. (2), but it would probably not occur to them to use "probability" in the context of this rule.

Bonell wondered whether it would be possible to have language which combined "certainty" with "future loss".

Both Farnsworth and Furmston indicated that it would.

Farnsworth indicated that it would be the certainty that future profits had in fact been lost.

Furmston stated that an English lawyer would conclude that if one used different language one meant different things. Therefore, if the lawyer saw "a reasonable degree of probability" in para. (1) and "a sufficient degree of probability" or "certainty" in para. (3), he would assume that a distinction was being made by a deliberate choice of different words. Secondly, assuming that they had a general rule of full compensation, and that they were coming to a rule of foreseeability, what he had read this as aimed at was a situation such as that of a supplier who supplies a factory with a piece of machinery which was clearly established to be defective in breach of contract. The effect of this was to impair the future productivity of the factory over the next ten years because it was not economic to replace the machine but it made the process less efficient: he took it that one had then established with a reasonable degree of probability that harm including future loss had taken place. What would give rise to problems for an English court was the process of actually quantifying loss in financial terms. If one had to establish with a sufficient degree of certainty what the loss of profits would be, one might have considerable problems. English judges actually took a robust view on this question - added enough naughts until they felt happy - but he was not

sure what the situation was if it went to a jury, as might be the case in America. He had the impression that American lawyers required a higher degree of certainty in practice than English lawyers did. He had no difficulty with para. (1), as one would expect to be able to establish that the plaintiff had suffered loss, including future loss. The process of assessing the loss on the other hand, which was in para. (3), was much more complicated as it involved making assumptions.

Brazil stated that to talk about matters being established with certainty would be received with a certain amount of alarm in Australia. Australian judges and practitioners would probably state that the appropriate standard of proof in this area in relation to para. (1) would be proof beyond reasonable doubt. What the sort of degree of probability required was would depend on the importance and the seriousness of the issue. From that point of view he had found para. (1) agreeable and thought that it would be acceptable in Australia. If "certainty" were used, he thought that questions would be raised in Australia as to whether or not the higher criminal onus of proof was being indicated here, namely proof beyond reasonable doubt. He agreed with Furmston on the reference to "sufficient degree of probability" in para. (3), which he thought had to be lined up with para. (1). Finally, in relation to para. (2), which stated that the loss of a chance might be compensated, he noted that no attempt was made to state how the judge or other tribunal was to assess this loss of a chance, how it was to be evaluated. He thought some very difficult questions could arise in this regard.

Crépeau indicated that, as far as the general principle was concerned, what he saw in this article was that damage which was to be compensated must be certain. He thought that all they were doing here was to bring in the traditional distinction between the certainty of the civil law and the certainty of criminal law: in criminal law more was required, whereas in civil law it was certainty by reasonable probability.

Bonell indicated that this was exactly what was intended and wondered whether it might not be possible to change the language of para. (1) to read "with a reasonable degree of certainty", which would also make it consistent with the title.

Date-Bah suggested that it was possible to put some interpretation on "certainty" - he found that to be a higher degree of proof - and since throughout the Principles no reference had been made to the burden of proof, why was it referred to in this article, and why was it referred to in terms that might suggest a higher burden than the ordinary civil burden?

Bonell did not think that this addressed the question of the burden of proof directly, because no matter who had to prove the probability, or the absence of probability, the substantive test was laid down here: instead of a 100% certainty, it might be sufficient if it was highly likely in accordance with the common rules of experience. He had first understood

Date-Bah's problem to be with "is established": was it just a question of the burden of proof or was it above all a question of what had to be proved?

Date-Bah stated that what he was suggesting was that if one used "certainty" that might indicate to people from a particular tradition with an acquaintance with probability other than burden of proof, that one required a higher burden.

Maskow supported Bonell's suggestion of "with a reasonable degree of certainty" because it comprised both aspects: on the one hand it stated "with a reasonable degree" and this was an allusion to probability and made it clear that the certainty required was not quite the certainty of criminal law, but on the other hand "certainty" indicated that there should be a rather firm assertion that things were like this.

Hartkamp and Brazil also favoured Bonell's suggestion.

Crépeau wondered whether in the common law world the phrase "reasonable degree of probability" had a technical meaning for the civil as opposed to the penal measuring of damages.

Brazil indicated that in Australia the lower burden of proof in the civil area was the subject of very detailed judicial writings. In the end it would come to a judgment on the part of the judge or the jury and the judge would tell himself or the jury that he had to be comfortably satisfied that what was alleged to have happened had happened - he did not have to prove it beyond reasonable doubt, the degree of proof he would need would depend on the seriousness of the matter in issue, etc. "Reasonable degree of probability" was, however, not in itself a term in Australian law. The first question it raised and did not answer was in fact, what was a "reasonable degree"?

The Group agreed to the formulation "[...] a reasonable degree of certainty" in para. (1). The square brackets in para. (1) were further deleted.

Komarov pointed out that the general principle spoke of the loss which the aggrieved party suffered and of the gain of which he was deprived, and then this article spoke of future loss. He suggested that it had to be drafted in such a manner as to avoid this discrepancy.

Drobnig also wanted to raise the question of the word "loss", which if compared to Art. 4 (6.4.3) did not include the gains of which the party was deprived. It should include the gains lost, so clearly this was an instance where "loss" should be replaced by "harm".

Tallon agreed with Drobnig.

Farnsworth pointed out that in Art. 6.4.3 "loss" had been used to denote loss suffered in the past and "gain" deprived in the future, whereas in the next article "loss" was used in the sense of gain of which one was deprived in the future, and that was not very consistent. He suggested that the words in square brackets could be eliminated, which would eliminate the problem.

Brazil wondered what the situation was with respect to losses incurred, i.e. expenditure incurred even before the contract was entered into. He assumed that the harm or loss could be brought to account in getting damages in the appropriate case.

Drobnig did not find that Art. 6.4.3 made a distinction between past loss and future gains lost, the difference was between physical loss, which could be past, present or future, and gains lost which could also be past, present or future. That was the established civil law distinction, and one would therefore unduly restict Art. 6.4.4 if one were to replace "loss" by "gains". He thought it had to be replaced by "harm", because "harm" was inclusive, it covered both future physical loss and future gains lost.

Furmston wondered whether there were systems in which taking out the words "including future loss" would actually make a difference: in English law it would mean exactly the same if one took them out as if one left them in.

Crépeau pointed out that if the words were taken out the comments would have to say something of this.

Bonell agreed they would, particularly when one spoke of "harm" and of a "reasonable degree of certainty" instead of only of "certainty" or of "direct consequence".

Tallon indicated that if future loss were deleted here, it was still present in another way when they spoke of the loss of a chance, because that was an example of future loss.

Drobnig stated that he would make the *argomentum e contrario*: since chance was expressly dealt with in para. (2), future loss was excluded.

Hartkamp felt that it would be useful to have the reference to the future loss in the provision. He wondered whether it could not be put in Art. 6.4.3(2) with lits. (a) and (b) explaining that full compensation included non-pecuniary damage and future loss, so that the a-typical kinds of damages were summed up. He on the other hand felt that loss of chance could stay where it was, because that was an elaboration of the future loss concept.

Crépeau and Lando suggested that the reference could be kept in Art. 6.4.4.

It was decided to keep the reference in Art. 6.4.4(1), modifying it to read "[...], including future harm, [...]".

Turning to para. (2), Furmston indicated that the English and French versions did not say the same thing. The French version was what he would want to say. If one lost a chance, and it was, for example, one chance in three, the damages should reflect a third of a chance, i.e. if one were to get 3,000 damages should be about 1,000. What the English said was that one would not recover unless it was more probable than not that the loss would occur, so one would only recover if it was more than 50/50.

Tallon agreed with Furmston on the substance and asked for assistance with the formulation.

Crépeau wondered if the phrase "insofar as it will probably occur" related to the measure of the damages or whether it was only a question of compensating loss of chance if the loss would probably occur, irrespective of how one would assess it.

Furmston thought that there would be a serious risk that an English judge or arbitrator would read it as meaning that. In other words, one could only recover chances that would probably occur. That had actually been held in some English tort cases where a doctor had made a mistake, the evidence being that if he had done the right thing there was a 25% chance of recovery. It was held that the plaintiff could not recover on that, because it was still more probable than not that he would not recover. He therefore thought that the language of the provision was a bit dangerous. He suggested that the provision could stop after "chance".

Tallon indicated that they already had the reasonable degree of certainty, which raised the first question, and then here was the second question, the loss of a chance and getting damages in relation to the probability of the occurrence of the chance. In France they had cases similar to the case Furmston had cited, but it was contractual in France and not tort.

Crépeau cited a Canadian case, in which a carrier was to carry a tender; the tender had had to be in by 12 o'clock but because of some fault on the part of the carrier the tender had only arrived two hours later and could therefore not be counted in the opening of the tenders: he had sued and had won an amount for loss of chance, because, as far as the probability of occurrence was concerned, the court had said that there was a probability because he was one of the lowest bidders. Then the question arose as to how the damages resulting from that loss of chance should be quantified.

Drobnig wondered whether that problem was not covered by para. (1), he could not see the reason for a separate provision.

Tallon conceded that one could say that it was covered by para. (1), but thought that as it had been decided to have something on loss of chance it was better to explain how to quantify it. It was of course an application of para. (1).

Drobnig feared that if one had a separate provision the consequence which could be drawn was that they had intended that a different measure be applied, whereas in his view the measure had to be the same.

Bonell recalled that the case of the loss of a chance had been similar to that of the non-pecuniary loss, in that they had thought it to be useful for the users of the Principles to have it expressly mentioned because it was not that self-evident. In substance, however, it certainly was covered by para. (1).

Tallon suggested that one could say "thus compensation may be due for the loss of a chance [...]". It could be a kind of example for the first paragraph.

Crépeau suggested saying in para. (2) "The loss of a chance is also susceptible of compensation". The rest would follow under the general rules on the probability of occurrence.

Tallon indicated that if Crépeau's suggestion were accepted it would just be an example, whereas Drobnig's criticism went further in that it appeared one had to have certainty of damage and that moreover one could recover for the loss of a chance, as if it was something different from the principle. They all agreed that the loss of a chance was a particular problem of certainty of damage.

Komarov indicated that having two provisions might imply that they were not cumulative, but that the aggrieved party could have future harm and additionally could claim for the loss of a chance. He therefore supported Drobnig's approach to delete para. (2).

Brazil thought that it would be better to include a specific reference to the loss of a chance rather than deal with it in the commentary. He thought that otherwise it would not be dealt with in a clear way corresponding to the feeling of the Group. He thought that the best way to do so was to include both future harm and loss of a chance in para. (1).

Lando agreed that there should be a reference to the loss of a chance, but thought that it should be kept in a separate paragraph. He suggested simply stating "Compensation may be due for the loss of a chance".

Crépeau suggested taking out "including future loss" in para. (1) and then have para. (2) reading "Future harm, including the loss of a chance, may [also] be susceptible of compensation".

Furmston suggested the formulation "Compensation may be due for the loss of a chance in proportion to the probability of its occurrence".

Tallon agreed with this formulation.

Bonell pointed out that then the test for future loss and that for the loss of a chance would be different: para. (1) stated that future harm would be compensated provided that it was established with a reasonable degree of certainty; para. (2) would then state that the loss of a chance would be compensated in proportion to the probability of its occurrence.

Furmston thought there to be two questions: the first was whether the chance had been lost, which had to be established with a reasonable degree of certainty: the second was what was the value of the chance which had been lost, which had to be established in proportion to the probability of its occurrence. For example: a lady is told that she will be considered for a place in a chorus line. There are 48 applicants for 12 places. When she arrives for the audition the producer refuses to consider her. She brings an action. It is clear that there is a breach of contract. The court says that she has lost a 25% chance of being selected and therefore the damages should be in proportion to that.

Maskow thought that this was a different solution. He had understood that in the Canadian case Crépeau had cited a 25% chance would not give anything and so far he had understood that if there was only a rather small chance one would get nothing, but only if the chance was rather high was it probable that what was chance would in fact turn out, and in that case one would get in accordance with what one would have gained if one had taken the chance. He therefore favoured saying the same as what was said for future harm. If this solution were adopted, "including future harm and the loss of a chance" could be put at the end of para. (1).

Drobnig stated that in determining and compensating future harm the same two steps had to be taken as if one wanted to make a distinction, namely whether any future harm would occur and determining its measure. Para. (1) laid down one criterion, one measurement for both stages of this process as far as he understood it, and he was convinced that a lost chance was just future harm and that they therefore had to be treated in the same way. It was impossible to make a distinction, they had to be put on the same level. He therefore preferred a formula along the lines proposed by Crépeau: "Compensation can also be made for future harm, including lost chances", because this made it quite clear that lost chances were just one element of future harm.

Brazil indicated that then one could say "Compensation payable under the first paragraph includes". He preferred this way of doing things rather than introducing a mechanical concept of proportionality to probability which gave the decision-maker no room to move, as he had to come up with a percentage and to apply it. In actual cases the judgement which had to be

made would be taken by reference to the fact that this was not certain to happen, that it only could happen, and this might involve a subtle judgment which would be sufficiently accommodated by what was proposed by Crépeau's approach.

Lando stated that the chance could be a chance which occurred before the judgement. In the case cited by Furmston it was not a question of future harm, it was harm which occurred because she had lost a chance. If thus by "future harm" harm after the judgment was intended, chance should not be included in future harm. If instead they meant harm occurring after the conclusion of the contract, every harm was future harm.

Date-Bah considered Furmston's formulation to do more than replicate what was at present in the provision as it introduced a measure of damage, rather than establish the principle that damages were payable. If the purpose of Furmston's reformulation was merely to reword what was in para. (2), the formulation would not be acceptable.

Furmston stated that he was simply trying to render an accurate translation of the French text, with which he was perfectly happy. Two questions were discussed in this article: one was the question as to whether the plaintiff had suffered harm, the second was what was the compensation for that harm. If A lost an arm he could prove he had lost an arm, that was harm, but the value of the arm depended on whether A was a writer or a tennis player or whatever, and that was a separate question. The text dealt with these as separate question, or so he read the text, even if people kept on saying that they were the same question.

Bonell wondered what he thought of Drobnig's point that the assessment of the harm to be compensated was a question which arose with respect to the loss of a chance but also with respect to other harm suffered, so why should the proportionality be dealt with only with respect to the loss of a chance?

Furmston thought that para. (3) dealt with assessment in general.

Bonell instead felt that it was a last resort clause, for the case when one could not fix the amount of damages more precisely.

Tallon thought that the discussion pointed to the necessity of having a separate paragraph. In the first paragraph there was the principle of certainty. In French law there were two cases of people being crippled by an accident: in one case it was a very brilliant student who had almost finished his studies as a doctor; in this case the court had judged that there was the loss of a chance to become a great surgeon and had given compensation. The second case concerned a child of seven and the parents had said that he could have become a great surgeon. In this case the court had judged it to be too far ahead. This was the first problem, i.e. certainty. The second step when there was a chance was how to assess this

chance. He therefore agreed with the formula proposed by Furmston. It was important to have a separate provision, just to know whether there was a chance, or whether the chance was too distant to be taken into account. This was the first paragraph, then there was a second paragraph concerning how to assess the chance if there was one. Lando was right when he said that the loss of a chance was not necessarily future harm. The principle of the loss of a chance might be actual harm, then it was only the development of the chance which was future. It was difficult to say that the loss of a chance was a future harm and that they would therefore treat it like a future harm. He therefore preferred keeping the provision as a separate paragraph, with the French formulation as it was and the English as proposed by Furmston. He stated that he would take care to explain the two steps in the comments.

Drobnig felt it to be artificial to distinguish between future harm and the loss of a chance. It was also artificial to establish two different criteria for first the occurrence of a future harm or lost chance, and second for its measurement. He requested that the substance of his dissent be reported.

Crépeau also had difficulties with the proposed formulation, particularly in view of the explanation given by Furmston, because there was an element of a mechanical rule that could well apply in a competition with 25 for 1 position when it was a 1/25th chance, but if one were passing an examination of one kind or another to become a lawyer or a doctor it was not possible to say that there was a 1/300th chance. They were dealing with an article on certainty of damage. The question of how the damage was to be evaluated was a different problem. He suggested simply telling readers that when they were dealing with harm they should not forget that future harm, including the loss of a chance, could also be compensated according to the rule established in para. (1).

Voting on the text as modified by Furmston, 4 voted in favour and 4 voted against.

Huang found it difficult to distinguish future harm and loss of chance in practice. If, for example, there was a case of fish imported from the Americas which should be sold before the spring festival and the shipment were delayed, would that be future harm or the loss of a chance?

Lando and Bonell indicated that in this case it would be a matter of certain damage and loss of profit.

Maskow pointed out that as the texts read the conclusion could be reached that in the case of future harm compensation did not have to be in proportion to the probability of its occurrence as was the case with the loss of a chance, whereas the same had to apply to both as also future harm could occur with greater or lesser probability.

Furmston indicated that if future harm had been proved with a reasonable degree of certainty then the assessment of it was to be established with a sufficient degree of probability. Unless future harm was a sub-species of chance rather than chance being a sub-species of future harm, once one had established that there would be future harm, e.g. that there would be loss of profits in five years time, the question was how did one assess that, which was a question of a sufficient degree of probability.

Date-Bah took it that Art. 6.4.4(1) did not include a rule on the measure of damages, it merely established the fact that damages were payable whereas para. (2) established a measure of damages as well. For one case the assessment was at the discretion of the arbitrator or the judge, and was therefore more flexible, whereas a rule was established for the second case. There therefore had to be a difference.

Furmston thought that the measure for other losses, including future loss, was answered by para. (3), whereas the measure for a loss of chance was handled by para. (2).

Drobnig felt the confusion to be increasing: para. (3) only came into play if para. (1) did not give a sufficient answer because a reasonable degree of certainty could not be established.

Furmston indicated that that was not what the provision said in English.

Crépeau pointed to a discrepancy between the French and the English in para. (3), because the French clearly indicated the *"montant du préjudice"* and para. (3) did deal with the assessment of damages. The English should therefore say "Where the amount of damages cannot be established [...]".

Bonell indicated that he had always understood the references to amount to refer to the amount of damages.

Komarov asked for confirmation that this rule implemented the objective criterion, i.e. it was not that the aggrieved party could not prove the damage, it was objectively impossible to do so. He suggested that this be made more explicit by the introduction of the notion of impossibility: "Where it is impossible to establish with a sufficient degree of certainty".

Furmston thought that the English was all right as it stood.

It was indicated that the comments could take care of this point.

Brazil assumed that the commentary would say something about how the discretion would be exercised on this sort of thing. It was not a

discretion which should be exercised at the whim of the judge, but in a considered, judicious and judicial way.

Drobnig pointed out that the title of the article which now would read "Certainty of harm" would cover only paras. (1) and (2) and not para. (3) which referred to the certainty of damages.

The text of Article 5 (6.4.4) as adopted therefore read as follows:

"(1) Compensation will be made only for harm, including future harm, that is established with a reasonable degree of certainty.
(2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence.
(3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment will be at the discretion of the court".

Article 6 (Article 6.4.5 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 6 (Article 6.4.5), Tallon indicated that it dealt with a question which existed in many legal systems. There were essentially two approaches in dealing with the problem involved: either by a limitation of the full compensation principle, or by the way one evaluated the causality. A formula had to be found which could cover both of these approaches. They had agreed on the first approach, the only problem left being the criterion of the limitation ("unless this non-performance is deliberate or reckless [grossly negligent]"). In French there was the general formula *"faute lourde ou dol"*. It was an accepted formula with a lot of connotations behind it which might or might not be understood by everybody and it was very difficult to find a similar concept in English law. The first option was between saying "deliberate" or "intentional", but if they said "deliberate" they would have to take out *"dol"* and say *"délibéré"* in French. He preferred "deliberate" as he found that with "intentional" it was difficult to know what the intention was, as for some people "intention" meant intention to harm the other party, whereas here the intention was the intention not to perform. "Deliberate" instead referred to the fact that the defaulting party knew that he was not performing the contract, whatever the reason. The second problem concerned the *culpa lata dolo equiparato*, i.e. the equivalence of serious fault to deliberate breach. If they decided to have it, the question was how to say it in English: the text had the two term "reckless" and "grossly negligent" and this was something which they would meet again when they spoke of exemption clauses.

Bonell recalled that all recent transport conventions where this problem was expressly dealt with used the term "deliberate and reckless".

Tallon wondered whether the French versions of these conventions had not rendered "reckless" by *"faute inexcusable"* and not by *"faute lourde"*. He felt that "reckless" was nearer *"faute inexcusable"* than *"faute lourde"*.

Maskow observed that in the report of the Ivry meeting reference was made to the *Principles of European Contract Law (PECL)* which at the time had read "However, where such non-performance was deliberate or reckless, the defaulting party may in the discretion of the court be held liable instead for loss which he foresaw or could reasonably have foreseen at the time of his non-performance [...]" (Art. 2.603(2)) following which the decision was recorded that the same wording should be adopted here. The difference was that in the PECL for the case of deliberate or reckless breach of the contract the time of the non-performance was decisive and not the time of the conclusion of the contract. He felt this solution to be convincing, as to a certain extent there was then the decision of the party to break the contract and for this decision the time of non-performance was decisive. He wondered why this had not been taken into consideration in the present draft.

Tallon stated that his notes had not offered this conclusion, and further the version of the PECL had changed since then, so he had doubts about using the old PECL version.

Crépeau observed that to avoid the problem of gender in the rule it could be expressed "The defaulting party is liable only for damages which were foreseen or could reasonably have been foreseen". This had the added advantage of allowing what was not said in the commentary: the commentary said that the foreseeability was assessed from the point of view of the debtor, but it very often happened that the parties at the time of the conclusion of the contract determined in advance what the damages would be, i.e. the parties themselves both together foresaw of what type the damages would be, and it was only in the absence of an agreement on the assessment of damages that the assessment would be made through the eyes of the debtor.

Bonell wondered why damages and not loss or harm were referred to. CISG and the Italian Civil Code, for example, all referred to the loss, why should they change that here and speak of damages? He then cited the *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (OTT)* which used the words "done with the intent to cause such loss, [...] or recklessly and with knowledge that such loss [...] would probably result" (Article 8(1)) (the same formulation was used in the *United Nations Convention on the Carriage of Goods by Sea* (Hamburg 1978) (Article 8(1)). The French text said *"avec l'intention de provoquer cette perte [...] soit témérairement et en sachant que cette perte [...] en résulterait probablement"*.

Brazil wondered what the position of the PECL was.

Lando cited Art. 4.503 of the PECL April 1991 version, which stated that "The non-performing party is liable only for loss which he foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of his non-performance, unless the non-performance was intentional or grossly negligent".

Farnsworth stated that almost any common lawyer would have trouble with this insertion of fault. In connection with the words "intentional" and "deliberate" what was meant in the case where party A reads the contract to mean X and party B reads it to mean Y, B performs Y intentionally and later the court says that he should have performed X? His sense was that B had done everything he had done intentionally. Was good faith misunderstanding of the meaning of the contract something which prevented an intentional act from being an intentional breach?

Tallon indicated that the intentional breach was a breach with the intention not to perform.

Farnsworth indicated that under American law misunderstanding did not save you. If B was wrong in his letter to A his good faith did not help him.

Tallon stated that then B was in breach, but that the consequences of the breach was not the same if it was a deliberate breach, if one knew one was not performing the contract or if one did not know.

Farnsworth indicated that in America the consequences were the same, with some unusual exceptions which were difficult to explain.

Furmston indicated that there were cases in which one party had gone to his lawyer and asked what he should do and the lawyer had told him what to do. Some of the judges had said that that was right but the majority of judges in the House of Lords had said that it was wrong and that therefore the party had done a repudiative breach.

Lando indicated that this had nothing to do with the civil law concept of intention. The civil law concept of intention was when the party knew what the contract was but performed it differently. For example, A knows that he should take B the parcel on Wednesday but intentionally takes it on Thursday instead.

Furmston indicated that that was not what an English lawyer would understand by the provision as they did not have this concept. The problem was therefore to express the concept in language that was understandable to an English lawyer.

Farnsworth indicated that both "intentional" and "deliberate" would lead every common lawyer to ask the question he had asked.

Crépeau suggested to adopt the solution in Art. 25 of the Warsaw Convention ("(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct [...]").

Furmston wondered what the situation would be if A made a contract to write a book and he did not write it, whether that would be an intentional breach.

Tallon indicated that it would be intentional. It was a case which occurred frequently, for example in the case of builders who signed lots of contracts but could not perform them all and then had to choose which to perform. This was a deliberate choice.

Furmston wondered what the case would be if the builder then did all the contracts but rather slower, so he was late on all the contracts. Would that be deliberate?

Tallon indicated that it would be deliberate breach if the builder knew that he could not perform in time.

Bonell and Lando indicated that the misreading of the contract would be an example of a non-deliberate non-excused breach.

Tallon gave the example of a builder who through laziness or negligence does not buy everything in time to perform the contract. It was not a deliberate breach, it was negligent conduct which led to the non-performance of the contract.

Furmston pointed out that then according to this reasoning if A made a contract to write a book but was too lazy to start it that would not be deliberate, whereas if he made a contract to write two books and wrote very fast but was only able to finish one, that was deliberate. He had the impression that whatever answers were given to these questions common lawyers would have different answers unless it was spelled out very clearly in the comments. Presumably the European Group had managed to persuade the English lawyers to accept that text, but he could not understand what they thought it meant.

Bonell thought that the basic test was not so much the non-performance as such, but the effects of the non-performance: e.g. A deliberately does something knowing that it will have a certain concequence, that it will do certain harm to the other party, but does it anyway. Or, alternatively, does it knowing that it is very likely that this behaviour, which is contrary to what he should do, will result in this harm to the other party.

Tallon indicated that this was the explanation for the assimilation of the *culpa lata* to the intention, because it was very difficult to prove

intention but not *culpa lata* - a party does not want to break the contract but does nothing to prepare for it and so is grossly negligent and this was the same as intention. The rule of the *culpa lata* was explained by the difficulty to prove intention.

Farnsworth went back to Furmston's contract to write a book, because the modern twentieth century rationalisation of this rule was that at the time of the conclusion of the contract a party who was to write a book was entitled to have an idea of the consequences if he or she decided not to write the book. A is B's publisher and B's book sells well in England. A has in mind an Italian translation which will sell to millions of Italian law students but B does not know this. B decides not to write the book as he has agreed to write too many books. Suddenly under this rule that was a deliberate or intentional breach and B was liable for A's loss of profits for the enormous sales A expected in Italy, and B says that if he had known this when he made the contract he might not have made the contract or he might have put a clause in the contract which excused him or he might have arranged for higher royalties so that risk would be paid for. He thought that in this case it was rather unfair to put the burden of unforeseeable loss on B. He thought that both he and Furmston wanted to suppress the exception and keep the rule, or at least have the exception written in such a way that people in their countries would understand it. He did not think that the words "intentional" and "deliberate" communicated what they had been told they meant.

Date-Bah indicated that it would be strange to have this in the system he came from.

Brazil also shared the reservations.

Drobnig indicated that also German law did not have the foreseeability test, but only causality and under that test the intention to breach was not relevant. The examples given made him hesitate as to the appropriateness of the system.

Crépeau thought this a rule which had to remain whatever the formulation of it, because if they accepted that in matters of contract only foreseeable damages would be awarded, which was already an exception to the *restitutio in integrum* rule, surely they had to keep the exception to the exception whatever one called it: deliberate, reckless or wilfull, i.e. if there was such gross negligence or wilfull conduct the full measure of damages would be given to the creditor. There was one area where all systems were aware of the solution, and that was Art. 25 of the Warsaw Convention which did exactly refer to this problem of the liability of the carrier being reduced unless there was wilful conduct or gross negligence. That was an international document which civilian and common lawyers had lived with for more than 60 years.

Bonell pointed out that with respect to gross negligence there was a huge amount of case law with divergent outcome. He recalled that CISG did not foresee such an exception and if they kept it they would introduce in the Principles something which CISG had not adopted with respect to sales contracts.

Furmston recalled that the Warsaw Convention contained a clause limiting liability, so one could ensure what the maximum of one's liability was, one did not need to worry about these fancy rules.

Bonell pointed out that these exceptions were foreseen for the breaking down of the limits of liability.

Drobnig pointed out that the Warsaw Convention put a deliberate maximum limit on the recovery and therefore this limitation was being excepted from if there was an intentional breach of contract. That was not really comparable to the situation in the Principles, because foreseeability was a much wider concept. The Warsaw Convention could therefore not be considered to be a precedent in favour of the exception.

Maskow thought that the difficulties arose because different concepts were mixed here. As a rule they did not have the default concept but they had the force majeure concept. On this occasion they were using terms which had been used in a different way elsewhere in the Principles. He recalled Art. 2.13(1) which dealt with terms deliberately left open, in which reference was made to where parties "intentionally left a term to be agreed upon later", i.e. the same terminology was used in a different context. He thought it important to have the foreseeability test as in CISG. It was less important to have the exception, but if they wanted to have the exception they should try to use words different from "deliberate" or "intentional".

Komarov favoured keeping this test. There were cases in which a contract is made between two parties and one later on discovers that another contract would be more advantageous to him and therefore intentionally breaches the first contract, and for these cases limitations as to damages should not be allowed. Parties should take into account what was perceived at the moment of the conclusion of the contract.

Bonell objected that the foreseeability test would be applied also in that case.

Komarov thought that the term "intentional" had to play a greater part in that case: if the party had breached the contact intentionally he should not be allowed to make use of this limitation.

Voting on the deletion of the "unless" proviso, 7 voted in favour, and 4 voted against.

Crépeau asked whether when one said that "The defaulting party is liable only for the harm which *he* foresaw", one was not precluding the possibility that the parties themselves at the time of the contract could have foreseen what the damages would be. In other words, if both parties had foreseen the harm they would fall outside the scope of this provision. The commentary said very clearly that *"la prévisibilité s'apprécie en la personne du débiteur"*.

Bonell stated that what was important was that it would not be sufficient if it was only the innocent party who had foreseen the damage. What the innocent party had foreseen could never be decisive, but if in addition to defaulting party the innocent party had also foreseen the harm, this did not matter.

Crépeau gave the illustration of a case which had actually occurred: a man parked a car in a parking lot and put 100,000 dollars of jewellery in the boot and locked it. The car was stolen. Would there be liability not only for the loss of the car, or for what one generally found in a car, but also for the 100,000 dollars of jewellery?

Bonell indicated that there would not, because that loss was not foreseen, nor could it have been foreseen.

Crépeau wondered whether it would not be preferable to have "The defaulting party is liable only for loss which was foreseen", which could be either by both parties or by the debtor.

Bonell did not think so. He indicated that this was Crépeau's interpretation, that he would have many doubts because "which was foreseen" - who says that it can be either both parties or the debtor? Why would it then not be sufficient if it was only the creditor who had foreseen the loss?

Crépeau indicated that he had only wondered if they should not reserve the possibility that the parties may at the time of the contract determine what would be the foreseeable damage.

Tallon indicated that this was liquidated damages and that both cases could not be covered in one text.

Tallon asked for confirmation that he had to state in the coments that there was no exception to the rule in case of intentional or deliberate breach or in case of gross negligence.

Bonell thought that a short comparative analysis would be of great help, to the effect that although in some jurisdictions, civil law in particular, traditionally at least the "intentional" breach led to ... it was considered that on a world-wide basis such an approach did not meet with general approval, quite the contrary given the difficulties in certain

other systems even to define the concept and the fact that also recent instruments ...and so on.

Article 6 (Article 6.4.5) as adopted therefore read as follows:

"The defaulting party is liable only for loss which he foresaw or could reasonably have foreseen at the time of the conclusion of the contract would be likely to result from his non-performance"

with *"Foreseeability of harm"* as its title.

