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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

WORKING GROUP FOR THE PREPARATION OF PRINCIPLES
FOR INTERNATIONAL COMMERCIAL CONTRACTS

SUMMARY RECORDS

OF

THE MEETING HELD IN ROME

FROM 29 JUNE TO 3 JULY 1992

(prepared by the Secretariat of Unidroit)

Rome, January 1994

The seventeenth meeting of the *Working Group for the Preparation of Principles for International Commercial Contracts* met at the seat of the Institute from 29 June to 3 July 1992. A list of participants is annexed to these Summary Records.

The President of Unidroit, Professor Riccardo Monaco, welcomed the members of the Group.

Mr Malcolm Evans, Secretary-General of Unidroit, informed the Working Group that at the annual session of the Governing Council which had taken place the previous week the Council had been very enthusiastic as regards the progress made and was looking forward to the speedy completion of the work on the Principles. A tentative schedule had been submitted to the Governing Council. It was hoped that the Governing Council would be able to approve the final text of the Principles together with the commentary in 1994. The Working Group would in the course of the week see if such a schedule was possible. The Governing Council had considered problem areas in the sections on hardship, general provisions on non-performance, right to performance and termination and the comments offered by the Council would be brought to the attention of the Working Group in the course of the week. He welcomed Mr Alejandro Garro, Lecturer at Columbia University and an expert on Latin American law, who participated in the work of the Group for the first time.

On the table for discussion was the revised draft provisions and comment on Chapter 1: General Provisions, prepared by Professor Bonell in the light of the discussions of the Working Group in Miami (Study L - Doc. 51). He indicated that the time had come to give careful consideration to the comments, suggestions and criticisms were most welcome. Mr Patrick Brazil was asked to take the chair.

Article 1.1

Crépeau opened the discussion on Article 1.1 by referring to comment (a.) "Purpose of the Principles" which in the second paragraph stated that the purpose of the Principles was to provide "a comprehensive system of rules". He wondered whether the word "comprehensive" did not promise more than was it kept in view of the number of problems which were not dealt with.

Brazil agreed and wondered whether, if the word "comprehensive" were kept, the word "general" should not be placed before "rules".

Drobnig had the same difficulty but did not think that the problem could be solved by adding "general". He suggested deleting, or replacing, "comprehensive".

Bonell understood that "comprehensive" might be too far reaching. The

intention was to indicate right from the beginning that the Principles were more than just a *summa* of general principles, that the Principles might well be used, for example, as the *lex contractus*. After all, one could say that the Principles were as comprehensive as many national codifications.

Crépeau suggested saying that the purpose was that "of providing a set of rules intended to be applied to international commercial contracts".

Lando suggested saying "a system of rules" which he felt was more comprehensive than a "set" of rules.

Brazil thought that "general" could be added also to "system".

Evans felt that in English "set" read better than "system".

Bonell observed that the INCOTERMS provided a set of rules, that the *Uniform Rules and Customs on Documentary Credits* provided a set of rules. The idea here was to say that the Principles were something different, something more comprehensive. He suggested that "system" would be fine.

Farnsworth observed that the Secretary-General had volunteered to rationalise the comments throughout. A general system of co-rapporteurs who were to work on the comments had also been mentioned. He recalled that in Bristol there had been a discussion of the comments and their length and that Fontaine's comments had been felt to be of the general sort they should have, and they were much shorter than many of the other comments. He suggested that the editors ought to look particularly at the scope of the Principles and then shorten the comments. Comment (b)(2), "Commercial contracts", seemed to him to contain two very useful points of information, one with respect to what "commercial" meant and the absence of a distinction in the system of the Principles, and the other with respect to comsumer contracts.

Bonell thought that the main focus of the discussion should be the structure of the comments, one aspect of which was the average length of the comments. The approach followed should clearly be discussed and agreed upon, because all Rapporteurs were at the end of the meeting invited to re-write their reports to enable the work to progress. He confirmed Farnsworth's recollection of the outcome of the discussion at Bristol.

Farnsworth observed that the last paragraph of comment (b)(1) to Art. 1.1 gave two very important ideas: one was that the Principles should be interpreted broadly, the other was that one could apply the Principles even if by themselves they did not apply. On the other hand, the sentence beginning on line 3 of page 2 ("Moreover ...") added nothing which anyone using the Principles would need to know. It might be useful for members of the Group to indicate the nature of the things they thought should be in the comments.

Maskow observed that what was in comment (b)(1) might in fact serve as a general introduction to the Principles as a whole, if such a general introduction were intended. In his view it was important to say something along these lines, particularly as there were those who thought that unification only for international contracts was out-dated. Such ideas circulated particularly in Europe because of the European Communities. The situation was of course different at universal level, but it might still be useful to explain why the Principles were limited to international contracts. The main idea here was however not expressed clearly enough: the comments stated why rules were needed for international contracts, but why they were for international contracts *only* was not indicated with sufficient clarity.

To Crépeau it seemed rather curious that they should start by saying that the Principles dealt with international contracts and yet the commentary of both Art. 1.1 and Art. 1.2(3) provided that a purely local contract could be submitted to the Principles.

Bonell recalled that this point had been thoroughly discussed in Miami. The emphasis was that the Group had prepared an instrument which it thought was most suited for international transactions, but that if parties who lived on the same street wanted to use this instrument within the limits admitted by the applicable law for a purely domestic private transaction, they were free to agree to do so.

Crépeau stated that Art. 1.2 should clearly indicate that notwithstanding what was stated in paras. (1) and (2), these Principles may nevertheless be used in purely domestic contracts if the parties so chose.

Hirose found that the previous version of the comments had been more ambitious, as it had stated that the Principles intended "to enunciate principles and rules which are common to the existing legal systems", even if admittedly it had also stated that "it would be entirely unrealistic to attempt to lay down on a world-wide basis rules intended also to cover purely domestic transactions". He found that the previous version of the comments was the more realistic one. In the revised comments the phrase which began with "Moreover" was a little weak, and something should be added to it to bring in the more ambitious element of the previous version.

Drobnig referred to the comments on p. 2, first full paragraph, which stated that the criteria used for distinguishing between national and international contracts included the nationalities of the parties. He knew of no convention which had this principle, certainly not in the field of contract law. It was always specified that the nationalities were irrelevant. He also questioned the last phrase of the following paragraph, which said "subject to the mandatory rules of their domestic law", which seemed to contradict Art. 1.5 which referred to the private international law as determining which mandatory rules should be observed.

Bonell agreed with Drobnig's first remark, but was lost as to the second, as within a purely domestic transaction private international law was not relevant *per definitionem*, so if two people living on the same street used the Principles for their transaction it was pretty clear that the general framework was provided by their domestic law. Later on the assumption was that it was an international situation.

Lando suggested changing the sentence referred to by Drobnig by saying "subject to those mandatory rules of their domestic law which are applicable to international contracts", the reason being that there were lots of domestic rules which were mandatory for domestic contracts but not for international contracts.

Bonell referred to the sentence before this one, which stated that the idea was to exclude only those cases where no international element at all was involved.

With reference to the very last line of the comments to this article, which spoke of contracts for legal services, Brazil found that there was no particular reason to single out legal services as it could be any services.

Furmston suggestion "professional" as the discussion on this point had related to the distinction beween commercial and professional.

This suggestion was accepted.

Maskow suggested that in the first paragraph of comment 2 (""Commercial" contracts") reference be made also to contracts which tourists made. The reason certain types of contracts were excluded from the Principles was explained by the existence of special rules - e.g. special rules for consumers - but there was also a second reason, i.e. they did not want to cover tourist contracts even if there were no special rules for them. Secondly, with reference to the comment on p. 3 that "the concept of "commercial" contract should be understood in the broadest possible way", he would go along with that as far as the subject of the contract was concerned. On the other hand, he did not know whether this should also be valid as far as the function of the contract was concerned. For example, if A, a lawyer, sees something nice in Rome for his office back in Germany and buys it, was it then a contract in the sense of the Principles, or was it not? He would say that it was not, because A was in Rome as a tourist, and if he went into a shop and bought a copier or something which was cheaper in Rome than in Germany, then it was not a commercial contract in the sense of the Principles. Also the function of the contract should be interpreted in a broad sense.

Bonell could see no difference between Signor Rossi buying consumer goods in Rome and Herr Müller who has come to Rome from Germany doing the same thing. In both cases it was a consumer transaction, so if there were special rules in Italy this situation was covered.

Maskow stressed that his suggestion was merely to state in the comments that consumer contracts had been excluded, not merely because there were special rules covering them, but also because a small dealer in Rome would not be able to see whether the contract was an international contract or not, as for the small dealer all contracts were the same.

Bonell observed that in the CISG scheme it was important to know that in certain instances the international character of a contract was irrelevant, whereas for them this was not the case. They on the contrary wanted to give the Principles the widest possible scope. If a lawyer for his own business, therefore acting in the course of his profession, bought something abroad instead of at his usual place of business, according to the Principles that would be a commercial transaction. The international instrument which for CISG was so important played no role whatsoever here.

Garro wondered whether the Principles would have a preface or a general introduction, because if that was the case the Rapporteur would surely appreciate some guidelines on what to put under Art. 1.1, and what instead in this general introduction. Secondly, he wondered what form the comments should take. He understood that it had been decided to keep the comments as concise as possible. If the comments to Art. 1.1 were to be taken as an example, he had no objections to this format. The fact that the comments included explanations as to what they did not intend to cover seemed to him to add clarification and Rapporteurs should be encouraged to add that sort of comment. He understood that the Rapporteurs were exclusively responsible for the comments, i.e. that votes were not to be taken as to whether a certain term was to be included, but rather that Rapporteurs should get guidelines on this.

Brazil felt that the key to the approach to the comments must be who had the professional responsibility for the comments and clearly that responsibility was with the Rapporteur. There was a proposal that there be a kind of co-rapporteur, and this would be discussed later on in the meeting. They were not there to take votes on what should or should not go into the commentary. If the Rapporteur felt the need, he would indicate that he wanted further guidance on a particular point. As to whether or not the comments should indicate that the particular article concerned was not intended to cover this or that other situation, his understanding was that this was permissible, but it should be used very sparingly indeed and only for major points. As for the introduction, he understood that the only proposal was for a short introduction which might set out very briefly the reasons for developing a set of Principles.

Tallon raised the question of the coherence of all the comments. It was correct that each rapporteur was responsible for his own comments, but he wrote in a different way from Drobnig, for example, or from Maskow. There should therefore be a "super-Rapporteur" to harmonise the comments.

Bonell had understood the Group to have agreed to have an introduction

more or less of the kind outlined by Brazil. As concerned the work the Group now had to do on the comments, this was a unique chance to have the advise of all the members of the Group as to the contents of the comments. He would be grateful if a certain discretion were left to the Rapporteur as to the way in which the suggestions made should be taken into account, particularly if they had not been unanimously carried. Once each Rapporteur had sent in his revised version, the revised comments would be sent to the appointed Co-Rapporteurs - those members of the Group who had not been Rapporteurs would be appointed Co-Rapporteurs with the task of scrutinising the comments very carefully and of making suggestions for amendments, etc. The Rapporteur should thereafter again revise the comments where necessary. In the meantime the Secretariat, led by the Secretary-General, would start the editorial work *strictu sensu*, which would have little to do with the actual content, but very much with the formal presentation and the language of the comments. The Group would then be reconvened to review the whole thing and to give their last word. There would certainly be points on which the advice of the Group as a whole would still be needed.

Coming back to the comments to Art. 1.1, Komarov had some difficulties with the interpretation of the phrase "the concept of "commercial" contracts should be understood in the broadest possible way". There were contracts which were very similar - contracts for international services and international labour contracts for example - and he felt that it should be pointed out that international labour contracts were not covered by the Principles. For example, if a foreign lawyer goes to a country on the basis of a three-month contract, this would in some countries be considered to be a labour contract.

Bonell thought that this would open a Pandorra's box: what, after all, was a labour contract? To what extent could a clear distinction between the two be envisaged at universal level? For example, in Italy a commercial agent was not considered to be an employee, but to be equivalent to an employee - what did this mean? Was it really that important to state that they wanted to exclude or to include it? He had taken the discussion in Miami to indicate that they should here just say that consumer transactions were excluded, and that as for the rest whatever fell within the commercial concept in a broad sense came within their scope. After all they did not need a hard and fast rule on the scope of application of the Principles, because of their well-known nature.

Drobnig felt that the labour contract point was well taken, as labour contracts were on the same level as consumer contracts which were expressly excluded. There was the same degree of national protective regulation for both types of contract.

Brazil wondered how those labour contracts would be described in the comments. He had the feeling that "labour contract" meant something very specific and precise in some systems whereas in others people would wonder what exactly was meant.

Drobnig felt that that should be left to the national laws.

Bonell admitted that this could be an approach. However, he wondered whether they really wanted to declare that the Principles would never apply to employment contracts at international level. He stressed "at international level", because very often one had to forget about domestic laws: what was the legal qualification of an employment contract in the broad sense between ESSO and an individual in a country where a sufficiently developed labour law did not exist? The tendency also in private international law was to provide considerable party autonomy at international level just because it was so difficult to distinguish between the employment mass contract, with or without trade unions as intermediaries, and the employment contract which in many respects came very close to a professional service contract.

Komarov indicated that his suggestion merely went in the direction of indicating in the comments that there were limits to the applicability of the Principles, that one of these limits was consumer contracts, but that a second was labour contracts. He suggested adding "some" to the phrase "but also other types of economic transactions" so as not to cover all transactions.

Bonell referred to the UNCITRAL International Commercial Arbitration Model Law. He had participated in the long discussion which had taken place on how to define "commercial". The question of employment and service contracts had been raised, but immediately put aside because the delegates had considered that they did not know exactly where they were. No one had wanted to exclude them from the outset from the model law, on the understanding that they were speaking of international contracts.

Article 1.2

Opening the discussion on Article 1.2, Crépeau wondered whether, in view of the fact that parties, if they so desired could decide to have the Principles apply to a purely domestic contract, it would not be preferable to have a provision in Art. 1.2 saying that "nothing in these Principles prevent a domestic [local] contract from being governed by these Principles if the parties so agree". In Art. 1.2(1) the word "contract" meant "international contract". If they wanted to make sure that parties might have the Principles govern a local contract, subject to the imperative rules of local law, then they should say so.

Brazil felt that it would be sufficient to refer this to the commentary.

Drobnig also felt that it need not be said in the text of the article, even if it should probably be said also in the comments to Art. 1.2, as it was only mentioned in the comments to Art. 1.1.

Bonell thought that they all agreed that they were confined to international contracts and therefore he took it that as a whole the Group would not favour stating in the text that parties may also have the Principles apply to domestic contracts . This was stated in the comments to Art. 1.1, and he felt that one would confuse the reader if it were repeated in the comments to Art. 1.2, because what was addressed in Art. 1.2 was the question of the choice of law, even if in a rather atypical manner because as long as they thought in terms of State courts such a choice of law by the parties, meaning a choice of the Principles, would not be considered a true choice of law. He admitted that there was a grey zone, but at least the concept in Art. 1.2 was first, that there was an international contract; secondly, in such a situation, as a result of the general principle of party autonomy as to the applicable law, parties may also choose the Principles. He had doubt about repeating here that parties may choose the Principles also with respect to a domestic contract. He felt more comfortable once one moved towards arbitration, because then to a certain extent one could forget about traditional concepts. Even so, they could not say that the Principles were relevant only in arbitration, and this being the case he thought that for systematic reasons Art. 1.2 should be restricted to the typical situation where these Principles applied, i.e. international contracts.

Lando understood Bonell's hesitations, because first Art. 1.1 said that "These Principles set forth general rules for international commercial contracts" and then the comments seemed to indicate that they did not really mean what they said because the rules could also apply to internal contracts. This was brought out also in Art. 1.2. There was a *non sequitur* there. He fully sympathised with the ideas put forward by Bonell. What they needed to say was that the purpose of these Principles was to lay down rules for international commercial contracts, that that was what they had focussed upon. Then it did not matter that maybe they could also take other contracts in; they had addressed their attention to the international contracts, but this did not exclude that they could take domestic contracts into consideration as well. He preferred to change Art. 1.1 and to say simply that "The purpose of these Principles is to set forth general rules", i.e. they explained what their approach had been and then that these rules could nevertheless also apply to other contracts.

Drobnig pointed out that there was a tendency for Supreme Courts to allow parties to adopt the rules of an international convention for contracts which were not covered by the convention - he had a decision of the Dutch Supreme Court in mind, which applied some provisions of the CMR Convention to a contract for road transport which was not covered because it was not international. The modern tendency was clearly that parties were free to declare that certain rules which in themselves would not be applicable should apply to their contract in a breach situation. Secondly, it was said repeatedly that the rules set out in the Principles were not really rules of law but were equivalent to substantive rules of the contract, so therefore he did not have the slightest reservations as

regarded the possibility of parties to a purely domestic contract saying that the Principles were to be part of their provisions, i.e. just incorporating the rules rather than spelling them out. He could therefore not see any real inconsistency. He did feel that it was necessary in the comment to Art. 1.2 to say that that possibility existed.

Crépeau saw the reasons for not putting it in Art. 1.2, but thought that if Art. 1.2 dealt with the application of the Principles, which basically dealt with international contracts, the commentaries on p. 7 should have a fifth paragraph stating that they would be happy to bring into the club any person who would like to have their local contract governed by the Principles, provided that the national law permitted this.

Bonell thought that one could argue whether there was a real need to specify that parties enjoyed freedom of contract in accordance with their applicable law. They did so once on p. 2.

Furmston stated that they could not stop people from applying the Principles to their domestic contract if they wanted to, but if they were going to say it they should also say that this was not the sort of thing that they had had in mind. He could remember times without number being told that the points he was making were not appropriate to international contracts. They had to warn whoever was minded to adopt the Principles for domestic transactions that this might turn out to be inappropriate.

Crépeau pointed out that his suggestion only meant deleting the last sentence on p. 2 and transfering it to the article which dealt with the scope of the Principles, because that was where the reader who wanted to know whether the Principles applied or not would look for the answer.

Bonell stated that it was one thing that they could not prevent parties from making use of a power granted to them by their applicable law, and another to say first that they had laid down principles for international commercial contracts as they had done in Art. 1.1, and then in the comments to Art. 1.2 to say that a further application was that of a purely domestic transaction.

Tallon thought the best solution was to refer to this in Art. 1.1 in the comment on the scope of the Principles by simply stressing the problem of domestic contracts. The comments dealt first with international contracts, then with commercial contracts, and to these could be added a third section on domestic transactions, saying that the Principles were not written for domestic transactions, but that of course nothing prevented parties from applying them to domestic transactions.

Komarov supported this suggestion. He thought that it was necessary because in some countries it was not so simple that contracts were either international or domestic, in some countries there was a third category. This was the situation of Russia, for example, where there now was the CIS

and the trade regime which existed between the CIS countries was neither international nor domestic.