Article 8A (Article 6.4.6 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 8A (Article 6.4.6), Tallon indicated that it was one of two special rules, the first (Article 6.4.6) dealing with cover, the second (Article 8B or 6.4.7) dealing with the current price. They had been added after the Ivry meeting. The two rules set presumptions in order to facilitate the task of the creditor in proving the amount of the harm, and of course in both cases it was a simple presumption so that it was always possible to prove further damage. There had previously been a general rule on proof which gave the principle *actori incumbit probatio* which had been suppressed. He had then been asked to make rules for these two special situations. The only drafting problem was whether they should say "cover" or "cover transaction".

Crépeau wondered whether the term "cover" was a term of art in the common law world, such that it was necessary to use it. The word "cover" was unknown in the English civilian world. He wondered whether there could be a less technical description of what was meant here, and whether that was the reason for "transactions" which had been put in brackets.

Farnsworth observed that the origin of "cover" was the United States Uniform Commercial Code. It had not been a common word in the American vocabulary until the Code, and the rest of the common law world might have a reaction similar to that of the civil law world. "Substitute transaction" had occurred to him, and "replacement transaction" might attract the French and might be better understood. The word "presumed" evoked extensive discussion in America, often going off into questions of evidence that experts in contracts and commercial law were not terribly familiar with, so he wondered whether it would be acceptable to eliminate the word "presumed" and to rewrite the two sentences in one along the lines: "When as the result of a breach there has been a reasonable replacement transaction the loss is the difference between the price fixed by the contract and that of the replacement transaction, unless a greater or lesser loss is proved".

Tallon observed that he would have to speak of presumption in the comment.

Farnsworth felt that it was better to do it in the comment than in the text.

Drobnig indicated that for civil lawyers presumption was not a matter of evidence: it might provoke evidential questions, but, especially for the qualification under conflict of laws, it was part of the *lex contractus*, so he had no difficulties in speaking about presumption. He observed that the text deviated from the decisions taken in Ivry, where it had been decided that the formulation of this article should be made closer to Art. 75 CISG, and that in particular it should be made clear that the cover transaction must not be concluded before avoidance of the contract (Report of the Ivry meeting, p. 9).

Tallon did not feel this to be necessary, because they were not speaking of termination or of the effects of termination, they were speaking of the fact that whenever there was a cover transaction damages should be assessed in such or such other way.

Maskow thought that what was decisive in this connection was to say that the contract was terminated. In theory, according to the article there could be a cover transaction without the old contract having been terminated.

Tallon felt that the result would be the same, so then one might as well simply say that whenever there had been a cover transaction damages were to be assessed this way.

Bonell observed that CISG did mention it, but he was also a little embarrassed if he had to think of why it should be expressly stated.

Drobnig indicated that this was the only place where cover transactions were mentioned, so implicitly that important condition should also be mentioned. CISG supported this view, because in the context of damages CISG mentioned that the cover had to be made after termination. Thirdly, if one did not mention this any transaction undertaken by the creditor could afterwards be characterised as a cover transaction and be used for the purposes of computing damages. It was therefore important to say that only a cover transaction made after termination, i.e. after the intention to end the contract, came into consideration.

Bonell agreed that it was important that not every transaction came into consideration, but he had thought that that was covered by the concept of the "reasonable" replacement transaction. He still could not understand why it had to be after termination.

Maskow stated that it was a question of damages for non-performance. Non-performance presupposed that it was no longer possible to perform the old contract and this presupposed that that contract had been terminated. On the other hand, one could say that one got those damages and that if the

contract had not been terminated one could ask for the fulfillment of the old contract as well, in addition to the costs of the cover transaction. One could for instance ask for the repair of the goods delivered.

Furmston wondered what the case would be if A was a buyer and the seller has contracted to deliver goods that day and did not deliver them, he took it that A could go out to buy substitute goods - did he have to tell the seller that he was going to do that? He would have expected simply to go out and buy them. Was the thrust of this provision that A could not rely on the substitute transaction unless he had first told the seller that he was terminating?

Drobnig pointed out that if he did not do so the first seller might still deliver.

Furmston assumed that the seller could not deliver because he had failed the day of delivery and the buyer would reject the goods the following day.

Drobnig wondered how the seller could be expected to know that, because the buyer might be willing to accept the goods the following day.

Furmston indicated that he was assuming that it was a commercial sale where time was of the essence and where one would naturally expect to be able to reject delayed goods. He could imagine that in this situation people would not realise that they actually had to tell the other party that they had terminated the contract.

Lando could see this being important only in the case of defective performance, because if there was no performance there was no necessity to give notice under the rules of the Principles on notice. In the case of a defective performance one had to give notice within a reasonable time. For example, A lets B some goods which B can use, e.g. a leasing contract, and then under the lease B wants to acquire substitute goods. In this case he thought that B should notify A that he would not keep A's goods and that he would get something else. Then it was useful to combine it with termination. He therefore felt that they should have the CISG rule.

Tallon stressed that here they were not dealing with cover transactions but with damages. If they wanted to have a rule on cover transactions it should be placed elsewhere.

Bonell indicated that there were two alternatives, a shorter formula along the lines "If the contract is terminated and there has been a reasonable replacement transaction [...]", and a longer one which would be taken word by word from CISG ("[...] in a reasonable manner within a reasonable time after termination [...]").

Tallon indicated that there was a third alternative formula, i.e. that of Art. 4.505 of the PECL: "Where the aggrieved party has terminated the contract and has made a cover transaction within a reasonable time and in a reasonable manner, he may recover the difference between the contract price and the price of the cover transaction as well as damages for any further loss recoverable under this Section". In the Principles "cover" would become "replacement".

Crépeau pointed out that the "greater or lesser loss" of the provision in the Principles was lost in the PECL formulation.

Bonell felt that there was a difference in substance, because the defaulting party under the PECL could not prove a lesser harm, because it said that the aggrieved party could recover the difference between the two prices and any further loss recoverable, while in Tallon's version the aggrieved party could prove not only a greater loss, the other party could also prove a lesser loss. He thought this was quite reasonable. He recalled that Farnsworth had also had a proposal.

Farnsworth observed that for him the basic question was which basic formula they should follow: the long CISG formula or the shorter one.

Voting having a longer formula such as the one of CISG/PECL for the opening of the provision (on the understanding that termination would be included), 10 voted in favour.

The formula would therefore read as follows: "Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable manner it may recover the difference between the contract price and the price of the replacement transactions unless a greater or lesser loss is proved".

Farnsworth could not understand the circumstances in which a lesser loss would be proved.

Drobnig stated that this was the reason the PECL only spoke of the bigger loss, because a lesser loss could not be recovered by the aggrieved party, it could perhaps be recovered by the defaulting party but they were speaking of the aggrieved party's claim for damages. He therefore thought that it would be correct to have the shorter formula in this respect.

The two alternative were therefore the one of the PECL which stated "as well as damages for any further loss recoverable under this Section" and the present formula "unless a greater loss is proved".

Farnsworth indicated that a problem which was much much discussed in the United States was that of where there was a cover transaction in which the buyer who was very lucky or skillful bought the cover goods for a favourable price and then wanted his damages to be based not on cover, but

on the market price because he had been skillful enough to cover at less than the market price. The answer that they would want would be that one was limited to damages based on cover if there was cover. If that was the case, the PECL formula was better because the formula "unless a greater loss is proved" might invite a buyer to claim damages based on the market price differential because it was a greater loss. It was better to say that one would get damages based on cover plus other damages.

Drobnig suggested that this problem was taken care of by the next article, which dealt with the case where there had been no cover: as it specifically referred to the case where there had been no cover it was clear that one could only claim under Art. 8A. The "unless" formula was less clear, because it could be understood as saying that in the case where the damage was bigger the aggrieved party could not claim damages under the main rule, because the "unless" implied that that did not apply, whereas what was meant was that one first could recover the difference under the main rule and then in addition further damages could be claimed. It was therefore possible to say "as well as damages for any further harm recoverable under this chapter".

Bonell did not think "recoverable under this chapter" was necessary.

Farnsworth observed that these articles dealt with both the suplier and the recipient of services, which was one reason why "cover" was not so good as "replacement". For example, a builder makes a contract to build a house and the owner of the land breakes the contract so the builder does not get to build the house. The builder makes another contract with someone else and the owner says that the builder has made a replacement transaction and that as the price for which he was building the new house was the same as the price for the house he was to have built for him, the damages are zero. The builder states that that was not correct because he could have built both houses and made a profit on both houses. In the United States there was much discussion and litigation on whether there had been what they called "lost volume". If A was to work full time as B's research assistant and B fires A who takes another job, it was assumed that that was a replacement as it was possible to have only one full time job. On the other hand, if A was a builder or a writer of books. A could make additional contracts and they would not be replacements. Generally in the case of builders it was assumed that a builder could expand the business so that if someone broke a contract for house no. 1 and the builder made a contract for house no. 2 it was not a replacement transaction. His answer would be that in the case of the builder Art. 6.4.6 did not apply because the second contract for a house was not a replacement for the first, the builder could have made both contracts and performed them and therefore the full compensation rule of Art. 6.4.3 would apply and the builder would be able to recover his lost profit on contract no. 1 and contract no. 2 would be irrelevant in calculating his damages. If that was not what the text meant, he would want to discuss it, if it was what the text meant it was important to put in an example. If the question of lost volume were not

resolved in the comments at least, every American would say that the Principles had not dealt with lost volume. In sale of goods cases CISG applied, but in building cases it was a case of lost volume. He wondered whether he was correct in thinking that the comments should say that cases of lost volume did not involve replacement transactions and therefore did not come under Art. 6.4.6 but under Art. 6.4.3.

Furmston was sure that in England the case Farnsworth referred to would not be considered a replacement transaction. The cases in England were sale of goods cases but there were sale of goods cases saying one had lost volume.

Drobnig thought this a very interesting point. It had in fact always bothered him in this connection, because one would make the same argument also in sale of goods cases outside CISG. He had never found an answer to this question: did it mean that cover, with the consequences set out here, was limited to civil transactions and to certain commercial service transactions where a person could do only one job and no more? That would narrow the idea of cover transaction enormously.

Farnsworth referred to the solution in the Uniform Commercial Code which had a provision which said that if the rule which in the Principles was Art. 6.4.6 was not adequate to give full compensation the party could recover the lost profit. The Principles did not have such a rule in its text and he thought that it was important to have it in the comments so that at least it was understood that in the case of the builder, and in many service contracts, where there was lost volume Art. 6.4.6 did not limit the damages. What happened frequently was that if the market had not changed the replacement transaction was for exactly the same price, and one would lose a transaction but get no damages. Hundreds of pages had been written on law and economics on what lost volume was, and many cases had been decided on it. It was usually always assumed that in the case of building contracts one had lost a transaction. In the case of sale of goods that was not easy to answer but that was the problem of CISG.

Maskow was not sure that this was used all that often in practice. Until now when they had spoken of cover transctions they had taken the position of the party who wanted to have the goods or the services, i.e. the party who had to perform the monetary performance, and this was clear. Now they had changed their position and had taken the position of the party who had to deliver the goods or build the house, i.e. the party who had to deliver the non-monetary performance, and in this case the most frequent approach would be for this party to ask for loss of profit and was not so much a question of a cover transaction. This would only be the case if it could sell the same goods at a lower price in which case the party would ask for the difference, but maybe in this case if individual things were concerned it was not possible to speak of lost volume.

Farnsworth indicated that lost volume arguments could be made by either buyers or sellers in the goods cases, usually by sellers but not always. Maskow seemed to suggest that he read Art. 6.4.6 as being limited to the party who was to pay the money and he wondered whether that was correct.

Maskow pointed out that even if in theory this were not the case, in practice it would work out in this manner.

Farnsworth indicated that Art. 6.4.6 was a rule which would apply to the builder of the house also, and the question was what happened if the builder said that he wanted damages under Art. 6.4.3 and the owner of the land said that he would pay damages under Art. 6.4.6 - which were zero. Where did it say that if Art. 6.4.6 was not adequate Art. 6.4.3 would apply? Where did it say that Art. 6.4.6 did not apply if there was lost volume, i.e. if there was no replacement? For example the party who had broken the contract said that the rule in Art. 6.4.6 applied and the damages were zero, the other party objected that that did not give him full compensation and the party in breach said that Art. 6.4.6 said it did.

Tallon observed that this was because the notion of presumption had been set aside. The presumption was just a way to facilitate the job of the aggrieved party, but if he did not want to avail himself of the presumption he could revert to the principle of full compensation.

Bonell wondered if it was possible for the defaulting party to object to the aggrieved party claiming full compensation under Art. 6.4.3 by stating that the aggrieved party should avail himself of Art. 6.4.6 because he had in the meantime entered into another contract.

Farnsworth stated that the point was that sometimes the party in breach should be able to do this and sometimes not. In the case of the full time employee certainly the party who fired the full-time employee and saw the employee get another job for the same price could say that the employee must limit his damages to Art. 6.4.6. If A agreed to sell all the electricity that his plant produced and then B broke the contract and did not take it, after which A sold it to C and got the same price, he did not lose any volume because it was all electricity, and certainly B could say that Art. 6.4.6 limited A's damages. To him the reason was that it was a replacement in the case of the output of electricity.

Bonell stated that in Farnsworth's example the defaulting party could object that the aggrieved party had already found someone else to sell the electricity to, so where was the loss?

Brazil found that it was difficult to capture this in a text. It might be easier to capture it in the commentary, but it would still be difficult. He wondered whether this problem was not covered by the words at the end "as well as damages for any further harm". He wondered whether,

with a suitable commentary, that might not be the way to dispose of the problem.

Farnsworth pointed out that usually what would be understood by "damages for any further harm" would be, for example, brokerage fees: if one had to pay an intermediary to arrange the cover transaction then one would get not only the difference between the price, one would get the additional fee one had to pay the intermediary for the second transaction. In addition, one could get any shipping charges there might be. However, if the price of the second contract happened to be lower so that the builder seemed to be losing on the second contract, it did not seem to him that the answer was to take the profit lost on the first contract and then to add the price differential on the second contract, which was what the proposed rule said, because that would give too much. All one should get as loss was the loss of profit on the first contract. The second contract should be irrelevant in the case where there was a loss of volume. What was the answer to the case where he sold all of his electricity, and so could not lose volume if he made a replacement, or to the case where he sold so much electricity and the other party broke the contract and he then sold the same amount to someone else and said that he could not produce enough for both? Somewhere that had to be dealt with in the comments. Every American lawyer knew that this was a common problem, especially in building contracts.

Furmston wondered whether it was any kind of answer to say that the second building contract was not a replacement under this section.

Farnsworth indicated that that would be his answer. If that was satisfactory it could be put in the comments, but that was not the answer Bonell or Maskow gave.

Drobnig observed that if he said that it was a replacement transaction he could recover the lost profits of the first part under the proviso on further damages.

Farnsworth did not think this was possible.

Bonell referred to the cases of the full time assistant and the builder. If the full time assistant claimed loss of profit it was easy to say what the assistant had lost, what he was able to do and what his new job was, and if the compensation was the same, that was it, it was hardly possible to do it twice. Thus, even if the assistant tried to ask for further damages he would not succeed in proving them irrespective of whether or not there was a cover transaction. On the contrary the builder might well consider the second contract a cover transaction and ask for the difference in price if there was one and then in addition say that as he would have been able to do this job twice he would also ask for the loss of profit for the first one of the two. At that point the other party could hardly say that the builder could not have done it.

Farnsworth indicated that if they put in language at the end of Art. 6.4.6 that said "unless there is greater loss" and it meant what Bonell said it meant, i.e. it was intended to refer to the lost volume case, he thought it possible to do so and it was the solution which the UCC attempted, but then what about the research assistant? The research assistant objected that it was not true that he did not sustain loss because in his new job he had additional expenses for travel, he had to pay an agent, etc. The problem was that they were talking about two different things: in the case of the assistant they were talking about using the formula in Art. 6.4.6 and adding things that the formula did not take into account, such as intermediaries. In the lost volume case they were talking about something quite different, they were taking about forgetting about the formula and using a lost profits formula to get the actual loss. He thought people would be confused if the same words were to apply to the assistant's ability to add to the amount the formula gave and to the builder's right to claim damages on a totally different base.

Bonell felt lost, because he thought that in the case where, for example A, instead of having a post in Rome had an equally paid job in Perugia and therefore had to travel this would clearly be an additional harm which was recoverable. Equally, the lost profit.

Farnsworth observed that the lost profit was not something one added to the cover formula, it required a totally different method of calculation. The cover formula had nothing to do with the lost volume case. It was not that one took the cover formula and added something, it was that one rejected the cover formula. If one tried to use the same simple language to refer to the case where one rejected the cover formula for lost volume and to the case where one added something to the cover formula because there were additional expenses the reader would be very confused.

Lando did not think that this should be put in the text, but that it certainly should be considered in the comment. He saw that the typical lost volume case was the case where the aggrieved party was a professional who provided services or goods which were of a generic kind, because if, for example, it was all electricity it was specific goods and if it was a Rembrandt which he had sold it was a cover transaction if he then had to sell it to someone else. The lost volume presupposed that one had several items of the same kind and that one could replace the one.

Bonell wondered how one could link the lost volume case with the text.

Lando indicated that one should say that the case of the lost volume was not covered by the rule on cover transactions.

Farnsworth indicated that if they were willing to point out in the comment that it was not a replacement transaction then what the comment said was that Art. 6.4.6 did not apply to the lost volume case.

Date-Bah felt that it was a question of the interpretation of the notion of replacement transaction and the comment could swing the perception one way by saying that in the lost volume situation it was not to be perceived as a replacement transaction.

Bonell felt that it would be useful to draw the attention of the users to the problem.

Drobnig felt that the Art. 6.4.6 formula would be adequate also for the lost volume cases. Even if one considered the lost volume case a replacement transaction the provision entitled the aggrieved party to ask for additional damages and the additional damages were the profits lost on the first transaction.

Farnsworth stressed that if it was a case of lost volume the second transaction was not relevant to the calculation. If one used Art. 6.4.6 the second transaction was necessarily relevant because one would be subtracting two numbers. It was therefore nonsense to say that one could use Art. 6.4.6 in the lost volume case because Art. 6.4.6 said that one took the difference between the two transactions, lost volume meant that one transaction was irrelevant.

Drobnig objected that the main point was that one could claim additional damages. Admittedly, under the main rule it would not be possible to claim anything, but one could prove and claim additional damages.

Brazil indicated that the comments should reinforce that.

Maskow felt that it would be dangerous to proceed as proposed by Drobnig. There might be a second transaction in which the building was made at a lower price. Then one could ask for the difference and additionally also for the lost profit of the first transaction, and that would be too much.

Farnsworth agreed with Maskow.

Bonell concluded that then the comments should give an idea of the mechanisms involved: the main hint should be that this provision was not intended to refer to these cases, it was intended to be applied where it really was a case of replacement in a strict sense; if it was a case of lost volume one should forget about it and had to resort to the general rules unless one interpreted the last words in a broad sense, meaning that the difference could also be recovered.

The text of the article as adopted therefore read as follows:

"Where the aggrieved party has terminated the contract and has made a replacement transaction within a reasonable time and in a reasonable

manner it may recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm".

The title of the provision was changed to *"Proof of harm in case of replacement transaction".*

Article 8B (Article 6.4.7 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 8B (Article 6.4.7) Tallon indicated that it dealt with a very controversial issue. He had tried to give a better distinction between "current price" and "market price". There was also the fundamental question of whether this article really was needed. There were various possibilities: to have nothing at all, or to have paras. (1) and (4) only. He had a definition of current price which was different from the one in CISG which he did not consider to be satisfactory. He referred to Art. 4.506 PECL ("Where the aggrieved party has terminated the contract and has not made a cover transaction but there is a current price for the performance contracted for, he may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further loss so far as these are recoverable under this section") which might be an alternative solution.

Drobnig suggested that as the PECL version had been adopted for the previous provision, for the sake of consistency the PECL version could be a point of departure also for this article.

The Group agreed that the opening phrase should be aligned to the preceeding article.

Brazil felt that there ought to be a definition of current price.

The other members of the Group agreed.

Crépeau pointed out that the "Principles" of the English text had been rendered by "loi" in the French and that this should be seen to.

Drobnig wondered whether it would not be possible to be satisfied by para. (2) and to broaden it a little. The end of the formula which referred to "comparable circumstances" was very good and rather comprehensive and could be made to cover both the price and the circumstances as such and probably also the place.

Tallon recalled that para. (3) was a copy of CISG.

Komarov observed that para. (2) used the words "the price generally charged" but CISG used "the price prevailing". Was this indicative of a

different approach? He assumed it was not, and suggested that the same words as CISG should be used to facilitate things for users.

Bonell referred to Art. 5.1.11(1) which used the formula "the price generally charged" which was consistent with the present formulation.

Drobnig observed that Art. 76 CISG had only one paragraph to define current price whereas the present text needed two paragraphs. He himself preferred CISG which he found to be a good model.

Tallon found that having two paragraphs was clearer.

Bonell suggested that a one paragraph definition could have the advantage that it covered the whole spectrum, so the words "For the purposes of the preceeding paragraph" could be quite useful in that it directed the reader to what was actually the purpose of the provision.

Tallon wondered whether it was necessary to add "For the purposes of the preceeding paragraph" - it was evident.

As regarded the phrase "taking into account the difference in transport charges for the performance", Drobnig wondered whether it really was necessary or even justified. If in the first case of non-performance these goods did not exist, and then of course one had to take into account the cost of transportation, but the more frequent case would be that the goods existed but that there was no current price and in this case transportation costs were not involved.

Tallon wondered whether the Group wanted to follow also the formulation of CISG "such other place as serves as a reasonable substitute".

This was not thought necessary.

The wording of paras. (2) and (3) as merged and as finally adopted therefore read as follows:

"Current price is the price generally charged for goods or services delivered or rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference".

Turning to para. (4), there was also the alternative of the PECL formula which merged para. (1) with para. (4).

Drobnig pointed out that this had already been decided.

The text of para. (1) as adopted therefore read as follows:

"Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm".

Huang referred to the last lines on p. 18 of the commentary which with reference to the moment in time which should be used to determine the current price stated that *"Cette solution n'a pas été définitivement adoptée par le groupe de travail".*

Bonell pointed out that the Group had now agreed on the time, i.e. the time the contract was terminated, so this question was settled.

Article 9 (Article 6.4.8 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing the provision, Tallon recalled that at Ivry it had been adopted without any detailed discussion. Two questions could be asked: first, what link was there between this article and Art. 6.1.2? Secondly, what were the consequences of a non-performance which was due in part to the aggrieved party on the other remedies?

Bonell pointed out that the relationship between Art. 6.4.8 and Art. 6.4.9 should also be considered. He referred to Art. 4.504 PECL which combined what was in Arts. 6.4.8 and 6.4.9.

Turning to the relationship between Arts. 6.4.8 and 6.1.2, Lando indicated that the PECL did not have a provision such as 6.1.2 but they did have Art. 3.101 on remedies available, which in para. (3) stated that "A party may not resort to any of the remedies set out in Chapter 4 to the extent that his own act caused the other party's non-performance" and was therefore very close to Art. 6.1.2.

Tallon indicated that Art. 3.101 was a general provision for all remedies, and Art. 6.4.8 was only for damages. The problem they had had was to know whether there should be similar provisions for the other remedies.

Bonell stressed that the approach adopted by the PECL was basically the same as that so far adopted in the Principles, i.e. having a general provision dealing with the impact of the innocent party's acts and omissions on the remedies available and a specific provision on the *fait du créancier* with respect to damages. He wondered whether Tallon, who was in favour of having a special provision on mitigation of damages, would also be inclined to give up the provision on the *fait du créancier* with respect to damages only, and would think that it was already covered by the general provision.

Tallon agreed that it was a more general situation to have a reduction of damages.

Bonell referred to CISG which followed the same approach of the Principles in having a general provision and then only a mitigation of damages provision in the section on damages. In other words, the Principles would correspond to CISG if the article at present under discussion, which did not appear in CISG, were to be deleted, even if the placing of the provisions was different. He wondered whether Tallon thought that a repetition of the same rule with respect to damages was necessary.

Tallon pointed out that this provision contained something which did not appear elsewhere in the text of the Principles, i.e. the reduction of the damages, so it might be useful to have it. It was an application of the general principle and gave the rule for the measuring of the reduction of damages.

Bonell wondered whether Tallon could envisage the comments stating that the rule was an application of the general principle in Art. 6.1.2 which however introduced this additional element.

Tallon agreed that he could.

Drobnig wondered whether Art. 6.1.2 did not have an element which was not repeated in Art. 6.4.9, i.e. where the non-performance was caused "by another event as to which the first party bears the risk". He was not sure what the effect of this would be, whether Art. 6.4.9 was a departure from Art. 6.1.2 and if so what the reason for this departure was and what its effect was.

Hartkamp recalled that the addition in Art. 6.1.2 had been made because the article spoke only of the act or omission of the aggrieved party and there were other factors or circumstances which might cause the non-performance on the part of the debtor which were not acts or omissions of the aggrieved party but circumstances for which he bore the risk, e.g. if an employee of his caused the non-performance, a fire and so on. This was true also for the case in Art. 6.4.9, so he did not think that there should be any difference between the two articles in this respect.

Drobnig agreed that in this respect the two provisions should be the same. He was not sure whether or not the other difference, which regarded the behaviour of the parties, was justified.

Hartkamp referred to the case where A lends his car to B who is not an employee, who then has an accident through his fault and the fault of a third party. In this case B's acts or omissions would be covered by this broad formula as it would cover what A took the risk for.

Brazil referred to the statement that the amount awarded "may be reduced": the "may" imported a discretion. The provision went on to say "taking into account the respective behaviour of the parties" and his question was what the discretion related to. As he read it, it related to the question of whether or not one could reduce the damages, that one had to make a decision on that question taking into account the respective behaviour of the parties, but if one decided that one should reduce the damages, one did not have any discretion as to the amount of reduction, one was directed to make a reduction to the extent that this act or omission had contributed to the loss, i.e. one looked at the causation. Did the "may" apply to whether one took the behaviour of the parties into account at all, or did it also apply to the question of the extent to which it was taken into account?

Tallon pointed out that the French version said *"est réduit"* and suggested that the English be changed to "is reduced". The discretion did not refer to the fact that there was to be a reduction, it only referred to the proportion of the reduction. Of course, when one had to take into account the behaviour of the parties that was not really a discretion at all, it was an appreciation which had to be made by the court and it was a very subjective appreciation.

Lando gave the example of a debtor who is in breach committing this breach intentionally and the other party, because of a slight mistake, not preventing or reducing the loss. Under the PECL the fault of the debtor would be considered to be so serious that the other party would receive full compensation anyway. He therefore preferred to keep a certain discretion here.

Tallon insisted that if there was a *"fait du créancier"* there must be a reduction, even if the reduction was slight. The discretion referred to the entity of the reduction. The court could not say that a party had made such or such other mistake but it would nevertheless not reduce the damages.

Bonell asked for confirmation that in the common law systems one could disregard contributory negligence if it was of minor import.

Furmston stated that it was not clear whether contributory negligence was a defence in contract, but in tort courts had consistently said that if it was less than 20% one ignored it. In other words 80% was the largest division one could have, one could not have 85½%.

Hartkamp referred to a judgment of the Dutch Supreme Court in which a child of 14 had contributed by at least 50% to an accident, as a result of very negligent behaviour but not as a result of wilful misconduct. In that case the child had been able to recover all the damages by reason of equity - there had been no mitigation of damage. He considered that the example given by Lando, of wilful misconduct on the part of one party and a very

slight contributory negligence on the other, might give the same result.

Tallon indicated that this was then quite a different rule. They had said that they did not want to have such a discretionary power for the judge, only to reintroduce it in one small instance. In France they had had a case which was exactly the same as the Dutch case, but the solution arrived at had been different, as the damages had been reduced as a result of the contributory negligence. If they wanted to introduce such a discretion for the judge this should be expressed more clearly: simply changing the "may" to "is" would not be sufficient. He thought, however, that such a solution was inconsistent with what the Group had decided as regarded full compensation, because it was an exception to full compensation.

Bonell recalled that Art. 6.1.2 did not envisage any discretion. This meant that having the discretion here would introduce an exception with respect to damages.

Furmston pointed out that even if the French text, which was more stringent than the English one, were adopted, the judge still had a good deal of scope for decision - he would not call it a discretion as the judge had to make a reduction but it was not a mechanical process and the judge would have to inject a substantial amount of judgment. The English statute on contributory negligence did not talk in terms of discretion, but there was no simple way in which one could say that this was 45% or 55% fault, it was a matter of judgment and he would have thought that that was so whichever version were chosen. In many cases one had to look not only at cause or contribution, but also at the extent to which both parties were at fault, which were not necessarily the same.

Maskow felt that for the cases under consideration here, i.e. international commercial contracts, elements of equity and so on which played a role where children were concerned, did not have a role to play. It should therefore be obligatory for courts to reduce the damages if there was reason to do so. Of course, whether there was reason to do so or not depended on the facts, so in some cases there might be no reason to do so. He therefore preferred wording along the lines of the French text, which made it an obligation for the court to go in that direction if there was reason to do so.

There were thus two alternatives: the first, which was favoured by Tallon and Maskow, which went along the lines of the French text and following which there should be no discretion, the second, favoured by Lando and Hartkamp, following which at least the present English text should be kept, if not further developed to make it clear that a discretion was granted to the court with respect to the question of whether or not to reduce the damages.

Drobnig preferred the French version. They were laying down rules of substantive law and should not invoke the discretion of the court too much, because the most important field in which this rule might be applied was among insurance companies of different countries and they would not want to go to court and to wait until a judge decided something. They wanted to settle it for themselves and they needed certainty as much as possible in order to avoid crowding the courts. On the other hand, he did not think that it made much difference if one spoke of discretion of not, because also the French version left a certain margin of appreciation, especially under the "taking into account" part. A certain flexibility was left, even if he did not think that there should be too much. He thought that it was wrong to consider it discretion because it was not free discretion, but if it was discretion it was one which was prescribed, i.e. to take into account the two causal contributions and other conduct. They still had to see to it that the main part of the article was brought into line with Art. 6.1.2.

Bonell recalled that this latter point had already been decided, and that it would be expressed along the lines "When the loss is due in part to the aggrieved party's act or omission or another event as to which that party bears the risk [...]".

Komarov also preferred the French version, because the majority of international commercial contracts were settled by international commercial arbitration and if the arbitrators were allowed this amount of discretion that was not compatible with the notion of international commercial arbitration and the notion of international commerce. He therefore thought that it was better to take the French version and to state "is reduced".

Maskow indicated that the Principles had departed from the system in many countries by having full compensation and compensation of non-pecuniary loss in contract matters. If they went this far they also had to consider the behaviour of the other party which might contribute to the loss. It was therefore in any case necessary to take the behaviour of the aggrieved party into consideration and not to leave this only to the discretion of the court.

Drobnig wondered whether the comments could not mention that the French formula might in certain cases lead to the result that no damages were awarded.

Tallon considered that no damages should be an impossibility because it was an exemption, it would be force majeure. It was not possible to say that the debtor had not performed but would not have to pay anything because of the behaviour of the the creditor - the behaviour of the creditor here was a case of impossibility of performance.

The proposed text of Art. 6.4.8 therefore read as follows: "When the harm is due in part to the aggrieved party's act or omission or to another

event as to which that party bears the risk, its award is [should be] reduced to the extent that this act or omission or event has contributed to the harm taking into account the respective behaviour of the parties.".

Drobnig felt that "award" was misleading because it presupposed a judicial or arbitral proceeding. This was not intended and did not correspond to the French text. The text should refer to "the amount of damages".

This suggestion was accepted by the Group.

Drobnig suggested saying "to the extent these factors contributed" which would also shorten the text.

The text of the article as finally adopted therefore read as follows:

"When the harm is due in part to the aggrieved party's act or omission or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent these factors have contributed to the harm, taking into account the respective behaviour of the parties".

Article 10 (Article 6.4.9 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 10 (Article 6.4.9), Tallon recalled that it had been inspired by the Québec New Civil Code. He observed that even if the principle of mitigation was not one which was recognised in civil law systems, the same solution was arrived at. He compared the present formulation with Art. 4.504 PECL which in para. (1) stated that "The non-performing party is not liable for loss suffered by the aggrieved party to the extent that [...] (b) his loss could have been reduced by his taking reasonable steps". Something which could be added to the present article was what was presently Art. 4.504(2): "The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the loss". There were thus two questions to be considered: the drafting of the provision as it stood at present, and the possible addition of what was in Art. 4.504(2) PECL.

Maskow pointed out that this had already been decided in Ivry.

Bonell raised the point of the title of the provision, and suggested that it be changed to "Mitigation of harm".

This was accepted by the Group.

Drobnig observed that Arts. 6.4.8 and 6.4.9 were closely related, and therefore wondered why they were drafted so differently. He suggested that

the drafting of Art. 6.4.9 should be brought closer to that of Art. 6.4.8.

Bonell referred to the problems he had encountered when preparing the notes on Italian law for the PECL draft: the Italian Civil Code used a formula similar to the one in Art. 6.4.9, speaking of the damage the aggrieved party could have avoided by using due diligence. It now occurred to him that there was a difference in substance, because strictly speaking the rule in Art. 6.4.9 (which corresponded to Italian law) did not require the aggrieved party to take positive steps to reduce the damage; it only said that the defaulting party was not responsible for the increase of harm caused by the aggrieved party not having behaved diligently. This question had been raised both in judicial decisions and in legal writing in Italy, and the judicial decisions had excluded that such a duty to mitigate the harm existed.

Tallon indicated that the position was the same in French law: one did not have to take positive steps, but if one did not take them one could harm the other party. It was for this reason that he found it normal to have different drafting in Arts. 6.4.8 and 6.4.9.

Drobnig felt that these were two very different arguments: Bonell's argument was that only an increase of the harm should be taken into account

Tallon indicated that the situation was that the harm existed; it then increased because the aggrieved party did not take reasonable steps. These were two different situations and for this reason it was natural to have two different formulations.

Crépeau observed that the difference in drafting simply came from the fact that Art. 6.4.9 was taken literally from the Québec draft Civil Code.

Bonell insisted that there was a difference in substance, and that the difference in formulation was due to Tallon's desire to exclude that the aggrieved party had a duty to take positive steps in order to mitigate the harm. The aggrieved party was only asked not to increase the harm.

Lando found this difference to be very theoretical.

Bonell did not think so, because the courts argued that it was not possible to impose such a positive duty, because what about expenses?

Tallon added that there were also other reasons: the aggrieved party was innocent and had nothing to do with it, it would be inequitable to impose a duty upon him when he was a victim of the other party.

Furmston observed that this article did not bear any resemblance to mitigation of damage or harm as known to any common lawyer. That was not because it had anything to do with duty: in England it was quite clear that one was not under a duty to mitigate, but one could not recover loss which

one would not have suffered if one had mitigated. For example, company director A has a five year contract for £ 100,000; after a year A's company is taken over and A is dismissed. In one sense A would have lost four years of pay at £ 100,000 per year, it was quite clear that A would not recover that, unless he had made some attempt to get another job and demonstrably could not get another job. A would not actually be under a duty to do this, but would not actually recover damages compensating for the whole theoretical loss because A could have avoided some of that loss by taking reasonable steps.

Lando drew attention to the fact that the CISG approach had almost the same wording as ULIS, and that there had been court decisions, particularly German court decisions, on ULIS, the most important of which addressed the question of whether one had to make a replacement transaction, and the German courts had held that this rule made it a duty to make the replacement transaction, which was an act involving expenditure.

Bonell wondered whether there was a tendency also in French legal writing to stress that particularly in commercial settings a more constructive attitude should be required on the part of the aggrieved party. In Italy there was no case law, but in legal writing there were a number of opinions on this point.

Tallon thought that the position of French law was rather different from the text he had drafted for the Principles: the aggrieved party had no duty to take positive action, but there could be cases of abuse, and in a commercial setting it was easier to admit that there had been a kind of abuse in the passive attitude of the aggrieved party.

Hartkamp favoured the rule which was expressed in Art. 4.405(1)(b) PECL and also in Art. 77 CISG. He doubted that the rule in Art. 6.4.9 was a useful rule. In the Netherlands there was the mitigation rule, but in many cases they would say that if the aggrieved party increased the damage this damage was not damage which the debtor could have foreseen, so he would not be liable at all for the damage. The other rule was much more useful, provided that one added that the aggrieved party should be entitled to recover his costs.

Huang also preferred the CISG approach, which she felt would prevent many unnecessary disputes.

Komarov also favoured the CISG position.

Crépeau considered that there really was not much difference between the two versions, except that Art. 4.504(1)(b) PECL looked at it from a different point of view: if one put the damage sustained in a scale from zero to ten, CISG looked at the damage from ten and said that the aggrieved party could have reduced it to five, whereas Art. 6.4.9 said that one

looked at it from five and any increase broke the chain of causality and therefore one could not recover. For the sake of uniformity he was inclined to think that it was better to stick with the PECL formula.

Brazil suggested following the structure of the PECL.

Bonell suggested adapting the formula of Art. 77 CISG to read "The aggrieved party must take such measures as are reasonable in the circumstances to mitigate the harm. If he fails to take such measures, the defaulting party may claim a reduction in the damages in the amount by which the harm should have been mitigated".

Tallon preferred the PECL formula: "The non-performing party is not liable for loss suffered by the aggrieved party to the extent that his loss could have been reduced by his taking reasonable steps", with also a second paragraph as in Art. 4.405 relating to expenses, as that was not always a question of the reduction of damages.

Lando could accept the PECL rule, even if he felt the CISG text to be more pedagogical: it first laid down a duty and then the sanction for not doing it.

Tallon recalled that in the preparation of CISG there had been a lot of resistence to this duty which was not recognised in all systems, so in a way the PECL formula was more respectful of all systems. CISG was in force in France, but only for international sales, not for general law of contract and it was not considered to be a model for a general theory of contract. The Principles instead did try to do something for the general theory of contract.

Hartkamp and Drobnig agreed with Tallon.

The text of the Art. 4.405 PECL was adopted, with modifications to uniform the language to the other Principles, and read as follows:

> *"(1) The defaulting party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by its taking reasonable steps.*
> *(2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm"*

Drobnig wondered whether this also covered the efforts to avoid an increase in the harm: the French of the original article had started from the idea of the increase.

Tallon indicated that either one looked at the harm at the end of the process when one had nothing to mitigate, then one reduced it, or one took the harm at the beginning and then one took measures so as not to increase it.

Drobnig feared the narrow French interpretation. The rule had indicated that only increases had to be avoided, now they had a rule which said that only reductions must be made, so did this mean that increases could be left on? This should perhaps be taken care of in the comments. One further element which was missing was the proportionality which was in the preceeding provision. He wondered whether that should not also be expressed.

Tallon and Brazil indicated that this would be covered by the words "to the extent that". Tallon added that he would put this in the comments.

Article 11 (Article 6.4.10 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Opening the discussion on this article, Crépeau observed that the way it was worded ("by an award") meant that one had to contemplate arbitration or the court. The substantive issue was that non-pecuniary harm could be compensated by way of damages or by way of any other means, irrespective of whether there was a voluntary performance, or whether there was an indemnification.

Tallon indicated that this had been his intention.

Farnsworth recalled that he had put forward when the possibility of merging this provision with Art. 6.4.3 he had indicated that readers from the United States would not fully appreciate what the difference was between the two provisions. Since Art. 6.4.3(2) was also accurately described as compensation for non-pecuniary harm, it would certainly help if the title to this were to be changed to read "Means of compensation for non-pecuniary harm". The reader would then understand why there were two provisions which dealt with essentially the same general subject.

Lando indicated that in cases of what might be called "moral harm" one could get, for example, the publication of a retraction in the newspaper. Could this not apply also to cases of pure economic harm, to for example cases of unfair competition? He saw no reason to limit the scope of this provision.

Tallon felt that it was a problem of the definition of a non-pecuniary loss. In the case of, for example, unfair competition two things were involved, a pecuniary loss and a subsequent loss of commercial reputation and so on.

Crépeau also referred to the possibility of getting specific performance.

Furmston indicated that if it was possible to propose that one could get specific performance, then this should not be lodged in the middle of a

provision about damages. He had considerable difficulty in seeing what was meant by "any other means". He took it that it did not actually mean *any* other means, and that what it meant was *some* other means.

Brazil was also troubled by the phrase "damages or any other means" and agreed with the comment which had been made in Ivry that one should say only "damages or other means" so as to avoid the impression that there were no limits.

Crépeau indicated that in the Canadian system they had had considerable difficulty with the use of the word "or", because it had been felt that if one said "damages or other means" it was either one or the other and one could not cumulate. He wondered whether in the case of non-pecuniary harm, e.g. moral damages resulting from defamation, it was possible to have both the publication of a retraction and damages. It was in other words not a question of choosing between one or the other, but possibly of having a bit of both.

Bonell indicated that he would not have excluded this even with the present wording.

Hartkamp suggested that this was something for the comments.

Tallon agreed that this could be put in the comments, because otherwise one would have to make the text more heavy by putting "and/or".

Crépeau felt that it was relatively easy in French, as it was sufficient to say *"sous réserve de dommages-intérêts"*.

Hartkamp referred to the question of on whose demand the judge was allowed to award compensation other than in money. In the Netherlands one could always say that this could only be done at the request of the aggrieved party even if it admittedly could also be offered by the party in breach and then the judge could do so. As he recalled German law it was not such a firm principle. He wondered whether this question should not be dealt with, and it be decided whether it should be done at the request of the aggrieved party, or whether the question should be left open.

Tallon indicated that in French law the judge had a discretion: he could refuse damages and decide for compensation other than in money even if the party had not asked for it. It was very nearly a procedural matter.

Drobnig indicated that German law started from the proposition that in principle damages meant restitution *in natura* and not compensation by money. In practice this had been completely reversed, but there were situations and times in which the aggrieved party, because there was no functioning market, were not interested in obtaining money but in obtaining specifics. To a certain extent this was connected with Lando's question whether other means than monetary damages should be allowed. He was

inclined to say that damages primarily meant monetary damages, but in certain cases might be something else.

Bonell wondered whether that was not the *restitutio in integrum* which at least in the Italian legal system found its place in torts. In a contractual situation, however, when there was breach one either awarded damages or one requested and got specific performance. How was is possible to imagine an award for damages in the form of specific performance?

Drobnig observed that if there was a claim for specific performance then this was not necessary, but there were situations where even under contract specific performance was not available and monetary damages were not adequate.

Tallon observed that this was part of a very large problem and did not belong here.

Bonell found reparation or delivery *in natura* to be the most frequent, but was that not specific performance in the context of contracts?

Hartkamp observed that in the Netherlands a contractual case for damages in other than money was, for example, when A promises B not to conclude a certain contract with a third party and does so anyway. If B then does not want to have damages, Dutch courts had accepted the rule that declaring the contract void was a way to give damages other than in money.

Tallon observed that in France when it was an *obligation de ne pas faire* the creditor could ask for the destruction of whatever had been done which should not have been done and this was considered to be specific performance (Art. 1143 of the French Civil Code).

Hartkamp observed that also in the Netherlands when the contract was for the building of something, one could have it demolished, but when a legal act was concerned, they would not call it specific performance.

Furmston observed that if this provision, which carried all these consequences with it, were to be kept, it would need to be very carefully and fully explained in the comment. The comment as it was was rather odd, as it had a discussion of English tort law which really had nothing to do at all with the problem. The problem was whether one could recover non-pecuniary loss in contract. English law only allowed the recovery of non-pecuniary loss in contract in rather limited cases where the contract was designed to give non-pecuniary results, such as a contract for holidays. He was perfectly happy to have a wider rule, but he would like to know what the rule was.

Farnsworth had the same feeling as Furmston, especially about the comment, the second last paragraph of which gave only one example (i.e.

publication in a newspaper) of means of compensation other than in damages. If that was the only example it would be interesting for the comment to admit it, if it was not it would be helpful for the comment to give more examples. It was not so important for the comment here to make the point that there should be compensation for non-pecuniary loss because that was the matter dealt with in the previous provision. Furthermore, with respect to the second paragraph of the comment, which said *"même si elle rejette sur le juge la charge de mettre en oeuvre le principe général posé au texte"*, each time the word "judge" appeared the careful reader in the United States asked whether they were still doing a codification. The Principles were instead envisaged as being applied principally by arbitrators, and may be one could avoid the use of either word, or if one mentioned "judge" one could also mention "arbitrators".

Maskow suggested that a further example of means of compensation other than in damages could be that the party was obliged to conclude the contract. This was an important example in German law.

Bonell and Lando observed that this would be specific performance.

Maskow observed that it was construed differently.

Tallon added that this happened also in French law.

Lando indicated that all these examples clearly applied also to pecuniary loss.

Bonell agreed with Lando that this no longer had anything to do specifically with non-pecuniary loss, because once this approach was followed and one opened the concept of damages in this way one was clearly in the field of pecuniary harm.

Hartkamp recalled that there had been a suggestion to enlargen the concept of non-pecuniary damage, so as to make good harm other than by paying a sum of money also in cases of moral harm.

Tallon observed that if a broad approach were adopted the provision would have to be placed elsewhere, not in the section on damages.

Hartkamp indicated that the problem was that if it was accepted in this respect only for non-pecuniary loss then readers would start to wonder about pecuniary loss, and might resort to an *argumentum a contrario* which might not be very satisfactory.

Lando suggested deleting the provision.

Hartkamp agreed with Lando.

Bonell wondered whether the Group could accept the deletion of Art. 11 (6.4.10) and the adding in the comments to Art. 6.4.1 that compensation could be by means other than monetary damages.

This was agreed by the Group.

Article 12 (Article 6.4.11 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 12 (6.4.11), Tallon stated that the text had been adopted with some parts of the text still in brackets. As to the two brackets of para. (1) he felt that the text did not say very much, even if he did remember the discussions in Vienna. In para. (2) the phrase beginning "in the absence [...]" had been added to accommodate what then had been socialist countries. He referred to Art. 4.505 PECL ("(1) If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due. (2) The aggrieved party may in addition recover damages for any further loss, so far as these are recoverable under this Section.").

Bonell indicated that the phrase beginning "or notice" in the last set of brackets in para. (1) should be considered to be deleted as Art. 6.4.2 to which it referred had been deleted.

This was agreed. It was also agreed that the brackets should be deleted.

Lando observed that while in most legal systems interest was due also when the non-payment was due to force majeure, in some legal systems it was not. He wondered whether the Group should take a stand on this. For instance, in a case where A has to pay a certain amount from Ruritania and Ruritania forbids the export of money, would interest have to be paid?

Tallon did not think that this could be put under the heading of damages, it could be an indemnity for unjust enrichment or something like that but it was not damages. The provision did not apply in the case of force majeure, because force majeure excused non-performance and when non-performance was excused there were no damages. This provision was only a way of calculating damages.

Bonell observed that on the other hand it was argued that money in the hands of the debtor produced interest.

Tallon reitterated that then it was a case of unjust enrichment or the like.

Drobnig observed that the general rule in the civil law was that one always had to have money, that there could be no excuse for not having money.

Lando objected that there could be an excuse for not having money.

Maskow agreed with Drobnig that there was no excuse for not having money, but suggested that this problem could be dealt with in the context of the article on force majeure. For example, Art. 6.1.5(4) stated that "Nothing in this article prevents a party from exercising a right to terminate the contract or withhold performance" and to this could be added "or claim interest".

Furmston indicated that the basic rule in English law was that there was no right to interest on unpaid debts in the absence of agreement. In practice nearly all commercial contracts had provisions for the payment of interest. There had been some cases in which such interest had been held to be implied, but they were rather restrictive.

Farnsworth stated that where interest was allowed in American law there was no rule for force majeure. If one was excused for force majeure one would not pay interest, even if it would be very rare that one was excused for force majeure in the case of a money debt.

Brazil added that the same was true in Australia: there had to be a debt due before the question of interest arose in a contractual context.

Furmston added that conceptually it was not a question of damages if it was an excused non-payment, which it would be in the case of force majeure.

Bonell referred to the comment on Art. 78 CISG by Nicholas in Bianca/Bonell, *Commentary on the International Sales Law*, in which he states that "there is no requirement that the failure constitute a breach of contract" (p. 570), which meant that the provision applied also in case of force majeure. Nicholas continued stating that "[t]he absence of a requirement of a breach of contract may presumably have the effect of requiring interest to be paid where payment of a sum due has been temporarily suspended by an exemption under Article 70. If, for example, the price is payable in the seller's currency and the buyer is prevented from paying by a temporary ban imposed by his government on the export of currency, and if under Article 79 the seller is able to claim the price when the ban ends, Article 78 seems to entitle him to interest [...]" (p. 571).

Drobnig observed that during the period the debtor was unable to pay he would have the money available and would benefit from it, whereas the creditor would lose out, so it was perfectly logical.

Lando added that to construe unjust enrichment was artificial and unnecessary.

Tallon instead felt it to be a clear case of unjust enrichment.

Hartkamp indicated that the new Dutch Civil Code provided that even if one was excused from the non-performance one had to pay damages, but technically it was a case of unjust enrichment because one would be able to get interest on the money oneself. There had recently been an interesting case where the debtor had not been able to pay as a result of force majeure: creditor A of debtor B seized a debt which B had against C then before the judgment C was not allowed to pay to his creditor and he was not allowed to pay to the seizor; he was thus not unable to pay but he had to pay interest. It would probably be solved as a case of unjust enrichment.

Drobnig wondered whether it made any difference whether one regarded it as a claim for unjust enrichment or as a direct claim for interest.

Bonell referred to the comments to the PECL which stated clearly that interest was not a species of ordinary damages, so the general rules on damages did not apply, interest was due whether or not non-payment was excused under the relevant provision.

Tallon wondered why it was in the damages chapter if the comments proceeded to state that it was not a form of damages.

Lando pointed out that the chapter was called "Damages and interest".

Maskow suggested that it was possible to say that interest was a species of damages, but that a monetary debt was a special kind of debt, it was a debt from which one could not be exempted and for this reason interest had to be paid in any case.

Komarov referred to a situation when the non-performance would be excused, i.e. the situation when the transfer of the money was prohibited, in which case it might be that the debtor was deprived from using the money which was tied up: in this case making him pay interest was not justifiable because he was not using the money. In this case if the non-performance was excused the debtor should also be excused from paying interest on the money.

Drobnig felt that the situation was different: the debtor could not pay, he had the money available and of course it carried interest - whatever interest was possible in that particular country. It was not that the money was paid into some state bank and was frozen there, which might be a different case but back in the thirties when in Germany this situation had arisen even the accounts in the so-called "Konversionskasse" carried interest. Even if it took decades before this money was unblocked the creditors were entitled to the interest.

Bonell referred to the case of countries where, as had been the case with Italy some years previously, one was not allowed to possess foreign currency, or one was allowed to pay foreign currency, and therefore to transfer it abroad, only under authorisation. In such a case, for example, a ban is introduced and such a transfer is no longer allowed. A has to pay B in DM in Hamburg, if A is prevented (force majeure) from transferring DM from Rome to Hamburg A would not be able to do anything with DM in Italy and the lire might well produce the same rate of interest, but if A then transfers them into DM once the ban is recalled, it would be reasonable to anticipate that the interest rate was much lower. For cases such as these he could imagine problems arising.

Furmston thought that it did make a difference if one was talking about damages or unjust enrichment because if one were talking about damages one would be talking about the loss to the plaintiff, whereas if one were talking about unjust enrichment one would be talking about the enrichment of the defendent and unless the defendent was a bank he was not earning interest at the prime rate, he was earning interest at the prime rate minus 3%.

Lando observed that this depended: most businesspeople he knew of had to borrow money, so the enrichment was that they did not have to borrow money.

Brazil wondered why the point of interest in the case of force majeure had not been dealt with in the PECL.

Drobnig recalled that it had been thought that the comments would take case of that. He agreed that it should be taken up.

Lando indicated that the PECL were made for Europe and that the problem in Europe was very small as such currency restrictions were a thing of the past.

Bonell suggested that the comments should state explicitly what was implicit in the text, namely that the combination of the opening provision with this provision meant that no interest accrued if one was excused. The view prevailing in the Group would thus be indicated.

Drobnig observed that it was not that simple, that it could not just be assumed that the majority was against interest accruing, at least a couple of the members of that majority would point to the fact that there was also a rule on unjust enrichment.

Tallon pointed out that the PECL contained rules on the payment of money when the creditor would not accept it, in which case the money was deposited. In this case there was no problem, when one was prevented from paying by a force majeure event one deposited the sum in the name of the creditor and he would get the interest directly whenever the force majeure

situation ended. There were also no damages involved because the debtor had discharged his obligations by depositing the money with a bank.

Lando observed that this would only operate when the problem was with the receiver and not when the debtor was preventing from paying.

Bonell added that if one was prevented from paying one was already discharged. This was different from the case where one could not pay because the creditor would not accept payment.

Farnsworth observed that in the United States, in so far as interest was payable, if there was no debt no interest would be payable in the case of force majeure, but, although he knew of no case, he thought that generally restitution would be allowed in cases of force majeure and that if there was unjust enrichment there would be a claim for restitution. From his own country's point of view interest was not payable in the case of force majeure, but there might be a claim based on unjust enrichment. He did not think that one needed to say that there would be a claim, but to leave it to general principles.

Brazil indicated that he would have no problem with that at all.

Tallon also agreed with Farnsworth. He wondered how to put this.

Bonell indicated that the Principles so far stated that interest was not due in case of force majeure. If it was agreed, this could be reaffirmed in the comments which then could also mention that this did not mean that nothing had to be paid, but that in certain circumstances restitution of what the debtor had possibly gained might be possible.

Tallon indicated that he was inclined to state that no interest was due as damages, but that a sum might be due as restitution of unjust enrichment when the debtor had kept the interest after he should have paid it.

Bonell saw two possibilities: either to reaffirm in the comments that the rule in Art. 6.4.11 did not apply in case of force majeure, but that this did not mean that the creditor could not recover under different headings (unjust enrichment, restitution, etc.) what the debtor might have gained; or the question should be asked whether it was correct to assume that force majeure affected the right to interest, and either in the text or in the comments an approach similar to that of the PECL should then be followed, which stated very clearly that interest was not a species of ordinary damages, therefore the general rule on damages did not apply, interest was owed whether or not payment was excused.

Tallon indicated that if the second position were opted for he would prefer to have it in the text. It was not possible to say in the comments that this rule applied even in case of force majeure, one had to say in the

text when it fell due even if excused by force majeure.

Maskow indicated that another argument for the second solution was that if it were adopted the rule would actually be in the Principles, whereas if they had to rely on unjust enrichment they had to rely on national law, and the question of whether of not there was enrichment might be solved differently in different countries. He suggested to add "or request interest on money due" to Art. 6.1.5(4).

Crépeau was inclined to think that interest should not be paid for the case of force majeure.

Voting on the position that interest should not be paid in cases of force majeure (the "Tallon" position), 9 voted in favour.

Furmston suggested that both in the title of the article and in the text of para. (1) the word "off" be deleted after "pay", and also that the word "monetary" be deleted before the word "debt".

Tallon agreed with the first of these suggestions, but observed that to people who were not English mothertongue just having the word "debt" might not be clear, as in legal systems such as his own a debt did not necessarily have to refer to a monetary debt.

Bonell pointed out that the performance section spoke of "monetary obligation", and that this should perhaps be harmonised.

Furmston declared himself happy with "monetary obligation". He further suggested to change "justify" in para. (1) to "prove" or "establish".

Bonell suggested that what was meant was "prove" actual loss.

Brazil suggested that "ask" be substituted by "is entitled to".

Farnsworth agreed with this.

Brazil wondered whether then the words in brackets were needed at all.

Tallon was not convinced that the words in brackets were not necessary even if "entitled to" were used.

Huang suggested that what was in brackets could be placed in the comments.

Maskow felt that if there was any doubt about the clarity of the provision it was better to say it expressly and therefore suggested that the words in brackets be kept.

Voting on the words in square brackets, 5 voted in favour of keeping them and 6 voted for their deletion. The words were consequently deleted, and it was decided that their substance should be dealt with in the comments.

Crépeau observed that one did not "pay" a monetary obligation, one "performed" a monetary obligation; one paid a sum of money.

Lando also suggested saying "pay a sum of money", which was the formulation used in the PECL.

Tallon pointed out that the French text said precisely this.

Bonell wondered what the title would then be.

Farnsworth suggested it could simply be "to pay money".

Both these suggestions were accepted.

Komarov suggested adding "from the date of maturity to the time of payment".

Crépeau wondered whether it was necessary.

Brazil agreed with Komarov that having the words made the meaning clear.

Drobnig observed that there were legal systems, such as the English, and also arbitration laws which said "only until the award" and then no post-judgment interests.

Brazil added that there might be a different between pre-judgment and post-judgment interests so the question did arise of whether it only applied to the time of judgment, and it might be better to spell it out.

Furmston saw no harm in spelling it out.

Turning to para. (2), Lando wondered what would happen when there was no prevailing rate for prime borrowers and there was no law which fixed a rate in the country in which the payment had to be made.

Drobnig had the same doubts as some countries no longer fixed interest rates. The provision should perhaps be made more flexible and should refer to "or an equivalent rate" or "or, in the absence of such a fixation the rate prevailing in that country".

Bonell wondered whether it was not really up to the interpreter to interpret the provision in a broad manner and that if there were no rate fixed by the law the interpreter would resort to the rate prevailing in the

country, which therefore would *de facto* be fixed - fixed by practice.

Drobnig observed that the comments could supply this.

Maskow wondered whether it was necessary to say "the due place of payment", whether "due" could not simply be deleted.

Drobnig stated that it was intentional, because if "due" were deleted it could refer to the factual place of payment and the debtor would be able to select any place he wanted, whereas the only place which counted was the one the parties had agreed upon or which resulted from the contract.

Furmston wondered whether it was aimed at the situation where one borrowed in one currency but it was envisaged that one would pay in a different currency, i.e. one borrowed dollars but it was envisaged that one would pay in francs.

Drobnig felt that it could also cover that case: if one borrowed in English pounds and one had to repay in pounds the rule applied, and it would also apply if one borrowed in English pounds and had to repay in US dollars.

Furmston indicated that what he could not understand was what the words "due place of payment" indicated which one did not know before.

Farnsworth indicated that "due place" was not common English usage in the United States, one might say "the place where payment is due" but they would be inclined to say simply "the place for payment", meaning for payment under the contract, meaning the place where payment is due.

Brazil recalled that the previous week at the meeting of the Governing Council of Unidroit the formulation "the place for payment" had been suggested by Prof. Goode and had been accepted by the Council.

Drobnig was not sure that the fine distinction between the place "for payment" and the place "of payment" would be appreciated, that this implied that the debtor could not use any place he liked but only the one which had been agreed upon.

Bonell pointed out that this was a problem which occurred mainly in the performance chapter, and suggested that for the time being the Group agree on "the place for payment".

Komarov observed that in some countries several rates of exchange were fixed by the state and he felt that this situation should be taken care of. He therefore suggested adding the word "appropriate" to "rate".

Bonell wondered whether in the particular context of interest a reminder in the comments might not suffice.

Huang observed that the English version of para. (2) did not mention the contract and was therefore less clear than the French ("The rate of interest shall be the average bank short term lending rate to prime borrowers prevailing for the currency of payment [...]"; *"le taux sera le taux bancaire moyen de base à court terme moyen pratiqué pour la monnaie de paiement du contrat [...]"*).

Bonell understood the "currency of payment" to be sufficient in English, it had nothing to do with the contract: the currency of account was the currency in which the contract expressed the debt, whereas the currency of payment was the currency in which payment took place, even if this was contrary to the contract provisions. The distinction between currency of account and currency of payment was based on the fact that the latter could in some cases by law be different from the currency of account which was the currency expressed in the contract.

Huang wondered which version should be used as the authoritative version as she saw a difference between the texts.

Maskow felt that she had a point, because it could be that according to the contract invidual payments had to be made in different currencies and it might therefore be better to delete "du contrat" in the French text.

This was agreed upon.

Furmston felt that the more he looked at it the more difficult it actually was: what about debts expressed in ECU?

Drobnig observed that the rule would apply accordingly.

Bonell indicated that there were short-term bank lending rates in ECU.

Furmston agreed that there were but observed that they were different in different countries.

Lando agreed that they were.

Furmston observed that the English text was divided into two halves by a colon or semi-colon: in the first half one had to have regard to the currency of payment and the place of payment, but in the second half only to the currency of payment. He wondered why there was this antithesis, granted that they could be different, which otherwise there was no point in having that.

Maskow thought that the reason was that in the second case there was no place but only the law of the money was decisive and it was so

independently from the place.

Bonell objected that what it referred to was when there was no such rate at the place.

Furmston gave the example of A borrowing Swiss francs in England: he was not sure that there would be a prime rate for this; if there was no prime rate for borrowers of Swiss francs in England the rate would be fixed by the law of Switzerland - did the law of Switzerland fix rates?

Drobnig observed that this problem had already been addressed when they had decided that the comments would deal with this, in the sense that in the absence of a legal rate of interest in Switzerland the commercial rate should apply.

Furmston observed that in England there was no legally fixed rate for prime borrowers, it was fixed by the market, although the Bank of England gave the market fairly forceful nudges as to what it thought it should be doing. Similarly in the United States the Federal Reserve influenced the rates of interest but did not tell the banks what rate they should charge.

Huang gave the example of a commercial contract in which the currency was the US dollar; according to these provisions it would be possible to pay in Chinese currency, but the rate of interest for the two currencies would be quite different. It was therefore important to decide which currency would be paid.

Bonell indicated that in the case where the contract stated that payment should be made in US dollars and that the place of payment was China, the interest rate would be the interest rate for US dollars which existed in China.

Huang agreed that this was correct, even if she admitted that at times it was not possible to pay US dollars in China, and that then payment was made in Chinese currency, but what interest rate would then apply?

Maskow indicated that the understanding was that the money for payment was the contractual money (and this would be the rule), but that there were exceptions to this: in certain cases payment in a different currency was allowed. For instance, in certain countries payment in the national currency was allowed. In this case the national currency would be the currency of payment. This was, however, not possible if the currency of payment had been specifically fixed in the contract. There was further the case of damages, for which they had said that in certain occasions it was permitted to ask for damages to be awarded in the currency in which the damage had accrued, and that it was not necessarily the currency of the

contract, it could be a different currency. For this reason a broader concept had been used here, but despite this in cases where it had specifically been fixed that certain sums had to be paid in, for example, US dollars, the sums would then actually have to be paid in US dollars and not in Chinese money.

Huang indicated that in some cases it was actually impossible for the Chinese party to pay in US dollars and that then the other party would agree to accept payment in another currency, and what then?

Maskow recalled that there was a proposal made by Fontaine which still had to be discussed and which dealt with the case of there being different rates of exchange. He suggested that the same or a similar wording could be used to cover also the problem of there being different interest rates. The word "applicable" could be used to cover this: "in the absence of such a rate the applicable rate fixed".

Farnsworth recalled that the word "appropriate" which had been discussed earlier was better than "applicable" because there might be no rate that was literally applicable.

The Group agreed on the word "appropriate".

Brazil referred to the last words of para. (2) ("in which money the payment has to be made"): he suggested saying "the rate fixed by the law of the State in the currency of which the payment has to be made".

This was found to be acceptable.

Maskow came back to the question raised by Furmston, of the case when a payment had to be made in a country different from that of the currency in which payment had to be made (e.g. Swiss francs in England), when there was no prime rate and then the alternative according to their text was to take the legal rate. He felt that this solution might not be appropriate and that it would be better to say that in that case one had to take the prime rate in the country of the currency in which payment had to be made. If there was no such prime rate, as in the case of a currency which was not convertible, then the rate should be that fixed.

Bonell had hesitations about this: if payment had to be made in Swiss francs in London, and there was no prime borrowing rate in London for Swiss francs, why should one have to pay in London according to the prime rate of Zürich?