Farnsworth pointed out that the comments to Art. 1.2 made a distinction picked up in Art. 1.5 on mandatory rules between the situation in which one incorporated the Principles as one would a standard form to supplement the law that one had chosen as the applicable law, and that where one simply incorporated or subjected the transaction to the Principles without having the law of any particular state as the applicable law. Under Art. 1.5 one could however not avoid mandatory rules. The Principles were not really comprehensive rules in the sense that they would enable one to dispose of most of the problems he had encountered in arbitration. Nor would the mandatory rules of the applicable law do that, and he found no enlightenment as to where one stood if one had taken the second route for those cases that were neither controlled by the Principles nor by mandatory rules. Secondly, they had to keep in mind that the Principles and the comments might be read by parties who were thinking of incorporating the Principles in some way, and it seemed to him that they ought to have a sentence saying beware of saying that these Principles govern unless you also pick a particular legal system, because we cannot tell you exactly what law will govern the kinds of disputes that are very likely to arise. Either they should be a little more specific: if they had the arbitrators as *aimables compositeurs* for the many situations that are not under the Principles or mandatory rules American lawyers would like to know that because they would run in the opposite direction, as they had no enthusiasm in their practicing bar for *aimables compositeurs* or for *lex mercatoria* or the like.

To Brazil it seemed that in contemplating an arbitration the first thing one should logically do was what was indicated by Farnsworth, i.e. make sure that one had an applicable law that would enable one to do the things one wanted to do.

Crépeau sympathised with what Farnsworth had said.

Lando thought that the Principles were an excellent addition to the *lex mercatoria* which was a thin body of law, but parties did not choose these Principles when they chose the *lex mercatoria* because they were not comprehensive, many questions were not covered by them, so the choice of the *lex mercatoria* would not be confined to these Principles. The only objection he had related to the third paragraph of the comments on p. 3 which stated that "The situation may be different if the parties agree to submit the disputes arising from their contract to arbitration" with which he agreed, but which continued "Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as "aimables compositeurs"". He suggested taking out the sentence beginning "This is self-evident" - he did not think that it was self-evident and he did not think that the sentence was needed.

To Drobnig it seemed that there was a certain contradiction between the last half-sentence of the first paragraph which said that the parties could choose the Principles "in lieu of one or another particular domestic law" and the second paragraph which said that "the proper law of the contract will still have to be determined separately on the basis of the rules of the private international law of the forum". He suggested omitting the last words of the first paragraph.

Bonell explained that he had conceived the comments as follows: first one should tell parties, who might believe that they could forget about the usual conflict of laws problems and who wanted something which provided them with an internationally uniform solution, that they might have found the proper instrument and that it was the Principles. This was the reason for the general announcement in para. (1), for the "in lieu of one or another particular domestic law", which meant that they could forget about quarrelling about choosing the law of country A, B or C, the Principles were an alternative. The second and third paragraphs were intended to high-light what he considered to be a basic difference, i.e. he thought that nowadays it was clearly established that the parties' freedom of choice in international contracts meant only freedom to choose this or that other domestic law. This was the traditional view, and he thought that State courts all over the world stuck to this traditional view. He was not aware of any State court having admitted that parties could disregard any domestic law and subject their contract to something a-national or supranational. The second paragraph was intended to warn parties by saying that they could choose the Principles as the "applicable law", but they should be aware of the fact that since this was the traditional view, if they went to State courts their choice would not be considered to be a proper choice of law, but to be a mere contractual incorporation of the Principles with all that this meant. Paragraph three was intended to say that if the parties in addition to choosing the Principles stipulated an arbitration clause, then things might be different because there was a growing tendency to allow arbitrators to base their decisions on a-national or supranational rules of law. He thought that if the point raised by Farnsworth was that even in this latter case they should tell parties that the contract was subject to the applicable national law, this could be considered to be the minority view, i.e. the view according to which even arbitrators had to apply a domestic law and parties were allowed to make other choices only within that limit. If Farnsworth's point instead was merely a lacuna point, i.e. if his concern was only that they should first warn the parties and then possibly also advise them on how to solve the problem of the fact that the Principles did have gaps and might therefore well need supplementation, he thought that this was dealt with in Art. 1.7, which of course did not give any conflict of law rules for the case when one could not find the answer within the system of the Principles, but which at least expressly addressed the question of gaps in the Principles.

Farnsworth thought that the two related points could be addressed by adding two sentences to the next to the last paragraph of the comment (p.

5: "Parties who wish to adopt [...]"). The first sentence would say "In that event if the controversy is not governed by these Principles, see also Art. 1.7, it would be decided under ...", and his first question would be what would it be decided under? He did not think that they were talking about a minority of cases because most of the cases in arbitrations that he had been familiar with involved some issues that had nothing to do with these Principles. The second sentence, which might be more controversial, would be "Therefore if the parties do not want it to be governed by [...], they should choose a domestic law". In his experience whenever the subject had come up he and others who spoke about CISG in the USA were very careful to tell lawyers that this did not mean that they did not have to pick a governing law. Many questions would not be governed by CISG and if they did not pick the governing law there would be choice of law questions. He was first interested in what was the blank, and he thought that the blank was what was discussed in comment 2 in another context, i.e. it was the *lex mercatoria*, general principles of law.

Furmston commented that the idea that if the parties expressly stated that their contract should be governed by the Principles there would be problems which arose which could not be resolved, was new to him as he had thought that they could be resolved by invoking notions of good faith. If there were actually commonly occurring major problems, should they not be dealt with? He would not want to have to go off to discover what the law of Ruritania was on those problems.

Bonell observed that one thing was a gap, to use the formula of Art. 7 CISG "a question falling within the scope but not expressly settled", and another matters falling outside the scope of the Principles. With respect to the issues which had not been settled, he thought that Art. 1.7 was intended to ensure that before resorting to this or that other national law in accordance with the usual conflict of laws rules, one would try to find a solution on the basis of the ideas underlying the Principles. There were of course many other questions which were clearly outside the scope of the Principles - assignment, third party rights - and for these kinds of issues he thought that even without it being expressly stated, one had to forget about the Principles and do what one would have done if the Principles did not exist, i.e. see what the proper law was. He was fascinated by what seemed to be the opinion in the United States with regard to CISG, as Art. 7 CISG tried to make this distinction clear. If one took a question of capacity in an international sales contract, or of agency or of third party rights, a sales transaction falling under CISG, he thought that as this was a matter not covered by the convention and whether or not the parties themselves had from the beginning indicated that for the rest they considered the law of country A as the applicable law, a judge facing such a problem would put aside CISG and look at the applicable national law, and if one did not choose it one would have trouble. What should one say? CISG and the law of New Jersey?

Farnsworth indicated that if one said "law of New Jersey" that would include CISG. He was troubled by the suggestion that one always looked to the otherwise applicable law, because on p. 10 there was a clear dichotomy in the case of mandatory rules between the incorporation of the Principles (which he had no trouble with) and the case where the Principles were the law governing the contract, which clearly said to him that that was different from the case where one incorporated the Principles. Where one incorporated the Principles, if the Principles did not govern one looked to the otherwise applicable law. If the Principles were the law governing the contract, this told him that one looked to the Principles and in the case of mandatory rules one looked to the mandatory rules of the applicable law, but not to the non-mandatory rules of the applicable law. Otherwise comments (b) and (c) on p. 10 were exactly the same. His question was what did one do if neither the Principles nor the mandatory rules governed in a case of comment (c)?

Drobnig recognised the logic of what Farnsworth was saying, but felt that they should be more helpful to the parties. If they advised them here to choose the Principles, they should clearly tell them that the choice of the Principles was of a very limited scope, that it was therefore advisable for them to think that those issues which were not covered by the Principles must also be thought about and that it would be necessary for them to consider whether an express choice of a specific national legal system should be made for those other issues and that if it was not made then the conflict rules of the forum, or of the fora which may differ, would come into play. It was merely advice to be more helpful to the parties.

Furmston was interested in knowing the advice a competent lawyer ought to give parties contemplating use of the Principles. He had thought that what one would say was that the contract should provide for arbitration subject to the Unidroit Principles, but if he understood the discussion, the contract ought also to have a provision saying that if all else failed, the law of Ruritania should apply. That did not come across in the comments.

Bonell stated that he would agree with helping the parties as suggested by Drobnig, but he wondered whether they did not run the risk of making a self-goal. To a certain extent they could trust the success of their instrument, particularly in those cases where parties either were not aware of, or did not want to tackle, the problem of the choice of law and therefore said nothing about it, in which case if litigation arose arbitrators might prefer to use the Principles rather than to have to look around to see what particular domestic law applied, or where the parties were only too aware of the choice of law question but as they had not been able to agree on a particular domestic law they referred to the Principles. That he thought would be the most frequent application of the Principles. If they now to help parties stated that if they chose the Principles they should stipulate an arbitration clause, and then went on to say that since

the Principles did not cover everything they should choose an applicable law in addition to the Principles for those residual cases, he wondered whether there was any room left for the Principles, because if the parties still had to choose a domestic law, if even according to the Principles they had to do so, then they might say that they could forget about the Principles.

Farnsworth agreed with Drobnig. One did not have to say it in such a way that it did a disservice to the Principles, one could say that there may be cases, such as rights of third parties, that were not covered by the Principles and parties might wish to consider the possibility of choosing a law that would apply to such cases so that the arbitrators would not have to guess what the law was. Furthermore, he was still not sure how the discussion was consistent with the last three lines on p. 4 ("[...] with the result that the Principles would apply to the exclusion of any particular national law"). That was a hypothesis that nobody had been willing to discuss, and his assumption was that that meant that the *lex mercatoria* or the like supplemented the Principles and he did not understand how that fitted with what they had said.

Bonell stated that what was intended here was that within the scope of the Principles all this applied - obviously, he did not deal with what was outside the scope of the Principles. Within the scope of the Principles, in that particular situation - arbitral proceedings, express choice by the parties of the Principles as the applicable law - the Principles may and should be applied to the exclusion of any particular domestic law subject to those mandatory rules which, as stated in comment (c) on p. 10, were to be applied whatever the proper law was. In Farnsworth's first vision of the relationship between the Principles and the applicable domestic law, he was referring to cases which were outside the scope of the Principles and then of course it was not possible to understand the relationship between comments (b) and (c) which addressed the question of the relationship between the Principles and the applicable domestic law within the scope of the Principles.

Farnsworth indicated that he did not understand the difference.

Drobnig indicated that he understood the difficulties, but did not share the text of the comments. He had the same objection against the last words of the second whole paragraph on p. 5 ("might even be applicable to the exclusion of any domestic rule of law") as against the last words on p. 4 ("in lieu of one or another particular domestic law"), as that simply went too far. The two phrases gave the impression that any national domestic legal provision could be excluded in this way and that was not true. It might be true within the scope of the Principles, but in the text that went too far.

Farnsworth added that this seemed an elaborate theoretical construction that he could find no basis for in Art. 1.2. It created

something that he could not find in the text of Art. 1.2 and he was not sure that the comments should do that.

Bonell suggested that the concerns expressed could be met by making clear in the first paragraph of p. 4 that this referred to what came within the scope of the Principles and not to what was clearly outside their scope. He wondered whether with that proviso everybody could agree that then within the scope of the Principles the exclusion of any particular domestic law, subject to the mandatory provisions, was a possibility. If they agreed on this, one could on p. 5 envisage using the language suggested by Farnsworth, i.e. adding something like "of course parties should still be aware that even within the scope of the Principles there might be questions which are not expressly settled and for these occurrences Art. 1.7 [...] but furthermore there are questions which are clearly outside the scope and for the satisfactory settlement of these issues parties are advised to indicate if possible the applicable domestic law".

Maskow observed that he had understood there to be a third category, i.e. where everything had to be settled by the Principles without going back to national law and wondered whether that category was no longer there. He had understood the ICSID arbitration case on p. 5 in this way.

Brazil observed that ICSID really was an autonomous system which, if it operated properly operated quite independently of national law. There was admittedly a decision of a Federal Court of Appeal in the United States which took a different view, but most people did not agree with that.

Lando had understood the discussion to say that the Principles were not comprehensive, that there was a large area outside the scope of the Principles and when parties addressed the Principles they should be aware of that. For the issues outside the Principles they could choose a national law or they could choose the *lex mercatoria*. If they did not do so - and sometimes they would not do so because they for example could not agree, then they had to envisage that for these issues which were outside the scope of the Principles a national law would be adopted for the interpretation of the contract by a court or an arbitrator.

Tallon did not agree with Lando when he said that the parties could choose the *lex mercatoria* to fill a lacuna in the Principles. He could not see how that was possible.

Lando objected that he had not referred to lacunae in the Principles, but to lacunae in areas outside the Principles.

Tallon did not think that the parties would find anything in the *lex mercatoria*, they would go directly to a national system. Furthermore, they said that the Principles were the *lex mercatoria*.

Brazil indicated that he thought of it as two circles: the bigger circle was the *lex mercatoria* and what they were saying was that as to that part of the issues that related to the general principles of the law of contract one could fill out the content of the *lex mercatoria* by reference to the Principles. The Principles were therefore a smaller circle inside that wider circle.

Tallon disagreed with this.

Huang felt that only one problem could be dealt with in each article. Art. 1.2 should therefore only deal with the question of when the Principles should be applied. The text itself was sufficiently clear, so the comments need not expand too much. The article itself did not deal with the problem of when the parties had agreed or had not agreed on applying the Principles.

Farnsworth recalled a discussion at the meeting of the Working Group in Bristol which had related to the role of what in other drafts were reporter's note or a note of citations. In the Restatements of the law in the United States there were such reporter's notes which contained citations and occasionally contained assertions. They were said to be only the work of the reporter and did not have the authority of the body itself, but they did make it possible to compromise if the reporter had something very dear to his heart, as this could be placed in the reporter's note. Those notes did contain citations of French, German or other national sources as well as international sources. The Group had discussed what should go in the comments and had concluded that national citations should not go in the comments, but that international citations perhaps might. He felt that the citations of ICSID and the UNCITRAL Model Law did not help particularly. Particularly as regarded the second paragraph of comment 2, he did not know what he was to conclude from this paragraph: that somehow the ICSID rule applied for the Principles? It would at least need a sentence to say so. Rather than putting another sentence making the comment longer explaining this, he thought it might just as well be deleted He would say the same about the earlier citations, particularly the one at the end of the previous comment ("Also under the 1965 Convention [...]"). He was not even sure that it was necessary in the comment to support the assertion by referring to CISG; if there were a reporter's note this could be said in that.

Bonell recalled that it had been felt that no reporter's notes would be made. Secondly, as to what was to be done in the comments themselves, it had been suggested that no national laws should be quoted, in principle not even those which were clearly the model, just in order to avoid the speculation that only two or three legal systems had been taken for guidance. As to Farnsworth's remarks on the reference to Art. 7, he had no difficulty whatever in striking it out. As to the citations of the UNCITRAL Model Law and of the ICSID Convention, he thought that these instruments clearly introduced a new development. The UNCITRAL Model Law on arbitration

had introduced this new development derived from French domestic law, so such a reference was of some use to help the reader by indicating that it was not something imaginary. This was even more the case with respect to ICSID, because under Art. 42(1) of that Convention, if parties decided to adopt the Principles this meant that in addition to the ICSID Tribunal itself, every State court had to forget about any national law. He thought that this was of such importance for their purposes that perhaps it was necessary to refer to it. *Mutatis mutandis* this might be necessary also as regarded the other provision in Art. 42(1) which stated that if the parties did not say anything the arbitral tribunal must apply such rules of international law as may be applicable together with the rules of the law of the contracting State party to the dispute.

Lando felt that it was a good idea. He added that when quoting ICSID he would even say that "such rules of international law as would be applicable" was intended to be not only public international law but also general principles of law as recognised by civilised nations.

Maskow had no objections as regarded the citations of international conventions.

Furmston was worried by the fact that they seemed to be going off into a discussion of the law of arbitration. The question was not simply what the arbitrator would do, but what would happen if one had to enforce the arbitral award. In practice one would not get the money if one did not go to the national courts. The question was whether national courts would have access to the defendant's bank accounts to enforce the arbitral award if the arbitral award was based on the Principles. He saw the relevance of the UNCITRAL Model Law, because those countries which had accepted it presumably had enacted rules which would enforce the awards.

Brazil observed that the same would be true of the parties to the ICSID Convention: they would have to have laws immunising the arbitrations in that system from local courts.

Bonell suggested that an express reference could be made in the first paragraph to the fact that what was laid down here related only to those matters which fell within the scope of the Principles. The same then applied to the second paragraph on p. 5, in relation to which he understood the Group to agree with Farnsworth and Drobnig who suggested adding something to the effect that parties should be aware that whatever they decided to do with respect to the Principles, as regarded questions which fell outside the scope of the Principles the problem of the law governing those issues still had to be settled and might therefore in practice arise, and for this possibility parties could consider stipulating the domestic law which should govern these issues. A reference to Art. 1.7 could be made. As to the distinction he had been trying to draw between the consequences which a reference to the Principles by the parties in their contract might have, a first consequence would be what he had referred to

as the traditional view, the second that which began on p. 4 with "The situation may be different [...]". This was clearly a continental way of approaching the problem, as the underlying concept was the distinction, which was fairly clear and well-known on the continent, between a contractual incorporation of rules of law, even of a particular domestic law, and a true proper choice of law. The distinction was first, as concerned the admissibility of such choices, that the true choice of law was limited to international situations, everything else fell under a mere contractual reference. As to the effects, the differences were mainly, but not exclusively, related to the impact of the mandatory law on the rules thus chosen, i.e. in the case of a purely contractual reference any mandatory rule whatsoever of the applicable domestic law would prevail, while in the case of a true choice of law the impact of the mandatory law on the rules chosen as the applicable law was less strong, because in the traditional rule if A chooses to apply the law of country X instead of the otherwise applicable law of country Y, country Y's mandatory rules will no longer apply whereas the mandatory rules of the law of country X would apply instead, except for those mandatory rules of country Y which claimed to be applicable irrespective of what the otherwise applicable law was. Another approach was that one could immediately stick to the consequences and develop the whole matter under Art. 1.5, or at least to put the emphasis there. A possible objection to such an approach would be that readers might feel lost if it was not more or less conceptually explained here, and secondly that as the impact of mandatory law was only one effect of this distinction, to say here that the only effect was that of mandatory law, see Art. 1.5, could perhaps be misleading. The third paragraph could perhaps be redrafted so as to no longer incorporate the reference to Art. 28 UNCITRAL, but to go ahead after the reference to *aimables compositeurs* with State courts and then "following this approach" where of course a clearer reference to Art. 1.5 could be made, "for an express recognition of the freedom of the parties to choose non-national law as the law applicable, see Art. 28 of the UNCITRAL Model Law", so that the whole quotation would be shortened considerably and put more as a footnote.

Drobnig wondered whether the very strict juxtaposition of incorporation as rules of law on the one hand, and reference to a sytem of law on the other hand was really quite up to the modern conception of private international law. If one looked at the *1980 Rome Convention on the Applicable Law*, the parties there could submit different parts of the contract to different systems of law. One could say that the Principles were rules of law and that therefore the parties would, under the Rome Convention certainly be entitled to make a reference to these rules, but of course for other parts of the contract they could refer to another legal system. It was no longer a case of mutually exclusive alternatives, they now stood side by side. That would take away some of the difficulties which he saw between the idea of a mere incorporation and the reference to system of law.