Drobnig observed that the legal rate was usually rather low and was inappropriate as compared with the rate fixed in the first sentence. It

should not be the legal rate, but the corresponding rate in the country the currency of which is involved: "the appropriate rate which obtains for prime borrowers in the State in the currency of which payment has to be made". The same yardstick should in other words be used as in the first instance.

Bonell felt this to be a change of policy.

Maskow did not think so: the idea was to use the prime rate, and now they had to find a place where such a prime rate existed. Of course in the first instance it was the prime rate of the place of payment, but if there was none, then they tried to find the next most adequate place in which there was a prime rate, and this place was the country of the currency which was used.

Farnsworth indicated that then the proposal was that if one had Swiss francs payable in London and there was no prime rate for Swiss francs in London then one looked to the prime rate for Swiss francs in Zürich and if there was no prime rate for Swiss francs in Zürich then one looked to the law of Switzerland.

Furmston and Lando came back to the ECU and to the situation where there was no prime rate for the ECU at the place of payment where one had a debt in ECU and one had to pay in a country where there was no prime rate.

Bonell did not think that this could be covered.

Lando pointed out that in the PECL there was a rule which related only to prime borrowers, but then they had a general provision (Art. 2.104 "Reference to a Non-Existent Factor") which stated that "Where the price or any other contractual term is to be determined by reference to a factor which does not exist or has ceased to exist or to be accessible, the nearest equivalent factor shall be substituted". He suggested adopting a similar formulation here, which he felt to be more realistic than to mix in the State. The rates established by the State were often very low.

Farnsworth suggested the formulation "the rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or, in the absence of such a rate, in the State the currency of which payment is to be made". One would then need to have another sentence covering the case when there was no prime rate in either place. He was, however, not sure that it made a great deal of sense to have the catch-all rate, the rate fixed by the State. Lando's solution to find the nearest approximation might be better.

Furmston felt that it made no sense to make the provision more and more complicated in order to deal with more and more difficult cases. The central notion was quite clear and one on which they agreed, i.e. that a commercial rate of interest should be paid, and perhaps they should have a simple provision saying that interest shall be at some appropriate commercial rate, taking into account the place of payment, currency of payment and so on, leaving it to the arbitrator to do the right thing.

Drobnig felt that it would be odd if the rate of interest, which was a relatively fixed thing, were to be left to arbitration.

Bonell suggested the formulation "The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment or, where no such rate exists at that place, then the same rate in the State of the currency of payment."

Farnsworth suggested continuing "In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment".

This was agreed by the Group.

Turning to para. (3), it was decided to change "ask for" to "is entitled to" as had been decided for para. (1).

Farnsworth recalled that they had tried to avoid the problem of proof, and suggested that the same thought might be expressed by saying "if the non-payment caused him greater harm". Generally they did not say which party had to prove what.

Drobnig felt that in this connection the words "if he proves" should be retained in order to make clear the distinction between this paragraph and the preceding paragraphs. They were now turning to real damages and therefore proof was necessary, whereas for interest no proof was necessary.

Tallon agreed with Drobnig.

Farnsworth observed that in other comparable rules they did not touch burden of proof. It might be more interesting to see who had to prove mitigation, or the avoidance or lack of it, for the rule on mitigation and they said nothing there. In the general rule on full compensation they did not say that one had to prove one's damages to get full compensation and it seemed to him that para. (3) was an example of the full compensation principle. He therefore felt that it would be better not to have it here.

The text of Art. 12 (6.4.11) as finally adopted therefore read as follows:

"(1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment.
(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.
(3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm".

Article 13 (Article 6.4.12 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 13 (Article 6.4.12), Tallon recalled that it had been adopted with reservations. There was no corresponding text in the PECL. He did not find the title satisfactory and hoped it would be improved upon. The provision intended to remind of the necessity to give the judge a large discretion as to the way in which damages were allowed.

Crépeau observed that with respect to this article they had made "the big jump" in Québec, from lump-sum damages to indexing payments, but when the question had been raised the idea had been that it was all right to index payments, but one had to provide the creditor with additional security because it one thing to say that one had to pay $ 100,000 now or one had to pay $ 20,000 for the next five years, but what about the security which the creditor was entitled to obtain? The way this had been solved was that not only could the court index the payments, but it could also order any appropriate form of security to make sure that the instalments would be paid at the due time.

Hartkamp indicated that the article of the Dutch Civil Code referred to in the comments only referred to the damage which had not yet occurred, i.e. future damage. If this rule were inserted in the Principles, then it would go much further than the article referred to by Tallon. As regarded Crépeau's point, the article referred to by Tallon also had a reference to the duty to furnish a security if the judge allowed the debtor to pay in instalments, in which case he could, and normally would, ask for securities. He did not think that in commercial contracts where damage had already occurred, the court would easily allow the debtor to pay in

instalments. In the Netherlands this was only done in law of torts for future damage occurring to a person's income as a result of harm to a person's physical integrity but so far never in commercial cases.

Tallon felt that this was covered by "according to circumstances".

Maskow observed that this article referred to the judge, with the consequence that the whole article focussed on the judge, whereas the primary aim of the Principles was to advise the parties.

Tallon felt that it was not possible to escape the judge.

Komarov had some doubts on the utility of the article as such, because although it was quite sound for the regulation of domestic relationships, it was not that appropriate for international commercial contracts because there were so many implications within this realm. He felt that it would not be of advantage to the Principles if the judge or court were allowed to interfere in this way with the relationship between commercial people. The majority of disputes in international commerce were settled by commercial arbitration and the arbitrator was very seldom allowed to go this far. It was up to the plaintiff to decide how he wanted to receive the damages, whether in a lump sum or in instalments.

Date-Bah also had doubts on this article. If it were retained, he supported Crépeau's version. It was important to keep the idea of the lump sum payment as the primary principle, otherwise parties, or at least one party, could see it as an easy way out to go to arbitration or to a court, because then he could get payment in instalments rather than having to pay it all at one time.

Lando felt that they were dealing with a marginal situation.

Farnsworth was not sure that these problems did not arise in commercial contracts. If there were long-term contracts and there was one party who was, for example, to pay royalties or a fee based on production to another and then the contract was broken and one had to forecast far into the future how much would be earned from the contract, sometimes it did happen not only that the defendent would prefer to pay in instalments but that the claimant would like instalments because the claimant was otherwise unable to prove how much the damages would be in the future. In the United States instalment damages were not used with very rare exceptions, but he was inclined to be sympathetic towards a provision as long as it was made clear that damages in instalments was the exception for only unusual cases.

Tallon did not like the division proposed by Crépeau of a principle and then the exception. He suggested that the modification "if appropriate

taking into account the nature of the damage [harm]" proposed before might be considered.

Drobnig had great sympathy for the Crépeau approach because in commercial situations in probably 98% of cases compensation was made by lump sum and this should be reflected in the Principles. The other was clearly an exception.

Tallon still did not think that this was a principle and an exception, it depended on the nature of the damage. There was no "special" nature of damage just as there was no "general" nature, there were just different kinds of damage for each of which one or other solution might be more appropriate.

Bonell indicated that a question which had to be considered was whether the decision of damages in a lump sum or in instalments should be linked to a specific request on the part of the parties or whether it should be at the discretion of the court. If the formulation was "may be awarded" then everything was open and ultimately the parties were given no guideline.

Farnsworth indicated that in the only arbitration case he had been involved in, in which instalment damages had been asked for, it had been the claimant who had asked for them, not the defendent, and the claimant had wanted them because the claimant was afraid it would not be able to prove what the damages actually would be in the future, so the lump sum would be small. He did not think that one could say that one or the other party must ask for it, one did not know which.

Crépeau wondered whether the Group could not agree on the principle that lump sum was of right whereas instalments was a matter of arbitral or judicial discretion upon the request of either of the parties.

Voting on such an approach, it being understood that the addition of the request of either party was not necessarily part of the proposal, 9 voted in favour.

Komarov wondered whether this approach meant that if the claimant wanted instalments and therefore claimed instalments, but the judge saw that it was not appropriate in the circumstances to award the damages in instalments, then the claimant would not be awarded instalments but a lump sum. If so, there was a restriction on the claimant.

Hartkamp recalled that it had been decided that these kinds of problems should not be dealt with because they touched on national procedural law.

Bonell agreed that this could lead into a very complex area.

The text of para. (1) as finally adopted read as follows:

"Damages are to be paid in lump sum. However, they may be payable in instalments when the nature of the harm makes this appropriate".

Turning to para. (2), Lando queried the possible indexation of damages which were to be paid in instalments.

Bonell felt that this was related to the whole question of security.

Maskow observed that the question of securities was relevant only for those cases where damages were payable in instalments. The scope of para. (1) had now been narrowed with the consequence that damages could be paid in instalments only when the nature of the harm made this appropriate, and this meant that there was no need for security. He indicated that he would go in the direction of giving the judge a strong position, and in fact part of Tallon's draft did go in that direction. As regarded commercial matters, however, more importance should be given to the autonomy of the parties.

Crépeau felt that the need for security was greater in commercial matters. Whatever the nature of the case, once damages in instalments had been adjudicated the creditor could never be sure that he would receive all that was due to him.

Hartkamp and Farnsworth agreed with Crépeau.

Maskow referred to the case of damages in case of royalties: if there was no security for the royalties, why should there be for the damages? The creditor would end up getting more than he had before.

Drobnig wondered whether security was actually demanded in the practice of commercial intercourse. He was loathe to lay down a new principle if it had no basis in general commercial conderstanding.

Lando could think of situations in which the principle was useful. Instalments were requested for a variety of reasons. If instalments were awarded on demand at the request of one of the parties the creditor would not require security but on the other hand the debtor would.

Bonell wondered what securities could be offered.

Crépeau suggested in general movable property, bank warranties and the warranty of a private warrantor, specifically for international transactions warranties offered by banks or trust companies.

Brazil felt that they were getting into matters which did not come within the scope of the Principles. He shared Drobnig's reservations and also wondered how it would work in practice.

Voting on whether or not to deal with the question of security, 4 voted in favour and 5 voted against.

Maskow pointed out that German law had restrictions as to indexation and suggested that the comments could indicate that in some legal systems indexation might not be allowed.

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

"(1) Damages are to be paid in lump sum. However, they may be payable in instalments when the nature of the harm makes this appropriate.
(2) Damages to be paid in instalments may be indexed".

It was decided that the title of the article should be *"Manner of monetary redress"*.

Article 14 (Article 6.4.13 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 14 (Article 6.4.13) Tallon observed that there was no similar text in the PECL.

Crépeau found there to be a discrepancy between the French and the English texts, in that the French referred to *"l'appréciation de l'étendue du préjudice"* whereas the English referred to "the extent and the amount of damages". He suggested modifying the English text, so as to making it conform to the French which was the original, to make it read "The assessment of the damages is normally to be determined as of the date of the final judgment".

Drobnig instead felt that the provision was wrong and that it therefore should be deleted.

Bonell added that it excluded the possibility that the parties themselves decide as of when the damages are to be determined.

Furmston added that in English law the basic law assessed the damage at the date of the breach.

Tallon felt the matter to be covered by the full compensation rule.

Maskow indicated that what was decisive was that the facts that were known at the time of the judgment. He also felt that the provision could be deleted.

Lando felt that the provision should be deleted.

Komarov also felt that the provision should be deleted. It was redundant as they had already given the plaintiff the right to claim damages also for future harm.

Tallon pointed out that the point of the rule was that all variations could be taken into account.

Drobnig however felt that this was taken care of by the full compensation rule.

Huang also felt that it could be left out as it did not cover the case where the parties settled the matter themselves.

Furmston agreed that it should be deleted, which would make the system more flexible.

Crépeau warned that flexibility could produce uncertainty and that if nothing was said the consequence was that there was no uniform rule.

Brazil agreed that it was best to leave out the article. It was unreal to talk about a date of assessment as the evidence often covered a period of weeks, one could be talking about a situation which had arisen several months earlier.

Crépeau observed that the gist of the rule was that one had to take into account the facts between the time of the breach and the time of the assessment.

Furmston suggested taking out the provision, although he indicated that he could live with a rule which permitted but did not require that post-breach events be taken into account.

Voting on the deletion of the article, 9 voted in favour of its deletion. The article was therefore deleted.

Tallon suggested that a reference to the problem treated in the article be placed in the comments to the provision on full compensation.

Article 15 (Article 6.4.14 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 15 (Article 6.4.14) Tallon referred to Art. 4.509 PECL which stated that "Damages are to be measured by the currency which most appropriately reflects the aggrieved party's loss".

Bonell referred to Art. 5.1.15 (Currency of payment) which followed a similar approach.

Hartkamp wondered what the difference in practice was between Art. 6.4.14 and Art. 4.509 PECL.

Tallon felt that the PECL rule might be more flexible.

Crépeau raised the question of the "currency of the contract" which for a normal reader was a term of art which indicated the currency to be taken into account. He wondered which currency it referred to. Art. 5.1.15 did not define the currency of the contract.

Bonell indicated that the currency of the contract would be the currency indicated in the contract.

Furmston gave the example of a time charter in which the set-off was in another currency. The currency in which one paid was in the contract and the currency in which one suffered loss was not known.

Komarov indicated that two clauses were common: first one which indicated the price in US dollars, secondly one which indicated that this price should be paid in, for example, Italian lire. He stressed that the currency in Art. 15 was the currency of payment and not the currency of account.

Hartkamp felt it to be unclear what was meant by the currency of the contract, also for example in Art. 5.1.15(2). It could not be construed as the currency of account as it was not possible to force a party to pay in the currency of account.

Bonell indicated that Art. 5.1.15 related to the case where the price was expressed in a currency and that was that, in which case there was no problem. The situation here was where the contract itself indicated that payment should effectively be made in a currency. This case would fall under Art. 5.1.15(1)(b) as a different currency was concerned. The term "currency of contract" was however misleading as what was intended was the currency of actual payment.

Maskow suggested that then "currency of payment" should be used instead of "currency of contract".

Farnsworth recalled that Art. 5.1.15 had raised several questions in the Governing Council. The outcome of this discussion had been a recommendation that the Group reconsider the use of the word "effectively".

Hartkamp also recalled the discussion, and that it had been suggested that the currency of the contract was the currency in which the obligation was expressed. He suggested that this was wrong, and that what should be referred to was the currency in which payment of the obligation had to be made. He wondered what the situation would be in the case of a contract in which the price was indicated in US dollars payable in Amsterdam and where payment had to be made in Italian lire.

Furmston wondered whether the currency of the contract was defined.

Bonell indicated that it was not.

Lando also felt that what was meant in Art. 6.4.14 was unclear.

Bonell suggested that Art. 5.1.15 be redrafted using Art. 2.111 PECL ("(1) The parties may agree that payment shall be made only in a specified currency. (2) In the absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due. (3) If, in a case falling within the preceding paragraph, the debtor has not paid at the time when payment is due, the creditor may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment").

Bonell indicated that in Hartkamp's case the debtor was no longer entitled to pay in Dutch guilders because the contract clearly said that payment had to be made in Italian lire.

Hartkamp stated that that was not his example - there was no statement that payment had to be made effectively in Italian lire. The debtor would be allowed to pay in dollars according to Art. 5.1.15.

Bonell did not think so.

Farnsworth agreed with Hartkamp. Hartkamp's example was: A promises to pay a million dollars' worth of lire in Amsterdam. That did not say that payment should be made effectively in lire.

Bonell recalled that "effectively" had been questioned in the Governing Council because what was really meant was "specifically", i.e. if there is a specific provision that payment must be made. He wondered

whether Hartkamp thought that if a contract expressed the price in dollars but then had another provision which stated that payment had to be made in Italian lire, the debtor would in such a case on the basis of Art. 5.1.15 still be entitled to pay in Dutch guilders.

Hartkamp stressed that he had intended his example in the way Farnsworth had reformulated it: A wanted to have the million dollars' worth in lire in Amsterdam. In this case he thought that A could pay in guilders.

Farnsworth agreed. What one said was that one wanted to measure the number of lire in terms of dollars, but these rules did not take account of how one wanted to measure something.

Bonell felt that then they were again in a different situation, i.e. the so-called indexation clause, where it was said that this was the price, it was expressed in Italian lire according to the rate of exchange with the US dollar at that time. The Italian lira was clearly the currency of account even if it was linked to the dollar as an index factor. In Hartkamp's case the price was just expressed in US dollars and then another provision said that payment had to be made in Italian lire.

Hartkamp stated that in his way of legal thinking one had to distinguish between the money *in computatione*, the money *in obligatione* and the money *in solutione*. *In computatione* of course meant the currency of account. In his example the dollars would be the currency of account. In Bonell's more simple approach, when A owed dollars but had to pay in Amsterdam, he would not call the dollars the money of account, they would just be the money *in obligatione*, but in that case when one did not refer to another value of currency and he did not think that one spoke of the currency of account.

Lando observed that even if the formulation of Art. 5.1.15 was not very good, it covered both the payment of the money and the payment of damages. The concern here was how to measure the damages, because there was the rule in Art. 5.1.15(1) which explained in which currency one had to pay once it was measured.

Bonell agreed, but added that as the problem existed also with respect to Art. 5.1.15 an effort should be made to settle the question there too. He suggested that some drafting changes along the lines of the PECL could overcome at least part of the difficulties. He admitted that Art. 5.1.15 was open to divergent interpretations.

Hartkamp suggested that the comments might indicate what was meant by "currency of the contract" in Art. 5.1.15.

Bonell observed, however, that the discussion had made it apparent that the term "currency of the contract" was not a fortunate one, because it was misleading and would therefore have to be changed.

Farnsworth recalled that it had been suggested that they say "currency of account" rather than "currency of the contract", even if the discussion had discouraged him from thinking that that was a good idea. He thought that "currency of the contract" was unclear and that Crépeau was correct in asking what was meant by that. What he thought was meant was that the currency of the contract was the currency in which the price, or in which the monetary obligation, was expressed. Whether they wanted to put that in a definition, or whether they wanted to put that in a comment, was maybe a matter of less importance than to understand that to find what was meant by the currency of the contract one looked at the number and the symbol which came with it.

Hartkamp suggested replacing "currency of the contract" by "the currency in which, according to the contract payment has to be made". That was then distinguishable from the currency in which actual payment took place, which might be a different currency.

Bonell thought that in practice the case where the contract determined the currency in which payment had to take place was less frequent that the case where the price was just expressed in a currency, without further qualification, with the consequence that the question arose of how payment actually had to be made.

To Furmston it seemed that what made the provision unclear was that there were at least three different currencies which were being discussed and it attempted to talk as if there were only two. It was possible to envisage practical situations in which there was one currency which denominated the extent of the obligation (which he would not call currency of account but it could be called something else), for example, one sells 1,000 barrels of oil at US $ 25/barrel and the contract says "payment in Rotterdam in Italian lire". In that case money was to be paid, currency of payment was Italian lire, the currency of the place of payment was guilders and one should not assume that the currency of payment and the currency of the place of payment would always be the same. If they were, then one only had two currencies to worry about and it was all much easier. He did not think that the existing formulation of Art. 5.1.15 actually covered that sort of fact situation very well.

Bonell recalled that there now was an attempt at a formulation to cover this: "currency of the contract is currency in which the monetary obligation is expressed as being payable" - and here he was lost, because how often did parties express the monetary obligation in a currency and add the further words "and this has to be paid in that currency"? It did happen, and this was the situation envisaged under para. (1)(b), but it might well happen that the parties just expressed the price in a currency different from that of the place for payment and that was it.

Farnsworth objected that then it was not possible to answer

Hartkamp's example. In Hartkamp's example one did not really know whether what was meant by "the price is expressed" was the million dollars or the lire equivalent. If his example were simplified and A simply said that he would pay a billion lire in Amsterdam, the currency in which the price was expressed as being payable was lire and it would not be necessary to say "and the price is payable in lire". If one had a contract in Rome which simply said "a billion lire", it would be expressed as being payable in lire. The notion of being expressed as being payable was an attempt to make a distinction between the simple case where one just put the lire sign before the number, and the case where it was apparently thought that one had to have a special agreement that payment must be made in lire.

Bonell agreed and added that according to Farnsworth's definition the first case would not be covered.

Farnsworth stated that it would be covered.

Hartkamp stated that when he had said "according to the obligation it should be paid in" he had meant what in French would be *"lorsque l'obligation opte sur"*.

Bonell thought *in obligatione* was totally different, as there it was the object; like when one indicated a currency which was no longer valid, in which case one spoke of the currency *in obligatione*, for instance three gulden from centuries ago, or in currency transactions. He could, however, hardly imagine a language which was clearer than the one adopted in the PECL and suggested that that formulation be considered.

Hartkamp and Farnsworth observed that para. (2) contained the word "expressed".

Maskow recalled that the question of non-transferable currencies had to be considered.

Farnsworth indicated that his difficulty was in Hartkamp's example, because he did not know whether the currency expressed was dollars or lire.

Drobnig thought that if dollars were meant it should be covered by "a sum of money expressed in a currency".

Furmston wondered whether if he sold oil at so many dollars a barrel payable in Italian lire in Holland, Art. 2.111(2) PECL would involve converting directly from dollars into guilders without going through lire, which could make a lot of difference as to how much one ended up with assuming all three currencies could fluctuate. He would have expected that one converted from dollars into lire at whatever date was appropriate for the conversion then if there was some rule which required payment in guilders and not lire because the lire or the guilder was not convertible then one converted again, which might be at a different date.

Maskow suggested that if one took Art. 5.1.15 as it stood and only replaced in lit. (b) the "currency of the contract" by "the currency agreed", then in Hartkamp's example what had been agreed would be a question of interpretation, whether or not it had been agreed that payment should effectively be made in lire.

Furmston did not think that Art. 5.1.15 was aimed at the problems they were discussing, it was primarily aimed at those cases where it was actually non-convertible currencies.

Bonell suggested starting with "a monetary obligation is expressed in a currency other than that [...]" and then under lit. (b) "the parties have agreed that payment should be made effectively in the currency in which the monetary obligation is expressed". The comments could then explain that sometimes the case might be even more complicated, that three currencies might be involved and that therefore Hartkamp's payment clause (the Italian lire clause) should be construed as rendering the Italian lire the currency of account and of payment because that was expressly stated. He would have no hesitations in saying that in Hartkamp's example, if it were stated that payment had to be made in Italian lire in Amsterdam, then that came under para. (1)(b).

Maskow did not think that this was so decisive, it was a question of interpretation of that clause. He himself would agree with Hartkamp that it did not necessarily have to be paid in Italian lire, it was only a clause to give a certain yardstick for the measurement of this amount and it did not mean that it had to be paid effectively in lire. He could, however, go along with the modifications Bonell had proposed for Art. 5.1.15.

Komarov felt that this example had nothing to do with Art. 5.1.15, because here the second currency came into operation through the operation of the law, but in his example the two currencies came into play because the parties had so agreed. In a case where there was both the currency of account and the currency of payment, if the provision referred only to the currency of the contract and it was understood that by that what was referred to was the currency of account, then the party would be interested in having damages not in the currency of payment but in the currency of account. That was why he had connected the definition of the currency of the contract with the currency of account.

Drobnig came back to Bonell's proposed modifications to Art. 5.1.15: if the first line of para. (1) were also changed to read "If a monetary obligation is expressed" instead of "due", that would change the intention - "due" indicated the currency of payment and that was the agreed currency of payment.

Bonell pointed out that the PECL had used only two concepts - the current in which the money is expressed and the currency in which payment

takes place.

Drobnig felt that the PECL formulation did not fully take into account situations such as that in Hartkamp's proposal. If they started to redraft Art. 5.1.15 they should stay within the terms of Art. 5.1.15, and the monetary obligation due was then really the agreed currency for payment.

Maskow felt that it was the same in lit. (b).

Drobnig agreed that it was the same in lit. (b), with the difference that there this was related to the currency of account - one could relate the currency of payment to the currency of account, in which case in Hartkamp's example it would say that payment had to be made in dollars.

Lando suggested using the Latin expressions Hartkamp had quoted as a basis to decide what they wanted to say, and then afterwards finding appropriate English expressions.

Bonell pointed out that *in computatione* referred to the way one actually calculated the amount to be paid, *in solutione* to the way one paid, and *in obligatione* could only refer to the money as the object of what one was doing.

Hartkamp instead insisted that that was not the normal meaning of these words. These words were the currency *in obligatione* - that was what one had to pay. *In obligatione* would be what one had to pay and *in solutione* would be what one was allowed to pay by the operation of law, and Komarov had claimed that this provision stated that one was allowed to pay in guilders although this was not this was not the money *in obligatione*.

Drobnig wondered whether they should not look through the PECL text which was the clearest. It dealt with the three-currency situation - with the agreed currency of payment (para. (1)), with the case where no currency of payment had been agreed but it was supplied by this rule in that payment could be made in the currency of the place of payment (para. (2)), and in the background was the currency of account. He thought this approach was much easier than that in Art. 5.1.15.

Bonell cited Nussbaum, *Money in the Law*, which stated "Where a debt is contracted in a money other than that of the place of payment, the law of that place frequently provides that in the absence of an expressed stipulation to the contrary, the debtor may make a payment in local currency equivalent to the sum contracted for in the debt. This "local-payment" rule merely gives a privilege to the debtor, [...]." Nussbaum clearly spoke of "money of contract" and "money of payment". "Money of contract": "When a debt is contracted in a money other than [...]", which he thought was precisely "Where a sum of money is expressed in a currency other than [...]". He thought that with such a rule a lot was achieved in

clarifying matters, even if he doubted that this covered the whole field (there were also indexation clauses, for example). He suggested that Fontaine, who was the Rapporteur for Art. 5.1.15, should be asked to change the article to read "If a monetary obligation is expressed in a currency other than that of the place of payment [...] (b) the parties have agreed that payment should be made effectively [specifically] in the currency in which the monetary obligation is expressed. (2) If it is impossible for the debtor to make payment in the currency in which the monetary obligation is expressed the creditor may require [...]".

Farnsworth wondered whether what was intended by "effectively" or "specifically" was what Art. 2.111 PECL stated, i.e. "payment shall be made only", then they should say "only".

Hartkamp did not think that "specifically" would do because it would restrict the exception rule more than it should be restricted. It had also been the opinion of the Governing Council.

Farnsworth recalled that the vote in the Council had been 9 to 7 and then it had been said that it should be loosened up a little, or that account should be taken of the fact that 7 people did not like the exception at all.

Lando suggested saying at the beginning of Art. 5.1.15 "If the currency in which the obligation is expressed (the currency of the contract) is different from that of the place of payment [...]" which would avoid the repetition of the currency in which the obligation is expressed.

Crépeau pointed out that anyone reading Art. 6.4.14 would not know that the currency of the contract was defined in Art. 5.1.15.

In conclusion it was agreed that the opening words of Art. 5.1.15 would be changed, that the "currency of the contract" in paras. (1)(b) and (2) would be changed to "the currency in which the obligation is expressed". It would then be a drafting matter whether it was to be replaced here as well as elsewhere or whether a definition along the lines adopted here should be put in the article on definitions. For the moment the provision would stand, the only change being the word "expressed".

Crépeau pointed out that the comments had used the expression "currency of account" and he suggested that if that expression were used it should be defined.

Lando and Bonell thought that it should be done away with.

Coming back to Art. 6.4.14, Crépeau observed that when one went further into the sentence one saw "or in the currency in which the loss accrues" and he wondered whether there was not a linguistic difficulty in loss accruing. There was, in fact, a discrepancy between the French and the

English again, as the French said *"la monnaie dans laquelle le préjudice a été souffert"* and the English said "the currency in which the loss accrues".

Farnsworth indicated that "the loss is felt" was sometimes used in American English.

Crépeau also wondered whether the actual phrase "the currency in which the loss" was clear, or whether it was "the currency of the place where the loss occurs".

Drobnig gave the example of a truck which had a first accident in France for which the expenses would be in French francs, and then later on has a second accident in Spain for which the expenses were in pesetas. Francs and pesetas would be the currencies in which the loss occurred.

Crépeau indicated that his question when reading this was whether there was a problem if a loss occurred in two different countries.

Drobnig could not see any problem. In those cases the loss accrued in both currencies.

Drobnig drew attention to the first part of the PECL formula which was intended to cover the problem which arose when the purchase price was expressed in dollars but was not paid on time and interest then accrued: in which currency would the interest accrue? The answer to this problem had been given as the currency of the contract. Similarly, if one did not deliver on time and had to pay a penalty or liquidated damages of 10% of the outstanding deliveries, that would also be in the currency of the contract.

Bonell stated that he had arrived at the conclusion that what was at stake was the measurement. Once it had been expressed it was a question of payment or no payment and then there was the other rule. He therefore thought that the formulation should be changed to "Damages are to be measured". This no longer had anything to do with currency regulations etc., because that related to the actual payment.

Tallon agreed that the brackets at the end of the provision should be taken out, but he preferred the old formula of Art. 6.4.14 to the PECL formula because it addressed the situation which was the most frequent.

Bonell stressed that it was not a question of the rather vague formula, that was a separate question. He wondered whether they could agree that the language should be changed to something like "Damages are to be measured either in the currency of the contract or in the currency in which the loss accrues according to which of the two is most appropriate".

Tallon could not see any major difference, but agreed to do it.

Brazil wondered what was meant by "measured" - simply calculated? Because it might suggest rather more than that.

Bonell indicated it meant calculated and expressed, but thought that only "calculate" might suffice.

Maskow suggested that then it would be sufficient to say that damages had to be calculated in the currency in which they accrued, and to leave out the currency of the contract as that was a question of the payment of the damages which had to be made either in the currency of the contract or in the currency which had already been agreed.

Drobnig referred to his example of interest which was expressed in a percentage only, or of a penalty or liquidated damages which were also expressed only in a percentage, without any indication of currency. He thought that it was clear that then the intention of the parties was that the interest should accrue in the currency of the contract, of the purchase price, and that this was true also of the penalty clause. For this reason the part of the formula which referred to the currency in which the loss accrued was not accurate enough.

Lando added that that was one of the reasons the PECL formula was more adequate.

A possible formulation was thus "Damages are to be calculated either in the currency [of the contract] or in the currency in which the harm was suffered".

Furmston wondered who was to make the choice.

Drobnig observed that for certain items the first part of the rule was adequate, whereas for other items the second part of the rule was adequate.

Bonell suggested adding "whichever is more appropriate".

Maskow and Furmston indicated that this should then be explained in the comments.

Bonell concluded that there was agreement on the formulation "Damages are to be evaluated either in the currency of the contract [in the currency in which the monetary obligation was expressed] or in the currency in which the harm was suffered, whichever is more appropriate."

Huang suggested saying "calculated" or "measured".

Furmston indicated that "measured" or "assessed" would be more natural than "evaluated".

Farnsworth agreed, indicating that "measured" seemed better to him.

Drobnig did not think that measuring was correct, because measuring meant evaluating different items - loss suffered, gain lost, etc. What they meant was "expressed".

Farnsworth suggested that then "assessed" might be better.

This was accepted.

Bonell wondered if it was not better to have "may be" instead of "are to be" if one had "assessed", as they were introducing an option which *per se* did not exist.

Brazil indicated that if one used "may" one opened the way up to other options as well.

Farnsworth agreed. The damages were to be assessed one way or the other, there was no third possibility.

Drobnig wondered whether it was correct to refer to "foreign currency" and suggested saying "currency in which damages have to be assessed".

Lando stated that it went more to the question of how one could measure the damages. In the distinction between *obligatio* and *solutio* this was the former.

Bonell stated that he would have thought that if he had to pay a car mechanic in Spain and another in France and then had medical expenses in England he would be entitled to get these losses compensated in the currency in which he had suffered them, i.e. in the currency in which he had actually paid.

Maskow indicated that this was the original idea but that it had then changed. The last version was that the calculation had to be made in the currency of the contract but that one could be paid in the currency of the place of payment. This was only for calculation, then one had the sum and how the sum was to be paid was decided in accordance with the general rule.