Bonell observed that while the possibility that parties choose the

Principles for, for example, formation, and the law of Ruritania for performance and the law of Arcadia for non-performance existed in theory, at least according to the Rome Convention, he wondered whether they really should deal with that in the comment on Art. 1.2, whether this really would not go too far. What was even more important, the overwhelming view was that the term "law" in the Rome Convention was to be understood as a national system of law, except in the case of Art. 3(3) which stated that parties may choose whatever law they want even in a purely domestic setting, provided that the mandatory rules of that particular domestic law applied and this was what was stated in the second paragraph.

Lando observed that according to most comentators the Rome Convention did not allow courts to choose the *lex mercatoria*, i.e. a non-national legal system could not be chosen by the court under the Rome Convention. The Principles could therefore only be chosen by incorporation. Arbitrators had more freedom, even if he did not think that they could choose the Principles as a party reference, whereas they could choose the *lex mercatoria* as a party reference.

Tallon did not think that they should encourage partial reference. Of course it was possible, but he was not so sure that it was a general trend. They should try to have the Principles adopted as a whole.

Maskow recalled that the Berlin Arbitration Court had had a case (case 126/90) in which part of the Principles had been referred to, particularly the section on hardship, in order to solve a particular problem.

Coming back to comment 2, Maskow felt that it would be better if in the first paragraph a full stop were placed after "law" in line 7, and a the next words be modified to saying "Instead of applying the law of a single State the parties increasingly base [...]", as the way it was presently formulated it was very difficult to understand. Furthermore, on p. 6 the first paragraph of comment 3 said "[...] the applicable law generally lies in the rudimentary character [...]", he had doubts as to the use of the word "rudimentary" as it referred to national law and national law would be less rudimentary than the Principles. Thirdly, the end of the second paragraph of comment 3 said "[...] the advantage of avoiding the application of a law which in most cases will favour one of the parties" and this was not clear. The advantage for one party was that it was his own law, and this was a formal advantage, not an advantage in substance, because whether materially this or that other law was in favour of one party or the other depended on the problem.

As to the "rudimentary" character of national legislation, Bonell explained that the intention was to refer to not too well developed legal systems and these did exist. How one should call these systems was up to the native English speakers. Lastly, he confirmed that the idea was that a legal system would be more familiar to one of the parties. The formulation should perhaps be changed as in most cases the *lex fori* would be the law of

the country of one of the parties.

Crépeau observed that in international conventions articles such as Art. 1.2 were in general in two parts: one stating where the convention applied, and the second relating to where the Convention did not apply. One very often found very specific provisions stating that "this Convention does not apply in the following cases". He wondered whether that principle ought not to be used for drafting as it was adopted in other parts of the Principles, e.g. Art. 3.19. He wondered whether to help the non-specialised reader they should not in one article of the Principles concentrate all the Principles that indicated to which matters the Principles did not apply.

Bonell found that to a certain extent it depended on the particular nature of the Principles. Here the distinction was not apply/do not apply, but shall be applied/may be applied. He observed that CISG had a number of provisions stating that the Convention did not apply to this or that issue, but everyone agreed that the enumeration was far from exhaustive. There were a number of issues which were obviously outside the scope of the Convention, such as agency, prescription etc. He wondered whether Crépeau envisaged a provision which attempted to be exhaustive and enumerate all the issues of contract law which were not covered by the Principles.

Crépeau stated that he would not have an exhaustive clause, but at least have an "among others" or "*notamment*" does not apply to this that or the other. To him Art. 3.19 should be placed here.

Maskow had misgivings as to having an enumeration of issues not covered, because it would require a special study to establish which things did not fall under the Principles to be able to mention them expressly. It was simpler to say what the Principles covered, and that everything else was left out.

Garro had not understood Crépeau's suggestion to be that of including an exhaustive list of all the topics of contract law that the Principles did not cover. What had transpired from the discussions was that to a certain extent the comments should make clear that the Principles had a more limited application than might appear to the uninitiated reader. He supported the view that the comments should include specific reference, by way of illustration, to areas of contract law which were not covered, including Art. 3.19. This would help to make it clear that the Principles did not stand by themselves to cover all areas of contract law. He was not persuaded that the article itself should state that the Principles should not apply to this or that, mainly because if they put something of that kind it would have to be exhaustive and he thought that it would be difficult to have an exhaustive list of items of contract law not covered by the Principles. He therefore supported that the comments should make more clear that the application of the Principles did not stand by itself, that the Principles did not cover everything, that there were certain areas that were were not covered which should be mentioned by way of

illustration, and that therefore they were unlikely to be applied to the exclusion of any domestic law.

Lando suggested that this could be said in the introduction.

Bonell agreed, but felt that it would be even more appropriate to deal with this in comment (d) under Art. 1.7, in which he began by indicating that a number of issues which would fall under the scope of the Principles were not expressly settled by them. Here he clearly addressed the lacuna situation, but did not mention that there were a number of areas which were not in the scope of the Principles and therefore were also outside Art. 1.7. A separate paragraph could perhaps high-light that either because the Principles themselves expressly said so (Art. 3.19) or because it followed from the general concept of the Principles (third-party rights etc.) there were areas which were to be considered outside the scope of the Principles and would therefore in any event be covered by other sets of rules.

Maskow observed that the case of the Principles was different from that of CISG because CISG only dealt with sales law whereas the Principles were intended to be of general application. They were all aware of the difficulties which had arisen with CISG, particularly with regard to Art. 4 which stated that certain issues were not dealt with even if certain questions of validity mentioned in Art. 4 were dealt with anyway in certain connections. Furthermore, the Principles had a different degree of generality. If one spoke of performance or non-performance then the rules dealt with that, but the Principles also had general rules like the rules on usages and good faith, and those rules could be applied to nearly every problem of contract law, even to those problems which had not been dealt with in detail in the Principles. This meant that a certain problem could be partly covered by the Principles and partly not. For example, prescription was not covered by the Principles, but the prescription rules which were applicable were to be interpreted having regard to the international character of the contract and this was in the Principles. He would therefore be very reluctant to say expressly that for certain problems the Principles had no importance whatsoever.

Garro observed that in delimiting the scope of the Principles they had not gone so far as to say that the Principles had no bearing on those issues. The question was related to the wording of Art. 1.7(2), which spoke about issues not expressly settled, and that was the point they were discussing. Issues that were not expressly settled might nevertheless be influenced by the general principles of the Principles. His suggestion was to make clear in the comments that some issues were not expressly settled.

Huang wondered whether "*lex mercatoria*" really appeared in modern commercial contracts. If these words were not actually used in the contracts, she preferred not to have them in the text of the article but only in the comments. She suggested using "usages and customs of international trade" instead of *lex mercatoria*.

Bonell suggested including "usages and customs of international trade" also in the text.

Lando indicated that *lex mercatoria* was spoken of. He thought that it was useful to use *lex mercatoria* as it included not only international usages. The sources used by an arbitrator who decided an issue under a non-national law were many - international usages, even public international law, standard contract forms, the common core of the legal systems, - and all these sources were included under the *lex mercatoria*. He hesitated to include "usages and customs of international trade" in the text of para. (2)(a).

Maskow had no objections against mentioning the *lex mercatoria*, but was not sure that this kind of expression was very frequently used in contracts. He himself could only remember one case where such an expression had been decisive.

Farnsworth stated that the term *lex mercatoria* had also troubled him. Most lawyers in the United States would regard it as a last resort to have to do this, and to say "quite frequently" raised it to a level that in his experience was not justified. He suggested "sometimes state". He was also not sure that arbitrators increasingly based their decisions on principles, and again suggested saying "sometimes". There was also among academics in the United States a tendency to question assertions like "frequently" and ask where they had the statistics that indicated this, and one avoided that by saying "sometimes".

Bonell observed that there was a difference between the United States and Europe, as it was more frequent in Europe, and again in continental Europe it was much more frequent than in England, which was understandable as the English and the Americans were much more confident in their national law and able to impose it on their trade partners, while those who started from a weaker point of view thought that this was the only device to escape imposition on the part of the English and the Americans. He admitted however that "quite frequently" might be exaggerated. There were trade sectors - investment agreements, concession agreements - where it was much more frequent than in others, but "sometimes" might be fairer. He asked the native English speakers of the Group for advise on the title of comment 3 on p. 6 ("The Principles as a substitute for the domestic law otherwise applicable").

Brazil suggested that "supplement" might be used instead of "substitute".

Crépeau pointed out that comment 4 dealt with the Principles as a means of interpreting and supplementing existing international instruments.

Lando pointed out that in this case the Principles replaced the domestic law.

Brazil pointed out that comment 4 dealt with the Principles supplementing international instruments, whereas here it was a case of supplementing domestic law.

Bonell observed that "supplementing" would indicate that one applied domestic law but that there were lacunae and for these the Principles would apply. He recalled the discussion in Miami according to which they did not suggest by this rule that if there was a gap in the national system one applied the Principles. On the contrary, the assumption was that a national legal system had no gaps. The situation addressed here was that where it proved impossible to know the relevant rules because one did not have access to them. He indicated that there were plenty of cases, in Italy as well as in other countries, where the court had come to the conclusion that: (a) according to its own conflict of laws rules the law of Ruritania applied, but (b) it was just impossible or it would be too burdensome to ask parties to prove it, and therefore they immediately turned to the *lex fori*.

Brazil indicated that in Australia this was put in the way that if expert evidence was not to be had on the question of what the foreign law was on the point in question, it was presumed to be the same law as the local law.

Furmston stated that basically what they had suggested was to substitute the presumption that the Ruritanian law was the same as the Principles, rather than the same as the law of the forum in those situations where it was impossible to find an expert on Ruritanian law.

Lando referred to para. (3), which stated that "The Principles may provide a solution to the issue raised when it proves impossible to establish the relevant rule of the applicable law". They had had a discussion on this in Miami, and had come to the conclusion that they should use the word "impossible", but that was not quite in harmony with what was stated in comment 3 on p. 6, i.e. that recourse to the Principles might be justified not only when it was impossible but also when it was too costly or difficult. The word "impossible" was therefore not quite adequate or relevant here. By saying "impossible" they imposed a rule of procedure upon the judge, as they said that the Principles should only be applied if it was impossible. There were many different threshholds here, some countries applied the *lex fori* at a very early stage, some countries only did so when it was absolutely impossible, but by saying "when it proves impossible" they told courts how their law of civil procedure should be and he did not think that they should do that. He would therefore say "The Principles may provide a solution to the issue raised when the relevant rules of the applicable law have not been established".

Crépeau had sympathy for Lando's views. If they did not change the text they should at least revise the commentary.

Bonell recalled that in Miami the feeling of the majority had been that the text should use very strong language so as to make it clear that it really was the very last resort. They obviously could not impose a rule of procedure, and the only way to indicate that it was the last resort was to use the concept of "impossible", on the understanding that the comments should explain that it was not only absolute impossibility, but also economic impossibility.

Furmston did not feel that the text should be reopened. He could not see why the comments could not be modified slightly to say that what was meant was not literally impossible but rather more than difficult.

Brazil suggested talking about something "beyond the limits of practical possibility."

Furmston thought that if the comments started with a slightly different point and said that this was not simply a provision aimed at gaps in the pure sense, which perhaps did not exist in theory, but at gaps in the practical sense, i.e. where it was very difficult in real life to establish without disproportionate effort what the rule was, either because the law was obscure, or because of the absence of adequate experts. The way to sell it was to say that this was to be preferred to simply applying the *lex fori*.

Garro suggested relying on the Summary Records of the Miami meeting, which at the end of the discussion on this article indicated that Bonell himself had explained that it was not a question of impossibility of applying the law but of impossibility of having access to the foreign law, which was the question of finding the foreign expert (P.C. - Misc. 18, p. 36). In the comments instead, when he said "whenever the research would involve disproportionate efforts and/or costs" this mostly concerned the term that noone wanted there, i.e. "impractical". The Group had decided not to use this word because they had not wanted the lawyer not to exhaust the means to find the law. He therefore suggested saying that impossibility was not limited to the fact that there was no law on that point, that there might be someone in Ruritania who knew about it, but to impossibility to have access to the law.

Bonell indicated that he had on purpose disregarded this, because logically speaking Crépeau was right: if one spoke of impossibility, then strictly speaking it was not impossibile to have access to the law of a country because one only had to go there and to make a sufficiently lengthy enquiry and sooner or later one would get an answer.

Crépeau recalled that it was all the more important to explain by way of comment what exactly they meant, because under Art. 6.2.2 they had made a distinction between impossibility in law or in fact and right after that they had referred to where performance was unreasonably burdensome or

expensive, so there "impossibility" meant "impossibility" and there should be parity of reason from one article to another.

Lando feared that this provision as it stood would become a dead letter, because every legal system had rules of legal procedure which decided at which point in time they should turn to the *lex fori* or to other systems, and they were saying that when it was impossible judges could turn to the Principles. In fact judges might apply the Principles, but they would do so at the point in time and under the conditions which their rules of civil procedure prescribed.

Brazil observed that the article referred to the impossibility to establish, and it was the question of access to the law that they were focussing upon and that must mean access to that court or that arbitration, dealing with that particular matter, so there was a little bit of room to move and he could see the rule having some scope of application.

Drobnig observed that there was no comment on para. (2)(b), and wondered whether that was self-explanatory.

Bonell indicated that the first paragraph of comment 2 should cover both cases: it began "Parties [...]", continued "Equally, arbitrators [...]" and then referred to the ICSID Convention which also referred to the case where there was no express choice by the parties. Literally speaking there were two different situations, but he had come to the conclusion that for their purposes they should be treated together. One had to be very careful in addressing what was in para. (2)(b), because unless it was an arbitration case and unless other things were present, in an international contract which did not contain an express choice of the applicable law the common approach was still to look for the appropriate domestic law on the basis of the conflict of laws rules. He had treated the two together on purpose, and had given the title "The Principles applied as *lex mercatoria*" not "The Principles applied because of the parties' reference to the *lex mercatoria*".

Brazil wondered whether some explicit reference in the comments to para. (2)(b) might not be necessary.

Bonell stated that it worried him a little to take, e.g., the second sentence of the first paragraph of comment 2 and the ICSID out and to make them into a separate section.

Drobnig indicated that that scepticism should be expressed and not just swept under the carpet, and also the few situations which he could think of should also be spelled out. It could not remain as it was if the title had a specific reference to lit. (a).

Brazil agreed with Drobnig.

As to the *amiable compositeurs*, Drobnig's view of the *amiable compositeurs* was that they were not bound by rules of law, so he could not see how they came in here at all.

Bonell recalled that the issue of the *amiable compositeurs* was a very controversial one, because there were those who maintained that they were not bound by any rules of law, there were those who maintained that they were not bound by a particular domestic law, and there were those who said that they were bound only by mandatory rules of internationally binding force. The point he had wanted to make was only that if arbitrators were authorised to act as *amiable compositeurs*, why should they not be encouraged to make use of the Principles, which could be seen as an expression of *ratio scripta*, of fair rules of behaviour?

Drobnig indicated that a reference here clearly implied that he was taking a position on a very controversial point. He did not think that the Principles should expose themselves unnecessarily to taking a position on points which were internationally very controversial. He could see no harm in deleting it.

Lando agreed with Drobnig, particularly as he did not quite agree with Bonell that someone asked to act as *amiable compositeur* would be expected to use the Principles. He would say that such a person should look for the most expedient solution and should not just be advised to use the Principles.

Brazil observed that in Australia *amiable compositeur* was translated to mean that the arbitrator was required to act according to equity and good conscience, and that meant that he had to apply his own sense of justice to that particular case. If he said that he would do this by adopting the Principles that was a point on which there could be an appeal to the court.

The Group decided to delete any reference to *amiable compositeurs*.

Article 1.3

Opening the discussion on Article 1.3, Crépeau observed that as Art. 1.3 was written it was not true, because it was not true that parties were free to enter into a contract and to determine its content as there were Arts. 1.5, 1.6, 1.8, 3.20, 5.21, and 6.4.13 which all brought reservations to the general principle of freedom of contract. He suggested saying that "Parties are free to enter into a contract and to determine its content, except as otherwise provided in these Principles".

Furmston observed that that was not true either. The absence of freedom was at least in part external.

Lando considered Art. 1.3 to be superfluous, and that it was contained in Art. 1.4 which said that a contract validly entered into was binding upon the parties.

Bonell drew attention to comment (c) on p. 8, and stressed that the assumption was that the Principles were composed of two equally important parts: the rules and the comments, so sometimes it was reasonable to state the rule in the rule and then further develop the rule and possible exceptions in the comments. The substance of comment (c) was that there were two kinds of limitations to the parties' freedom of contract: one was an internal one (Art. 1.6) and one was an external one (Art. 1.5). With the addition Crépeau had suggested only the internal limits would be covered, because "unless otherwise provided in these Principles" could be understood as only those provisions in the Principles which stated that some of their provisions may not be derogated from by the parties. In addition to this kind of limitation of the autonomy of the parties, one also had to mention the external limits to which only Art. 1.5 made an indirect reference. He wondered whether it might not be sufficient to draw parties' attention in the comments to the fact that what was stated in the rule as such was only the rule, but one should not forget the exceptions.

Crépeau observed that when the Group was together as jurists it was quite possible for them to say one thing and for everyone to understand that they meant something else, but if this document were not to go only to specialists - arbitrators, jurist and non-jurist arbitrators, - they had to explain the rules, and not derogate from them, in the commentaries. The commentaries had to be a comment on the rule as it was, and to say in a commentary that there were of course limitations to a general principle which was not stated in the Principles was not good legal writing. A rule had to say what it meant and had to mean what it said.

Drobnig felt that Crépeau was overstating the case. There was no legal rule which stood on its own, they were all inter-related, and it was obvious that freedom of contract was an extreme expression of one principle, and that of course it was modified and the modifications were clearly indicated in the comments to Art. 1.3 and in the following provisions. He felt that that was clear enough. On the other hand, these days it was a very good thing to express the principle of freedom of contract for international contracts. He therefore felt that they should stick with the Principle as it was.

Maskow felt that as far as legal provisions were concerned the question was not whether they were true or not, but whether they were valid or not, because legal rules did not describe reality. Whether or nor they were valid depended on what was laid down and if they laid down such a rule it was valid except to the extent that other rules influenced its validity. He saw no contradiction here. It was not always possible to indicate all other provisions which might influence a given provision so he could therefore live with the article as it stood.

Huang agreed with Maskow. She thought an indication in the comments would suffice.

No further comments being forthcoming on Art. 1.3 or its comments, it was considered to be adopted.

Article 1.4

Opening the discussion on Art. 1.4, Crépeau recalled that in relation to this article it had been felt necessary to bring in the reservation on the binding character of contracts at the end of the article.

Drobnig observed that the title of the article referred to "agreement" whereas the text of the article spoke first of a "contract" and then in the second sentence of "agreement".

Bonell had hesitations to use "contract" as the concept of "contract" was far from universally accepted, there was no total coincidence.

Furmston had no problems with changing "agreement" to "contract" in the title of the provision.

Farnsworth indicated that in the United States a big thing was made of the difference between "contract" and "agreement". The most common general difference, leaving aside the UCC, was that a contract was often thought of as a binding agreement, so that the text of the provision was somewhat tautological when it said that a contract was binding as by definition a contract was binding. The main problem was that a reader might have the same reaction Drobnig had had, and say that one word was used in the title and one in the opening phrase and that seemed objectionable.

The Group decided to change "agreement" to "contract" in the title of the article.