Bonell wondered whether this made sense in a case where one did not have a bill which one had paid, where it really was an assessment.

Lando gave the case of someone who made a contract with the EEC Commission which was stipulated in ECU. He then ended up having to a lot more work than had been stipulated for and for this performance of more work he claimed damages. It was not that he had used money, he had just worked more. The other party had said that this had to be calculated in accordance with Danish standards of what one got in such situations, and in

Danish money.

Bonell felt that this was different. If one said according to the cost of living of that country instead of that of the country of one's own residence, this was one thing but then the currency was perhaps only one element if any. Was this what was meant by this provision? When this provision stated that "Damages are to be assessed either in the currency of the contract or in the currency in which the loss accrues" they all understood this in such a broad sense, i.e. on the basis of the indicies, salaries and costs of living of the country involved?

Lando observed that if this person had been ill and had had to pay medical expenses it would also have been Danish standards for the doctor's expenses.

Bonell stated that it was one thing to have paid something in a foreign currency and then to have the right to be compensated in that currency, and he realised that this was no longer at stake. Another thing was to say that if one had to perform in country A but one lived in country B and the loss one suffered occurred in country C, one could do as if one were a resident of country C for the evaluation of the actual harm.

Furmston stated that it was a question of evaluating the loss. If one suffered a loss which was naturally measured in the currency of country C, what would be wrong in saying so? There were a lot of contracts for performance in many countries where it was possible to envisage breaches which took place and cost money. All the rule was saying was that one had the facility to measure a loss in the currency of the place where the loss had been suffered or in the currency in which the loss had been suffered.

Bonell wondered what happened when the measurement depended on the cost of living. For example, A lived in Rome and in order to determine the loss A suffered because he was ill for 10 days, he could, just because he happened to fall ill in New York, take the index of the cost of living in New York and get the compensation in dollars?

Furmston pointed out that this was about measurement, not about payment. All it said was that if one suffered the loss in US dollars then one measured the loss in US dollars if that was appropriate.

Lando referred to the case he had given above - this person was an engineer, and if he had hired other Danish engineers to do the work he had to do he would have had to pay them according to Danish standards and in this case Bonell would have no objection to the rule. Instead, when the engineer did the work himself Bonell objected to the rule.

Bonell indicated that he had nothing against a Dane being paid in Danish krone, but Lando appeared to be suggesting much more, i.e. that if this engineer happened to do the work in New York and was not able to do it

he could claim US dollars.

Lando objected that this was not what he had had in mind, his case was a Dane doing work in Denmark as a Danish engineer, in which case his compensation should be measured in accordance with Danish standards. This was also a conflict of laws rule in this respect.

Furmston indicated that if he also suffered a loss of profit because he was unable to keep a commitment in Rome so that he did not earn the large fee he would have earned in Rome had he arrived back on time, then that loss was suffered in lire - assuming he was to have been paid in lire. If he was being paid in dollars he would suffer the loss in dollars. The question was in what currency did he suffer the loss. A contract might have resulted in a series of different losses which one started off by calculating in different currencies. This had nothing to do with the currency in which the final award would be given, it was about the measurement.

Drobnig thought that it was easy where expenditures were concerned. The difficulties arose where gains were lost, but then he suggested that one look to the currency in which the gains would have been earned.

The provision as adopted therefore read

"Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered whichever is more appropriate".

The title of the provision as adopted was *"Currency in which to assess damages.*

<u>Article 16 (Article 6.4.15 of the Consolidated version in Study L - Doc. 40 Rev. 7)</u>

Introducing Article 16 (Article 6.4.15), Tallon indicated that it was a rule which was not in the PECL. It had been discussed in Ivry, but had been kept for further consideration. It could be objected that it was a procedural rule which was not needed here, it could be objected that the payment of interest on damages was payment of a sum of money and not of a contractual sum so it could be left out. As there was now no rule on the notice (the *mise en demeure*) it was difficult to choose a rule which was different from this one.

Drobnig observed that the principle of full compensation would imply that compensation should be paid at once, immediately after the harm had occurred. He was therefore not sure why it was necessary to wait until a suit had been filed. Interest had to be paid as from the time the harm had occurred.

Tallon observed that often it was not all that easy as the sum was not always known and one could not pay interest on something which had not been fixed.

Furmston wondered whether it did not depend on the date at which one assessed the damages. If one assessed the damages at the date of the award one was in considerable danger of double-calculating if one also gave interest from some earlier moment, because one would have taken into account inflation up to the date of the award while the award assessed the damage at that point.

Date-Bah indicated that if by the time one assessed the damages one built into the assessed sum an interest element it would be taken care of, but it seemed to him that the full compensation principle should not entail your foregoing interest between the date of breach and the date when the money should be coming to you and the date when you actually filed suit, because then there was a gap. In principle he could not see why the interest should be post-poned to the date of the suit because if the man had suffered a loss and it was accepted in principle that he should recover both the loss and interest, then it should be paid from when the obligation fell due and not later.

Farnsworth referred to Art. 6.4.11, where a party did not pay a monetary debt. He gave the example of A selling B something and B refusing to take it: A does not resell it to anyone else and seeks specific relief. He took it that A was suing for the price and he thought that that was a monetary obligation and he thought that interest began to run from the date of maturity which was the date B should have paid the price. Suppose A would like to have some money now and does not want to wait until the law suit and understands that it is commercially more feasible for him to sell it to someone else and to sue B for the difference between the price and the replacement transaction. He guessed that it was not now a monetary obligation, but he was not sure, and that it was actually damages calculated by the replacement transaction. If that was not right, then he did not know how to read this and it should be clearer. If he was right, then it seemed to him that they had a rule that was a little unfair to A because now Art. 6.4.15 said that A must bring suit in order to get damages on the smaller sum which was the difference, and if A made all these arrangements to resell and went to see his lawyer the lawyer would say that he was a fool because he would have got much more intrerest if he had behaved in a less efficient way. He thought that in the United States they had a rule at which interest ran depending on whether the damages were easily calculable, i.e. if A were to sue B for loss of profit which would be very difficult to estimate, and A says that he wants a billion lire and B says that that is much too much and that they should go to court to decide, American courts would tend not to allow interest until the sum was made precise by a court, because the defendent would not know what to pay interest on until that time. He had problems particularly with the case when one distinguished between a money debt and damages based on

replacement.

Hartkamp agreed with Farnsworth. He stated that they should in any case get rid of the suit being filed. The claim for damages could accrue on different dates, but as soon as there was a claim for damages there should also be interest. If one was ill and went to hospital one might not have a claim until one had paid the hospital bills, but if one's car was knocked down in an accident, and the damage was assessed only six month's later because only then did one know how much it cost to repair it, in the Netherlands they would say that one had a claim immediately upon the accident, so it depended on the kind of damage, and that need not be settled here. Here they only needed to say that if there was a claim for damages there was also interest.

Drobnig observed that if it was not yet liquidated the debtor enjoyed the money until he paid, so he would draw interest and that was really money which belonged to the other party.

Furmston observed that if the interest was compensating you for not having the money, it should run during the period you did not have the money even if it was only in retrospect that you realised what it was that you did not have.

Tallon observed that if one went into details on this question, one also had the problem of the nature of the judgment allowing damages - in France there was this problem between a *jugement constitutif* and a *jugement déclaratif*, i.e. between a judgment which created the obligation, or a judgment which stated that the obligation existed from this or that other date.

Drobnig stated that he would not go into that, but that he would go into the economics of the matter, and that the economics was that assets of the creditor were diminished and he might have to go to a bank and take a loan, but certainly the debtor who did the damage enjoyed the money until he paid and this gain must be transferred.

Brazil had difficulties with an article which seemed to preclude those clear cases where it seemed to him that in principle the aggrieved party ought to have interest on a liquidated amount back to the time when the maturity of the monetary obligation occurred. On the other hand there were other cases where this might not be appropriate and he wondered how all the possibilities could be dealt with in an article. He felt that they should consider suppressing the article and then perhaps dealing with the matter in the comments to the article on full compensation.

Maskow agreed with Hartkamp, i.e. with the view that the decisive date should be the date of a notice with which the creditor requires the damages. It would not be justified that the other party had to pay interest if he did not even know that he had to pay damages.

Tallon observed that the problem was that the notice requirement had been deleted.

Maskow pointed out that in any case if one wanted to have damages one had to write to the other party stating that one wanted damages so that the other party knew this.

Bonell asked whether Art. 6.4.15 applied also to interest granted under Art. 6.4.11. This lead to the question of whether compound interest was to be granted or not.

Furmston indicated that he quite favoured deleting this provision. As to Arts. 6.4.15 and 6.4.11, if one had two provisions one assumed that they were not conflicting but that they were consistent and the most obvious way would be to say that the earlier one dealt with monetary obligations and the latter with non-monetary obligations, with compensation for losses other than failure to pay money, such as failure to deliver goods.

Drobnig observed that if this was so it should be made clear.

Furmston observed that if Art. 6.4.15 was only intended to apply to Art. 6.4.11 they clearly should be amalgamated.

Drobnig stated that he had assumed that Art. 6.4.15 did not apply in cases of Art. 6.4.11 and this should be stated. Consequently he would be against compound interest.

Furmston indicated that the question of compound interest was a separate question which they had not addressed at all.

Bonell indicated that his point was that if, as could be argued, Art. 6.4.15 also applied to the Art. 6.4.11 kind of damages, say interest, then there would be an admission of compound interest, because Art. 6.4.11 stated that one was entitled to interest from the date of maturity of a monetary obligation, and if this provision were to be cumulated with Art. 6.4.15 this would mean that according to the present text these interests, which were called damages, produced interest after one had filed a suit.

Furmston stated that the principle of full compensation meant that one must be entitled to compound interest.

Drobnig observed that if one delayed the payment of interest one ought to have interest on that interest. That however did raise some very delicate points so perhaps it was better to delete it and to make it clear that Art. 6.4.15 did not apply to Art. 6.4.11.

Date-Bah stated that clearly if the interest awarded on the sum settled was not paid, there was a continuing loss, i.e. there was more harm occasioned by the failure to pay the interest awarded, so if one deleted

this provision how was one to compensate that? Once the interest was payable, regardless of the kind of damages, if it was not paid there should be further compensation for the non-payment of those damages. If one expressly excluded the possibility of compensation for the interest one had not been paid, what happened to the loss?

Drobnig indicated that his idea was not to exclude expressly that payment of interest on late payment of interest was possible, but to exclude this from these Principles and perhaps explain in the comments that this was a very touchy question which in certain national legal systems touched upon public policy and so that was why the Principles did not deal with it, i.e. it would be left to national law.

Furmston stated that it was arguable that Art. 6.4.11(2) justified damage at compound interest. What one was doing was to import a standard that was related to the average behaviour of banks with short-term lending and that implicitly provided for compound interest.

Bonell gave the example of a sales price which had not been paid: the parties agreed that as from the date of maturity this monetary obligation gave rise to interest according to rate x, etc. There were two possibilities: sooner or later the debtor would be asked to pay the price and the interest, and either the debtor paid and that was that, or he did not and then the seller had to get an award. At that point the award fixed price plus interest. Compound interest could only accrue thereafter, even if it was not really compound interest, because if the price which had been 1000 and which with the interest had become 1300 was still unpaid, of course as from the date of the award one had to calculate interest on 1300.

Furmston felt that that was not correct. Suppose that one failed to pay the price which was 1000 pounds and one succeeded in not paying it for a year and the question was what interest would one have to pay to borrow the 1000 pounds for a year from a bank. However that was answered, the answer would include an element of compounding because one could not borrow for a year from a bank at the same rate of simple interest and at the same rate of compound interest. The rate of interest one paid would reflect that that included an element of interest on interest either monthly or quarterly or half-yearly. If one asked what the short-term interest rate was, the short-term interest rates which were quoted by banks were interest rates which included the compound interest. If they were quoting a rate of simple interest they would quote a higher rate in order to compensate them for the fact that they were not compounding the interest for the period.

Drobnig indicated that the award of the court or the arbitral tribunal would not capitalise interest, it would say purchase price 1000 plus 8% interest and that ran and interest was payable not only from the date of the judgment but from the date on which payment had to be made under the contract, so the interest ran as long as payment was not made.

Bonell wondered what happened if the debtor still did not pay.

Drobnig stated that then interest ran on. In a way it was a disadvantage because since interest up to the judgment was not capitalised the creditor only obtained the interest on the original capital sum. Nothing changed afterwards. Until the debtor paid the creditor only got the interest which was due from the very beginning, which was simple interest.

Furmston stated that he would be happy to ignore the problem, all he was saying was that he could find clues on how to answer it contained in the Principles at the moment. Art. 6.4.15 would be capable of dealing with the situation where the loss was clearly in the first instance not monetary. Suppose that the plaintiff's loss was damage to his goods, which was not a sum which one could express in money at the time, then the question was should the plaintiff recover, as well as the capital value of the goods at the date at which they were damaged, an award which included an element of interest. That was a completely separate question to the one which was dealt with by Art. 6.4.11.

Bonell concluded that they agreed that Art. 6.4.15 had its own scope of application, clearly distinct from Art. 6.4.11.

Drobnig felt that this should be spellt out in the text.

Bonell turned to the question of the time factor: as from when?

Date-Bah indicated as from when the harm occurred.

Bonell felt that this would be the general rule on full compensation, so a special provision would not be necessary.

Drobnig objected that it was not yet clear that interest was due on that provision.

Bonell wondered why not - if A destroyed B's car, and they established that if the damage was one million lire as from the date of the accident A would have to pay also interest on this million lire unless he paid immediately, this was full compensation. It was the contrary if they established that on that million lire which was the actual harm which A would pay a year later B would have the right to interest only after he had filed a suit or made an explicit demand, this would be a derogation from the principle of full compensation.

Drobnig agreed, but observed that the full compensation principle was not recognised everywhere in this respect. He felt that the provision was necessary, also because of the negative implication which had to be spelled out, i.e. that it did not apply to interest on delayed payment of a monetary debt.

Bonell pointed out that so far the text spoke only of after the suit was filed.

Komarov preferred interest to accrue as from when the obligation was due, because after that time the money which should be paid as damage was in the hands of the debtor, and for this reason it seemed to him to be justifiable to count interest from that point on.

Tallon thought that this went very far back, and that one would have to pay interest on a sum one did not know existed or how much it was. The solution he had adopted in his draft was perhaps bad but was a compromise between French law in which it was from the date of the judgment, and from when the harm occurred which was retroactive. He had thought it reasonable to have it from when the suit was filed.

Bonell indicated that Italian law went along the same lines as French law, as they thought that only as from the date of the judgment did one have an actual right to that particular sum of money.

Komarov pointed out that sometimes there could be no suit at all, the parties could have a dispute only as regarded the sum of the indemnity. For example, presently the Soviet Union had problems with payments and there were some cases in which Soviet buyers had accepted that they owed a sum of money to Western suppliers. The problem was the interest which was to be paid on this sum which had not been paid on time.

Bonell recalled that they had decided to exclude the operation of this rule with respect to monetary obligations.

Komarov pointed out that in this case the problem of compound interest arose again.

Bonell agreed, but recalled that they had decided in principle to exclude compound interest.

Furmston thought that they ought not to have a rule which required people to start actions because they wanted to encourage people to resolve disputes by agreement. Even if one did not know the extent of the loss, in most cases one would suffer the loss from the time the contract was written. Obviously, if one did not, then that would be taken into account. In England the court had a discretion as to the awarding of interest and if the court assessed the damages at the date of breach it would normally then exercise discretion to award interest from that period. If it were to assess the damages to a lengthy period it applied a different rule. One of the purposes of interest was to compensate the creditor for being deprived of the use of money, another was to compensate the creditor for changes in the value of money between the date of the injury and the date of the judgment. If one assessed the damages at the date of judgment one took care of the second case but not of the first.

Bonell indicated that in Itlay this would never be done under the heading "interest", but it would be revaluation of the amount of money on the basis of the price indicies of, e.g., car repairs, if one could show that the price had gone up by 30% one would get 30% more.

Brazil stated that in Australia there was a similar sort of situation and the trend had been to increase the possibilities of what was called "prejudgment interest", but in Australia this was very much a matter of discretion of the judge in the particular case.

Bonell wondered which legal systems in any event granted interest from the date the loss accrued.

Drobnig indicated that that was German law.

Hartkamp indicated that it was also Dutch law.

Maskow came back to the notice requirement: if there were low interest rates, it might be acceptable to take the date when the harm occurred, but now there were rather high interest rates, prime rates and so on, and this would mean that the creditor could wait with bringing his claim because he would get a rather good interest rate for his damage.

Drobnig pointed out that the debtor also enjoyed the same high interest rates.

Maskow thought the debtor might not always be aware of that.

Furmston observed that they were dealing with international commercial contracts where interest was a major factor which people knew very well, no one was going to be taken by surprise by the fact that there were high interest rates.

Voting on having a rule where the relevant date was that when the harm accrued, 9 voted in favour.

Turning to the formulation of the rule, Furmston suggested "interest normally accrues on the date of the harm".

Tallon did not favour the use of the word "normally".

Bonell recalled that they had of course also to exclude Art. 6.4.11.

Furmston indicated that if one wanted expressly to exclude Art. 6.4.11 it could read "Damages other than for non-payment of monetary obligations".

Farnsworth observed that if they said that interest on damages began

to run on the day when the harm was suffered, i.e. if that rule were applied to the non-payment of a sum of money, he thought they would get the same rule as that in Art. 6.4.11(1). Except for the fact that the words were different, the principle seemed to be the same for damages as it was for the non-payment of a sum of money. It seemed strange to have two rules that were so parallel so far apart, or indeed to have two rules at all. In the case of the non-payment of a sum of money the harm was suffered when the money was not paid and interest would accrue at that time. He also pointed out that here they said the interest accrued, whereas in Art. 6.4.11 they said that the aggrieved party was entitled to interest.

Bonell suggested that the provision could be deleted, because it was covered by the general provision.

Tallon indicated that it could be put in the comment to Art. 6.4.11.

Farnsworth had no objection to the point that paras. (2) and (3) of Art. 6.4.11 were not duplicated in Art. 6.4.15, his point was that it was rather startling to find two rules which said virtually the same thing separated and written in totally different language. If Art. 6.4.15 were deleted and put in the comments of the earlier section, then Art. 6.4.11 would not look strange because it was a rather specific rule.

Furmston wondered whether Farnsworth was suggesting to allign the wording of Arts. 6.4.11 and 6.4.15 and then to move Art. 6.4.15 closer to Art. 6.4.11 as Art. 6.4.12.

Farnsworth suggested that that might do it, and suggested even having it as Art. 6.4.10.

Lando thought that another possibility might be to have two provisions in Art. 6.4.11, one starting like the present Art. 6.4.11(1) and then a second paragraph stating the principle of Art. 6.4.15 and then the rate of interest.

Maskow suggested stating that damages were due at the time the harm accrued, because in Art. 6.4.11 they said when they fell due, and now they had to make clear when damages fell due.

Bonell felt that this already followed from the present text by implication, i.e. in interpreting the present Art. 6.4.11(1) one could state that this would also apply to the case when a non-monetary obligation had not been performed, because this meant that damages accrued immediately, which were *per se* a monetary obligation, and since they thought that these were immediately due, then of course they would also fall under this provision.

Drobnig thought that Art. 6.4.11 dealt with the non-payment or delayed payment of obligations which were monetary from the very beginning,

and para. (2), which said that the rate of interest was that for prime borrowers, was also geared to the non-payment of obligations which were monetary from the very beginning, as was para. (3) which said that additional damages could be claimed, neither of these provisions applied to cases of late payment of damages and must be kept separate. He had no objection to placing Art. 6.4.15 near to Art. 6.4.11 and to draft it in language which was as close to it as possible.

Tallon added that the comments should indicate that Art. 6.4.15 was an application of the same general idea as Art. 6.4.11.

Maskow wondered what the percentage of interest was in this case in Art. 6.4.15. He had always thought that it was the same interest rate, or at least that Art. 6.4.11(2) would also apply to this.

Bonell recalled that agreement had been reached that the interest should accrue on the day of the harm. The point left open was how to express this concept. It had also been suggested to move this article to either before or after Art. 6.4.11.

The final formulation of the provision was left open.

Article 17 (Article 6.4.16 in the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 17 (Article 6.4.16), Tallon recalled that it dealt with a very controversial matter. He had dealt with only exemption clauses and in Article 18 (6.4.17) penalties and liquidated damages, even if there might be other clauses which were closely related to these even if they were a bit different. He suggested that the question of forfeits, i.e. cases where a party agreed on a contract but could renounce the contract by paying a specified sum, should be looked into and their possible inclusion in the Principles considered. He recalled that the Group still had to decide whether or not to include a provision on unconscionable or unreasonable clauses. If they were to have such a provision in the introductory chapter this might affect the text of these articles.

Bonell recalled that the question of possible inclusion in the introductory chapter, or possibly in the chapter on substantive validity, of a provision on unfair or unconscionable contract terms in general had been discussed repeatedly even if the result of the discussions had not been too encouraging, in the sense that a sufficient majority had not been reached for the inclusion of such a clause. What was left was in Art. 3.8 (Gross disparity), which to a certain extent addressed the question of unfair contract terms, and the general clause on good faith which could be used by courts and arbitrators for a possible invalidation of a particularly unfair contract term. Apart from this, the Group appeared to be of the opinion that such a provision should not be envisaged.

As to the question of forfeiture, Lando recalled that a few years previously he had been involved with the drafting in Scandinavia of construction contracts relating to off-shore plants, and there had been agreement between the constructors and the owners of the plant that it should be possible for the owner to call off the contract, to say that he was not going to let the constructor construct this and the damages which were then to be paid were very small. This had to do with the oil prices: if the oil prices went below $ 18/barrel the construction of such off-shore instalments was not profitable and therefore it was decided that in such cases the contract could be called off. He wondered whether this was a forfeiture clause or a limitation of liability clause. The contract provided that there should be some damages, and the damages were calculated on the actual expenditure the constructor had had until then, but his expectation interest and some of his reliance interest were not calculated. If they agreed that this was a forfeiture clause he thought that they should clarify when there was a forfeiture clause and when there was an exemption clause.

Bonell wondered whether the problem of the distinction did not in actual fact exist even more in relation to penalties and liquidated damages.

Lando did not think so, although it could.

To Maskow this was a termination clause and he thought that this was something quite different from what they were dealing with here.

Drobnig thought that theoretically it was a different clause, but the function this clause performed was so close to a limitation clause that he would be tempted to deal with it.

Tallon pointed to the fact that there was a major difference between exemption clauses and penalty clauses and forfeiture clauses, because in one situation there was non-performance whereas in the case of the forfeiture clause it was not a case of non-performance of the contract, it just said that one could perform the contract or pay a sum of money.

Bonell pointed out that penalties or liquidated damages clauses to an even greater extent, often turned out to be a hidden way of excluding or limiting liability. What was actually the purpose of the question whether or not these other clauses should also be dealt with in this context? They had so far moved from the assumption that they would not have a general clause invalidating unfair contract clauses. What could they do except have a clause specifically addressing the question of exemptions, and perhaps then hope that *per analogiam* it might be applied to other clauses which had the same effect.

Hartkamp felt that it would be difficult to draft an article which

covered both clauses at the same time, but it would not be difficult at all to draft an article on exemption clauses and then to conclude it with a paragraph stating that rules on exemption clauses may apply accordingly to forfeiture clauses.

Bonell indicated that one should then indicate that they could apply to forfeiture and other similar clauses, because they could apply also to penalty and liquidated damages clauses.

Tallon stated that penalty clauses which were equivalent to forfeiture clauses were a major problem in French law, because of the problem of knowing whether the court could reduce the amount of the forfeiture.

Bonell suggested they concentrate on Art. 6.1.16 and then add at the end that the same applied also to other clauses having similar effects.

With reference to the North Sea example, Date-Bah wondered whether it would be covered by Art. 6.4.16.

Bonell also wondered what Lando could envisage as being the reaction of the Principles to that case. Invalidation of the clause so as to link the party to the contract? Or more the mechanism envisaged under Art. 6.4.17?

Lando stated that he could envisage two things which had been discussed. The ship-owner had wanted an even more restrictive clause, he had wanted it to say that he would not even pay all the costs the constructor had had, that this should be the risk of the contructor: he had taken a contract that was very profitable and if it was called off he should not even get some of his over-head expenses. This had been thought to be unconscionable. Another point which had been discussed was whether under Danish law this was considered to be an exemption clause, whether deliberate non-performance was reasonable. It had been thought that this was fully reasonable. If they here said that their rules on exemption clauses should apply, they would have to make one great reservation, namely that deliberate non-performance was admissible here. That was why he thought that the rule they had was satisfactory except that one could not invoke the exemption clause for the case of deliberate breach, because there were situations in the building industry and other industries where one should not punish deliberate non-performance.

Farnsworth observed that it was very common to have buy-out clauses in long-term contracts, for example in the case of a five-year contract to be a coach for an ice hockey team, the owner of the team would usually anticipate that the coach might be very unsatifactory and there would therefore be a provision that one could get rid of the coach by paying some money. It was possible to do this by saying that they would get rid of the coach and if they did "the damages shall be" as it was a small amount and

he took it that in the case of a deliberate breach where one fired the coach Art. 6.4.16 would say that that clause was unenforceable. Very often, however, it was not written that way, it was written by saying we will either employ you or we will pay you for this year, in which case it did not literally come within this provision. Essentially such clauses were so common that the Principles would hardly be acceptable if such clauses were invalid in the case of deliberate breach. It was very common in long-term sales contracts also, or distributorship contracts, to say that they could terminate, but if they did they would make a payment for the unexpired years, and often the payment would be on the small side. He agreed with Lando that the provision read fine up to the point of "except". The exception for unconscionability was all right, but not the exception for deliberate breach.

Komarov wondered if the provision covered waivers. It was formulated as a limitation or exclusion of liability, but what if someone waived his rights? It should be made clear that all types of provisions limiting or excluding liability were covered, irrespective of how they were formulated, particularly as this article had the reasonableness test and there was no general rule. This might be done in the comments.

Lando indicated that if they did what Farnsworth had suggested, and took out the exception for deliberate breach, he would have no objection to the rule.

Bonell stated that his worry was that now that they had mentioned these type of clauses which were known in practice, which might be understood as if they allowed a deliberate breach (he would never think in those terms, he would rather say that they granted the right of unilateral withdrawal) they were forgetting that the mentioning of deliberate breach was well-rooted at least in civil law jurisdictions (one could not simply forget about such an important matter just because one was speaking about forfeiture clauses, in some jurisdictions this was considered public policy). In other words, the language adopted here had its history.

Tallon stressed that when there was a forfeiture clause there could not be a deliberate breach, it would always be a deliberate non-performance allowed by the contract. It was therefore impossible to apply this rule literally.

Furmston wondered whether the question was not whether they wanted to have a clause which would regulate clauses in contracts which would not constitute breaches, but which would enable one party to do something which would deprive the other party economically of what he was expected to get. It was perfectly possible to draft clauses which were not exemption clauses, but which were clauses which defined the obligation. If there was a clause which said that A was going to give B a nice holiday, and there then was a small clause which said that A could send B to Blackpool for a day instead, that could be drafted in a way which did not technically

involve any kind of exemption clause problem, but one might well want to regulate it, because once one went that step, it was quite difficult to know how much further one was going to go.

Bonell agreed, but stated that here what was questioned was not so much the deliberate breach, but the opening phrase "limit or exclude the liability". In Italy, for example, this was an extremely controversial issue precisely in this context as, for instance, banks resorted to this sort of trick in their general conditions, i.e. instead of saying that they did not assume liability for this and this and that, they said that the bank's obligation was confined to this and this and that. They argued that this was not an exemption clause, that it was just a clause intended to determine the rights and duties of the parties precisely. He wondered whether it would ever be possible to find appropriate language, unless they decided to have a general clause.

Lando wondered whether if they had an unconscionability clause, it would not comprise those cases of deliberate breach which they wanted to fight and then they would not need to have the deliberate breach clauses, because such clauses were unconscionable in many cases.

Tallon did not agree with this suggestion. It was two different things to say that the clause was reasonable *per se* but it would not work if there was a deliberate breach, and to say that the clause was reasonable as far as the breach was not deliberate. The formulation of Art. 6.4.16 was quite close to that of Art. 3.109 PECL ("The parties may agree in advance to limit or exclude their liability for non-performance except where the non-performance is intentional or the limitation or exclusion unreasonable"), but there was one difference, and that was the problem of knowing whether the "deliberate" referred to the defaulting party or to those for whom the defaulting party was liable, because the PECL did have a general rule which the Principles did not. If they kept the deliberate breach restriction they would have to do something about the employees etc. Then there was the problem of intentional or deliberate, but that they had settled in the text on the foreseeability of damages. Another problem was the unconscionable or unreasonable and this question had not been settled at the Ivry meeting.

Bonell thought that the most controversial issue was that of the qualifications they intended to adopt to identify those exemption or limitation clauses which were to be considered invalid.

Tallon recalled that when he had first had to draft these provisions he had been uncertain because there were the two different approaches. Everyone agreed that there had to be some sort of control over the exemption clauses, and there were two possibilities: either through the unconscionability or unreasonableness of a clause, which was the approach of the PECL, or through the traditional civil law problem of intention - *faute lorde* and *dol* - and reckless negligence. He had first put in both

solutions, but the Group had then decided not to keep the reckless negligence, but to keep intentional breach on the one hand, and unconscionable clauses on the other. Now the proposal was to take out the deliberate breach and just to have the unconscionable clauses. In many civil law countries the fact that the exemption clauses covered deliberate breach would be considered to be against public policy. Even if it was not in the text, civil law countries would apply this limit anyway. In order to have uniformity, he thought it was better to keep the exception for deliberate breach in.

Brazil wondered whether he was right in assuming that if they agreed on a clause of this kind nevertheless it might well be subject to Art. 1.3 on party autonomy which was still in square brackets, so that the parties to a contract could agree to exclude this article, or did they mean it to be a kind of *jus cogens*, a peremptory article which could not be put aside by agreement of the parties?

Bonell agreed that the article did not say that it was mandatory, but on the other hand the article said that the parties could agree only to that or that other effect, so to agree that this should not apply would be contrary to what was stated in the rule itself.

Tallon suggested the comments could indicate that the formula excluded the possibility to set aside the limitation.

Farnsworth wondered how those that wanted to keep the provision on deliberate breach would apply it to two situation: where the clause stated that the ten-year contract could be terminated at any time, and that the payment of money, but not damages, was to be made, with the payment being a multiple of the number of remaining years under the contract (a buy-out provision); if the answer was that that was bad because some money was payable, then should he have his lawyer draft one which said that he could terminate at any time on thirty days' notice on an anniversary date, so that the sum payable was zero and it was just a termination clause? Those two kinds of clauses were quite common in international contracts, as were clauses which said that damages were payable on rupture or termination of the contract. If one had a provision on deliberate breach, one either had to distinguish those cases or one had to say that they were all invalid, including just the termination clause with zero money payable. It was undesirable to make major substantive differences depend on the form of words when the substance was very similar. If one did that, what one did was put a premium on having a smart lawyer draft the contract and most of the Group liked to think that the businessmen had some skill in these negotiations. It seemed to him that if they said that in his examples they were distinguishable from the example that was forbidden here, what they said was get a smart lawyer and draft it in either of the two ways he had suggested, do not draft it yourself or get a dumb lawyer because you will run afoul of this provision, and that seemed undesirable to him.