Hirose observed that in Japan the importance of good faith for the binding character of agreements was very great. He wondered whether in the comments to Art. 1.4, Art. 1.8 on good faith and fair dealing was referred to as a rule or principle which restricted the binding character of the agreement. He saw no reference to Art. 1.8 in the list of articles referred to under comment (b). He suggested it be included.

Bonell observed that to quote Art. 1.8 as an exception to the principle of *pacta sunt servanda* would perhaps go too far. In certain circumstances there were exceptions to the *pacta sunt servanda* principle in the application of the principle of good faith, and these specific exceptions were expressly dealt with also in the Principles (e.g. hardship). He therefore wondered whether it was advisable to quote the general principle of good faith as such as an exception, in addition to the

single instances where the Principles did provide an exception to the rule that came under Art. 1.4 and which could be considered to be an application of good faith.

Crépeau observed that Art. 1.8, good faith and fair dealing, was an integral part of the contract so it did not come as an exception. The exception was in Art. 1.8(2).

Hartkamp doubted that it would be wise to include such a specific reference to good faith in the present context. It was fortunate enough that they had expressed a general principle of good faith in the Principles and it might go contrary to their purposes to make it too clear that in some cases it might have the effect of derogating from the binding force of the contract. It might be more acceptable in national law than in international instruments such as the Principles.

Komarov observed that the first sentence of the provision could be interpreted not only in general terms, but also as an indication that the Principles did not cover the precontractual relationship of the parties. If this was so, he suggested that this should be mentioned in the comments.

Bonell indicated that he would definitely not infer from the present wording of the text or of the comments that they intended to exclude precontractual liability from the scope of the Principles. If one spoke in terms of "contract", and the provision stated "A contract validly entered into is binding upon the parties", he wondered whether that really meant that before there was a binding contract there was nothing, as the traditional common law doctrine said. The civil law systems spoke of precontractual relationships, so it was not excluded.

Farnsworth observed that on p. 15 the last sentence of the first paragraph of the comments said that "the parties' behaviour throughout the life of the contract, including the negotiation process, must conform to good faith and fair dealing". He was not sure that that bound them, but it was some evidence of something.

Hartkamp pointed out that there was an article on this also in chapter 2, so that made it clear that the principle of good faith extended also to the precontractual phase.

Komarov felt that it would be wise to mention expressly in this article that it was not only the contractual relationship which was covered.

Bonell had problems following Komarov, as this article only dealt with the binding force of a contractual agreement. Many cases of precontractual liability did not require a binding agreement, quite the opposite, they arose because there had been no binding agreement.

Crépeau referred to comment (c) on p. 9: when one stated the principle of the binding character of the contract that principle in effect did not deal with third party rights, because third party rights within the contract was a matter of the effects of the contract. A contract could be perfectly binding upon the parties but may also have effects on third parties which they might assert in the contractual sphere. For example, an impresario enters into a contract with a concert hall in order to allow Michael Jackson to come to Paris or to Rome for a certain amount of money. This was a three-party contract: did the Principles merely say that in the case of the contract between the impresario and the concert hall Michael Jackson had no contractual standing under the Principles and that all of this had to be decided under the applicable law governing the contract? The first sentence said "A contract validly entered into is binding upon the parties": once they had said that, they had merely said that once a contract had been validly entered into there was a creditor and a debtor and one could require performance and the other might be forced to perform, but that principle had nothing to do with whether a contract might affect third parties contractually or extra-contractually, that was an entirely different question. It seemed to him that the effect of this was that the commentaries added a paragraph ("Effects on third parties not dealt with") which did not relate to the rule that was laid down.

Bonell recalled the discussion in Miami as having brought up not only *pacta sunt servanda* but also privity of contract which was equally important in some jurisdictions, or at least it was a common way of understanding *pacta sunt servanda*. In other jurisdictions this was not at all generally accepted, or at least it was not accepted on those terms. Actually even in the former jurisdictions there was a growing tendency to overcome this narrow conception of privity of contract, but since this was such a complex area where so many differences existed it was better not to touch it. By stating the principle they intended to make it clear that although they did not deal with these possible effects, they did not intend to deny them as one might think if one were just reading the text.

Brazil indicated that applying Bonell's explanation to the example Crépeau had given meant that they were saying that nothing in the principles would prevent Michael Jackson from seeking to enforce those provisions that related to himself.

Crépeau understood that the Group did not want to deal with contractual rights of third parties and he could well see that it was very difficult and complex, but the way to settle the question of not dealing with it was not simply to put it as a comment to the binding character of the contract, because they were two separate problems.

Bonell indicated that a fairly common way of reading "A contract validly entered into is binding upon the parties" was in the sense of "is binding only upon the parties". This was addressed by comment (c) which said that they did not want their text to be understood in this way.

Article 1.5

Opening the discussion on Art. 1.5, Farnsworth expressed his embarassment at having encouraged the Rapporteur to be brief, and then finding that at the bottom of p. 10 he might have been too brief. He thought that the reader who was not expert on private international law might have a little trouble with the sentence because it placed in juxtaposition rules of domestic law which were mandatory irrespective of which law was applicable to the contract, with, in the preceeding paragraph, rules of the proper law from which parties could not contractually derogate. It was absolutely essential to understanding this, and to understanding the comment to Art. 1.2, that one realised that these were different things and understood what they were. He agreed with the substance of the comment but thought that at least a couple more sentences explaining that there were mandatory rules and mandatory rules would be very helpful, particularly as there was a well developed scheme of a German scholar which made this distinction between contractual incorporation and reference to a system of law with the consequence of a difference in mandatory rules. This was entirely unknown to ordinary students of law in the United States, so a little more was needed.

Bonell wondered whether the new edition of the American Restatement on the conflict of laws had a provision which spoke in terms of "internationally mandatory".

Farnsworth stated that they made the same distinction and if one spoke in functional terms lawyers in the United States would understand, but if it were assumed that they knew of the scheme, which was the assumption in Art. 1.2 leading up to this, they would be lost right at the beginning. He also felt that one really had to explain the difference between rules of domestic law which are mandatory irrespective of which law is applicable to the contract and rules of the proper law from which parties could not contractually derogate.

Bonell suggested using a formula such as "internationally mandatory rules" or "internationally binding rules", because this was a terminology which was used in German, French and Italian.

Farnsworth stated that they needed a sentence saying that in most legal systems, or generally, some rules were of such force that one could not avoid them simply by choosing another legal system and that these were the kinds of rules considered in comment (c). He would not resort to any particular terminology, because they would lose a segment of the readership if they tried to do it by using terminology.

Crépeau favoured the suggestion put forward by Farnsworth, because as it read, when one said "which are applicable in accordance with the relevant rules of private international law" one only referred to half of a legal system, but there might well be rules in the local system in civil

procedure or in the law of family or in the law of contracts that were local but which were so mandatory that one could not derogate from them. It would therefore be preferable to broaden the last words of the article so as to include all types of rules, also substantive rules of the local system which might be so important as not to permit derogation.

Hartkamp suggested taking out "as a rule" in comment (a). He thought that this referred to the question that to the extent that one was allowed to choose the Principles as the law of the contract one might perhaps be able to derogate from normal mandatory rules but not from the ones which would be applicable irrespective of the law of the contract. He could conceive of no other exception. He would say that the Principles could never derogate from mandatory rules.

Bonell observed that the intention here was to state that as a rule, in 90% of cases, the Principles could not prevail, but that there were cases where they could prevail over certain mandatory rules as suggested in comment (c). For example, Art. 1341(2) of the Italian Civil Code required written approval of certain kinds of general conditions and was of a mandatory character. An Italian court, notwithstanding a reference to the Principles by the parties in their contract, would nevertheless consider that reference as a contractual incorporation and therefore if Italian law was the proper law of the contract it would apply Art. 1341. If the case was instead brought before an arbitral tribunal the reference to the Principles could be considered a true choice of law and at that point the arbitrators should dismiss a possible objection by one of the parties that the formal requirement of Art. 1341 had not been met in a given case, because the Principles and not Italian law were the proper law of the contract.

Hartkamp suggested that if this was so it should be spelled out, because "as a rule" was puzzling and if they were going to elaborate on the distinction between mandatory rules which might be set aside by a choice of law and mandatory rules which might not, he would put this here and not at the beginning.

Brazil observed that he would have felt happier if that particular sentence read "In other words, applicable mandatory provisions", as the question was whether or not they were applicable as mandatory provisions.

This suggestion was accepted.

Lando observed that there were three kinds of mandatory rules: those which did not apply to international contracts (e.g. the British Unfair Contract Terms Act which explicitly said that it did not apply to international contracts); mandatory rules which were applicable to international contracts to the extent that they were contained in the proper law of the contract and from which, if one chose another proper law of the contract, one would be able to derogate; thirdly there were the

directly applicable rules (*règles d'application immédiate*) to which reference was made in comment (c), which claimed application and which a court and an arbitrator would apply notwithstanding which law was the proper law of the contract. He suggested making this inventory in the comment.

Drobnig had difficulties with the last three lines of commend (d) ("the present article deliberately refrains from entering into the merit of the various questions involved and refers for their solution to the rules of private international law which are relevant in each single case"). He suggested expressing this in a somewhat different way. He thought that what was intended was that these were difficult issues of conflict of laws and that they were outside the scope of the Principles and that they therefore made a reference to the relevant rules of private international law. He felt that this was what should be said.

Article 1.6

Opening the discussion on Article 1.6, Brazil observed that "derogate from" in the third line of comment (b) did not cover what was referred to in the article as it also referred to "varying the effect of". He suggested bringing the comment into line with the article.

Drobnig referred to the end of comment (d), which listed a number of articles which were implicitly mandatory in character. This list included Art. 1.7, and he wondered in which respects this article was mandatory.

Bonell had understood that to be the general view in Miami, as it did not make sense to say that the Principles should apply but that in derogation of Art. 1.7 they should be interpreted according to English law.

Drobnig wondered whether he then meant only para. (1) of Art. 1.7. He found this paragraph to be incomplete as it only gave some guidelines. For the interpretation of contracts they had a whole chapter, and for the interpretation of the Principles only this very brief formula. He thought that parties would be well advised if their attention was brought to the fact that they could agree on more specific criteria for the interpretation of the Principles. If one had a provision which stated that parties might exclude, derogate from or modify the contents of the Principles then they must be able to fix different or supplementary standards for the interpretation of the Principles.

Bonell thought that it was one thing to add something to Art. 1.7 and another to exclude its application altogether or to replace it by entirely different criteria. He had thought that the feeling of the Group was that the two latter possibilities were excluded.

Maskow observed that there were two different versions of Art. 1.6,

the version in Doc. 51 ("The parties may exclude or derogate from or vary the effect of any of these Principles except as otherwise indicated herein") and the one in the consolidated text in Doc. 40 Rev. 9 ("The parties may exclude the application of these Principles or derogate from or vary the effect of any of its provisions, except as otherwise provided in the Principles").

Bonell indicated that he had not known what to do with the wording "may exclude the application of these Principles". He wondered what it meant considering that they were dealing with a non-binding instrument, whether it was possible to imagine a contract stating that "This contract shall not be governed by the Unidroit Principles".

Drobnig indicated that he could, if a party wanted to avoid that arbitrators or judges use the Principles. There were lots of contracts which said that they would not be governed by CISG, for instance.

Bonell agreed, but observed that CISG was a law.

Maskow and Furmston indicated that one could imagine that parties had agreed on *lex mercatoria* and said that the Unidroit Principles should not be used as a source.

Bonell felt that ultimately the same result was reached with the two formulations. He had thought that the version in Doc. 51 was more appropriate. He further objected that if there was a provision which started "The parties may exclude the application of these Principles" he had to devote a special paragraph to the case where the parties excluded the Principles as such, and he thought it would look very funny to say that parties could of course in their contract state that the Unidroit Principles should not apply. He imagined that many would react and wonder what they were talking about. The case of CISG was different, as it was a binding instrument which applied unless it was excluded, whereas the Principles were not binding and would not apply unless this were specifically provided for.

Furmston stated that if one did not tell the arbitrator not to apply the Principles he would apply them. If one wanted to apply general principles of international commercial law but did not want to have anything to do with the Unidroit Principles, then this should be possible and should be expressly stated in the comments.

It was decided that the version adopted in Miami which was reproduced in Doc. 40 Rev. 9 should be reverted to.

As to the question of the inclusion of Art. 1.7 in the text at the end of comment (d), Lando thought that it would be very strange if the parties agreed on the application of the Principles and then said that they would apply different canons of interpretation. He therefore suggested deleting

the reference to Art. 1.7.

This suggestion was accepted by the Group.

Hartkamp referred to the last paragraph of comment (c) on p. 12, which stated that "If the parties expressly agree on the application of only some of the chapters of the Principles [...], it is presumed that the chapters concerned will be applied together with the general provisions of Chapter 1". He found this an interesting and correct statement, but wondered whether it should not be inter-faced with the article because otherwise one could imagine that perhaps not all arbitrators or judges would understand the reference to the Principles in this way. He wondered whether this was sufficietly clear if it was set out in the comments, and whether it should not in fact go in a para. (2) of the article.

Farnsworth thought that if one were to make a change it would be in favour of deletion. It was hard for him to see how the Principles could lay down a rule for the interpretation of the language that itself incorporated the Principles. He would certainly not put it in the text.

Drobnig did not think it necessary to have an express provision, it would seldom occur that if one made a reference to the chapter on formation the general part would not also be included to the extent that it applied. He therefore thought it should be left in the comment.

Article 1.7

Drobnig wondered whether the canon of interpretation in Art. 1.7(1) was complete. Personally he felt that it was not, it only gave certain additional criteria, because there were much more developed canons of interpretation of international systems of law. The first issue was whether the additional criteria set out in this provision would be sufficient and if that was so then at least the comment should make it clear that they were only additional criteria. It was obvious that interpretation could not work only on the two criteria mentioned in the provision, but that the classical canons of interpretation would have to be taken into account, and these might be understood differently in different countries: in a literal meaning, in a historical meaning, in a systematic meaning, etc. All of this was not mentioned here, but certainly would come in and would come in differently in different countries. He therefore thought that there was a gap and if they decided that the gap should be left open, at least the comments should say so.

Brazil observed that para. (1) stated that regard should be had to the international character of the Principles, and that might pick up the relevant parts of the principles of interpretation of international instruments as laid down in the *1969 Vienna Convention on the Law of Treaties*.

Maskow had understood this provision in the sense that it should only indicate special elements of interpretation and not give the whole picture. It might be wise to make this clear in the comments.

Bonell had hesitations about raising in the comments the problem of the canons of interpretation which had to be added to what was expressly laid down, because, at least in theory, they were so very different. What should a commentator say - that there was a great variety of other canons of interpretation and nobody knew where they were? This could risk becoming a mini-treaty on interpretation, or alternatively a comparative survey, or just a reminder that this was not sufficient, that there were questions left open, but was this really an advisable approach? He reminded the Group that international conventions did not contain any such treatment of rules of interpretation.

Maskow thought that it would be sufficient to say that they were aware that there were established rules on interpretation and that they stressed specific manners of interpretation, that the striving for uniformity included the intention to reach uniformity in the rules of interpretation.

Huang observed that arbitrators in different countries might give different interpretations and people would like to have an authority to go to to get an authoritative interpretation, and she wondered whether the Principles or the comments covered this. Who should give the final answer?

Bonell observed that they were of course aware of the possible differences in interpretation, and of the possible difference in binding force with which the Principles could be used, depending on whether they were used as rules of law or as purely contractual rules, so to enter into this field, even if only in the comments, caused him some difficulty.

Tallon agreed that as the nature of the Principles was rather obscure, the rules of interpretation of domestic law or the rules of interpretation of treaties or of contracts could not be applied to them.

Drobnig observed that if the rules of interpretation of the Vienna Convention on the Law of Treaties were to be used, this should be spelled out, because then there would be a generally uniform standard in addition to the criteria mentioned in this provision. Such a reference was worth thinking about. As to the question of uniformity in interpretation it might be worth-while for Unidroit to see whether it would not like to establish a service or an information centre to collect arbitral awards and decisions delivered on the Principles and to offer that information for dissemination. That should then be spelled out under comment (c) as an offer for users.

Lando wondered whether there was a danger that the Principles, when interpreted in the United Kingdom, would be interpreted in the usual manner of interpretation used in the UK. In civil law countries and even in the

United States teleological interpretation was used and this was intended here. If there was such a danger then perhaps one could say something along the lines "These rules are to be liberally construed in accordance with their purposes [aims]", but if there was no such danger then there was no reason to say it.

Furmston indicated that experience suggested that different countries interpreted uniform instruments in different ways. The only effective way to fight that was actually to have good information. English arbitrators and judges would certainly have regard to how other countries had interpreted them if that information was available. He wondered whether the records of the meetings of the Group would be made available.

Bonell was not too comfortable with the rules in the Vienna Convention because even with respect to binding instruments he was not that sure that they applied directly or even should apply, because they for example put a very strong emphasis on the *travaux préparatoires* while, at least on the continent, the intent of the drafters was becoming less and less important, what was important was the purpose of the rule as such. The summary records of the meetings of the Group would certainly not be published.

Farnsworth felt that it was important to pay some attention to the *travaux préparatoires* and their role. The initial draft of the UCC had said that one could not look at the *travaux préparatoires*, and that had turned out to be one of the less successful provisions. He hoped that the summary records would be available in the Institute, they were official documents of the Institute, if they were not available in the Institute if the Principles ever had any significance in the United States his telephone would ring incessantly with people who wanted to get copies of them. In the countries he was familiar with it might make a difference as to what a court would do with these documents, whether one looked at them as statutes and applied a plain meaning rule or looked at them as contractual documents and applied some form of the parole evidence rule, he was not sure what the answer was but perhaps the most common initial question with respect to the Principles that would arise in the United States with respect to lawyers was to what extent they could collect a lot of documents that would help them interpret the Principles. He felt that they ought to say something about that somewhere.

Lando indicated that the European Group had tried to solve this question in its Art. 1.104(1) which stated that "These Principles should be interpreted and developed in accordance with their purposes", which opened the possibility of going to the sources where one could find this information. They then continued "In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application". This provision therefore had more factors than Art. 1.7.

the possibility of going to the sources where one could find this information. They then continued "In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application". This provision therefore had more factors than Art. 1.7.

Furmston observed that what one was trying to do was to discover what the parties intended when they had adopted the Principles, whereas parties at the time they adopted the Principles would often not have the vaguest notion of what had been said in the discussion, and there would also be the question of whether the relevant debates in actual fact were not those which took place in the Governing Council rather than the debates of the Working Group.

Brazil wondered whether one of the main points of this article was not to say that the Principles were autonomous and that it was not the usual sort of situation of what the parties to the contract intended. What they were saying was that when they picked up the Principles they really wanted them to apply them in accordance with the purposes the Group had around the table.

Furmston indicated that that was the notion which now existed in his system in relation to standard form contracts: if parties adopted a standard form contract, what they were doing was adopting the meaning of the standard form contract irrespective of what they thought it meant.

Drobnig felt that the discussion had shown that this was a very important point for preserving the uniformity of the Principles. He did not think that interpretation according to the purpose of the Principles should be put in the comment if it was not expressed in the text. The text of the article had to be broadened a little. He suggested saying that regard should be had to their purposes and to their international character.

The Group favoured broadening the article to include also the purposes of the Principles.

Hirose referred to Art. 1.8 on good faith and fair dealing. When Bonell referred to uniformity, was he thinking about having some guidelines also with respect to good faith and fair dealing? Should good faith be interpreted with uniformity or was it something different from the other Principles? The flexibility of the concept of good faith made it difficult to channel it in a particular direction. He himself felt that uniformity with flexibility would be very important.

Bonell pointed out that they all knew that the prime object was uniformity, but then commentators added that this should not be an absolute goal because one was obliged to deviate from this current of thought in some instances, either because one operated in a particular setting and/or the particular transaction was of a certain kind. As concerned a reference

to good faith in this particular context, the original draft had contained such an express reference but in Miami they had decided to get rid of it.

Farnsworth suggested the formulation "In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application".

The Group agreed to this suggestion.

Sono wondered whether the purposes would also include need to promote good faith.

Bonell agreed that to promote good faith in international trade was a very good purpose, but he hesitated to put it explicitly in the comments. He thought that as the text stated that the purposes had to be taken into account, the comments simply had to state that this was stated in the text in order to prevent those called upon to interpret the Principles from a narrow, purely literal interpretation. They had to develop the underlying purposes without explicitly mentioning good faith and fair dealing. If the Group instead felt that this should be done, he wondered why it should not then be stated in the text of the provision.

Sono agreed that the meeting in Miami had decided to take out any reference to good faith, but the reason this last amendment had been introduced was that in comparison with the PECL text some improvement had been felt necessary. First it had been suggested that the purposes should be mentioned before their international character, but this had been reversed, and the purposes had been stressed. It would of course be difficult to provide for good faith alone, but he wondered whether it would be good to have at least some difference with the PECL text in the comments.

Drobnig thought that the same result could be achieved by referring to Art. 1.8 in the comments to Art. 1.7, to say that this was expressed in such a way that the parties were obliged to observe good faith and fair dealing in international trade, but that as comment (a) explained that this was a general general principle underlying many of the individual principles, and it therefore had to be taken into account also in interpreting the Principles. He would have no difficulty in bringing good faith into Art. 1.7 in this way.

Garro referred to the summary records of the Miami meeting which on p. 62 indicated that Bonell had stated that it would not be desirable to include any reference in the text as to what would happen if para. (2) were not enough to settle that question, i.e. for cases which were not within the scope of the Principles. Bonell had expressed his conviction that one should not state positively that one had to go back to national law. He wondered however whether the comments should not say something about this.

Bonell recalled that the Group had decided to have such a proviso in the second paragraph of the comments on p. 5, and to have in comment (d) to Art. 1.7 a reminder that questions that were outside the scope of the Principles were not covered. This article on the contrary intended to address questions within the scope but not expressly settled by the Principles.

Maskow referred to the second paragraph of comment (d) on Art. 1.7, which started by referring to an example relating to Art. 2.12. He did not find the example convincing, as it said that Art. 2.12 should be applied by analogy also to the case where all the parties insisted that a contract not be concluded under those conditions. In his view it was self-evident and not an example of analogy, the problem was what happened if only one party insisted and the other did not.

Bonell admitted that the situation was clear if both parties insisted that there was no contract until agreement had been reached on a certain issue and nothing happened in between this, but quite often in complex arms-length negotiations there were in between agreements and there was an understanding at a certain point that other elements had to be settled and that only when these had been settled would the final contract enter into force, but then maybe one of the parties reopened the question by saying that they had advanced very far and that this could easily be left to be settled by someone else at a later stage, that the contract was sufficiently definite to enter into force. He could therefore imagine that even if at the beginning both parties agreed, one of them could later on one argue that things had developed in the meantime.

Maskow considered that then there would be a direct application of the article.

Brazil suggested Bonell consider whether another example could be given of application by analogy.

Komarov referred to para. (2) which spoke of the "scope" of the Principles. He wondered what this meant. If one read the comments to Art. 1.1 one could get the impression that the scope of the Principles was contract law only, specifically international commercial contracts, but there were problems which were connected with international contracts but which fell outside general contract law and it would be wise to mention in the commentary that the scope of the Principles was broader than general contract law. For example, restitution was not part of general contract law.

Bonell concluded that Komarov agreed with Garro that it should be made clear also here that Art. 1.7 applied only to questions covered by the Principles. He recalled that the Group had concluded that given the variety with which the classifications were made in the various jurisdictions, it was better not to touch upon this. They had in fact ultimately agreed not

to give positive criteria or indications as to what they considered to be included in or excluded from contract law. There were those who would say that restitution was clearly contract law.

Drobnig suggested that, in the light of the autonomous interpretation they had established, functional criteria coherent in the context be indicated, and not dogmatic criteria of national law. Some areas of restitution would be covered, for example restitution after termination of the contract, and this could be given as an illustration. He suggested indicating that a functional approach on the limits of contract law was utilised here.

Bonell wondered whether they were really sure that everything which even in such a functional approach could be considered to be contract law was covered by the Principles.

Drobnig objected that Bonell himself said in comment (d) that Art. 5.1.13 on place for performance should cover also restitution, i.e. he extended a principle of clear and pure contract law to an aspect of contractual restitution. He agreed with this, but felt that Bonell should not put out the underlying theory.

Bonell indicated that restitution was clearly covered because they had a provision on it so the question was settled from the outset. As he had understood Komarov and Garro, they should remind the user that Art. 1.7 applied only to questions falling within the scope of the Principles.

Komarov confirmed that he thought that they should indicate that the application of the Principles was not limited by contract law.

Bonell stated that he needed an example of something which was to be found in the Principles which did not belong to contract law, because according to some restitution would definitely belong to contract law. What worried him was that there were a number of issues that were clearly within contract law which were equally clearly not settled by the Principles: agency, assignment of the contract, sub-contracts, etc. He suggested seeing how the Principles developed, and hoping that arbitrators might find a solution in exploring areas not covered by further development of the general principle of good faith, etc. It was of course all right to hope this, but he doubted that they could really state here that they had to move from the assumption that whatever was contract law, even in a functional approach, was covered by the Principles.

Drobnig observed that it would be within the confines of the Principles, which was what was indicated in the table of contents. Agency was definitely not covered and was therefore not within the scope. He suggested referring to the table of contents of the chapters to set out that these subjects and anything which was functionally related to them were covered.

Furmston wondered whether the doctrine of privity of contract were within the scope of the Principles. He stated that to him it clearly was within the scope of the Principles because the Principles were general Principles which had to do with contract law. It seemed to him to be a classsic example of something which came within the scope of the Principles but was not expressly settled by them. The commentary merely said that they were not settled by the principle *pacta sunt servanda*. The Principles further said that the principle of consideration should not be bothered with - at least the comments said that and may be the text did as well - and it was seriously arguable in England that the doctrine of privity of contract was actually a reduction of the doctrine of consideration, therefore by analogy the Principles did provide a solution.

Bonell did not think it possible to answer Furmston's question with a yes or no, because this was first of all a problem of definition: what did they really mean by third party rights? There were contracts for the benefit of third parties, which was one thing, then there were the secondary duties of the parties which may affect third parties, and that was quite another thing.

Maskow had the impression that the difference between tort and contract was decreasing. If they started from the assumption that contract had a stronger binding force than tort, then the tendency was to expand the validity of contract rules to areas where it was doubtful whether there was a contract or not. If they took the doctrine of privity, this would then lose its force and there was a tendency to include more and more other persons in the contractual liability rules. They could not take a stand on these developments, but he felt that they should not prevent the Principles being interpreted in such a broad way, and he therefore thought that they should admit that they did not include the doctrine of privity in the law of contract and that they covered subjects which were not clearly contractual subjects in the traditional sense.

Article 1.8

Opening the discussion on Article 1.8, Brazil informed the Group that in Australia in the last month and a half a major decision had been rendered by the New South Wales Court of Appeal, in which the leading judgment stated in very strong terms that, at least in the view of that judge, good faith and fair dealing was a principle of law that existed in the common law of Australia. This confirmed a trend that had been evident for some time. It still had to be accepted by the very highest court, but he thought that it was a reliable indicator that it was just a matter of time for the principle of good faith and fair dealing to be completely accepted. In reaching this view the judge had relied very heavily on distinguished authorities such as Farnsworth, on the general position in the United States and also on what he understood to be the position in Canada, i.e. that good faith was accepted as being part of the law of

contract in Canada.

Crépeau stated that in a Canadian case the Supreme Court had said that there was no contract in which good faith was not an implied term.

Lando had problems with the first illustration which stated that "Buyer A is granted by Seller B an extension of twenty-four hours of the time fixed for acceptance". Acceptance could be made in various ways, e.g. by letter. He further recalled that in accordance with Art. 2.5(2) an acceptance was effective when it reached an offeree. He therefore suggested that they say "[...] for his oral acceptance". He also had difficulties with Illustration 4, because he thought that this example was not an example of good faith, but of *pacta sunt servanda*. He also had difficulties with Illustration 2 on p. 17 because in this example it depended on the level at which the course was taught. If the level was too high then the example was not so good, if the level was low then it was.

Farnsworth also had problems with the illustrations. He thought that it might not be such a good idea to put as the first illustration a pre-contractual illustration, as that was probably not the main thrust of the article. He further had a problem with style with assertions such as "cannot object", "may not object", "cannot complain", as one could always complain. If one was writing illustrations one had to say what it was in connection with the black letter that was the bottom line, and he thought that the bottom line had to be, for example, that there was a breach of a duty of good faith and fair dealing in the particular case. If that self-discipline were exercised it would help in Illustration 1, because he would be happy to take B's position in Illustration 1: A says "I tried to call you and noone answered the phone and I tried to leave a message and there was no machine" and B says "and what else?" and A says "nothing else"; B says "you did not accept then". The bottom line had to be that A's acceptance was effective, even though it was late - that had to be the conclusion but there was nothing that came late. He would add to Lando's difficulty that one could write and if one wrote and if it were late, then one would nevertheless be able to argue that it was effective though late because of the other factors and he thought that the reason one missed that bit of substance was that it was not enough to say that one could not in good faith object, one had to say that there was an effective acceptance and there was a contract, and on the facts there was no contract. This was something which ran throughout, and in each illustration one had to have something like "there is a contract" or "there is a breach of a contract" and not simply that a party can or cannot say something.

Tallon observed that the EEC Group had decided to render the idea by saying only *"bonne foi"* and not to say *"bonne foi et loyauté"*. The first proposal of a French version of the Unidroit Principles drafted by Crépeau's group said *"bonne foi et loyauté"*. It was important to decide whether when the Group spoke of *"bonne foi"* they spoke of both good faith and fair dealing. He did not think that *"loyauté"* added anything. On

Illustration 1, he commented that it would be understandable to a French lawyer to put this in relation to offer and acceptance. He thought one could have a more typical illustration, e.g. A sends B a notice to end a lease and B has to answer in ten days, but A knows that B has gone away for a holiday and will not get the notice in time to answer. There had been such a case in France where it had been said that this was bad faith. He also wondered why there was no illustration on the obligation to inform the other party which arose from the contract, following which one was in bad faith if one did not inform. This was a duty which arose both in the pre-contractual stage and during the contract.

Bonell recalled that in Miami the Group had already decided that the French version should speak of *"bonne foi"* only, whereas the English would speak of "good faith and fair dealing". As to the illustrations, he understood Farnsworth's remarks as to the way in which the conclusions were drawn, but sometimes he had some difficulties as it was not always a question of there is or is not a contract, there is or is not a breach, but just that a certain remedy was no longer available or was still available. Was there a contract in Illustration 1? He was not that sure: he had taken this illustration from a German commentary, and there no indication had been given that the contract was nonetheless concluded. One might only be responsible for pre-contractual liability. He had instead immediately taken Lando's remark.

Lando indicated that having heard Farnsworth's remarks, he felt that the illustration would be more interesting if there was a contract.

Bonell wondered whether that was not precisely the same kind of situation as that suggested by Tallon, where A has to give notice within ten days and gives it knowing that B is away. Here B gave A a 24 hour extension knowing that A could not reach him. He could not see a big difference. As to the duty to inform referred to by Tallon, if this duty related to after the conclusion of the contract there was the article on implied terms and he took it that an example would be given there. He indicated that he had had a general difficulty with the illustrations on good faith because there were a number of provisions in the Principles which were a specification of the principle of good faith, which other legislations or codes did not have. In for example Germany there was a huge amount of decisions, but most of them related to topics which were expressly dealt with in the Principles. As to Lando's point in relation to Illustration 4 which he had considered to be one of *pacta sunt servanda*, he had started with pre-contractual illustration on purpose because he had thought that this was the sequence, and here he now dealt with remedies, and the remedy was the withholding of the performance and the request for further guarantees, the emphasis being on the very last words that A had known of B's difficulties right at the beginning.

Lando did not think it was an illustration of that, he thought that it was a case of a contract being made under the presupposition that he was in

financial difficulties and he cannot invoke these financial difficulties if he wanted to get out of the contract. This was *pacta sunt servanda.*

Furmston observed that Illustration 1 only made sense on the assumption that the telephone was the only available instrument of communication. There were now very many ways of getting messages to people within 24 hours: there were courier services, faxes. So to have this example it would be necessary to make it clear that the telephone was the only possible means of communication. As to Illustration 1 on p. 17, it was clear that one could not just say that it was a standard term and therefore bad luck. In England the mere fact that it was a standard provision would not be sufficient to show that it was reasonable, in fact if anything the fact that it was a standard construction practice weakened the argument that it was reasonable. What he was saying was that in England where there was no provision of good faith and they practiced bad faith daily B would not be bound by the exclusion clause. He was not clear why it was thought to be an illustration of either good faith or fair dealing that B had no remedy. To him that seemed to show an extremely low standard of good faith or fair dealing. Did Bonell think that the mere fact that everybody in the construction industry excluded liability for consequential loss meant that they should be entitled to go on doing so?

Bonell recalled that the Principles had a provision on surprising terms in standard forms, and it said that they needed to be expressly accepted or they would not be effective. This was the general rule, and he thought that a term excluding consequential damage, which *per se* was not an unfair term but was just an exemption clause, would be surprising in many other trade sectors but was the rule in the building industry. He therefore thought that by invoking good faith and fair dealing in international trade one could not invoke the provision on surprising terms because one should have known that it was common contract practice.

Furmston observed that the illustration did not say that one should have known. Secondly, even if one should have known, it did not seem to him that it followed that one was necessarily bound, because the fact that expressly or implicitly all contractors established a cartel from which they excluded consequential loss did not mean that those who used the services of the contractors were as a matter of good faith obliged to accept this.

Bonell observed that the UNCITRAL Legal Guide said that in this sector this was common practice and there were a number of reasons to be found in literature as well as to why it was almost necessary to exclude consequential damage, so he took the clause seriously. Of course this was not true of every clause. There were, however, twenty pages in the guide explaining why it was reasonable in that particular trade to exclude consequential damages.

Furmston stated that the point Bonell was making was that common

practice required contractors to be entitled to exclude liability for consequential loss, but the example glided over that argument. It was not a self-evident argument that people who supplied services should be able to exclude liability for consequential loss. The illustration was a classic example of a situation in which the two parties were not in the same trade, because people who bought buildings often bought them only once in their lifetime and could not be expected to be familiar with all clauses used. It was not the same as somebody who was in the same trade as the supplier, who would know that sort of thing.

Maskow felt that this was not the point in this particular case. The question was whether, if liability had been excluded, it corresponded to good faith if the party who had done so now said that this was not valid. He agreed with Farnsworth that it was important to give a clear solution at the end of every illustration, particularly in Illustration 1, for which he still did not know what the solution was. Whether there was a contract, or whether there was a right to negative interest, was not clear.

Sono felt that in relation to Illustration 1 on p. 17 there might be some confusion, because it dealt with usages and fell within Art. 1.9. When they came to Art. 1.9 there was some qualification of this. If one changed the facts and supposed that there was no standard form at all but supposed that exclusion was widely practiced in the business, then, even if there was no standard contract or clause, he was sure that in such a situation the result would be the same even if it was not a case of good faith at all. He therefore had some reservations on the appropriateness of this illustration.

Hirose also had problems with Illustration 1 on p. 17 as one had to see what the delay was due to. If the delay resulted from gross negligence that would be one thing. The principle of good faith would urge the court to see what the reason for the delay was and it depended upon the situation whether the exemption clause was reasonable or not. He therefore suggested indicating that the delay was reasonable and not the fault of the constructor. He had hesitations about having an illustration dealing with standard terms and exemption clauses in relation to good faith.

Sono referred to Illustration 2 on p. 15. He wondered whether the result would be different if they did not have the good faith element. To him the solution seemed to be the result of the application of ordinary logic and to have nothing to do with good faith. B had agreed to do something and should therefore be responsible for what he was supposed to perform.

Bonell thought that in most, if not in every, case of good faith there was a spontaneous reaction to say that of course one had to do so, but some might argue that from a strictly legal point of view one did not have to do so. As to Illustration 2, which was taken from the Restatement, he was not so sure that it was so clear without the good faith element. He could even

imagine that in invoking the principle of good faith it was possible to argue that one did not necessarily have to reach this result. What did one undertake contractually? To communicate improvements, but was this not implicit as long as one was carrying out the activity? If one stopped production one would obviously no longer be under a duty to communicate possible improvements. In the Illustration A did not stop the activity but set up an affiliated company. At that point of course if it was 100% owned it was merely an organisational matter within the enterprise, and it was possible to argue that it was not in accordance with good faith to say that the affiliated company was a separate legal entity so A was no longer its concern, but was this so evident?

To Farnsworth it seemed a good subject for an illustration, but it might be improved by making it clear whether this was a subterfuge, i.e. whether the use of this subsidiary was designed to evade this particular obligation, in which case it was one kind of bad faith, or whether it was set up for business reasons but there was an implied term read in by good faith. In other words the illustration did not make it quite clear what was happening. In addition, one should conclude that A's failure was a breach of the duty of good faith and fair dealing and say it flat out.

Article 1.9

Opening the discussion on Article 1.9, Sono referred to Illustrations 2 and 3 on p. 20 which were given after an explanation, and he wondered whether this was by virtue of the operation of para. (2) or something else. Secondly, with reference to comment (c) on p. 19 which stated that "the parties are bound by any usage to which they have agreed", he wondered how this clause should be interpreted. Comment (c) seemed to narrow the scope of application of para. (1). It stated that this was a general application of freedom of contract as laid down in Art. 1.3. If this was the case it did not add that much, because what the parties had agreed should control, but "any usage to which they have agreed" might be a usage which they had agreed in a different setting altogether. As long as they had agreed, in whatever context, then when they entered into a contract, even if they did not mention the usage, it would come under this proviso and would apply. He felt that this was an interpretation which could be given under CISG which had the same proviso. He wondered whether it was really necessary to narrow it down to the particular situation when the parties had agreed on such a usage in the context of a particular contract.

Bonell did not think that it was all that frequent that parties sat together to agree that should they later on enter into a contract usages of the Harbour of Hong Kong should apply, but even if this was so, and certainly Sono had a lot of experience in this respect, he wondered whether Sono was sure that what was stated in comment (c) could be understood so as to exclude such a possibility. He himself felt that the contrary was true, in fact in the comment he did not say that the parties had to stipulate the

application of a usage on the occasion of a particular contract.