Bonell admitted that there might be these border-line cases. On the other hand, he thought of an unsuspect text such as the last edition of the Uniform Rules and Customs relating to Documentary Credits, which even had the *imprimatur* of UNCITRAL, in which there appeared a provision according to which the bank was allowed to choose the correspondent on its own initiative and also to avail itself of other banks for auxiliary services at its discretion. As if this were not enough, it stated that whatever this chosen bank did, the principal was not liable, not only if he had not exercised due diligence, but in no case whatsoever. This was clearly a case which they always had in mind when they said that one could not contractually exclude ones liability even in cases of *dolo* and *colpa grave*, of intentional or reckless non-performance. A bill of lading clause exempting the carrier's liability whatever happened, either on his part or on the part of his servants and agents, was clearly a clause which they would identify as excluding liability also in case of intentional, deliberate or reckless breach. Although he saw that in some cases there might almost be an identity with the cases quoted by Farnsworth, he still failed to see that in 90% of cases there should be such a confusion, because if A hired a coach and said right at the beginning that the contract was for five years but either party, or only A, could terminate the contract, was it then an intentional breach if A exercised this right?

Farnsworth stated that in the US most lawyers would be smart enough to avoid this provision. What Bonell was saying was that it made all the difference in the world what words the lawyer used.

Tallon stated that it was not the words which were important, it was the intention, whether there was an intention to limit the liability or just to use the definition of the obligations.

Farnsworth observed that the client would say that he wanted to limit his liability, and how could he do that? The lawyer would advise him to do it this and not that way and would draft it for the client. Then the client who did not have a lawyer would fall into the trap.

Bonell wondered whether Farnsworth really thought that the president of the icehockey club was concerned with limiting his liability - what for? He would rather have said that the president was concerned with being committed for such a long term notwithstanding the fact that the coach might well prove not to be all that good, and so he would say to the coach that he would pay him a certain sum but that the coach would run the risk of being fired even after a year. Would that be limiting liability?

Farnsworth observed that if the president were to write that if he fired the coach his damages would be limited to x, then he took it that it was unenforceable under this provision. The owner of the team was not concerned with any of these legal niceties, the owner wanted to be able to get rid of the coach without very much liability any time within the five years. One drafted it one way and it was all right, but if one drafted it

another way it was not, and he found that objectionable.

Furmston indicated that if they were going to go down the route of actually trying to stop people excluding liability and say that exclusions of liability were ineffective or void, they could not be hampered by a conceptual apparatus making the distinction between whether it was or was not a breach, because clever lawyers learned rather quickly to dress things up as not being breaches. It was very easy in most of these cases to make the contract so that what one was doing was not a breach, but it had exactly the same economic objective which they were trying to inhibit. There was no point trying to stop people doing this if one allowed them to do it by simply drafting in a different manner.

Bonell thought that Furmston was absolutely correct, but observed that they were not discussing whether or not to delete the second qualification, i.e. the unconscionability, they were discussing the deletion of the first, and he wanted to point out that for so many of them and for so many of the future users of the rule it was a deeply rooted principle and why should they just forget about it. Did it do any harm? Furmston would get what he wanted in the second part of the provision.

Furmston indicated that the objection was to both parts, because at the moment the clause was limited to non-performance and Farnsworth's New York lawyers were queuing up to draft clauses. The "or is otherwise unconscionable" only applied to clauses which sought to limit or exclude liability for non-performance, so the clauses that were being drafted did not limit or exclude liability for non-performance.

Brazil agreed that the weakness in the provision was in the concept of non-performance, because that would be a very feable instrument indeed against smart lawyers.

Bonell indicated that he had always understood the common law systems in the sense that they did not pay all that much attention to the fact that the clause related to a deliberate breach or to a reckless breach, they wanted the unconscionability or unreasonableness to be the decisive test, but the concept of exclusion and limitation clauses was known also in the common law systems.

Furmston indicated that their legislation extended beyond non-performance, so that a clause which deprived the creditor of what he reasonably expected to get could be ineffective in whatever form it was cast.

Farnsworth stated that one could imagine an example of the coach with a contract so one-sided and so unfair to the coach, that in whatever form the lawyer put it one would say that it was objectionable and invalid, and that kind of provision could be a perfectly sensible provision. To have a provision that invited you to sit down with clever lawyers and draft it in

a way that was unobjectionable seemed to him to be objectionable itself.

Bonell thought that this was a new prospective, meaning that they should forget about exemption causes *strictu sensu* and that they should try to envisage something broader, why not a clause stating that any contract term which was unconscionable by nature and content was void.

Lando drew attention to the fact that in Scandinavia there was a provision in § 36 of the Contract Act which was similar to this one and which applied to all contracts ("Contract terms may be modified or disregarded if the term is unfair in relation to the contents of the contract, the circumstances at the formation of the contract and later circumstances [...]"). There had been a general unconscionability clause, the old § 36, which had then been abrogated.

Maskow suggested that they could also use, e.g, § 9 of the German Standard Contracts Act.

Hartkamp indicated that Art. 233 of Book 6 of the new Dutch Civil Code stated that a clause which was unreasonably onerous and which was part of general conditions could be annulled, even by extrajudicial declaration, just for being unreasonably onerous ("A stipulation in general conditions may be annulled: a. if it is unreasonably onerous to the other party, taking into consideration the nature and the further content of the contract, the manner in which the conditions have arisen, the mutually apparent interests of the parties and the other circumstances of the case; b. [...]"). There were then lists of clauses which elaborated on this, but they were only meant for consumer credit contracts. The general clause applied to all kinds of contracts, even if limited to clauses contained in general conditions, because if the clause was not in the general conditions the general rule on good faith applied and that could give the judge the same discretion to declare that to invoke such a clause in the contract could be contrary to good faith. If a clause was not a part of the general conditions, it was rather seldom that the clause that it was against good faith was invoked even if it theoretically was possible.

Brazil indicated that the way this particular problem was dealt with in Australia was that the courts construed exemption clauses that had the effect of defeating the main object or purpose of the contract very strictly, sometimes to the point of making them disappear. So if for example one had a contract to sell someone apples and one provided tomatoes and sought to rely on an exemption clause, courts said that one could not really have meant that to apply to that sort of situation.

Komarov asked for confirmation that the general clauses which existed in the different legal systems were public policy clauses and that if they were they would come into play in any case because they were a type of mandatory clause.

Bonell agreed but thought that it might be felt appropriate that also the Principles give the right message to the parties, particularly when they were drafting their contract. Komarov was right in that whether it were stated here or not would not necessarily affect the validity of a given contract, but certainly it could and should have such a pedagogical function. There were also legislations which did not have such general clauses, so such a provision in the Principles could even serve as a model.

Voting on having a provision prohibiting unconscionable or grossly unfair contract terms either in the introductory chapter or in the chapter on validity 11 voted in favour.

Tallon pointed out that this did not do away with the question of exemption clauses in the case of deliberate breach.

Lando thought it would.

As to the possible content of this provision, Lando commented that if one agreed on a general clause then he knew of two approaches which might be taken: one was to say that clauses which were unconscionable were to be set aside, the other was to say that the clauses which disturbed a contractual equilibrium were to be set aside, meaning that it was the disparity of performances which was the centre. Another thing was whether the clause should only be set aside, or whether, as in the Scandinavian law, one could modify the clause so as to take out the unconscionable element, which left more discretion to the judge. Finally, some laws, such as the Dutch which had followed the German pattern, together with the general clause gave catalogues of rules which were unconscionable, and this could be done in different ways: the Germans had some provisions which *per se* were invalid and some which were suspect, where there was a presumtion that they were invalid, but these catalogues both in the Netherlands and in Germany were mostly addressed to consumers and he did not advocate the insertion of such clauses in the Principles. Personally he felt that the question should only be addressed in a general clause.

Komarov stressed that great care should be taken in drafting this provision not to get businesspeople suspicious about the extent of involvement of the court in their business relationship. Some Russian trade organisations, for example, were inclined to provide for Swedish law but they tried to exclude § 36 because it gave the court the power to modify contract clauses which were unreasonable or unconscionable. Personally he did not think that the courts should be given the power to modify the contract.

Lando on the other hand felt that the possibility to modify the contract should be introduced.

Tallon had some misgivings about the way such a provision would be accepted by the practitioners. When the EEC Group had discussed with the

practitioners rules such as the ones on hardship, the problem had been whether to give the court the power to modify or to adjust the contract and nearly everywhere practitioners had been against it. He was not saying that this view was correct, he was simply pointing out that very general far-reaching statements might not be very well accepted. He did not think that it was possible to have catalogues in the Principles. He recalled that in German law and other legislations this was a regulation which was particular for general conditions and it was with a view to consumer transactions and so on. They should therefore have a general formula and not a catalogue. However, even if they had a general clause they still needed a special provision on exemption clauses.

Bonell drew attention to Art. 3.8 which clearly interfered with their envisaged new provision. He therefore asked Lando and Drobnig, as Rapporteurs of the chapter on validity, to prepare a draft provision on unfair or unconscionable clauses for the next meeting. He suggested the Group consider how such a new provision would fit with Art. 3.8.

Maskow thought that if they adopted such a new provision the presuppositions should be stronger than in the case of gross disparity. Only in quite exceptional circumstances should it be possible to disregard the contract term *per se* without proving anything else.

Bonell understood there to be two aspects: procedural unconscionability and substantive unconscionability. Procedural unconscionability meant that A could not exploit B's inferiority in several aspects, and that if A did so, B could avoid the contract. Substantive unconscionability on the other hand, was whatever happened between A and B, regardless of their personal qualification and behaviour in the negotiating process. Such a clause was *per se* to be considered to be without any effect. Art. 3.8 was the result of a very lengthy debate, and it had then been thought that it should combine the two aspects, and they could be seen combined in para. (1) which stated that regard should be had, among other things, to a. (the procedural unconscionability), and b. which, although in a rather hidden indirect manner, referred to the substantive unconscionability.

Brazil indicated that one way of looking at a provision such as Art. 3.8(1) was that it gave a party a unilateral right to say that he would tear up the contract because it came within this particular article. He did not think that that was a satisfactory situation, and did not think that that was what they envisaged, what they envisaged was that there was an argument as to whether or not the article was available and in most cases there would be a very vigorous argument as to whether the article was available. What was therefore unavoidable was some sort of third party settlement, either arbitration or a court. In a sense it came out in the article itself, because when one came to para. (2) one found that at least when one got to the point of rewriting the contract one could not get one of the parties to rewrite the contract and they had to bring the court in. In other words they had to have regard to the fact that even at that first

stage when the party would say that on the ground of hardship or on the ground of unconscionability this contract was no longer or was not a valid contract, they were really getting into the area of bringing in the court or the tribunal, because they would not want to give the impression of putting forward a system where a party could just invoke Art. 3.8 and just walk away from his contract.

Bonell recalled that Crépeau had always had difficulties in conceiving that a party could unilaterally avoid a contract. It could of course be seen from this angle and therefore be considered to be rather surprising, but on the other hand it applied *mutatis mutandis* to all other remedies as well. If one said that A was entitled to damages it was not just because A wrote a letter requesting damages that B must pay it, B could question this and state that ultimately they would meet before a third person.

Drobnig thought that the main problem was to find a criterion which was more than a very broad general formula. He was getting worried whether they should go beyond gross disparity and say, e.g., "very fundamental disequilibrium", because the other party agreed to it, and did he not deserve to be protected only if there were subjective elements on his part - inexperience and so on - which justified taking into account his stupidity for having signed the contract? He had difficulties in envisaging a provision which could be one in addition to, and apart from, gross disparity. Hardship was of course a different case.

Furmston found that the discussion seemed to have gone on on the assumption that what had been decided was to discard a clause dealing with exemption clauses and to put whatever they were going to put into some other part, maybe gross disparity. He could envisage something different. They had not actually decided what they were going to do in a positive sense, what they had decided was that the clause was not wide enough because it was easily evaded by reformulation of the contract. One could envisage a clause which was in the area of exemption clauses, but which said not merely that clauses exempting or limiting liability were invalid for deliberate breach or unconscionability, but also that clauses that were not technically clauses of limitation or exemption, but which had the effect of substantially depriving a party of what he expected to receive, were also subject to the same test. In other words, widening the scope of the exemption clause provision outside what one might call exemption clauses *strictu sensu*, that was one of the things they wanted to deal with. They wanted to deal with the behaviour of parties who made expansive policies and then they wheedled their way out, and whether they wheedled their way out by exempting or by reformulating the obligation should not make any difference, it should be objectionable or subject to tests of reasonableness or unconscionability or deliberate breach or whatever.

Tallon stated that these were the two aspects he had referred to: there was the general unconscionability *per se* which might be appreciated

in the abstract, without looking at the circumstances, and then there was the problem of deliberate breach: was it possible just to breach the contract deliberately and escape the consequences? This was why he had said that a general provision on unconscionability would not be enough to regulate the control of exemption clauses.

Brazil had no problem with unconscionability, because that meant that everything could be looked at. "Deliberate" was a little bit of a worry, but it would be easier to accept it if it were made clear that what they were talking about here was resort to an exemption clause in relation to an event that defeated the main object of the contract. Referring to the case of the contract to sell apples he had mentioned, he indicated that common law courts had dealt with that sort of problem by saying that they did not read the exemption clause as covering that sort of activity, because that really defeated the main object of the contract. He could not see that in the provision in relation to deliberate breach, he could read it into the provision in relation to unconscionability, because that was one of the things one would take into account.

Bonell suggested distinguishing between the test to be applied in order to decide whether or not a certain term, or the reliance on a certain term, was possible or not (the last two lines), and the scope of the provision which was presently restricted to agreements to exclude or limit liability for non-performance which had been questioned as being too narrow. Furmston had suggested that they might find broader language so as to cover also the hidden exemption clauses. In Italy there was the classical exemption clause provision which prohibited exemption clauses *strictu sensu*, only to find that court decisions were mainly concerned with finding that what one of the parties - the maker of the conditions of the contract terms - claimed to be only a definition of the contractual duties in fact were exemption clauses. One might be perfectly able with a broader formula to prosecute also these cases, because for example a bank which was paid for the custody of a safe-deposit box could not say that it was only obliged to exercise due care with respect to this safe-deposit box, but not with the whole building which might be subject to theft.

Date-Bah thought that it might be easier to turn the provision around. It might be that one should indicate what the parties could not do and it might be that what one of the parties ought not to be able to do was to exclude the main purpose of the contract. The fact was that the parties had not agreed to limit or exclude the main purpose of their contract.

Tallon indicated that it was quite legitimate simply to give a description of the obligation. What was not legitimate was a kind of *fraude à la loi*, as when, for example, hotels put up notices saying that they were not responsible for objects left in the cars parked outside, which meant that they were watching the cars but not the contents of the cars and this was not an exemption clause, it was quite legitimate, that the hotel assumed liability for the cars themselves but not for what was inside the

cars. When the definition of the object of a contract was such that one could do anything, then of course it was a disguised exemption clause. He was therefore not that disturbed by this definition because it was a marginal case and people were always trying to turn around rules of law and one could not make rules only for those people.

Bonell stated that in Italy court decisions were in 90% of the cases concerned with such border cases, just because clever lawyers would never say that they excluded liability.

Drobnig indicated that the words which gave rise to doubt were probably "for the non-performance of their obligations", and he wondered whether by elimiating those words one could achieve something. What they were driving at was that the parties assumed obligations *in verbo* and then said that they did not want to assume them, that they did not want to be held fully responsible if they did not fulfil them.

Furmston agreed that many clauses defining obligations would be unobjectionable, but nobody was proposing that all of these clauses should be void. What was proposed was that they should be invalid in certain circumstances - deliberate breach, unconscionability, query unreasonableness. Many clauses which defined liability would satisfy the requirements, because they would be conscionable and reasonable. He did not think that one needed to worry that the ambit was too wide, because one simply selected a valid test.

Lando indicated that the only thing which could really meet the smart lawyers was a general clause, because even the smartest lawyer could not avoid a general clause. The dangers of drafting a doctrine of fundamental obligation or something in that area was that even in such cases the smart lawyers could perhaps draft and be unclear about what the fundamental obligation of the contract was. He was afraid that even this doctrine might not be enough, and so even with this doctrine he felt that they needed a provision. The development in many countries showed that the legislators had felt the need for a general provision. They also needed it because they needed some sort of collateral to the hardship clause. He did not agree with Drobnig that parties went into contracts with open eyes, the way in which standard form contracts were made even with businesspeople showed that although people ought to be more careful, better informed, and stronger, they were not. Even businesspeople who could be in a strong bargaining position were sometimes negligent. He did not agree that they were not these people's keepers, because experience showed that even the business community needed this kind of protection through a general clause. Having a general clause would not prevent them from retaining Art. 3.8 which addressed special procedural aspects of it, nor did it make it completely unnecessary for them to draft a rule on exemption clauses.

Maskow felt that people should not be invited to limit or exclude liability, which now was the introductory part of Art. 6.4.16. He suggested

a wording along the lines of "No party is permitted to rely [unconscionably] on a contract clause in such a manner that the other party is deprived of what it reasonably could have expected as a result of the contract". This would cover also the case where the other party intentionally broke the contract, and in, for example, the case of the ice hockey coach, this provision could not be used in order to fire the coach without any reason at all.

Brazil supported Maskow's approach and suggested to say "is deprived of the benefit of the main object of the contract" instead of referring to what the parties might reasonably expect.

Furmston suggested the wording "A clause which limits or excludes one party's liability for non-performance or which purports to permit one party to render a performance which is substantially different from what the other party reasonably expects, is invalid if it is [unconscionable] [unreasonable]".

Huang had no problem with the parties agreeing to limit or exclude liability, as parties could agree on whatever they wanted. She wondered whether in practice it was very common to put an exemption clause in a commercial contract. Secondly, she wondered about the conditions for the application of this article: when they said "The parties may agree in advance", did this mean only at the time of the conclusion of the contract, i.e. before performance, or, in the case of long-term contracts, also for example after one year? Thirdly she wondered whether this provision was intended to cover cases of hardship or force majeure. Why would the parties want to limit or exclude their liability?

Bonell indicated that one was induced to enter into such an exclusion agreement just because one wanted to restrict one's liability further, beyond cases of force majeure and hardship, i.e. one wanted to restrict one's liability also for faulty behaviour which clearly was not excused under force majeure.

Tallon added that sometimes there could be agreements on force majeure which were exemptions, when one said, e.g., that there would be a case of force majeure if the dockers were on strike for more than six days.

Bonell found this to be another argument in favour of broader language, because they were all aware of the difficulty in applying the exemption clause provisions of the Principles to such force majeure clauses. If there was the broader language one would have no hesitation in invalidating these clauses if they really reduced the extent of the party's undertaking to almost nothing. As regarded the time element, in normal cases when one entered into a contract one would insert such a contract term in addition to all other terms of the contract, so before the performance, but later on one might well modify the contract and include such a term later on, but still before the actual non-performance or other

incident occurs. The techniques were very different - they had just had the example of a force majeure clause which was far being a force majeure clause, because what was listed in it as an exonerating event was clearly human behaviour for which one should be liable. The result was always that of reducing one's liability to a minimum.

Date-Bah gave the example of a software licensing agreement which often had an exemption clause which in effect rendered the sale doubtful.

Furmston indicated that in the UK it was virtually impossible to buy a computer without there being the most elaborate exemption clause. In effect the computer manufactuers were operating a cartel - maybe not legally, but they all used the same lawyers.

Tallon observed that the great difference between the proposals and the original text was that the proposals said nothing about deliberate non-performance, which in his view was the main part.

Brazil indicated that he would be happy to add in his proposal, i.e. that it was limited to cases where a party was deprived of the benefit of the main object, the word "deliberate", so that it would apply either where the breach was deliberate or where it was otherwise unconscionable.

Farnsworth referred to Maskow's proposal which said that no party was permitted to rely unconscionably, so he assumed that a party could somehow "conscionably" rely on a clause that deprived the other of what the other could reasonably have expected and he wondered how one conscionably could do that. With respect to Furmston's draft, apparently one could have a clause permitting a party to render a performance substantially different from what the other party reasonably expected and such a clause could be conscionable because it was only bad if it was unconscionable. He had sympathy for Komarov's view that provisions like this would cause parties to worry and perhaps to dislike or not to incorporate the Principles and this kind of double-layer left him quite confused.

Furmston gave an example of a conscionable clause which deprived the other party of what he could reasonably expect, and that was when one gave him something better. For example, if an airline had a provision saying that if economy class was full they could move you into first class, that was not what you expected to get but it was conscionable. If one were moved the other way one would certainly say it was unconscionable.

Bonell suggested that using the word "deprived" might improve the phrase so *in melius* would never be covered.

Brazil suggested the formulation "The parties may agree in advance to limit or to exclude their liability for the non-performance of their obligations except that a party cannot invoke such a clause where the non-performance would deprive the other party of the main object of the

contract and the non-performance is deliberate or unconscionable".

Date-Bah pointed out that Brazil kept the non-performance at the beginning which had caused trouble. The objection to this had been that it was not possible to make it turn only on non-performance.

Tallon indicated that if one wanted to cover clauses which were not openly limitation clauses one could say "[...] agree in advance to exclude directly or indirectly their liability [...]".

Farnsworth pointed out that even if "unconscionable" was used extensively in the United States they were not sure that there was such a thing as pure substantive unconscionability in the US, i.e. if A and B were sophisticated international people in business and they bargained for a week and everything was carefully explained and they signed the contract, a number of people in the US would say that it could not be unconscionable even if there was a very unfair provision. They wanted to say something which was contrary to that, and he worried that they should not say it. He thought that they wanted to say that no matter if A and B bargained for a whole week, if the clause deprived the party of the benefit or purpose of the bargain, at least in the case of a deliberate breach, it was not enforceable. He did not think that the word "unconscionable" helped in analysing that, if they meant that they should say it.

Bonell wondered whether Farnsworth had quoted the coach example as an example which, contrary to their view, should be valid?

Farnsworth recalled that he had quoted it as an example of evasion. If he were now to quote it, he would say that if it were fairly bargained for it should be enforceable.

Brazil observed that they were talking here of liability for non-performance and of relying on clauses in that regard. His approach was that this was one of the issues which would get to a tribunal or court: someone does not do something and the other party complains and says that the first party has to pay damages and the other party says he will not pay the damages because of this particular clause and the party is in that very preliminary situation of wondering what he should do, and he would probably have to go to court or to an arbitral tribunal. In other words they would have a tribunal or court in there that would be able to apply its view of what was unconscionable in that particular situation.

Farnsworth indicated that he was mystified as to why this could not simply be an illustration to Art. 3.8 which in para. (1) stated "A party may avoid a [...] term if at the time of the making of the contract [...] [the] term unjustifiably gives the other party an excessive advantage", and to him it seemed that that was what they were talking about. He realised that regard must be had to some things and if one wanted regard to be had to other things he could not see why they could not be put in the text, but

it did say that regard should be had to the purpose of the contract, which was not so different from what Brazil and others had talked about, and then with respect to Maskow's point that it might be bad only if there was a deliberate breach, that it might be all right if it was an unintentional or sloppy breach, under para. (2) a court "may adapt the [...] term in order to bring it in accordance with reasonable commercial standards of fair dealing", and he thought that what they meant to say was that one would make the term so that it was enforceable if the breach were of a certain kind but not enforceable if the breach were of another kind. He agreed with Komarov that the more of these provisions they put in, the more suspicious potential users were going to be of the Principles.

Furmston indicated that the unconscionability test was a very tough test, if they had said that the clause was invalid if unreasonable, that would be a much more indulgent test. He thought that people would expect to find some provision on exemption clauses.

Lando tended to agree that exemption clauses really could be covered by Art. 3.8 and then if they wanted to they could perhaps have a provision saying that such clauses would be governed by Art. 3.8. One had to allow parties sometimes to accept their liability for deliberate breach.

Farnsworth thought that the more of these principles there were, the more one allowed parties to make similar arguments with different cloaks on them. One might say that good faith was very different from unconscionability, but he assured the Group that in briefs lawyers received in the United States the same thing was being said with two different lables. He could very easily take the operative words (leaving out unconscionability) of any of the three proposals and put them into gross disparity. For example, Maskow's proposal read "in such a manner that the other party is deprived of what it reasonably could have expected to receive from the contract" one could in Art. 3.8 put "regard is to be had among other things to (a) the fact [...] (b) the commercial setting [...] and (c) the extent to which the other party is deprived of what it reasonably expected to result from the contract". That would at least mean that they were talking about one thing, rather than one thing in two different articles. He also thought that Art. 3.8 could be improved, for example with Maskow's point that the nature of the breach might be taken into account and the provision found valid in some circumstances and not valid in other circumstances.

Bonell pointed out that Art. 3.8 had a broader scope and was clearly also a preventive measure in the sense that a party should even before non-performance on the part of the other party, if circumstances had changes and that party became aware of the bad bargain he had been forced to enter into, be able to avoid and to get rid of the contract. The test of the nature of the non-performance could therefore hardly apply in some cases.

Maskow drew the attention of the Group to Art. 3.14(2) which stated that "Where an individual term of a contract may be avoided by a party under Art. 3.8, the time-period runs from the moment that the term is asserted by the other party", which meant that time-limits would not come into play here and therefore may be even the cases of deliberate breach of the contract in case of limitation clauses were covered by this article. In the light of the latest version of Art. 3.8 and the connected provisions he tended not to consider it absolutely necessary to have a general provision or even a provision dealing with exemption clauses.

Bonell recalled the two alternatives: the first approach was that of not having anything dealing with exemption clauses or unconscionable clauses in general, but just possibly to add language in Art. 3.8 if necessary, the second approach was that of having something special for exemption clauses in the section on damages. The only real alternative to Art. 3.8 was the last Brazil version.

Date-Bah pointed out that Art. 3.8 had a flavour of disparity before it snapped to the effect. He wondered whether it was intended to give the power to avoid the exemption clauses only if there was such a disparity. Was it in other words a condition precedent to an exemption clause being put aside that the parties were in an unequal bargaining position, or could two perfectly balanced businessmen bargain in such a way that at the end of the day the arbitrator was entitled to strike out the clause?

Bonell recalled that without some procedural unconscionability one would hardly be prepared to accept in a commercial setting the striking out of a clause. There should therefore be some inequality in bargaining but it was clearly not the only test and maybe not even the decisive test because the opening phrase of Art. 3.8 just spoke in terms of a contract term unjustifiably giving a party an excessive advantage, which was clearly the case of exemption clause.

Tallon added that it was not only a question of *lésion*, it was much wider than a purely economic loss.

Brazil wondered whether, when they said that Art. 3.8 was sufficient, that included also Art. 3.8(2), so that the court could come in and rewrite the contract.

Bonell found "rewrite" to be too strong, although he could imagine the court adapting the contract to give parties a clearer indication as to the precise meaning of a clause. It would, however be a whole package.

Tallon thought that the major point in dispute was the problem of the deliberate breach. If they chose only the unconscionability approach they would always find a way to put it in somewhere, but if the problem of deliberate breach was to be included, then he thought that it was necessary to have a special text. For French law, and also for other laws, this was

the way that exemption clauses had been controlled, and lawyers in the countries concerned would be astonished to find that this aspect of the question was merely set aside. The Brazil proposal would be quite agreeable to him. He recalled that he had suggested to add "directly or indirectly" to "to exclude".

Brazil indicated that his proposal did not deal with the question from the point of validity, but as depriving a person of the benefit of the exemption clause and in particular it did not involve rewriting the contract in other ways.

Lando was not sure that people would understand what was meant by "directly or indirectly". On the other hand he took it that the argument he had raised that one had to allow parties sometimes to accept their liability for deliberate breach was not taken care of in the Brazil proposal. For example, in the contruction industry where one had the knock-for-knock principle, one had to allow exemptions for damage done by deliberate breach, because otherwise it did not work.

Brazil thought that the test of the main object of the contract would answer that.

Lando indicated that there was a problem with incorporating the disparity in Art. 3.8, because there one focussed only on the situation at the conclusion of the contract. In Denmark they had seen that exception clauses which were not unfair when they were made, became unfair through the development of conditions later on.

Farnsworth wondered whether Brazil would accept Lando's clause on his provision that it applied not only to provisions that were unfair at the time the contract was made, but also to provisions that might because of intervening circumstances become unfair. He had not understood that it was meant to do that and he could not tell from reading it.

Brazil thought that there were two concepts in his proposal which would allow that, one being unconscionability and other the fact that one had to look at the main object of the contract, so that once one had identified that one could take proper account of the sort of relevance one had to give to it.

Drobnig wondered whether that was the main object of the contract as seen by the other party - he was not sure that in some situations that took into account the legitimate interest of the party who invoked the clause. He preferred a more objective provision in this respect which would say something like taking into account the main purposes or object of the contract.

Brazil indicated that that was intended to be covered by "the main object".

Voting on having a provision in Art. 6.4.16 along the lines suggested by Brazil and Tallon ("The parties may agree in advance to limit or to exclude directly or indirectly their liability for the non-performance of their obligations except that a party cannot invoke such a clause where the non-performance would deprive the other party of the main object of the contract and the non-performance is deliberate or unconscionable"), 9 voted in favour.

Drobnig felt, however, that this formulation did not cover the case covered by the Furmston formula "which purports to permit one party a performance which is substantially different" and this should be covered more explicitly. He suggested starting with Furmston's formula.

A possible formulation was therefore "A clause which limits or excludes one party's liability for non-performance or which purports to permit one party to render a performance which is substantially different from what the other party reasonably expects, cannot be invoked when the non-performance is deliberate or unconscionable".

Drobnig observed that then the purpose of the contract did not come in.

Brazil agreed, and indicated that that was what he had had in mind with "the main object", and this had to be stated in an objective way.

Farnsworth observed that when one spoke of "the main object of the contract", he supposed that the main object of the contract of the hockey coach would be coaching hockey, of the sale of goods would be to sell goods. That was a one-sided obligation and usually one party's main object was just to get money and the party would complain that he was not getting the money under this clause, that the contract was being unfairly terminated. The main object was not for the party to get money, the main object was to sell goods or whatever. As there were two parties and each of them had objectives one was immediately in the soup if one said "the" main object. The merit of the Furmston proposal was to focus on what the deprived party reasonably expected. He therefore had an initial difficulty with any proposal which centred on the main object because it seemed to him to be unilaterally unfair.

Brazil suggested saying "having regard to the purpose of the contract" after "different from what the other party reasonably expects".

Lando came back to the question of deliberate breach, because in some contruction contracts when there were several contractors on the same side, there was the knock-for-knock principle which stated that whenever a party suffered damage to property or personal injury, then each party carried the responsibility of paying damages to his own people and not to the others. This principle relieved contractors in their mutual relationship and also relieved the contractors vis-à-vis the owner of a large amount of

litigation and negotiation. It might very well be argued that each party in such a contract had reasonably expected that the other party would not harm his property and that it was therefore one of the options of the contract that each party should be careful not to hurt the other party. For the provision they now had, it could very well be argued that such knock-for-knock principles were invalid as far as intentional breach was concerned.

Drobnig thought that the new words of the provision would take care of it.

Farnsworth wondered whether it was common in anyone's legal system to speak of an unconscionable breach. In the US they spoke of unconscionable clauses or unconscionable contracts, but here they spoke of an unconscionable breach.

Furmston indicated that it was not the breach which was unconscionable, it was the reliance on the clause, so the wording might have to be changed.

Tallon referred to Art. 3.109 PECL which stated "where the non-performance is intentional or the limitation or exclusion unreasonable".

Farnsworth felt that that was all right.

A possible formulation was therefore "A term which limits or excludes one party's liability for non-performance or which purports to permit one party to render a performance which is substantially different from what the other party reasonably expects, having regard to the purpose of the contract, may not be invoked if the non-performance is deliberate or the limitation or exclusion unconscionable".

Farnsworth pointed out that if one stated "purports to permit" one would have to say also "purports to limit or exclude". He suggested saying only "or permits one party".

This was agreed.

Farnsworth took it that exclusion clauses for gross negligence were not covered by this case. If one said "unconscionable breach", he did not think that the breach was unconscionable or even necessarily in bad faith if one was just very careless. He wondered whether one wanted to include intentional breaches but to exclude gross negligence. He thought that if one did make a distinction one might want to do the opposite.

Tallon indicated that in many European countries there was the principle that reckless negligence was assimilated to intentional breach.

Farnsworth indicated that as far as gross negligence was concerned that was not a common law principle.

Tallon stated that if one wanted to exclude gross negligence one had to say it expressly in the text.