Sono felt that the first three lines of comment (c) ("By stating that the parties are bound by usages to which they have agreed, paragraph (1) of the present article merely applies the general principle of freedom of contract laid down in Article 1.3") sounded as if if the parties had agreed in a contract that a certain usage would apply, it applied, and then when they came to comment (f) on p. 21, that also contained similar implications. Readers should not be led to think that the first phrase of Art. 1.9(1) related to that situation alone. Suppose that in other dealings the parties always agreed on a usage, but that in a particular contract they did not. In that situation the usage should prevail because they had agreed in general that such a usage did apply.

Bonell had understood Sono to be introducing a third case, i.e. when the parties had repeatedly agreed on the application of a certain usage but did not do so expressly for a certain transaction, in which case he would have thought that this fell under comment (b) on practices established between the parties.

Sono admitted that this was so, but if it was not in previous dealings that the parties had agreed but in a different context, i.e. when they had had serious business talks in general they had indicated that such a usage existed. If in whatever context the parties had agreed as to the existence of such a usage, why should it not prevail in a contract they entered into later on?

Bonell observed that if parties agreed that for the future a particular usage should apply in their relationship, then of course this was intended. If they just aknowledged the existence of the usage, without indicating that it should apply, then the only consequence would be that they could not claim that they were not aware of the usage.

Brazil felt that the type of problem Sono was referring to would ultimately be resolved by an examination of all the evidence to see whether the parties had agreed that that particular usage was part of their contract, and this would be covered by the text.

Crépeau was concerned about the coherence of Art. 1.9 with Art. 5.1.2, which dealt with implied obligations. Art. 5.1.2(b) stated that in any contract there would be supplied usages and standard trade practices. He understood this to be irrespective of the agreement of the parties. However, the terminology of "standard trade practices" was not to be found in Art. 1.9. Reading the two together, as far as Art. 1.9 was concerned they were dealing with para. (2) and he wondered whether the definition given of a usage as being "widely known to, and regularly observed in international trade by, parties in the particular trade concerned [...]" was not another way of talking about standard trade practices. He wondered whether some uniformilty could be achieved.

Bonell recalled that Art. 5.1.2 had been adopted without the final wording being decided. The reference to "standard trade practices" had not been chosen deliberately as a term of art. Crépeau had himself introduced this provision, and he assumed that Crépeau's intention had not been to introduce a new concept in addition to usages. He wondered whether Crépeau agreed to delete the last words of lit. (b) and to keep only "usages".

Tallon observed that the title of Art. 1.9 spoke of "courses of dealing" which was yet another term which was used neither in the text of Art. 1.9, not in Art. 5.1.2.

Bonell observed that "courses of dealing" referred to the practices the parties had established between themselves. He understood "courses of dealing" to be a fairly well established terms in English and felt that it was more elegant to speak of "Courses of dealing and usages" rather than of "Practices which the parties have established between themselves and usages".

Crépeau observed that the difficulty was that when one had courses of dealing and usages it seemed as though one were dealing with two different things, but the two paragraphs of the provision only spoke of usages.

Bonell stressed that they also spoke of practices established between the parties and referred to comment (b). He recalled that this was Art. 9 CISG.

Tallon referred to the French version, where "course of dealing" and "practice" were always "pratique". He stated that he did not like using something in the title which was not used in the text. He suggested "Usages and practices" or "Usages and practices of the parties".

It was agreed to change the title of Art. 1.9 to "Usages and practices".

Hartkamp wondered what was meant in Art. 5.1.2(b): he would say that implied obligations could only stem from usages in the sense described in Art. 1.9, so if one deleted "standard trade practices" they would not have the same expression, because the word "usages" in itself was broader than usages as they were qualified in Art. 1.9. He suggested that saying in Art. 5.1.2(b) "usages as meant [referred to] in Art. 1.9".

Bonell indicated that he had the same understanding as Hartkamp, and he had tried to make this clear in comment (a) ("The present article lays down the principle according to which the parties are in general bound by courses of dealing and usages which meet the requirements set forth in the article. Furthermore, these same requirements must be met by courses of dealing or usages for them to be applicable in the cases and for the purposes expressly indicated in the Principles"). He had also referred to the articles concerned, including Art. 5.1.2. He did not think it necessary

to make an express reference to Art. 1.9 in Art. 5.1.2 because there were also other instances where they referred to usages so either one always made reference or one made one reference to all of the provisions in Art. 1.9 in the general section.

Drobnig observed that the comments were written for uninitiated readers and they would not read first the general part and then everything else, and then make all the connections that Bonell had in mind. He therefore felt that it should be done at least in the commentary on Art. 5.1.2.

Bonell agreed with this, adding that just as the comments on Art. 1.9 referred to all the other instances where usages were referred to in the Principles, in each of those instances it should be made clear that the usages were those qualified in general by Art. 1.9.

Crépeau observed that if they used "usages" in Art. 5.1.2 they would normally be referring to the definition of usage contained in Art. 1.9. This being so, he did not see much point in keeping the reference to standard trade practices in Art. 5.1.2. He therefore suggested that the reference to standard trade practices in Art. 5.1.2 should be deleted and only usages left.

Maskow agreed that there should be coherence between the provisions: standard trade practices did not appear anywhere else and should therefore be deleted. However, they refer to practices established between the parties, which were also referred to in Art. 1.9 beside usages.

Crépeau indicated that if only usages were referred to in Art. 5.1.2, the commentary could refer specifically to Art. 1.9 and would therefore cover both the usages agreed upon by the parties and the usages which resulted from the standard practices of the trade.

Bonell indicated that according to some members of the Group, if one simply mentioned usages in Art. 5.1.2 one missed the established practices between the parties.

Crépeau did not think so, because Art. 5.1.2(1) spoke about usage to which the parties had agreed.

Bonell observed that this was one thing, and another was the practices established between the parties. There were in other words three cases: one was usages (whatever one meant by that) agreed between the parties; then there were practices established between these two particular parties - so-called courses of dealing; and then there were usages which met the requirements set forth in para. (2) and which might be applicable even without an agreement between the parties, perhaps even without the parties being aware of them. Thus if in Art. 5.1.2 one spoke only of usages, the inference might be drawn that one excluded the practices established

between the parties. It was therefore being suggested that the title of Art. 1.9 speak of "Usages and practices".

Drobnig felt that there was a difference between practices and practices established between the parties. What was being referred to should therefore be specified. In Art. 5.1.2(b) what was referred to was practices established between the parties and that would correspond with Art. 1.9, so it should say "usages and practices established between the parties".

Crépeau felt that it was difficult to talk about practices established by the parties in a provision dealing with implied obligations. Practices established by the parties looked like express obligations.

Hartkamp observed that grammatically "established" also referred to usages and not only to the practices established between the parties. He still felt that a reference to Art. 1.9 was the best solution.

Drobnig had no objection to such a reference.

Bonell wondered what the situation would then be for all the other times that usages were mentioned in the text. Coherence would require that a reference to Art. 1.9 be added also there.

Lando referred to Art. 2.5(3) which spoke of "practices which the parties have established between themselves or of usage". Here a reference back to Art. 1.9 would only make it more difficult to read.

Drobnig felt that the proposed wording of Art. 5.1.2(b) had an ambiguity which was avoided in Art. 2.5(3) by saying "practices established between the parties or usage", which made it clear that usage was not only one established between the parties.

Garro felt it important to determine whether they really were talking about the same thing. The term "usage" did have an acknowledged acceptance, whereas the term "courses of dealing" was not in his civil code and he would have difficulties in translating it. "Courses of dealing" had for the time being been set aside, so they were left with "standard trade practices" or "practices established between the parties" and he wondered whether "practices established between the parties" was a species of the more general term "usages". If they were two different things they had to include both. This was not the terminology of Art. 2.5(3) which spoke of "practices established between themselves or of usage" or of comment (d) to Art. 1.9 on p. 19 which, when referring to Art. 1.9(2), referred to "other applicable usages". He wondered whether or not the standard practices established between the parties could fall under the umbrella of usages. If that was the case they should stick to the term "usages" throughout and not make any distinction which was not warranted.

The proposal for reformulation of Art. 5.1.2(b) was therefore "practices established between the parties and usages".

Hartkamp felt that the way in which the word "usages" was used in the Principles as a whole was ambiguous. Sometimes it meant usages as defined in Art. 1.9, and sometimes it did not, such as in Art. 4.3 where it was used in a much broader sense. Similarly, Art. 4.3(e) ("any meaning commonly given to terms and expressions in a trade concerned") was broader than what was in Art. 1.9.

Bonell felt that one could just as well believe that the usages referred to in Art. 4.3 were exactly the same as those referred to in Art. 1.9.

Hartkamp suggested that Art. 1.11 on definitions could indicate that the usages referred to were those defined in Art. 1.9. When one said "any usages" this seemed to be different from what was in Art. 1.9.

Bonell felt that if nothing was specified the presumption was that the same word would mean the same thing throught the text. What was intended was certainly not any usage in the sense of any usage from anywhere in the world.

Maskow thought that "usages" in Art. 4.3 could be used in the sense used throughout the Principles, as so many factors were mentioned in the article that everything would be covered even if the notion of usages was less broad. This could be indicated by deleting "any".

Crépeau wondered whether it would be of any help to consider Art. 1.9(2) as referring to international usages and to use this throughout. The definition in Art. 1.9(1) said that "The parties are bound by a usage that is widely known to, and regularly observed in international trade, by parties in the particular trade concerned". In effect they had qualified the word "usage" to restrict it as a source of implied obligations to international usages. This eliminated any local usage, unless the local usage was agreed upon specifically and was read into the contract by express provision.

As concerned the reformulation of Art. 5.1.2, Maskow felt that it was better to have usages in the first instance and then practices. He could not see that "established" could refer to both, because the definition in Art. 1.9 made it clear that there were usages on the one hand and established practices on the other. It was strange to start with the practices which only referred to the parties when the usages referred to something which was more widely accepted. He felt that the order should be changed also in Art. 4.3.

Hirose observed that Art. 4.3 referred to "any practices which the parties have established between themselves" (lit. (b)) and to "any conduct

of the parties subsequent to the conclusion of the contract" (lit. (c)), so if the "any" were taken out before "usages" the other *literas* might have to be changed as well. This article wanted to include everything which could help to understand the particular case concerned. This had therefore to be thought of separately from Art. 1.9.

Furmston wondered whether the weakness was not that there was no definition of "usage"; Art. 1.9 was not a definition of usage, it was a definition of when usages were binding, it assumed a concept of usage which was not actually contained in Art. 1.9. He could see a lot of money being made in the UK in construing this because people would say that in Art. 5.1.2 there was the word "usage" which must be wider than Art. 1.9 because Art. 1.9 said that certain usages were binding, and that assumed that there were other usages which were not binding. He suggested indicating what was meant by the word "usages".

Bonell recalled that they had started with a provision which had contained a definition of usages along the lines of Art. 9(2) CISG (""usage" means any practice or method of dealing 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" - Chapter I, Art. 4, in Study L - Doc. 40 Rev. 2). The Group had then decided to abandon this approach. He did not think that going back on this decision would affect the substance. What was very important was whether they agreed that throughout the text "usage" meant the same thing. He could see Hartkamp's point about "any usage" in Art. 4.3, which clearly could suggest that what was intended there was any usage and not only those which met the requirements of Art. 1.9(2).

Tallon stated that it was quite different when one referred to usage in Art. 4.3 as it was just an indication which might be taken into consideration. He stressed that "usages" did not have the same content in the different articles.

Brazil wondered whether they could agree in relation to Art. 5.1.2 to say that the usages they intended to refer to there were the usages referred to in Art. 1.9 and that the practices they intended to refer to there were the practices established between the parties.

Tallon thought that they could, because in Art. 5.1.2 the usages and practices had the purpose of creating implied obligations, so it necessarily referred to the narrow definition which was in Art. 1.9. Although he did not favour references, here he preferred having "usages and practices as meant by Art. 1.9".

Hartkamp observed that comment (a) to Art. 1.9 referred to a series of articles including Art. 5.1.15(1) in which he could not find the word "usages". They should perhaps consider all the articles which referred to usages, and for each decide whether they wanted to refer to a usage as that

indicated in Art. 1.9, or to a more general concept.

Bonell agreed that "usages" were not actually mentioned in Art. 5.1.15(1), but it did refer to "any form used in the ordinary course of business".

Hartkamp and Brazil felt that this was a different concept.

It was decided that this reference should be taken out of the comments.

Crépeau suggested that the Group consider the different terms used in the Principles: "practice", "standard practice" - which even if it had been deleted was still a reality, "usage" - which seemed to be either of a local nature (Art. 1.9(1)) or international (Art. 1.9(2)). He wondered whether they should not decide what to do with each of these as to the way in which they would be introduced into a contract, i.e. either by express choice or by implicit introduction.

Bonell observed that they had got rid of standard trade practices. In the text of the Principles there were therefore "practices", "local usages" and "international usages". As he saw it, what was addressed in Art. 1.9 was "usages agreed between the parties" - which could be internationally adopted usages, practices which the parties had established between themselves or non-agreed usages which had to meet the test in Art. 1.9(2) in order to be applied. He would have some hesitations in saying in the Principles that only international usages applied, because if this was the rule (and it was the rule) in some instances even national or local usages might be applicable according to the test laid down in para. (2), as that paragraph did not speak of international usages, but of usages regularly observed in international trade. He had tried to give the example of a terminal operator in an important sea port, many of whose customers would be foreigners. Although the usage was a local usage because it was only observed at that particular place, it nevertheless met the test of Art. 1.9(2) because it was regularly observed in international trade as far as this particular business was concerned. He therefore thought that it might be a little misleading to say that the Principles referred to local usages, meaning para. (1), international usages (para. (2)) and then to practices which he was not sure where to place.

Crépeau observed that in his view, irrespective of the document, "practices" were just ways of doing which would have to be incorporated by way of an express reference. They were not at the level of a usage and therefore had to be expressly introduced into the contract in order to be binding.

Bonell pointed out that the "practices" of the title of Art. 1.9 appeared to be what had been further developed in the provision itself to become "practices established between the two parties". He saw a very clear

distinction between such a rule of behaviour and a usage, because it related only to two particular persons and presupposed that in previous transactions these particular two parties had, with respect to similar transactions, abided by the same rule of behaviour. This was different from usages which related to the generality of transactions and therefore did not have to be agreed upon in order to be applicable: they were automatically binding. There were thus practices established between the parties, usages agreed between the parties and the usages which had not been agreed between the parties but for which para. (2) provided the criteria in order to determine whether or not they were applicable in a given case.

Crépeau wondered which category the INCOTERMS would come under.

Bonell indicated that he would put them under the agreed usages in para. (1). The INCOTERMS themselves recommended parties to expressly stipulate for their application. There were however decisions according to which even in the absence of an express reference to the INCOTERMS they might be applicable because they were internationally widely known. In that case they would fall under para. (2).

Coming back to the reference to usages in the articles listed on p. 18, there was no problem with the reference to Art. 2.5(3) which referred to practices which the parties had established between themselves. The provision however continued "or of usage". If "usage" there meant usage as referred to in Art. 1.9, this should perhaps be spelled out.

It was agreed that this was so.

As to Art. 4.3, this was the article which dealt with the relevant circumstances to which "due consideration" should be given. The question was whether the usages referred to in comment (f) were limited to the usages referred to in Art. 1.9, or whether it was a case where they had a wider meaning.

Tallon took the view that it referred to any kind of usage. The court should assess the importance of the usage depending on its nature.

Farnsworth indicated that that would not be his view, or the view of anyone who used the term "usage" in connection with the UCC in the USA. "Usage" was defined in the general article of the UCC and meant the same thing thoughout, it did not mean one thing in connection with offer and acceptance and another in connection with interpretation.

Drobnig thought that there was a uniform meaning also in the Principles and that in Art. 4.3 it meant the same as in Art. 1.9.

Bonell drew attention to the fact that this question arose also in the context of CISG, where there was Art. 9 which referred to usages in general

and Art. 8 (which corresponded to Art. 4.3 of the Principles) which dealt with interpretation and which only referred to "usage". As far as he could recall, there were no decisions so far, but legal writing was divided. Schlechtriem maintained that a different test had to be adopted, Honnold and others believed instead that the test had to be the same.

Huang preferred having a uniform concept.

Hartkamp agreed with Tallon that the reference to "any usages" in Art. 4.3 would mean something broader than the reference in Art. 1.9, but indicated that he would not be opposed to saying in the comments that it meant the same as in Art. 1.9. To his recollection there were only three articles besides Art. 1.9 which referred to usages and he would not mind if it were indicated that "usages" was always used in the same sense as in Art. 1.9.

Drobnig suggested that the word "any" in Art. 4.3(f) be deleted, because it could create the impression that what was intended here was a wider meaning.

Crépeau wondered whether that meant that "any" should be eliminated also in Art. 1.9.

Drobnig did not think so, as "any usage" was explained and qualified in Art. 1.9 but not in Art. 4.3.

Crépeau objected that the only qualification was whether there was agreement or not.

Voting on the proposal to delete the word "any" in Art. 4.3(f), 5 voted for its deletion and 5 voted to keep it. The word "any" was therefore retained.

It was further decided that the comments to the articles which referred to usages should indicated that the concept was that of Art. 1.9.

With reference to the final wording of Art. 5.1.2(b), following the decision taken it was agreed that it would refer to usages as referred to in Art. 1.9 and also to practices established between the parties. The formulation "practices established between the parties and usages" was adopted.

Garro wondered whether the text of lit. (b) would include a reference to Art. 1.9, and whether lit. (b) would refer to "any usages" as the "any" had been left in Art. 4.3(f).

Brazil indicated that a reference to Art. 1.9 would not be in the text but in the comments and that lit (b) would simply refer to "usages" and not to "any usages".

Drobnig suggested that the attention of the Editorial Committee should be drawn to the fact that in Art. 4.3 most of the points except lit. (d) started with the word "any", and that this should perhaps be uniformed in the final drafting.

Coming back to Art. 1.9, Drobnig drew attention to the possible contradiction between illustrations 1 and 2 on p. 20. The two illustrations fell into the same category. In the case of a real estate agent, even if there were foreign customers the local usages should be applicable. He could not see why different results were arrived at in the illustrations.

Lando agreed with Drobnig, but felt that the difficulty was that they claimed that the usage should be regularly observed in international trade. The examples showed that usages could be binding although they were not regularly observed in international trade. Illustrations 2 and 3 showed this. Even if they came to the opposite result in Illustration 1, which he agreed with Drobnig they should do, the reference to "regularly observed in international trade" was unrealistic. He observed that CISG itself was the result of a compromise and was not very well drafted. He suggested changing Art. 1.9. The formulation of Art. 1.103 PECL was as follows: "(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable". It made no reference to international usage and he thought that it was unrealistic to do so. Under the general rules of conflict of laws, if the contract was governed by German law German usages would apply, so a foreigner who came into the German market would be bound not only by German law but also by German usages (with some exceptions).

Bonell referred to the comments on Art. 1.103 PECL which did address the problem of international usages and which stated that "a local or national usage which operates at the place of business of one of the parties but not at that of the other party can only bind the latter if it would be reasonable to bind him". He confessed that he was not that enlightened by this. The problem was the extent to which a purely local or national usage bound parties to an international transaction. In the text of the Principles the emphasis was that as a rule it did not bind the parties, whereas the text of the PECL did not mention it at all, even if the comments then said that it could only bind if it was reasonable, which seemed to indicate that it was an exception also in the PECL. There was a difference as to the wording, and this Group had to stick to this text. He thought that a possible illustration of the difference or the extent to which local usages could exceptionally be applicable also under the Principles, even without the parties' agreement, could be found in the two examples given in the illustrations. The first illustration was a case where a local usage should not apply considering the text of the provision. The real estate agent was supposed to do a business which was locally restricted. If exceptionally a foreigner came in, then following the text

of the provision why should that foreigner be bound by a local usage if it was required that the usage be widely known to and regularly observed in international trade by parties in the same business? The solution was different in illustration 2 because a terminal operator doing business in Hamburg by the very nature of the business was engaged in international transactions, most of the terminal operator's customers were foreigners. What this terminal operator and the others operating at the port of Hamburg practiced was still a local usage, but because it was regularly observed in international transactions it met the test in para. (2). As far as he understood the comments on Art. 9 CISG, which was similar if not identical in substance to this one, this was more or less the current view. All commentators stressed the fact that as a rule local usages were not applicable or relevant without an express reference by the parties, but there were exceptions to this.

Hartkamp stated that half the skyscrapers in Amsterdam were sold to Japanese, English and Swedish buyers. Would in this case the local custom of the real estate trade in Amsterdam be a custom according to this provision or not? It was widely observed by all the buyers of skyscrapers in Amsterdam.

Bonell had hesitations in considering the buying and selling of skyscrapers in Amsterdam as a typically international business.

Hartkamp stated that there were so many investors buying commercial space in Amsterdam that it was a kind of international trade, or at least it was considered to be such in the Netherlands.

Furmston wondered why a transaction involving a real estate agent and a foreign buyer was subject to the Principles. Was it because the parties had agreed that the contract should be subject to the Unidroit Principles or because they had agreed that it should be subject to the general principles of law or to the *lex mercatoria*, or what? He agreed that if he went to a real estate agent in Rome and negotiated the buying of a plant and he negotiated that the transaction should be subject to the *lex mercatoria* then it could be argued that he was not subject to the curious practice, which he had never heard of before, under which Roman estate agents charge a commission both to buyers and to sellers, but it was only if one had that unlikely assumption that the problem came into existence in the first place.

Bonell indicated that the curious custom Furmston referred to was not only well-established, but was even stated in the Civil Code, but he wondered why Furmston raised the question of why the Principles applied to this particular case and not to others.

Furmston indicated that buying a plant in Rome did not strike him as a paradigm of an international commercial contract. Even buying an office in London did not strike him as an obvious example of an international

commercial contract.

Brazil indicated that a different view would be taken in parts of Australia where most real estate development was foreign investment sourced and certainly in that sort of market one had to say that that was an international market.

Hartkamp suggested that to avoid these problems the real estate example should be deleted.

This suggestion was accepted by the Group.

Hartkamp referred to the proviso "except where the application of such a usage would be unreasonable" in para. (2). The comments indicated that the usage itself was unreasonable ("Such unreasonable usages are not binding [...]", last line p. 20).He thought that there was a difference between an unreasonable usage and a usage of which the application in a particular case was unreasonable. He therefore suggested that the comments should be aligned to the text, because the whole concept of a usage that was unreasonable was very dangerous.

Bonell admitted that there was such a deviation in the comments but observed that if the text had to be interpreted literally, it did not correspond to what he had understood to be the intention of Lando who had proposed this provision, i.e. to provide a substantive test going to the content of the usage ad not just to provide a procedural test, meaning that the usage as such was fine but because of certain circumstances of the given case it was better not to apply it in that particular case.

Hartkamp observed that the last words would be unnecessary because good faith would be imposed upon any application of a given rule which in the circumstances would be unreasonable. He did not want to propose the deletion of this proviso, he just wanted to say that the same terminology should be used in the comments as in the text.

Furmston gave the example of a usage which might be reasonable most of the time but unreasonable in the particular circumstances: suppose that in the international wine trade there was a usage that one could only return bottles within a week. That might be a perfectly reasonable usage because usually one expected to be able to see if the bottles were broken but it might not be reasonable to apply that if what was wrong was something which could only be discovered by opening the bottle and testing the contents. That would arguably be an unreasonable application of a usage which ought to be reasonable. It was perfectly possible to envisage usages which were reasonable in themselves but which were unreasonable in particular applications. This was what it said in the article but not what it said in the comments. The comments were much wider than the article.

Bonell agreed, but observed that the comments of the PECL provision,

which was framed in exactly the same manner, said that "Commercial acceptance by regular observance of businesspeople is a *prima facie* evidence that the usage is reasonable", which clearly referred to the content, "but even a usage which is regularly observed may be disregarded by the court if it finds the application of the usage unreasonable". The decisive point was whether they believed that there was no room for an evaluation of the content of the usage, and that was just a question of the reasonableness or unreasonableness of an application of a usage which in itself was fine.

Garro felt that analytically they were dealing with two different problems, and the problem was that the comments only referred to one of them. There could be unreasonableness as of content and unreasonableness of the usage because of its application. The provision itself spoke about the application of a usage. It seemed to him that *a fortiori* if the usage was unreasonable because of its content, then its application would necessarily be unreasonable too. There was nothing wrong with what the comment said at the bottom of p. 20, but it was incomplete, because whereas the text spoke about the application, the comments only spoke about unreasonableness as of content. He therefore suggested including another sentence in the comments making clear what had been made clear at the Miami meeting when Bonell had said that if a practice was regularly observed this did not of itself mean that it would be applicable, because it may be unreasonable (see the report of the Miami meeting, P.C. - Misc. 18, p. 81) and this was what these comments did not say and was all that was necessary to make the comments compatible with the text.

Turning to Illustration 2, Lando suggested that they should suppose that the harbour in this port previously was only for local ships and that it had to change into an intensive terminal with foreign ships coming to the harbour. Under the rule as indicated by Bonell it would take time before the foreign ships were subject to the local customs, whereas according to him they should be subject to them at once because it was impractical for a harbour to operate under two different sets of rules. However, as he did not feel that he had sufficient support for this contention he withdrew his suggestions.

Sono wondered whether in cases such as the one referred to by Lando the Principles really applied. He thought that the local law would very likely be applicable and no question of this nature would arise. It was a local transaction. He therefore wondered why Lando had such concerns.

Crépeau observed that when one dealt with "practices" and "usages" there was also the term "custom" and particularly in the maritime world one very often spoke of "customs". Had they simply eliminated the concept and not wanted to bring it into this project, or had it never been considered? In his jurisdiction there was "practice", there was "usage" and then there was a custom, which was not only widely known, but which was deemed to be a rule of law and which was deemed to be introduced irrespective of whether

the parties liked it or not.

Bonell referred to CISG, ULIS, to some national codifications such as the new Dutch Civil Code and to the older BGB and HBG, in which in the area of contracts there was no reference to customs. A different term was used and, he thought, used on purpose: *Handelsbrauch, Verkehrssitte*. CISG also used "usages" but not with the test *opinio iuris seu necessitatis* to which they were accostomed, which meant that this was then a source of law and as such bound the parties. The more modern approach in the area of contract law was that it must be a more or less generalised practice but the decisive test was always that it fitted into that particular contract and bound parties on a contractual level. Customs as such did not bind on a contractual level but as rules of law and precisely because of this the French and Italian Civil Codes provided that they were applicable only if nothing was said in the contract or in the law. The usages referred to in the Principles even prevailed over the Principles because they operated at a contractual level. He was not sure that the approach in the UCC was the same, but he took it that it was. Customs as an autonomous concept with respect to usages had therefore not been dealt with at all and deliberately so.

Garro wondered whether when Bonell spoke of usages and distinguished them from customs, usages were to be understood under the Principles as those kinds of practices to which the parties were bound as they were binding *per se* as a source of law as they had been continually practised for a long time. He did not think that this was the case, but under Art. 1.9(1) usages were binding if they were included in the agreement. They were thus talking about commercial practices but not about those that were so important that the parties were bound even if they had not agreed to them.

Bonell confirmed that this was the case.

Hirose referred to the third line of comment (e) on p. 20, which referred to "the oligopolistic structure of the respective markets and/or in a particular way of understanding business relations". He wondered whether Bonell could explain this statement as it might cause some discussions in Japan because the way to estimate whether a usage was reasonable or not was very important and here it might be suggested that the market structure was one of the factors which were taken into account in this estimate. If this was so he thought that this was good but thought that it also produced difficult questions such as whether it was oligopolistic or monopolistic, etc.

Bonell indicated that here he had been thinking of a usage which was unreasonable in content apart from the circumstances of the given case. It was then possible to argue how a usage, i.e. a generally observed line of conduct, could be unreasonable because the assumption was that business people were reasonable persons so why should they behave in an unreasonable

way on a regular basis? He could imagine that either because there was a particular way of understanding business relations (e.g. in cases of bribery etc.), or because that trade sector was under the control of an oligopoly, meaning that all had to follow the two or three dominating enterprises, it might be possible to say that everyone was following that particular trade practice, but if one made enquiries to find out why such an unreasonable line of conduct was so generally observed, one would realise why. In the case of a monopolistic market structure of the market, one could hardly speak of a usage just because the monopolist succeeded in imposing that particular contract term. In this case the "generality" was missing, as on one side of the coin one always had the same person. If the whole sector was dominated by three or four, it became more difficult to speak of an unfair contract term imposed by one person, it could be argued that this was the common understanding in that sector.

Tallon gave the example of a trade association of sellers which imposed usages in favour of the seller because the buyers were not organised. There was then an imbalance between the parties.

Maskow indicated that normally "regularly observed" meant that it was voluntarily observed, so if an oligopolistic structure forced parties to follow a certain kind of behaviour it was not a usage in a strict sense.

Sono indicated that when he had read the phrase referred to by Hirose he had felt that there was a certain oriental flavour to it. He suggested that if the words were "oligopolistic or discriminatory structure" the picture might become clearer. He saw nothing wrong in the phrase and thought that it was reasonable.

Brazil felt that Sono's suggestion of adding a reference to discriminatory practices had merit.

Bonell hesitated to speak of the discriminatory structure of a market in a legal context.

Drobnig observed that they were speaking of the structure of the market and he did not think that the structure could be discriminatory: the practices could, but not the usages.

Article 1.10

Introducing the discussion on Art. 1.10, Drobnig referred to the end of para. (3) which read "or delivered to that person's principal place of business or mailing address". He wondered how it was possible to reconcile this with Art. 1.11 which stated that "if a party has more than one place of business the relevant place of business is that which has the closest relationship to the contract".

Bonell indicated that the Secretariat had realised that there was a contradiction with what came later under Art. 1.11, but the text agreed upon in Miami still had "principal". It could however be deleted.

It was so decided.

Hartkamp wondered what the situation was where a person had more than one mailing address as Art. 1.11 only referred to more than one place of business.

Bonell indicated that he could use this as an example of application by analogy: the rule in Art. 1.11 relating to place of business applied *mutatis mutandis* also to mailing address.

Tallon wondered why para. (1) of the article stated that "Where a notice is required it may be given by any means" and not simply "A notice may be given".

Bonell recalled that the previous draft had read "Notice given persuant to these Principles" and the objection had then been raised that everything was persuant to these Principles so it was better to say "Where a notice is required".

Crépeau observed that Art. 1.10 as such dealt with "notices", that para. (3) of the article dealt with the definition of "reaches" and that in Art. 2.5 they had the rule that the contract was entered into when the indication of assent "reaches" the offeror. The word "reaches" in Art. 2.5(2) had the same effect as "reaches" in respect of notices. He wondered whether there would not be an advantage in having an autonomous definition of "reaches" which would apply to notices and which would apply to any kind of indication of intention or assent.

Bonell indicated that this was the purpose of Art. 1.10(3) and it was clear if one read also para. (4).

Lando referred to comment (c) which stated that the parties were always free to stipulate expressly for the application of the dispatch principle. He was not sure that this was a very practical example as it almost encouraged them to do so.

Bonell recalled the discussion in Miami and that he at the end of the discussion had asked those who had been the strongest supporters for forgetting about the dispatch principle to give him two words of explanation as he still thought that in particular in international trade it might in certain cases go a little too far. For example, Richard Hyland had been among those who had said that they should forget about the dispatch principle because now with faxes if one had any doubt one would check and ask whether the addressee had received it and it was therefore up to the parties. The week before he himself had sent a fax but it had never

arrived and now he said that the Institute's fax machine did not work. This was a clear example that showed that things were not always easy with faxes. He had simply wanted to make it clear that if parties entered into a transaction with somebody who was in a place where one might have reasonable grounds to fear that one would encounter great difficulties with the ways of communication and in showing that the message had been delivered, one was better off stipulating that, at least as far as a notice of termination was concerned, the dispatch of the notice should suffice.

Sono commented on Bonell's assertion that Art. 1.10(4) would cover all situations. He wondered whether a declaration or demand were really covered by the words "form of communication". What they wanted was that even an indication of assent such as that under Art. 2.5 should be covered under para. (4), and this would not be covered by "form of communication" but rather by words such as "any other indication of intention". He therefore suggested changing "any other form of communication" to "any other indication of intention".

Bonell referred to Art. 2.5(3) which clearly was outside Art. 1.10 as it first stated that "by virtue of the offer or as a result of practices [...] the offeree may indicate assent by performing an act without notice" and then continued clearly stating that the acceptance was effective when the act was performed.

Sono stated that in Art. 2.5(2) the acceptance of an offer became effective when the indication of assent reached the offeror and Art. 1.10(3) explained what "reaches" meant. Para. (3) also wanted to cover the situation of an indication of assent, and in order to do so under para. (4) they indicated that "notice" included what was mentioned in the list, i.e. including "any other form of communication". His question was whether for example a declaration was a form of communication. He did not think so and had therefore made his suggestion. CISG used "another declaration of acceptance or any other indication of intention".

Drobnig suggested that it might in general be necessary to clarify the use of words. In Chapter 2 Art. 2.1 stated that "A proposal for concluding a contract constitutes an offer" and then Art. 2.5(1) referred to "A statement made" and neither "proposal" nor "statement" were mentioned in Art. 1.10(4). He found it very clear that the word "declaration" would comprise both an offer and a statement of acceptance. Presently it was not very clear because the word "declaration" was not used in Chapter 2.

Farnsworth indicated that to him "form" meant telephone, fax, telegram, letter. It did not mean declaration, demand, request, etc. It could not be correct to use "form" simply as a matter of English.

Brazil agreed. As to Sono's suggestion, he wondered whether the word "intention" was not a little limited although it might suffice.

Drobnig instead felt that "indication of intention" might be too broad, because conduct could also be an indication of intention. He referred to Art. 2.5(1) which referred to a "statement".

Farnsworth suggested "communication of intention".

Drobnig considered that it was necessary to take also the terminology used in Chapter 4 into account.

Komarov recalled that he had raised this point during the Miami meeting ("Komarov stated that he understood the enumeration in para. (5) to concern the contents of the notice but not the form, so the use of the word "form of communication" was not correct. He suggested deleting this word and only to speak of "any other communication" - P.C. - Misc. 18, p. 103).

It was decided that provisionally the formulation would be "or any other communication of intention".

Crépeau observed that there was only one rule dealing with proof or evidence: Art. 2.16(1) stated that "Nothing in these Principles requires a contract to be concluded in or evidenced by writing. It may be proved by any means, including witnesses". He wondered whether this rule which related to proof should not form part of the introductory chapter and apply to any kind of notification, because notification came in at various stages thoughout the Principles and questions of proof would undoubtedly arise. It seemed that they had only dealt with proof in respect of the form of the contract. The Principles often had the formulation "unless the party orally informs the other or in writing [...]". Whenever there was oral information in law the real question was one of proof, of evidence of whether there had been an oral communication. It did not occur only in relation to the form of the contract. He wondered whether there should not be a rule at the beginning in the opening chapter stating that whenever an oral communication was required proof could be made by any means including witnesses.

Bonell wondered whether this was not already covered by Art. 1.10(1) which stated "Where notice is required it may be given by any means appropriate to the circumstances". This meant that there was no formal requirement for notices in the broad sense or by implication, since as a rule an oral notice if appropriate in the circumstances was equally valid, one would be able to prove an oral notice by whatever means one had at one's disposal.

Crépeau wondered whether that meant that in Art. 2.16(1) "may be proved" was unnecessary, because it would be covered by Art. 1.10.

Bonell agreed that to a certain extent this was so, because a contract was concluded by means of offer and acceptance and an offer must be delivered by a sort of communication.

Crépeau wondered why if this was so it was necessary to make a specific rule under Art. 2.16.

Bonell indicated that it was necessary because in many countries contracts as such were subject to special requirements as to form, either for the purpose of validity or only for the purpose of evidence.

Brazil indicated that in the case of the English legal system which had been followed in Australia there was the well-known Statute of Frauds which set out a number of categories of contracts that had to be in writing. If one were a lawyer practicing in this tradition one would consider that this provision was simply there to make it clear that there was no requirement of writing like the Statute of Frauds under the Principles.

Crépeau objected that that was taken care of in the first sentence and not by the second.

Bonell indicated that the second sentence was intended to address those cases where, according to some national jurisdictions, the written form was required for certain contracts for evidentiary purposes only. He had understood that this had been added, as it was in both CISG and ULIS, in order to get rid of these requirements also for evidentiary purposes.

Garro recalled that the records of previous meetings indicated that this issue had been discussed in great detail and that the Group had finally decided to place the provision in its present location even if it had been suggested by some that it might be placed in the chapter on validity. Others had felt that formation was the best place and others again that Chapter 1 was the best place. There were good reasons to favour the location Crépeau suggested, but as the issue had been discussed he preferred to leave matters as decided.

Article 1.11

Opening the discussion on Article 1.11, Drobnig suggested that in the second item it would be better to indicate that the *relevant* place of business was that which had the closest relationship to the contract etc.

This was accepted.

Farnsworth observed that even if the title of the article was "Definitions" neither item was a definition, even if the first one put the word in inverted commas. He suggested that it would be possible to cast the second in the form of a definition by saying ""place of business" in the case where a party has more than one [...]".

No other comments were made on this article, the text of which stood

at:

"In these Principles

- "court" includes arbitration tribunal
- where a party has more than one place of business the relevant "place of business" is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

Article 5.1.17 - Proposal by Fontaine

Fontaine had submitted a proposal for Article 5.1.17 (Currency of payment) which read as follows:

"(1) (As modified in The Hague)
(2) (As modified in The Hague)
(3) Payment in the currency of the place of payment is to be made according to the applicable rate of exchange prevailing there when payment is due.
(4) However, if the debtor has not paid at the time when payment is due, the creditor may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment."

In the comments Fontaine explained that "These two new paragraphs to be added to Article 5.1.17 deal with the determination of the rate of exchange to be selected when payment is made in the currency of the place of payment instead of the currency of the contract (something the debtor may do in the cases of paragraph (1), the creditor may require in the case of paragraph (2)). The solutions are classical, and inspired by Article 2.111(2) and (3) of the EEC draft. The double reference to the "applicable" rate of exchange is justified by the fact that there may be different rates of exchange depending on the nature of the operation".