Farnsworth wondered whether this was the only place where the word "unconscionable" would appear in the Principles. If so he did not think it a good idea to put it in.

Bonell indicated that for the civil lawyers if would be all right to have only "and the non-performance is deliberate or reckless", and wondered what the position of the common lawyers was.

Farsworth indicated that he would be happier with that than with "unconscionable". He thought "reckless" was less often used than "grossly negligent", but in an international text common lawyers would say that what was probably meant was "grossly negligent". In the US it was not a term of art.

Furmston indicated that in England instead it was, there had been a lot of decision of the House of Lords on this.

Tallon recalled that international conventions used "reckless".

Brazil indicated that also in Australia recklessness was used as a criterion for determining unconscionability. He was quite happy to accept "deliberate or reckless".

Furmston indicated that he did not understand the concept of intentional breach.

Tallon understood Furmston's hesitations and recalled that the civil lawyers had the same hesitations about an unconscionable clause and it was for this reason that he had tried to include both ways of controlling the clause - deliberate or reckless and unconscionable.

Lando recalled that the American Restatement explained in the comments and illustrations what unconscionable meant, and he suggested that the same could be done here.

Bonell could see a difference between the terms, in that "unconscionability" was such a broad concept that one might well explain that one meant deliberate and reckless and grossly negligent behaviour, while if one had only "deliberate and reckless" one might cause great difficulties to those who were not familiar with them.

Tallon stated that "unconscionable" meant an examination case by case, but if one said that unconscionability covered deliberate and

reckless, one said that it was unconscionable to try to escape liability for one's deliberate or reckless non-performance in every case.

Farnsworth stated that if he brought this draft back people in his country who were familiar with the principle of unconscionability would ask him whether they had a general rule on unconscionability, and he thought the answer was no. Secondly, if they used unconscionable here, they would ask whether this was the only kind of unconscionable clause which was unenforceable, and he supposed that the answer was yes. This made him uncomfortable to use this term only in one place.

Lando felt that the provision would become very narrow if one struck out unconscionability.

Drobnig agreed and added that the first part of the provision did not only look at non-performance but also aimed at defining "unconscionably" the limits of performance and that was not being taken care of. The consequences still followed the old pattern. He suggested "if the non-performance is deliberate or reckless or the term is unconscionable".

Bonell stressed that if Farnsworth who came from the country where this term was most used had such difficulties they should be careful about using it. He suggested finding another term expressing the same idea.

Date-Bah suggested "grossly unfair".

Furmston stated that he was not that worried about magic words, and he was not attached to "unconscionable" but he thought that two different concepts were being used: one was that one was invalidating the clause because of the behaviour of the contract breaker, the other was that one was invalidating the clause because in normal circumstances it was unfair, and both of these had to be captured.

Lando suggested saying "or it would be grossly unfair to invoke the term".

A possible formulation was therefore "A term which limits or excludes one party's liability for non-performance or which permits one party to render a performance substantially different from what the other party reasonably expects, having regard to the purpose of the contract, may not be invoked if the non-performance is deliberate or reckless or it would be grossly unfair to invoke that term".

Drobnig pointed out that the phrase "having regard to the purpose of the contract" was as of now bound only to the second part, but should cover both parts and therefore also limitation clauses. He suggested moving it to after "may not be invoked".

Farnsworth agreed with Drobnig. The result of the collage they had arrived at seemed to say in part "a clause which limits or excludes one party's liability for non-performance cannot be invoked if the non-performance is deliberate or reckless", because the purpose of the contract and the business of what a party reasonably expected had no relationship grammatically to the first part of the clause. This was exactly what had been objected to in the original proposal, i.e. that it said that one could not exclude liability for intentional non-performance, and that was not something he could support, and was not the purpose of Furmston's proposal. If one qualified whatever provision with language such as that qualifying the second branch, then it seemed to him that the solution was satisfactory, e.g. if one said "A clause which limits or excludes liability for non-performance or permits one party to render a different performance cannot be invoked if" followed by language that would mention not only the purpose of the contract but also substantial difference from expectations. Unless one put in Furmston's thought of frustration of expectations in both branches one ended up with the original provision. One could say "A clause which has the effect of permitting one party to render performance substantially different having regard [...] by either limiting [...] cannot be invoked".

Farnsworth suggested "The parties may agree in advance to limit or exclude their liability for the non-performance of their obligations except that a party cannot invoke such a clause where the clause would permit that party to render a performance substantially inferiour to what the other party reasonably expects and the non-performance is deliberate or reckless".

Drobnig felt that it left out a major part of Furmston's elements. He suggested first dealing with the classic exemption and limitation clauses and then to deal with the Furmston proposal in a second sentence or paragraph. There might then be a third paragraph where the purposes of the contract are reserved.

Bonell did not think all these elements could be included in the text. He suggested saying only "A term which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expects may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract". Obviously the comments would indicate that a first instance where it would be extremely unfair to invoke such a clause was where the breach was deliberate or reckless. There would be no general clause on unconscionability.

This proposal was accepted by the Group.

The text of Article 17 (6.4.16) as adopted therefore read as follows:

"A term which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expects may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract".

Article 18 (Article 6.4.17 of the Consolidated version in Study L - Doc. 40 Rev. 7)

Introducing Article 18 (Article 6.4.17), Tallon recalled that the third paragraph had been deleted. The corresponding provision had been discussed extensively in the EEC Group (Art. 4.508: "(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of his actual loss. (2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the loss resulting from the non-performance and the other circumstances"). There was no difference in substance. The compromise arrived at was that they admitted the validity of penalty clauses even when *in terrorem*, but that the court had the power to reduce an excessive amount.

Bonell did not like the title of Art. 6.4.17, because people would immediately think of the sharp division which at least in theory existed between the two systems. He preferred a neutral title such as the one of Art. 4.508 ("Agreed payment for non-performance"). Furthermore, the formulation of para. (1) meant that it was only addressing liquidated damages, while in the tradition of a number of jurisdictions what one would mainly have in mind was the penal character of the payment - that was up to the parties. Here they only wanted to address the extent to which such agreements were valid. The language in Art. 4.508 was more neutral, leaving the character of the payment open.

Tallon indicated that as a rule it was a form of damages, but he did not object to the PECL draft.

Lando stated that considering that in the common law world penalties were not allowed, which meant that clauses made *in terrorem* were not allowed, the PECL addressed this problem in a clearer way, so to obviate the objections and interpretations of the kind which could be made in the common law world as Art. 6.4.17 was now cast, he would prefer the formulation of Art. 4.508 because it would also admit clauses made *in terrorem*.

Brazil wondered whether it was the "other circumstances" which covered that.

Tallon indicated that this was something which existed for instance in French, German and Italian law. One important feature for the judge who had a discretion was the behaviour of the parties, and this would be covered by the "other circumstances".

Farnsworth suggested deleting "the court may reduce it".

Brazil questioned the formulation "once the aggrieved party has established his right to recover damages" in para. (1), which suggested that one had to go to the Supreme Court before one could ask for the money.

Maskow also considered an advantage of Art. 4.508(1) to be that it did not refer to damages. On the other hand, it must be clear that force majeure also applied to clauses for an agreed sum, and this could perhaps be indicated in the comments. He wondered why para. (3) had been taken out of Art. 6.4.17.

Bonell indicated that now that Art. 6.4.16 had been formulated in a broader manner, one might well conceive in extreme cases that even such a clause could not be invoked if it was grossly unfair.

Maskow stated that the normal approach, following legal regulation and the UNCITRAL document, was that it was possible to ask for exceeding damages. If there was no rule everyone would think the normal approach was followed. It was not clear that this would mean that generally one was not allowed to ask for more.

Bonell stated that this was not addressed in para. (3). Here what was hinted at was that sometimes these clauses were hidden limitation clauses and it was suggested that in such cases the clause should be invalidated.

Maskow stated that it would be invalidated in certain exceptional circumstances. In general it would be a restriction of the damages.

Brazil wondered whether the clause they had just agreed to would not cover this sort of situation.

Bonell thought so.

Maskow thought that one of the most important problems of penalty clauses was whether one could ask for exceeding damages in normal cases, when there was no abuse. This question should be addressed in the Principles.

Lando suggested that it was enough to state the difference in the comments, because when one saw a clause it was obvious what kind of a clause it was.

Bonell thought this was a different question, because the extent to which such clauses turned out to be limitation clauses was one problem, and the broad formula adopted in Art. 6.4.16 took care of this. Maskow instead addressed the question of whether or not even if parties had agreed on such a payment, on such a fixed sum, additional loss could be recovered.

Drobnig thought that the connection between the present provision and the preceeding provision was not so clear for everybody. He preferred to reinstate para. (3). One could take care of Maskow's problem by saying in essence that if the actual damage exceeded the agreed sum additional damages could be recovered under the normal rules, that they must be proved etc., except if the preceeding provision came into play.

Bonell wondered whether they really thought that the rule should be that the exceeding damages could be recovered without an express agreement. He had always understood the rule to be that if nothing was said one could not recover.

Maskow pointed out that the UNCITRAL rules said that one could recover.

Bonell instead stated that the UNCITRAL rules did not exclude the right to performance, which was different. A liquidated damage agreement was intended to cut out all discussions about actual damage.

Furmston was inclined to say something here.

Farnsworth also found it important to say something on the question of whether the understanding generally was that it was a minimum that might be exceeded by actual damages or a limitation both up and down on damages. In common law countries it was always assumed, if nothing else was said, that it was both a limitation up and down. That might partly be because if it was a minimum it was invalid under common law rules generally. His supposition was that one should say something. On the other hand, it seemed to him that if they were going to allow *in terrorem* clauses to some extent, they should say that this was a matter of interpretation unless otherwise agreed, because under the Principles it was possible to do what was not possible to do in a common law system, i.e. say the minimum damages are US $ 1,000 but if I am injured I may prove $ 1,500.

Maskow indicated that he had understood the rule in para. (3) to presuppose that it was the maximum and that it could be changed only in certain cases.

Bonell felt that the PECL formula addressed this problem and solved it elegantly by stating "Where the contract provides [...] the aggrieved party shall be awarded that sum irrespective of his actual loss". If they adopted the PECL formula this problem would be solved. What was still open was whether they needed an express reminder that such a clause could well

be a limitation clause in substance and therefore fall under Art. 6.4.16.

The Group decided to adopt the PECL formula.

Bonell suggested changing "shall be awarded" in para. (2) to "is entitled to".

This was agreed.

As to the question of having an express reference to the preceeding article in this article, Maskow suggested that the comments could do this.

This suggestion was accepted.

The text of Article 18 (6.4.17) as finally adopted therefore read:

"(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual loss.
(2) However, despite any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and the other circumstances".

Proposal by Professor Lando for a new provision dealing with omitted terms and Proposal by Professor Crépeau for a draft Chapter 3A "Content"

Lando submitted a written proposal for a new provision dealing with the supplying of an omitted term which read as follows:

"(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances is supplied.
(2) In determining what is an appropriate term regard is to be had, *inter alia*, to
(a) the intention of the parties as expressed in the contract language;
(b) the purpose of the contract; and
(c) good faith and reasonableness".

Introducing his proposal Lando stated that the idea came from two different sources, § 204 of the American Restatement and the German concept *"ergänzende Vertragsauslegung"*. There were in general two concepts, that of the interpretation of the contract, i.e. the interpretation of the language of the contract, and the stop-gap rules of the law - when the contract was signed there were always legal provisions which stepped in to fill in the contract. In many countries there were only interpretation and stop-gap

rules of law. In Germany, in the United States, and also in Swedish doctrine, a third concept had been introduced, namely the supplying of omitted terms. The operation of which was not easily distinguished from the operation of the stop-gap rules of the law, but the idea was that in some situations a problem could not be solved by interpreting the language of the contract, and could not be solved by the stop-gap rules of the law, or the stop-gap rules of the law did not fit the situation. Rules to step in in such situations were therefore needed. The typical situation was the case he had given in his Illustration 1 ("An advertising enterprise in England contracts to fly during a certain period an airplane towing a streamer that reads "Eat Bachelor's Peas". Through oversight the pilot flies over the city of Manchester on Armistice Day while crowds are observing the two minutes' silence, thereby injuring Bachelor's reputation badly. Even though the contract contains no term that excludes flying on Armistice Day, the flying enterprise is to be held liable in damages for breach of contract"). In this case the contract said nothing but the occurrence was within the orbit of the contract and therefore the rules on the supplying of an omitted term had to be used.

Crépeau's proposal for a draft Chapter 3A on "Content" read as follows:

"Article 3A.1
[new]

A contract validly entered into constitutes the law unto the parties and is therefore binding as between them.

It cannot be modified or terminated except by agreement or as otherwise provided under these Principles.

Article 3A.2
[present Art. 5.1.1]

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

Article 3A.3
[new]

The parties to a contract are free to devise their contractual relations as will best serve their mutual interests.

Article 3A.4
[present Art. 1.6(1)]

The parties are bound to any usage to which they have agreed and by any practices which they have established between themselves.

Article 3A.5
[new]

Implied obligations stem from
(a) the nature and purpose of the contract;
(b) good faith and reasonableness.

Article 3A.6
[present Art. 1.6(2)]

The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known 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.

Article 3A.7
[present Art. 5.1.4]

Each party shall cooperate with the other party, when such cooperation may reasonably be expected for the performance of that party's obligations.

Article 3A.8
[present Art. 5.1.2]

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

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

Article 3A.9
[present Art. 5.1.3]

In determining the extent to which an obligation of a party involves a duty of diligence in the performance of an activity or a duty to achieve a specific result, regard shall be had to the following circumstances, among others:
(a) the way in which the obligation is expressed in the contract;
(b) the contractual price and other terms of the contract;
(c) the degree of risk normally involved in achieveing the expected result;
(d) the other party's ability to influence the performance of the obligation.

Introducing his proposal, Crépeau stated that in examining Lando's proposal it had seemed to him that what he was dealing with was part of a larger problem which he had thought the Group might wish to develop. There were a number of provisions in the Principles which could be grouped together under a new chapter on content. If one looked at the general outline of the Principles, there were general provisions, rules on formation, substantive validity, interpretation, performance and non-performance and to him it had seemed that something was missing, i.e. that once a contract had been validly entered into it was important to know exactly what the content of the contract was. The opportunity was there given to propose basic principles such as *pacta sunt servanda*, that the parties were free to provide whatever express clauses would best suit their interests and also the fact that a contract could also contain implied provisions that might result from the nature of the contract, from the purpose of the contract, from usages, from standard trade trade practices and also from good faith and reasonableness. He had therefore thought that the advisability of introducing a new chapter dealing with the content of the contract might be considered taking the opportunity to group together a number of provisions which were already there which dealt with the subject of the content, putting them together with some new provisions.

Bonell informed the Group that when the Governing Council had discussed the chapter on performance the previous week very similar remarks of a general nature had been made, among others by Brazil, i.e. that there was considered to be a lacuna of the kind mentioned by Crépeau: there was no provision which positively stated that the parties had to perform what they had agreed, and which indicated what the content of the contract was. He asked Lando if he agreed with the following analysis of the two proposals: Lando's proposal was more or less covered by Art. 3A.5 of Crépeau's proposal. If this was the case they could move from the assumption that there were no inconsistencies between the two proposals, one was merely confined to a specific aspect while the other covered a wider range of questions. He therefore suggested first having a brief discussion of the philosophy underlying Crépeau's proposal.

Maskow was not convinced by Crépeau's proposal because he felt that it was the same whether one spoke of performance or content - he had taken the word "performance" to be the word chosen by the Group to describe the content of the contract. Crépeau's proposal put together articles taken from the general part or from the part on performance. He had nothing against the new provisions proposed, on the importance of the contract and party autonomy, but these could be placed in the chapter on general provisions. He could see no advantage in taking out certain provisions from the chapter on performance in order to place them in such a general chapter. If they spoke about content they should also say something about time of performance, etc., which all were contents and they would then end up with a chapter which contained the same provisions as the present chapter on performance.

Bonell thought that the location of the provisions proposed was still an open question, and that they could very well be the opening provisions of the chapter on performance with the provisions dealing with time of performance, place of performance, etc., following them.

Tallon pointed out that Art. 1135 of the French Civil Code also provided for the supplying of omitted terms (*"Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature"*). He wondered where one would stop when one referred to the content of the contract. First Crépeau gave more general rules after which he went on to more specific provisions such as the present Art. 5.1.2 which he placed as Art. 3A.8, but why did Crépeau not go one step further by incorporating Art. 5.1.11 ("Price determination")? There were many other rules which might also be placed in a chapter on content. He liked what Crépeau had done, but had hesitations as to its extent.

Crépeau agreed that it was always very difficult to delineate chapters on content, interpretation and performance, because depending on the way one drafted a rule, one might see it better in a chapter on interpretation or on performance, but basically he had found there to be the question of what the parties had or had not undertaken to do, and to him that essentially was a question of the content of the contract. The parties were free to put in whatever express provision they felt would serve their interests, then in the absence of express provisions the contract would also contain provisions that were called "implied", and they had that as Art. 5.1.1, that would be read into the contract in a suppletive manner resulting from either the nature of the contract, the purpose of the contract, from standard practices, usages, good faith, reasonableness and these would allow the parties to know exactly what they had undertaken expressly or impliedly. Once one knew what the parties had undertaken there were five or six questions (who pays, in the favour of whom is performance, when, where, how) which were the problems of performance specifically, but before one could have the rules on performance one had to have the rules on what the exact content of the contract was. Whether one wished to put it in a separate chapter on content or whether it formed part of the preliminary section of the chapter on performance was a matter of esthetics.

Bonell referred to the present chapter on performance, the opening provision of which read "The contractual obligations of the parties may be express or implied". When the Governing Council had examined the draft, it had first felt the rule not to be that extraordinary because it was commonplace, but that what was missing was what "or implied" meant - implied by what? On the one hand the rule was therefore too obvious, and on the other it had been felt that what was most important was missing.

Drobnig found Crépeau's proposal to have merits, i.e. it drew together some provisions which were intimately connected with each other

but which were spread out a bit. He also found the supplementation of some gaps to be meritorious. The difficulty he saw was that it could not really be separated from the present chapter on performance which essentially dealt with the same things, and it was artificial in the context of the Principles to say that one first determined the content of the contract and then one could speak about performance. He suggested starting with Crépeau's paper and to consider whether it should not be placed at the beginning of the chapter on performance, which might have to be given a new title. He drew attention to the PECL as that Group had been struggling with the same problem and they had adopted a second chapter which was entitled "Terms and performance of the contract".

Farnsworth stated that one of the difficulties for an American common lawyer was the title of the chapter on performance. The Restatement had a chapter called "Performance and Non-Performance" but it mostly dealt with non-performance. It had another chapter called "Scope of Contractual Obligation" and for Americans looking at the performance chapter it took some time to understand that to a considerable extent this was what they meant by "scope". One way to integrate the proposals, the beginning articles of Crépeau's draft, into the existing text would be to start with the Council's expression on Art. 5.1.1 that this was not very original. It seemed to him that Crépeau's Arts. 3A.1 and 3A.3, which seemed to him to have some relationship that might suggest combination, essentially answered the Council's question of what they meant by "express obligation", and that Art. 3A.5 and Lando's proposed article answered the Council's question of what they intended by "implied". He could therefore imagine a change which did not do great violence to the present text that would consist of some slight changes as suggested by Drobnig in the title of the performance chapter that would have Art. 5.1.1 as it now was, that would have a second article that consisted of the first and third article of Crépeau's draft and another article that consisted of either Crépeau's or Lando's article, or a combination of the two, on implied obligations. He would not at the moment deal with whether one moved the other provisions around or not.

Komarov supported the introduction of some of the provisions proposed by Crépeau which would make the Principles more systematic and would promote their application, particularly when one considered that not only lawyers would make use of the Principles but also businesspeople. Where to put them was another question.

Brazil supported both the Lando and the Crépeau proposals. He had looked for a firm statement of *pacta sunt servanda* but the only explicit reference he could readily find was in Art. 5.2.1 which introduced the section on hardship, which was not about observing or carrying out of the obligation but was one of the places where a party was excused from carrying out the contract. He found in Crépeau's proposal that *pacta sunt servanda* loomed large and clear in the first article. He regarded Lando's proposal on the supplying of omitted terms and Crépeau's Art. 3A.5 as completely commendable and warmly supported them.

Date-Bah supported the addition of the new articles proposed by Crépeau. He agreed with what Farnsworth had said as to their location. He had a problem with saying "the law unto the parties" in Art. 3A.1.

Farnsworth agreed with Date-Bah that "the law unto the parties" should be modified.

Lando felt that the Crépeau proposal was a good one, although he felt that they had to go into what they understood by "implied term".

Bonell suggested starting with a provision stating the principle *pacta sunt servanda*. Then to say that a contractual obligation may be express or implied and then to start with one or more provisions aimed at laying down the criteria by which the implied terms were to be determined.

Crépeau indicated that when he had put together his proposal the outline had been precisely that Art. 3A.1 should be the general statement *pacta sunt servanda* and the consequence that a contract could only be modified or terminated by agreement or under the rules of the Principles, then the indication that obligations could be express or implied, and then Arts. 3A.3 and 3A.4 dealing with express provisions, Art. 3A.3 being the general principle and Art. 3A.4 being the rule which was already in Art. 1.6.1. Art. 3A.5 then dealt with implied provisions and Art. 3A.6 was taken from Art. 1.6.2 because it dealt with implied usages. Arts. 3A.7, 3A.8, and 3A.9 were already in the performance chapter.

Tallon did not see why these provisions were in the chapter on performance after the chapter on interpretation. Art. 3A.1 covered both - the chapter on interpretation stated that one had to consider the intention of the parties. He therefore thought that the question of the place and the question of the content were linked.

Bonell observed that as to location, if one considered the different civil law codifications one would have a lot of surprises: in the Italian Civil Code, for example, some of the provisions intended to cover the terms of the contract were to be found in the general part on obligations, some others in the performance of contracts, some others even in the chapter on non-performance. He did not think it possible to find an ideal system even if they could try to.

Furmston thought that where one put it in the order was actually the first question, because many of these provisions were already in the Principles and what was being proposed was moving them together to put them in a more attractive order and he agreed with that. Art. 3A.1 was a fundamental principle which should go in Chapter 1. The remainder of the provisions logically came before interpretation and after formation.

Farnsworth agreed with this.

Huang felt that it would be better to include the new articles in Crépeau's proposal, as well as Lando's proposal, without upsetting the present structure of the Principles.

Maskow felt that Lando's proposal should be in the chapter on interpretation.

Farnsworth agreed that one needed to know where the provisions would go before one addressed the detailed problems of drafting. He suggested taking up Furmston's suggestion. Looking at Art. 1.3 ("Party autonomy") which currently was in brackets, his understanding was that *pacta sunt servanda* was a Latin phrase which had somewhat the same general sense as party autonomy. The fact that there was an Art. 1.3 in brackets lent some support to Furmston's suggestion.

Drobnig indicated that party autonomy in this place had a different function, it meant that parties were to be free to agree or to exclude the Principles and not to make contracts.

Farnsworth understood that Art. 1.3 related only to the power to override the Principles, but it seemed to him that that was an invitation to say that the parties were free to make contracts as they chose in another more general provision in the same place rather than 20 pages later.

Maskow pointed out that in effect three, but maybe only two, new articles were proposed: Arts. 3A.1 and 3A.3 which dealt with more or less the same problem and could be covered by one article, and Art. 3A.5 which dealt with the same problem as Lando's proposal. He therefore thought that they could discuss only these artices and their location without going into everything again.

Lando felt that they needed to decide whether all these articles should be placed together, as it was Crépeau's idea that they belonged together and should be put together, or whether they should consider only the new provisions and that they had autonomy to decide where to put them. Personally he did not feel that, even if some of them belonged together, they had so much material consistency that there was an absolute need to put all of them together. Each article should be analysed so that they could see where to put it.

Drobnig had the impression that the first three or four articles of the proposed draft belonged in the chapter on general provisions, from which one or two of them had already been drawn. Particularly Art. 3A.3, and also Art. 3A.1, should be in the general provisions. Particularly in view of the relationship with party autonomy already pointed out by Farnsworth. Also the inclusion of usages had to do with the general aspects which covered the Principles as a whole. On the other hand the provision on implied obligations and Arts. 3A.6 - 3A.9 could be placed at the beginning

of the chapter on performance with an additional broadening of the title of that chapter.

Bonell indicated that with a general general principle of *pacta sunt servanda* they were entering into the realm of the philosophy of law and he wondered whether that was really necessary. He thought that Brazil's concern had been just to have it stated at the beginning of the performance chapter that what one had agreed upon one had to perform, which would make it into a more operative rule.

Drobnig could not see where else the provision could be placed. It was a very basic principle. He would even start with Art. 3A.3 which was broader than Art. 3A.1. As they had seen in recent European history this was a very essential aspect and should be under general provisions and not hidden away in a chapter dealing with technical aspects. It was the basic philosophy of a contracts society.

Furmston stated that if one was going to say this at all it was so important that it should be said at the beginning, even if it could be argued that everyone knew it so it need not be stated at all.

Bonell wondered whether they really could state explicitly in such solemn terms at the beginning that parties were free to devise their contractual relations as would best serve their mutual interests as if the Group was the legislator of the international community. Nowhere was such a provision positively stated, one did not even find it in national jurisdictions as such a solemn declaration would have to be interpreted in the light of the constitution, of mandatory rules, etc. He was worried about being over-ambitious. After all they had then either expressly or impliedly warned the parties that whatever they wanted to do with the Principles they should never forget about mandatory rules applicable to the individual contract. He wondered whether there was not a contradiction here.

Farnsworth considered that what Bonell had stated had nothing to do with location, it had to do with deletion. He had the impression Bonell was saying that he found Crépeau's proposal objectionable in so far as it had a first and a third article.

Maskow stated that if one really took what was stated in Art. 3A.3 seriously then it was not realistic because they all knew that there were many constraints which prevented parties from agreeing what they wanted. In this case it would be better to delete the article. It was particularly necessary to delete it if they wanted to have it as an operative article. If they had it as a general principle, as an ideal, it might pass, but it might be better to delete it.

Crépeau stated that there was no doubt that if this had been drafted in a local jurisdiction one would have read Art. 3A.3 as being subject to

the limitations and restraints provided under the code, but when examining this he had been reminded that Art. 3.19 stated that they did not deal with immorality or illegality.

Bonell referred to Art. 1.2, the idea behind which could not be denied.

Farnsworth felt that it was difficult to discuss the provision without location, because this principle placed well near the end would be much more misleading than this principle placed in such a way that it was connected with Arts. 1.2 and 1.3.

Article 3A.1

Turning specifically to Art. 3A.1, Crépeau stated that he had been reminded of Art. 29(1) CISG which stated that "A contract may be modified or terminated by the mere agreement of the parties", but he observed that in Art. 3A.1, after stating the principle that it was the law, one would naturally put it in negative terms rather than in positive terms as had been done in CISG.

Bonell indicated that he felt that Art. 29 CISG dealt with something quite different, namely the problem of consideration which the Principles dealt with elsewhere. This took away nothing from the merits of Crépeau's proposal which was clearly intended to say *pacta sunt servanda* - one cannot unilaterally modify or terminate a contract.

Date-Bah agreed that a contract should be binding, but the language of the proposal caused him some problems. The French *Code Civil* was probably where the expression "the law unto the parties" originated from, but in the international sphere problems could arise by saying this, because several people had tried to enable the parties to escape the orbits of any legal system. If one said "the law of the parties" one might give the impression that they were liberated from the restraints of law. He suggested simply saying that it was binding on the parties.

Drobnig agreed that for most countries outside the French orbit that expression was highly questionable. He suggested combing the first and second paragraph to say "A contract validly entered into is binding between the parties and cannot be modified [...]".

Farnsworth wondered whether, depending on the drafting, these provisions did not need exceptions for mandatory rules. To him they suggested that parties could write their own ticket - full stop, and if that was so it did seem to him that it would be useful, wherever one placed it, to look at Art. 1.2 as it appeared in brackets because Art. 1.2 stated that there was a role to be played by the mandatory rules of the forum (although he was not sure what that meant in connection with arbitration)

in connections with the mandatory rules of the applicable law. Implicit in that was the proposition that there were mandatory rules in the applicable law which were higher in hierarchy than the agreement of the parties. In the light of the discussion it seemed to him that it would be useful to say that. He could not understand how one could write an Art. 3A.1 or 3A.3 without some reference to mandatory rules. Furthermore, he was not entirely sure, if one was going to talk a lot about mandatory rules, whether that term was sufficiently well understood by all common lawyers.

Bonell indicated that not only common lawyers had this difficulty, because they were speaking here of an international setting where questions of *ordre public national*, *ordre public international*, mandatory rules, or *application necéssaire* and so on were very tricky.

Crépeau understood that whenever there was a dispute and that dispute went either before a national court or before an arbitrator there would be mandatory provisions that would have to be considered. The point was that Art. 1.2 looked at the contract when it was already the subject of a dispute, whereas here they were looking at what the parties had agreed to, which preceeded the situation where there was possible litigation.

Brazil recalled that *pacta sunt servanda* made an appearance in the section on hardship (Art. 5.2.1). This did suggest the possibility, if they were thinking of a general provision stating the principle *pacta sunt servanda*, of using language in Art. 5.2.1 in those sort of terms, i.e. to talk about a party being obliged to perform his obligations under the contract rather than the way it was stated here. It seemed to him to be more peremptory and to make claims that certainly did not make much difference to national laws and requirements. If they did go that way it opened up the possibility of addressing the question of whether they should have the words "in good faith" as well or not: "A party is bound to perform the obligations of a contract validly entered into in good faith".

Bonell stressed that there was now a slight change in perspective, as so far they had moved from the assumption that they were dealing with a certain lacuna in the performance chapter. The language used by Crépeau in his opening provisions was clearly more pretentious, as he addressed the basic question of party autonomy as such, and therefore immediately of course the relationship with mandatory rules of different kinds, etc. came up. They would have to come back to it when they discussed Art. 1.2. His impression so far had been that it was better just to give a warning and to leave everything untouched because once one touched these issues one immediately ran into extreme difficulties, at least if one was drafting at an international level, unless one accepted the risk of totally misleading parties.

Tallon recalled that as concerned the hardship provision, the Group had taken what had been done in the PECL and if they had put in the first paragraph, this had been done for two reasons, the first being that there

was no general rule on *pacta sunt servanda*, the second being that they wanted to make sure that hardship was not used too easily as a way to escape liability. He pointed out that the French Civil Code did not actually say that the contract was the law unto the parties, but that it was just as binding for the parties as the law was binding for the citizens. He agreed that the formulation of the principle had to be changed. He did not think that it necessarily had to appear in the chapter on general principles: either it was evident or it was controversial, so why have it?

Hartkamp agreed with both Date-Bah and Tallon. He did not think it necessary to have such a rule, as the same followed from other articles of the Principles.

Maskow suggested taking the formula proposed by Drobnig, which covered Art. 3A.1 and may be also Art. 3A.3, and to put it as a bracketed text in Chapter 1 and to come back to it when they discussed that chapter.

Lando wondered what the pragmatic use of Art. 3A.1 was. Would it help those who applied the Principles in the making and performance of their contracts if this article were there? He doubted it would. He liked the principle, but he wondered what its pragmatic use was.

Tallon raised the point of the distinction between a contract and a gentlemen's agreement or a letter of intent where the parties did not want to bind themselves. In this consideration it might be a good thing to have this text here.

Bonell wondered whether this question was not more related to the chapter on formation with its provisions on what constituted an offer and when a contract was a binding agreement. Personally he would not even subscribe to the principle that a contract was binding upon the parties whereas a letter of intent was not, because sometimes a letter of intent was binding. One could write whole treaties on how to distinguish them.

Crépeau thought the answer to Lando's question was simple. The principle was stated in para. (1), and it meant that once there was a contract no party could unilaterally modify the contract and no party could deal with the contract otherwise than under the rules provised in the Principles. It was not possible to modify or terminate the contract unilaterally and even the parties together could not do so except by agreement.

Tallon indicated that there was still another consequence, and that was that one had to perform just as the contract was.

Drobnig felt that it did have a practical use because it could be invoked if parties wanted to get away from a contract. He had also noticed that Tallon had given as a reason for the *pacta sunt servanda* principle in

Art. 3.19 that it had not been stated anywhere else: it was now stated here, and this was a more proper place to state this very fundamental principle. It might be of limited use, but he felt that the principle was one which should be stated. He supported Maskow's proposal to place it in brackets in Chapter 1. If this article were introduced in Chapter 1 he saw no need for a provision in the performance chapter.

Hartkamp indicated that the Netherlands had the same principle as the French Code, with in the first paragraph the *"tiend lieu de loi"* and with the good faith principle in the third paragraph. They had had it for two centuries and for 2/3 or 3/4 of that time the first paragraph had prevailed in case law very very much and this had led to all kinds of unreasonable decisions in cases where the circumstances changed and it would be extremely unreasonable to stick to the contract and the parties had tried to get exceptions but the court had said that they were bound. It had taken about a century and a half for them to overcome this. He was not saying that national and international contracts were the same, one would have an even greater need to observe the rules of the contract in international contracts, but furthermore in that context it would not be wise to create the impression that the binding force of the contract was more important than the making of exceptions where it would be reasonable to do so. The principle could in other words cause quite a lot of confusion and even unreasonable results. The second paragraph did not help, because it merely stated that the contract could only be modified or terminated by agreement or as otherwise provided under these Principles, which did not help very much in a dispute.

Komarov instead favoured the inclusion of this principle into the Principles, because in cases where the Principles were applicable to the contract and national law was expressly excluded, the binding force of the contract would result only from this provision of the Principles.

Bonell wondered whether it was realistic to state that parties could create a self-sufficient contract floating in the air without being affected by the law of this or that other State.

Komarov could well imagine contracts which excluded the applicability of any national law, and suggested that once the Principles were published such contracts could provide for the applicability of the Principles, in which case the only source for the binding nature of the contract would be the provision contained in the Principles.

Bonell wondered whether this was not either obvious or misleading. The theory of the self-sufficient contract did exist, but how many arbitral awards had then been reversed once they came before the state courts?

Brazil did not understand anyone to be saying that recognition of *pacta sunt servanda* in an appropriate way in the Principles would mean that they were claiming that parties could override peremptory laws, which all

countries had and which in particular cases would have to be obeyed and which were recognised in Art. 1.2. Now that the question had been raised of whether they needed a reference to *pacta sunt servanda* in any form at all in the Principles, he found it rather surprising to think that the appropriateness of that could be questioned, because it really was the basic norm or principle of the whole law of contract. What he found strange was that they had a whole set of principles that, except possibly in an indirect way such as in the law on hardship, did not make some sort of appropriate reference to that particular principle. He had suggested having it in Chapter 1, because they mentioned it there when they came to the point of telling people what they had to do and that was the appropriate time to remind them of the basic norm in this area, subject to all the qualifications that had to be put, to remind them that one went into this contract and was required to perform.

Date-Bah suggested that if they were going to put this in explicitly, they should have an opening clause such as "Subject to other provisions of these Principles".

Drobnig wondered whether this was not expressed in para. (2).

Date-Bah felt there to be a difference, because Hartkamp's account was of situations where as a matter of law one should let the parties out of their obligations, not as a matter of their agreement.

Hartkamp indicated that he was not against the rule that contracts should be observed, but feared that as the rule in Art. 1.4 was weak, the balance might be pitched too much to the other side. He was therefore against stating the principle again, perhaps in the first chapter, as that might overdo it.

In conclusion, there was a general feeling within the Group that the principle *pacta sunt servanda* should be stated in an appropriate manner somewhere.

There were thus two alternatives: either having such a provision at the beginning of the performance chapter reading something like "The parties are bound to perform what they have agreed upon", or alternatively, or additionally, having a provision in the opening chapter such as that of Crépeau as modified by Drobnig, in close connection with the article on mandatory provisions.

Voting on having such a provision in the opening chapter, either as an alternative or as an addition to having a provision in the performance chapter, 7 voted in favour.

Voting on having *pacta sunt servanda* only in the performance chapter, 6 voted in favour.

Bonell suggested the following wording for the article on *pacta sunt servanda* to be inserted in the first chapter: "A contract validly entered into is binding upon the parties. It cannot be modified or terminated except by agreement or as otherwise provided under these Principles".

This suggestion was accepted by the Group. It was further decided to place this article before Art. 1.2.

The text of Art. 3A.1 as adopted therefore read as follows:

"A contract validly entered into is binding upon the parties. It cannot be modified or terminated except by agreement or as otherwise provided under these Principles".

Article 3A.3

Turning to Art. 3A.3, Crépeau considered that, in view of the decisions taken, if this article were adopted it should stand before Art. 3A.2. He suggested that if they discussed the article "subject to any mandatory provisions under these Principles" should be added to it.

Drobnig considered that if Art. 3A.3 were adopted it should be placed before Art. 3A.1 because it expressed the principle of freedom of contract. It was a principle of the same standing as *pacta sunt servanda* and should also be spelled out and be placed in the first chapter.

Crépeau considered there to be two principles here: one was *pacta sunt servanda*, but the other one was the general principle of freedom of contract, which was not to be confused with *pacta sunt servanda*. The latter said that once the parties agreed, a contract validly entered into was binding. What they were now saying was that the parties could put whatever express provisions they wished into their contract.

Bonell wondered whether this really was the general view of the Group, as members had considered it utopistic to state that parties could put into the contract whatever they liked. He recalled that the mandatory rules would appear - in fact they already appeared in connection with Art. 3A.1.

Drobnig pointed out that Art 3A.3 was also subject to mandatory rules and that that could be derived from Art. 1.2. He felt that it should be made clearer, that it should be broadened, but he only favoured Art. 3A.3 if it was made clear that the agreement of the parties was subject to mandatory rules.

Bonell pointed out that the problem of mandatory rules in the Principles themselves was addressed by Art. 1.3.

Lando felt that the rule in Art. 3A.3 was very important. There was another rule which existed in the PECL which had not been discussed in this Group which was the general rule on good faith. In the PECL good faith had been made into a mandatory rule. He would have great hesitations about having Art. 3A.3 in the Principles unless he received assurances that the good faith principle would be made into a mandatory principle.

Tallon thought that Art. 3A.3 might sound well but that it did not mean anything and might even be dangerous. It implied that if there was no mutual interest there would be no freedom of contract. The parties to a contract had no mutual interest to begin with.

Voting on having Art. 3A.3 expressly stated 7 voted in favour and 5 voted against.

As to the formulation, Drobnig wondered what exactly was intended by "mutual": did it refer to each party's personal interest or to a basic common interest? In the latter case he would be scheptical, in the former he thought the word "mutual" could be dispensed with. He suggested striking the last words ("as will best serve their mutual interests") all together, as they might give rise to a judge or arbitrator claiming that he knew the interests of the parties better and consequently interpreting the contract in accordance with that understanding.

Farnsworth did not like the formulation either, and indicated that he had voted on the idea as such. He was not sure that they should spend a lot of time on the formulation, as they had not done so on the formulation of Art. 3A.1. If they put a full stop after "relations" and did not worry about details such as "devise" that was fine with him.

As to its location, Hartkamp felt that Art. 3A.3 should be tied to Art. 3A.1 and therefore also placed in Chapter 1, perhaps even before Art. 3A.1.

Drobnig, Bonell and Brazil agreed that logically it should go before Art. 3A.1.

Bonell wondered what actually was meant by this article.

Crépeau stated that what it simply meant was that the parties could put into their contract whatever obligations they felt would serve their interests. The basic rule was that the negotiations would lead to an agreement which would be considered to be the result of a combination of individual interests and that that was the contract.

Farnsworth had the same difficulty with this formula as with the formula "A party may ask for damages". It seemed to be a rule stated in terms of freedom of speech. It was fine to say that one was free to put what one wanted in the contract, that was probably the system in most

countries. One had to speak to the binding force of what one put in the contract and that caused him some difficulty with respect to mandatory rules if one said nothing about exceptions. In Art. 3A.1 they had said that the agreement was binding, now what they were saying was that the individual pieces could be devised by the parties and would have binding force.

Bonell wondered whether the idea was not that the parties could agree on whatever they liked and that this would have binding effect following Art. 3A.1.

Crépeau and Hartkamp indicated that that was freedom of contract.

Farnsworth indicated that to him freedom of contract meant that it was binding, not just that one could set it.

Bonell commented that there were three aspects: freedom of contract in the sense of the parties being free to enter into a contract or not to enter into a contract; to determine the content as they liked; to enter into an agreement which the law recognised as binding. Here they were addressing the second and the third of these aspects.

Lando observed that the third aspect was already covered in Art. 3A.1. They were therefore going to say that the parties could make the contract as they wished, and they had already said that the contract which the parties wished was binding upon them. They were in other words saying the same thing again.

Hartkamp indicated that in the Netherlands freedom of contract had four aspects: not to contract or to contract; to give the contents one wanted; to subject it to a given form or not; and to subject it to an applicable law - but not the binding force of a contract because that was the other article.

Brazil indicated that as he understood it "devise" was intended to say that it was for the parties to say what the content of the obligations they were undertaking was.

Bonell thought that now they came close to the formula that parties were bound to perform whatever they had agreed upon. One thing was that the parties were free to determine whatever they liked, and another was that the effects of the contract were those determined by the parties.

Drobnig suggested the formula "The parties are free to determine the contents of their contractual obligation".

Farnsworth felt that that was much better.

Maskow felt that it was too narrow because it only addressed the contents of the contract but the parties were of course also free to choose the type of contract they wanted. He suggested also saying that the parties were free to contract according to their interests.

Crépeau suggested "are free to determine the nature and extent of their contractual obligations".

Bonell suggested "The parties are free to enter into a binding agreement and to determine the content of their obligations".

Hartkamp thought that the contract might imply more than just obligations.

The formulation finally agreed read as follows:

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

Article 3A.2

Bonell observed that Art. 3A.2 was the old Art. 5.1.1 which had already been adopted. He pointed out that Crépeau's proposal for an Art. 3A.5, as well as Lando's proposal, aimed at further developing the idea contained in Art. 5.1.1. This provision had therefore to be considered in connection with what followed in the two proposals. He therefore suggested passing immediately to pass on to Art. 3A.5 which was intended to address the same question as Lando's proposal.

Article 3A.5 and Lando Proposal for an article on supplying an omitted term

Introducing Art. 3A.5, Crépeau observed that the idea of implied obligations could be dealt with independently of any other provision in the Principles. modified form would read:

"Implied obligations stem from
(a) the nature and purpose of the contract;
(b) usages and standard trade practices;
(c) good faith and reasonableness".

This meant that it was independent of anything else. The reason he had not put usages and standard trade practices in originally was that in looking at Chapter 1 there was Art. 1.6 which took over Art. 9 CISG and which dealt with usages: in the first paragraph it dealt with express usages which the parties had specifically agreed to, and in the second it dealt with implied usages. He had thought that this could be taken over in the chapter on content, but if they wanted to deal with this independently and to have a

general provision on implied terms, they should have lits. (a), (b) and (c).

Bonell suggested that they concentrate on the proposed article as modified, all the more so as to this provision one could well add another provision along the lines of Art. 3A.6 which better clarified which usages could imply terms.

Lando did not think that there was much disagreement in substance between his proposal and Crépeau's proposal. When he looked at a contract he saw three problems: first, what the language of the contract meant, which was taken care of in the chapter on interpretation; secondly, there was the question of implied terms, which comprised a different thing, i.e. the subtelty of the stop-gap rules (including usages), which were rules which had normative character and which applied to the contract (this was for example used in the English Sale of Goods Act which had a catalogue of implied terms), the third problem was the case of the contract which did not address a problem in its terms but which still covered a problem and that was when the omitted term came in. It was a term which was important for the determination of the rights and duties of the parties, a term which it was not possible to find in the usages or in the stop-gap rules of the law. For this case they needed a provision. He did not think that this problem was adequately covered by the term "implied obligations", which covered everything, under English law it could even cover mandatory rules. It was necessary to distinguish between these three situations: the language of the contract, the stop-gap rules and the omitted terms. He therefore preferred not having Art. 3A.5, which he thought mixed stop-gap rules and omitted terms, and to have the provision on omitted terms instead.

Drobnig tended to agree that there was a certain difference between Art. 3A.5 and the Lando proposal and the ideas behind them, but on the other hand he thought it difficult to express to an international auditorium the fine-line distinction between implied obligations on the one hand and the supplying of omitted terms on the other. He would prefer to use a uniform approach such as the one drafted by Crépeau who to some degree used the same criteria as Lando. He did not refer to the intention of the parties as expressed in the contract language, which was a criterion in para. (2)(a) of Lando's proposal, and this was a gap in Art 3A.5 which should be filled. He thought a compromise should be reached between the two solutions on this point and then the other things could be discussed later.

Maskow preferred taking the Lando proposal as a basis because it was more comprehensive and permitted them to discuss all the problems. He did not think it a good idea to mention good faith and the like in Crépeau's proposal, as they were dealt with elsewhere in the Principles. He thought they should concentrate here on settling what had not been settled elsewhere and in this respect it was really a question of the omitted terms, because implied terms could be derived for example from usages, but

here they should only mention what had not yet been mentioned. Something could therefore be added to Lando's proposal, saying that if the parties had not agreed with respect to a term and where this term could also not be determined by other means then this term had to be supplied by using the criteria indicated which would give a sufficient answer in these cases.

Bonell drew attention to the fact that there was already a provision which stated that the contractual obligations of the parties could be either express or implied (Art. 5.1.1). So far the idea of what an implied term was was not been developed anywhere.

Farnsworth was attracted to Lando's proposal because it came close to a provision in the Restatement, but he had some sympathy for the idea that it would be helpful to tie the language into the language of "express or implied". He wondered whether a little of that might not be done by using "implied" rather than "supplied". The Lando proposal did have the merits of first saying that one had to find a gap to be filled, which the Crépeau proposal did not address specifically, then it also said that somehow or other it would be filled and then it went on to say how it would be filled. As to the third point the Crépeau proposal did virtually the same thing. The Lando proposal did seem more complete, and he would therefore favour it, except that he thought that the language might be tailored to make it seem more traditional in terms of the other language that they had used and that was often used. He also agreed with Maskow that this was not the place to bring in usages.

Bonell wondered whether the Group agreed in substance that the sequence was the following: since there were express and implied terms one first looked at what was express, but before coming to Lando's wording (which presupposed a gap) one had to see whether the term one was looking for was not implied, but no one indicated what this meant or where the criteria had to be taken from.

Lando indicated that implied terms might mean two things the first of which was the stop-gap rules of the law. Basically all the rules on performance were implied terms in the English language and he thought that that was what every common lawyer would understand, i.e. implied terms meant the rules supplied in the Sale of Goods Act. If the Group did not understand it to mean this here, then they must define implied terms to mean something else and if one drew also usages into implied terms this went to show that the implied term was not the concrete decision of the idea of the party in the contract. Implied terms was wider than omitted terms, unless they defined what they meant by implied terms in the narrower sense, i.e. that implied terms were identical with omitted terms which was what he understood Bonell to be saying.

Bonell stated that he had thought that once one accepted that the contract terms or the contractual obligations of the parties could be either express or implied one envisaged terms which by virtue of factors

other than an express agreement by the parties were included in the contract and bound the parties at a contractual level. Contrary to the language used in English law this had nothing to do with suppletive provisions of law such as the Principles, this had to do with a *Vertragsauslegung* and he would have thought that an *ergänzende Vertragsauslegung* such as Lando had always quoted as a precedent for his proposal took precedence over the rules of law, and that consequently also the Principles would be superceded by means of an *ergänzende Vertragsausgegung*, i.e of supplying terms taking into account the intention of the parties as expressed in the contract language.

Drobnig observed that Bonell and Lando were using the term "implied terms" in two different meanings and that caused the controversy. Lando used it as it was used also by Crépeau, i.e. implied by law or the Principles.

Crépeau gave the example of A going to see his doctor and after five minutes the doctor diagnoses an ailment and prescibes a treatment. There was a contractual relationship that had been entered into and nothing was said in the negotiations that this relationship had to be kept confidential. The confidentiality of a medical relationship was an implied term which had to be read into the contract because it was part of the nature of the doctor-patient relationship. One could very well say that if one went to a banker and entered into a contract for a deposit of sums of money there was an implied term which was read into this contract that this was not to be published in the New York Times the next morning.

Lando observed that then it was provided by the law.

Crépeau instead stated that it was provided by the nature of the contract.

Bonell agreed that it was provided in some laws, but what if it was not?

Lando stated that that was a rule which was not individual enough to be considered an implied term, because this applied everywhere.

Bonell quoted Lando's proposal which stated "Where the parties to a contract have not agreed with respect to a term [...]" - then Lando thought that there was a lacuna. If one said that "the parties had not agreed with respect" and included also implied terms he agreed with that, but if one went a step further and said that implied terms were also the terms implied by law meaning some of the Principles, then he was lost because then he would no longer think that the parties had agreed with respect to this. This was then implication by law.

Lando stated that the example perhaps was not a fortunate one, because it was obvious in any law that with respect to these contracts

there was a duty of confidentiality.

Farnsworth understood Bonell's difficulty to be where the terms supplied by the Principles fitted into Lando's formulation, and he supposed that when Lando spoke of a term which was important for the determination of the rights of the parties being supplied, if the Principles provided the term there would be nothing additional that was important for the determination of their rights. He thought that it was possible to say that that was not the best way to express it, nevertheless he thought that it was in there and that it was a drafting question: one looked at what the parties said expressly, one looked at what was in the Principles and if one still found a gap then this was what one did.

Bonell gave the example of a German landlord and tenent case, in the contract for the renting of a flat nothing had been said about the possibility of the landlord to let the outside of the building for publicity purposes. At a certain point in time the tenent woke up one morning to find that big publicity notices were being put up. He complained and this was a gap in the express terms. The law said nothing, and it was by means of *Vertragsauslegung* (or *ergänzende Vertragsauslegung*) that the court had considered that in that particular area it was not customary, not *verkehrsüblich*, for buildings to have such publicity on their outsides and consequently it had supplied the omitted term by saying that one was not allowed to put up such publicity, as if the parties had expressly agreed not to have the publicity on the outside.

Crépeau indicated that in Canada the simple cases were also where one has a real estate broker who negotiates a contract about a movable property, nothing being said about the commission to be paid to the broker. The house is sold and the courts are asked to determine what the commission is. The courts have in such cases resorted to the usage on the island of Montreal, following which if it is for residential it is 7% if it is commercial it is 10%. The courts have read that into the contract as a usage.

Drobnig thought that the term "implied" should be used with care because, especially as Lando had observed invoking English legislation, they used it in different senses. He suggested one should start from a general proposition, i.e. what was the contents of the contract, what were the express terms of the contract? Secondly, this had to be interpreted in case of doubt and if that did not solve the problem, then the gap-problem came in and the filling of the gap which primarily should be done by ascertaining what the parties might have agreed and what the general line of the contract was. If that did not help then only so-called implied additional terms from law or the Principles came into play.

Farnsworth commented that his earlier intervention had been prompted by the earlier interventions discussing usage and the example of the broker's commission in Montreal was a good example. It seemed to him that

that was something a little different from what was talked about in these provisions - he did not know how he would know that it was 7% or 10% unless some people came in and somehow there was evidence and testimony and his understanding was that what they were talking about here, in filling gaps, was a somewhat different procedure in which one would not have witnesses come in and fill the gap by testifying as to the facts in Montreal.

Furmston stated that in the English system there were various techniques, but he did not think that they asked themselves in which order they were used. There was the Sale of Goods Act technique which was where the terms were laid out in the Statute which would not apply here because there were no statutes. They also used the same technique in relation to non-statutory implied terms where they had been built up by cases, so the confidentiality over the doctor would be based on the notion that all doctors were subject to a duty of confidentiality, which he assumed one could say was such a universal principle that it would apply under the Principles, assuming one had a case of a contract with a doctor which was subject to these provisions which was rather unlikely. There were other principles, such as the duty of confidentiality in relations between a bank and its customers, which would be the same all over the world, to which the same applied. In England they would call that implied by law. They would certainly regard the incorporation of usages as a technique for implied terms. There might be techniques for protecting people against what might be regarded as unreasonable results. The Bachelor Peas case in Lando's example was a case of the implication of a term based on the peculiar facts of a case.

Brazil saw the two proposals, the implied obligations and the omitted terms, as circles which might overlap to some extent in practice. He thought that intrinsically they were separate and obviously therefore if they inserted a provision along the lines of Lando's proposal, which he supported, it was very important to get a correlation between that proposal and the implied terms statement. He suggested adopting Maskow's proposal that when they had an article, and it would be a separate article, on this particular matter, that presumably would follow whatever they said about implied terms, they would introduce it by saying "Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights [..]" they would also add "and that this is not determined by other means" and that would cover all possibilities, usage being one possibility which might be relevant in some cases. He thought that that would be sufficient to establish a correlation between this principle, which was separate from implied terms, and whatever they decided to say on implied terms. He suggested changing the word "important" in Lando's proposal to "essential".

Bonell wondered whether Brazil considered the Lando proposal to be something in any event additional to something which they still had to decide and which might be along the lines suggested by Crépeau. Could he in other words conceive of having Crépeau's formula followed by Lando's

formula?

Brazil confirmed that he could.

Drobnig instead thought that the Lando provision should preceed implied obligations established in other ways, because this provision gave expression to the principle of freedom of contract which had now been inserted and which made clear the precedence of interpretation, even supplementary interpretation of the contract, over implications derived from these Principles or from the law.

Bonell thought that nobody could question the fact that nobody would ever be able to elaborate a precise definite distinction between what was called "implied term" and what was called "supplied term", or *Vertragsauslegung"* and *"ergänzende Vertragsauslegung"*. These were all things that were clearly interlinked and depended very much on the angle from which one looked at them. If this was so, then examining the content of the two provisions since according to some of them it was clear that one should prevail over the other, was what Crépeau suggested should imply a term so very different from what Lando suggested should supply a term? For instance, "the nature and purpose of the contract" which in Lando was "a term which is appropriate in the circumstances", or "regard is to be had to the intention of the parties and the purpose of the contract" - basically he thought that it was the same test. "Good faith and reasonableness" followed which for Crépeau should imply a term, which for Lando the same concept should supply the term. Could the two not be combined and the article be entitled either "supplying terms for lacuna if there is no express term", or "implied terms". He did not think that they were on two different levels.

Crépeau indicated that the supplying was ultimately the result of the analysis of the relationship - where a gap was found, a problem was raised and one said that the parties had not dealt with this problem specifically so one should see what sort of criteria one allowed so that it would be possible to read something into the contract that would determine the relationship between the parties.

Maskow thought that Lando's proposal could be interpreted in two different ways. If one took the title "Supplying an omitted term" it seemed to be that something which was left open had to be integrated, but if one took the text its main part seemed to be an explanation of how to interpret the agreement of the parties. If one interpreted it only in this latter way, i.e. as *ergänzende Vertragsauslegung*, only as the interpretation of the will of the parties, then it should prevail over the rules, but in this case he thought that lit. (c) would have to be omitted because it went more in the direction of the general rules, while lits. (a) and (b) related to the intention of the parties. Then there was the important problem of the extent to which such omissions should be interpreted, i.e. the extent to which the court or whoever should assume that the parties had made an

agreement and the extent to which the law or the Principles or whatever else should enter into it. On the one hand one could say that the parties had agreed on this, but on the other hand one could say that what the law said was different and that if the parties had not expressed them expressly then there was the problem of what should prevail and this was solved in Lando's proposal. That proposal solved it so as always to look for a particular solution because it said generally "a term which is appropriate in the circumstances is supplied" and if this was so, then all their rules were superfluous. There had to be cases where there was no express agreement between the parties but where nevertheless it was impossible to interpret the will of the parties to indicate that they had come to some sort of agreement.

Bonell wondered whether the provision of the Restatement, which had nothing to do with the intention of the parties but adopted the reasonableness test, was intended to come into play after one had got through the express terms and the implied terms, or whether it came into play after one had got through the express terms and one discovered that there was a lacuna in the express terms?

Farnsworth thought that it was the second alternative, i.e. in the Restatement this was perceived as a general principle on which all implied terms were based, so that to the extent that there were other implied terms that were specifically in the black-letter of the Restatement. He thought that the answer would be that those were also examples of the application of this more general principle. That was obviously not the understanding of almost everyone who had spoken here. He thought Lando's proposal was a good proposal, whether one regarded it in the first sense or in the second, and the only thing which was important was to make it clear in the Principles which sense one was using it in.

Lando agreed that the distinction between the implied and omitted terms was difficult to make, but there were really two situations, in one of which one could bring in witnesses to say what the *Verkehrssitte* was, and this was different from the situation where no *Verkehrssitte*, no norms at all regulating the matter, and they needed a rule for these situations. He pointed out that the good faith and reasonableness Maskow wanted to leave out was also a guideline for the interpretation of the language of the contract.

Bonell quoted the opening of the comments to § 204 of the Restatement which stated that "The supplying of an omitted term is not technically interpretation, but the two are closely related; courts often speak of an "implied" term".

Tallon suggested that the term "implied" should be avoided, and that they should merely say that when the parties had not made an express provision this or that other thing had to be done.

Farnsworth recalled that his advisers had refused to let him use "implied" when he had worked on the Restatement, on the ground that it often confused implied in fact terms and implied in law terms, in the sense that sometimes the implication was based on actions of the parties and sometimes on the notion that everyone knew that doctors should treat patients' problems in confidence without any particular facts. He did not know if this was a good example for international use.

Tallon did not agree with the formula "Where the parties to a contract have not agreed", because it could mean that the parties had disagreed, and if they had disagreed on an important term of the contract then of course there was no contract. They should perhaps put something to say that there was a gap but that this gap did not endanger the contract.

Bonell then suggested a formulation such as "Where the parties have not expressly regulated a term which is important [...] and which can not be determined otherwise under these Principles" meaning that interpretation and usages came into play as did the other Principles, after which one could say that if this was a true lacuna one had to adopt the reasonableness test.

Lando suggested also talking about the intention of the parties.

Bonell indicated that one already had the intention of the parties via the interpretation.

Drobnig thought that this attempt to supply an omitted term had to come before usages could intervene.

Bonell stated that originally, in the provisions this had been inspired by such as the Restatement, it had not been intended like that.

Farnsworth indicated that in the Restatement it was put in the interpretation chapter, which was not actually called "Interpretation" but was instead called "The scope of the agreement", which was like what the PECL would mean by "Terms and performance".

Bonell commented that if this were considered to preceed implied terms - implied by law, implied by usages and good faith etc. - then it was very difficult to distinguish it from the interpretation *strictu sensu* where interpretation already had to be done according to good faith and to the meaning that a reasonable person would attach to this or that other contract term, and then he was lost as to the relationship between this rule and a possible rule dealing with implied terms.

To Crépeau it seemed that once they had accepted the rule that the contractual obligations of the parties could be express or implied, that meant that the parties had said what they wanted to be governed by, and then by implication they had a situation of a lacuna, for example, the

parties had said nothing about the confidentiality of their relationship and asked whether confidentiality was a part and parcel of the bargain they had entered into. The answer to this question was what were the criteria whereby they would supply into the contract terms which the parties had not expressly agreed to? If it was a question of determining whether one of the express terms included something that was a problem of interpretation, but if on considering the contract there was a lacuna, they said look at the nature and purpose of the contract, look at usages in the area in which this contract was entered into, look at good faith and reasonableness and all these criteria would help to determine what the presumed intention of the parties would be, was therefore to be read into the contract as part of the contractual relationship. Once one had said that, it might very well be that the particular situation which Lando had referred to in his proposal could also be read into the document as an illustration of how one supplied an omitted term when there was one. His proposal therefore included Lando's, which could be an illustration of it. Lando's proposal served a specific purpose, whereas Art. 3A.5 was a general rule giving the criteria by which implied terms were to be read into the contract.

Maskow thought that the Principles had quite a number of articles covering these problems. In the chapter on interpretation Art. 4.3 gave criteria to be applied in the interpretation of the intention of the parties, i.e. any preliminary negotiations, any practices, conduct, etc.. What had not been expressly referred to so far was the intention of the parties as expressed in the contract language. This was taken from German law but in a certain sense it was covered by this formula. They had no comprehensive view of how to interpret the intention of the parties. They had a lot of rules which indicated that in interpreting the intention of the parties usages etc., had to be taken into consideration. If this failed, they had additional rules - both concrete and abstract rules - such as good faith. Most things were covered. The only situation not yet covered was where one did not get a result by interpretation, and one did not get a result by using any of the other rules - which was rather improbable as courts would always find a solution - in which case this rule could be used as an objective approach to be used when nothing else helped.

Bonell pointed out that there were already two precedents for this: price determination and the determination of the quality of the performance.

Huang stated that by "implied terms" she understood implied obligations. For example, in cases of product liability even if the contract did not state anything explicit about the fact that the product should not harm people, there was an implied warranty. There had been a case covering the export from China to the United States of children's toys (firecrackers or the like) which had hurt the eyes of the children, in which case even if the contract had not said anything the implied obligations had had to be borne. The term "implied obligation" could be omitted, but the obligation could not. As she understood it, she would

consider the provision in the context of interpretation. The two proposals should be placed in two different chapters: Crépeau's proposal on implied obligations should go in Chapter 5 and Lando's in Chapter 4.

Drobnig agreed with Huang, because the decisive difference he saw between Crépeau's Art. 3A.5 and Lando's proposal was that the latter used the intention of the parties which brought it close to interpretation, even if it was not identical with interpretation. He suggested placing the article at the end of the interpretation chapter and broadening the title of the chapter to make it cover this last point. All the other rules on usages and so on could go into an extended chapter on performance.

Bonell wondered whether Drobnig would add "expressly" to "agreed" in the Lando proposal so as to identify the fact situation. Presently it stated "Where the parties [...] have not agreed" and according to some this meant that the rule came into play only after the implied term procedure had been explored. Drobnig appeared to invert it now, and to say first the express terms, then, via interpretation, on the basis of this rule supply a term according to the intention of the parties and only if this did not work go to Crépeau's rule and implied terms.

Drobnig indicated that Crépeau's rule would either follow or even become superfluous. Personally he felt it would be superfluous, but it could perhaps be retained, in which case it should be placed after Lando's proposal even if close to it.

Lando supported this proposal, because they had seen situations where a stop-gap rule - a usage - could have been applied, but where because of the special purpose of the contract it was inappropriate. As he understood the chapter on interpretation it only addressed the questions where there was a question of interpretation, which meant where one could deduct the result from the language of the contract and if one could not deduce it from the language of the contract they were in the presence of an omitted term.

Bonell suggested postponing any final decision and to await the reactions of Fontaine. A proposal was to place the provision proposed by Lando at the end of the chapter on interpretation and to have at the same time a provision after the present Art. 5.1.1 along the lines suggested by Crépeau. For those who considered the two to be overlapping, he recalled that the BGB had similar overlapping provisions.

Voting on having the provision proposed by Lando in the chapter on interpretation, 11 voted in favour.

Voting on having Art. 3A.5 proposed by Crépeau after Art. 5.1.1 in the chapter on performance, 6 voted in favour and 4 voted against.

ANNEX

LIST OF PARTICIPANTS

Mr Patrick BRAZIL, former Secretary, Commonwealth Attorney-General's Department, Consultant, Australian Legal Group, C/- Macphillamy Cummins & Gibson, National Mutual Centre, 15 London Circuit, CANBERRA ACT 2601

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

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

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

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

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

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

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

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

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

Mr Dietrich MASKOW, Professor of Law, Frundsbergsstraße 25, BERLIN

Mr Yoshio OTANI, Counsellor, Civil Affairs Bureau, Ministry of Justice of Japan, 1-1-1 Kasumigaseki, Chiyoda-ku, TOKYO

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

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

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