Bonell recalled that Fontaine had been asked to prepare this text after the discussion on the article which had taken place in The Hague.

Sono felt that there were certain points which should be clarified in the Principles, particularly in Arts. 5.1.16 and 5.1.17, before the question of the currency of payment was tackled. These related to the notions of "money", "payment" and "monetary obligations". In Art. 5.1.16 the question of the notion or concept of "payment" was at stake, in Art. 5.1.17 instead it was the meaning of "money" or "monetary obligation". The foreign currency exchance rate would only come after this. He himself favoured the date of payment solution. He also recalled that a new set of rules on credit transfers had just been adopted by UNCITRAL. Under Art.

5.1.16, in the case of funds transfer payment could be made by a transfer even if in fact no funds were transferred. According to para. (2) this discharged the obligation, but was this really payment? Was it payment when one credited an account of the payee or the creditor? The International Monetary Law Committee's draft on the finality of payment stated that in the case of funds transfer, "payment is deemed to be made", i.e. it did not regard it as payment. The new *UNCITRAL Model Law on International Credit Transfers* spoke of change or payment orders that funds transfer process. It started from the originator's payment instruction, the originator's bank giving the instruction to the beneficiary's bank and when the beneficiary's bank finally accepted the payment order the total process would be complete. As to the kind of obligation the beneficiary's bank had to the beneficiary, ULIS stated that the beneficiary's bank was indebted to the beneficiary to pay the amount which it accepted. Even if it was credited, the beneficiary had only a claim against the bank, the beneficiary was not paid, because crediting was not the same as payment. On this point there had been a discussion within UNCITRAL on a proposal that they elaborate a rule stating that by the beneficiary's bank accepting the payment order the debtor's obligation should be regarded as having been discharged. There had been strong opposition to this, because it imposed the risk of insolvency of the beneficiary bank upon the beneficiary. On the other hand, if they said that payment was "deemed to be made" when the account was credited, then this meant that the risk was on the debtor. UNCITRAL had not been able to agree on such a text on the discharge and the footnote in the UNCITRAL Document stated that "If the credit transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by a credit transfer to the account indicated by the originator the obligation is discharged". This had, however, only had 50% support. Another reason was that the UNCITRAL rules related to credit transfers only and not to other transactions. As to Art. 5.1.16(1), it said that "payment can be made by a transfer to any of the financial institutions [...]" and the meaning was not clear at all: transfer of what? It said that payment could be made by crediting the account which the creditor had in a stated financial institution. Even if this was the case, this was not payment because this was a new situation, in that the parties agreed that an obligation to pay could be discharged by crediting and this was a contractual arrangement. If the parties had clearly agreed to this, it should be all right, but when it said that the debtor could be discharged, they had to enquire into what they meant by "discharged". Did it mean discharged from the underlying obligation *in toto*, or that, if the debtor credited an account of the creditor on the due date of the contract, the debtor should be free from breach, i.e. even if something went wrong after that date and even if the creditor after all did not get full payment, the debtor should be discharged from being late or from non-performance for breach regardless of the risk allocation. This was quite different from being discharged from the obligation itself. Para. (2), however, simply stated that the obligation of the debtor was discharged, which sounded as if the debtor was discharged from the payment obligation. They should be more precise in stating the meaning of "payment", "transfer", "crediting"

and "discharged". He suggested that they might soften the provision by saying that "payment is deemed to be made". Furthermore, "transfer" was unclear as there was no real funds transfer at all, so one should say "credit transfer", which was more an accounting process. Moreover, as to the meaning of "money", in Europe not only were there national currencies, crediting also occurred utilising the ECU. ECU were used among European banks, and there were Eurocheques. Even if they were drafted in local currency their clearance went by converting to ECU. They could not be paid in ECU, it was only a unit of account, but when settlement was made by ECU, the same rule should apply. The Principles used the term "monetary obligation", but according to UNCITRAL the definition of "funds" or "money" included credit in an account kept by a bank. Here money included credit in an account kept by a bank and included credit denominated in a monetary unit of account such as the ECU. If they adopted this approach and inserted this kind of definition it would be less of a problem. Combining the practice of debiting and crediting in ECU to Art. 5.1.16 and speaking of "payment" could be very confusing.

Maskow thought that crediting was covered by Art. 5.1.16. One could say a transfer to any of the financial institutions and what was really meant was that it was credited to the account of the creditor at this financial institution. It was not sufficient that the institution had received it, the institution had to credit the account of the creditor. If it was credited to the account indicated by the creditor, it should be said that it was paid, and not deemed to be paid. If the creditor did not indicate a special account then this provision would be applied. Because the creditor had chosen the financial institution the creditor had to bear the risk if this financial institution broke down. As to the risk of performance, and the risk of timely performance, this was covered. As to the risk of delay, there was the rule in Art. 5.1.13, which said that monetary obligations had to be performed at the creditor's place of business, which would mean that the risk of delay was with the debtor. He thought that the rule was clear.

Bonell recalled that Art. 5.1.15(1) stated that "Payment can be made in any form" and then para. (2) made it clear that it was presumed that this could be done only on the condition that it would be honoured, so "Payment can be made" was just an indication that the particular means of a transfer could also be used. As to Sono's statement that "funds" did not refer to electronic funds, if the comments could make it clear that this should be interpreted in a rather flexible manner that would be fine. As to the "discharge", Fontaine had deliberately left it open and he would disagree with Maskow's view that they had adopted a rule according to which the debtor was discharged at the moment the sum was credited to the creditor's account. Here it was left open when the transfer became effective, since banks themselves still had no uniform practice and therefore the Principles should not interfere with that banking practice. The wording of the new UNCITRAL uniform law was at first sight a very simple one ("when it accepts"), but then the relevant provision defining

acceptance had such a long list of ten or twenty cases which all depended on so many different things that it really was a mess. He felt it to be a strength of the Principles draft that it had left it open, so they would be able to follow up banking practice. As far as the risk of bankruptcy was concerned, this was at the risk of the banks, so why should the parties bear the consequences of that?. They were not at all concerned with the settling of the position of the rights and duties of the banks between themselves.

Drobnig thought that Art. 5.1.15(1) was decisive. The provision was drafted in a very broad way and used the criterion of what was used in the ordinary course of business. It was clear to him that bank transfers, that funds transfers, were covered by this broad definition of payment. As to whether the following provisions were an adequate expression of the modern way of analysing these things, this might not always be the case, but he thought that they had drafted these provisions with the more limited aim of understanding what was still current practice among most businesspeople. He would not think of it so much in terms of credit being transferred, but more (as indicated by Art. 5.1.15(1)) as payment, even if this payment was only in the form of a credit being given. This included also the consequence that the risk of the insolvency of the receiving bank was on the creditor because the creditor could, as soon as his account was credited, dispose of the money in any way he wanted to. The comments on Art. 5.1.16 in particular should be expressed in a modern way which was more adequate for electronic funds transfer.

Sono observed that the time when one thought of legal tender rules when one spoke of monetary obligations was gone, except for Canada and Japan. France was moving in a different direction and the U.K. and the U.S.A. had already abandoned it. When they spoke of payment, they were thinking in terms of money. They could still use the word "payment" because business people still used it, but he wondered whether they could redraft the provision to read "When the creditor has indicated a particular account of financial institution authorising the debtor to transfer credit to this account the obligation of the debtor is discharged when the transfer to the creditor's finanical institution becomes effective". The difference with the present text was that in order to discharge the debtor from the obligation the creditor must have authorised the credit, otherwise the provision would be too broad.

Bonell suggested that Sono transmit to Fontaine the documentation he had examined which had led him to these conclusions, and also possibly a short note indicating what in his view should be highlighted in the comments, e.g. the adoption of the UNCITRAL Uniform Rules on Credit Transfers.

Sono hesitated to do so and to disturb the approach adopted. He however presented a proposal modifying Arts. 5.1.16 and 5.1.17 to read as follows:

Article 5.1.16
(Effect of credit transfers)

"When the creditor has indicated to the debtor a particular account of a financial institution to which a credit transfer in a monetary unit of account may be made for the performance of an obligation of the debtor, the obligation of the debtor is discharged to the extent of the credit transfer which has been accepted by the financial institution."

Article 5.1.17
(Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place of payment as a unit of payment, the payment shall be made in that unit. If the contract is silent whether the currency other than that of the place of payment is used as a unit of account or as a unit of payment, it is presumed to be the latter.

(2) If the law of the place of payment prohibits such payment or, if the contract designates a currency other than that of the place as a unit of account but is silent on the unit of payment, the debtor may pay in the currency of the place of payment according to the applicable exchange rate prevailing there at the time of actual payment. However, if the debtor did not pay by the time when payment was due, the creditor may require payment according to the applicable exchange rate prevailing either when payment was due or at the time of actual payment."

He suggested also that following upon these modifications Art. 5.1.18 be deleted. Introducing his proposals Sono stated that he had tried to accommodate as much as possible from Arts. 5.1.16 and 5.1.17. In Art. 5.1.16 he had omitted the word "payment" but at at the same time the word "payment" came into Art. 5.1.17. Art. 5.1.16 spoke of "discharged by crediting". Unless a particular account had been indicated to which a credit transfer could be made, the crediting would not discharge the obligation. The original text said that if the account number was made known to the debtor, the debtor could credit that account and the debtor would then be discharged in accordance with para. (2). This had been omitted in his proposal. The reason he had omitted this was that it related to the discharge of an obligation: once one received credit into the account the debtor would be discharged and one would have to collect from the bank. The banking account could be not that convenient for the operator apart from the risk of insolvency of the bank, and for the debtor to be permitted to credit a creditor's account, the creditor should at least have permitted the debtor to do so.

Furmston wondered whether that meant that there was no solution for the situation where the creditor had not indicated a particular account.

Sono stated that in ordinary business one enquired how payment should be made and the creditor would indicate whether one should deposit to the chequing account or savings account or to any particular account.

Furmston gave the case of where parties had had previous dealings and the debtor knew that the creditor had several accounts.

Sono stated that in that case Art. 1.9 relating to established practices between the parties would prevail.

Furmston indicated that there was no established practice, even if the previous dealings between the parties caused the debtor to know that the creditor had an account with two or more banks and sometimes he paid to one and sometimes to the other, so there was no established practice and the creditor had not indicated what the debtor had to do with respect to this particular transaction. The existing text dealt with the situation where the creditor had not indicated into which account he wished the payment to be made, and it said that in that situation the debtor could choose into which account to pay. There were many ways in which one could discover that people had bank accounts without their communicating it, e.g. they could send one a cheque.

Sono did not think that this would authorise the debtor to credit the creditor's account for the purpose of immediate discharge, but if the creditor had made it known that he had those accounts, and the purpose of such revelation could be construed in such a manner that it could mean that he was indicating his authorisation, then it should be all right.

Furmston observed that Sono's rule dealt with the situation where the creditor had expressly indicated the account, but it did not indicate what one could do if the creditor had not indicated the account. The situation was that the creditor had made no indication of the account into which payment should be made, but the debtor knew that the creditor had two accounts. It was easy to discover where people had accounts without that being an indication of what one should do. The existing rule dealt with that situation but Sono's rule did not.

Sono observed that the existing rule stated that in that case one could choose any one of the accounts, one could pay and be discharged.

Furmston agreed and added that as he understood it, it said that the creditor had first choice. If the creditor did not exercise the choice then the debtor had the choice. On the other hand Sono's draft did not deal with that situation.

Drobnig indicated that his thought went in the same direction as Furmston's, with some modifications. The usual case was that the creditor in the bill or correspondence indicated several accounts and that was a clear indication that the debtor could make payment to any one of them.

This was clearly indicated by Art. 5.1.16(1) which stated that "Unless the creditor has indicated a particular account, payment can be made [...] to any of the financial institutions in which the creditor has made it known that he has an account" and that payment to any of those accounts would discharge the debtor. He felt that this was an important rule. The one Sono suggested was not so practicable. If the creditor had not indicated accounts and the debtor only happens to know that he has these accounts, that was not covered by the existing rule and for good reason. He felt that the existing rule had many virtues and he missed an equivalent in Sono's draft.

Farnsworth's concern was more with the aspects of Sono's draft that dealt with the technological points to which he had referred earlier. They had said that the operative point at which the debt was paid was when the transfer "becomes effective" and Sono had substituted when it had been "accepted by the financial institution". He understood that that was the jargon which was now being used to describe the technological advance. His difficulty was that if the technology were changed, or the jargon were to change, this would be out of date. They came close to saying what they wanted to say which was that the debtor was discharged when the creditor had access to the funds in the bank. They used the word "effective" and a comment could explain that. He was not certain that for all time that the Principles might endure the acceptance by the financial institution would be precisely the moment where there would be access. Another point was that banks often took a long time in letting their clients know of transfers made to their accounts and until they did so the money just was not available. There might be circumstances in which they would expect the debtor to tell the creditor that this was being done. He felt that the focus should be on the accessibility of the credit and "effective" seemed to him to be as effective a word as he could think of to do that.

Bonell also thought that for the time being they should concentrate on the second novelty contained in Sono's proposal and in this respect he had some difficulty with the introduction of the acceptance by the financial institution. It made a lot of sense in the framework of the UNCITRAL rules, of the uniform law, where a very detailed and extensive article was devoted to the definition of acceptance, of the numerous and varied cases of acceptance. If the Principles, which for the rest dealt with quite different aspects, introduced the concept of acceptance, which was far from universally known, this concept could not be introduced without giving a definition. The formula as it stood was an open formula, as what "effective" meant still had to be determined. Fontaine had very much insisted on their refraining from taking any position of what actual banking practice and/or legal rules might provide in this respect. They should not do so, also because this practice might change. He therefore preferred having the present formula in para. (2). As to the first aspect, Farnsworth had raised the point at the previous year's meeting of the Governing Council and apparently his colleagues in the United States had felt that it was perhaps not appropriate to give the debtor such a broad

freedom of choice only because he knows that the creditor has these several accounts. He recalled that the Governing Council ultimately had expressed support for the text as it stood.

Farnsworth recalled that he had proposed that it be amended to read "any of the financial institutions authorised by the creditor for that purpose", which would have met part of Furmston's objections that there might be a number of institutions. "Authorisation" was perhaps a vaguer word and might meet Sono's point. Goode had agreed with the proposal, Enderlein and Widmer had not and no decision had been taken. There was no indication that the Council objected as such to the amendment, but there was also none that it agreed with it.

Sono observed that as far as technological innovation was concerned, this had nothing to do with the contractual obligation. The UNCITRAL text applied to all funds transfers, it was not confined to electronic transfers. He understood the problems raised by the word "accepted", but wondered, when one said "becomes effective", how one could tell when it became effective. If the beneficiary bank failed to properly credit the creditor's account, but the transfer was made and it was the beneficiary's bank's failure, in that case would the debtor not be discharged? To him this sounded strange. If the beneficiary's bank accepted the instruction to credit the account, why should the debtor not be discharged? There was therefore the same ambiguity whether one used "effective" or "accepted". Furthermore, to him, the phrase "has made it known that he has an account" was too broad.

Tallon favoured Fontaine's draft and indicated that he did not quite understand Sono's position. He did not think that the word "payment" could be done away with, because they also had to consider Art. 5.1.15. Sono had considered that "payment" did not cover all the new modes of extinguishing obligations and therefore spoke of acceptence. Tallon could not see what an acceptance of an electronic transfer was. Sono was saying that "payment" should not be understood in its ordinary meaning so they should do away with it, and then he imposed a specific meaning on "acceptance", a meaning which was not understood by many people. They were writing for ordinary people and not for specialists, which was why he preferred "effective" even if it might not be very precise.

Drobnig also wondered what "acceptance" meant in this context and asked that Sono explain it.

Sono indicated that acceptance in this context was the acceptance sent by the beneficiary bank to the sending bank that the instruction was accepted. It did not really matter whether the beneficiary bank had in fact credited the creditor's account - of course it should, but even if it failed to do so, as long as the beneficiary's bank informed the other one that it accepted the instruction the debtor should be discharged.

Drobnig felt that it was not conceivable that there be an express communication to the instructing bank by the beneficiary bank that it accepted the payment. He assumed that in reality there might be a silent acceptance, but not an acceptance by express communication.

Furmston indicated that one point was whether the risk of internal delay inside the bank should be at the risk of the debtor or the creditor, and he could see that one could argue either way. The change in the wording would make no difference. In his experience when money was transferred it disappeared into some limbo in which banks could manage to lend it over night for two or three days and collect the interest and it was not in either bank account. It seemed to him that there was a very good argument for saying that the debtor ought to pay sufficiently far in advance that the creditor had the use of the money at the date at which he ought to have received it, so if it took a couple of days for the transfer to be effective, whatever the instantaneous nature of the technology, the real question was when the creditor could actually lay his hands on the money.

Komarov favoured Sono's proposal, not only because he had participated in the UNCITRAL discussions, but also because of the character of the Principles. The Principles were going to provide a uniform regulation of international commercial contracts and when the formula of the effectiveness of the transfer was used, arbitrators or judges would look for guidance in their domestic systems, but if this notion was quite acceptable to banking circles, they would make arbitrators look for a uniform guidance. The only guidance so far was the UNCITRAL Model Law, and that was why he felt that this regulation could be promoted.

Farnsworth recalled Furmston's observation that if the creditor were to pick a particular financial institution, that would be one thing, but that our rule covered also the case where the creditor did not do so and it was the debtor's option. He was not sure that the rule of the Principles specifically covered the first case, it seemed to him that it covered it by implication only. If one took the second case, they were thinking of a situation in which the debtor exercised an option. If the debtor exercised the option to put it in a particular bank the debtor took the risk that something internal went wrong in the bank. If the creditor were to say that he should be paid by crediting the account in bank X, it seemed to him that the creditor has taken the risk. He thought that this result could be reached under the Principles even if the existing provision did not specifically suggest it, but he took it that the rule in Art. 5.1.16(2) would be subject to a contrary understanding of the parties and may be the answer should be that if the creditor said that a specific account in a bank should be credited it was enough that the bank received the transfer and, in Sono's and UNCITRAL's analysis, accepted it. He saw a possible difference in the risk depending on who has exercised the option. He did not think that they wanted to have an elaborate provision that accommodated all those things, but the comments might help.

Maskow indicated that he had understood "becomes effective" as meaning that the creditor had access to the money, not in the sense that he had been informed of the crediting, and this was in relation to the parties of the contract. On the other hand there was some merit in saying that what was decisive was the date the bank of the creditor received, or accepted, the money. He agreed with Drobnig that this was difficult to conceive, as there would probably not always be a document or act which could be considered an acceptance. The merit in the Sono proposal would be that in fact the recipient bank had been determined by the creditor and therefore if this bank made a mistake or went bankrupt before it had credited the amount to the creditor, this could not be to the disadvantage of the debtor. Of course the other banks - his bank and any intermediary banks - had been chosen by him or by his bank, but this was not the case with the creditor's bank so there was no justification in making the debtor suffer for this bank's mistakes. He feared, however, that the proposal would raise other questions such as which was the decisive date.

Drobnig referred to Komarov's comments. He thought that in this "acceptance" was clearer than "effective" because it had a certain background which was formulated. On the other point, he felt that also the present text did not consider that the creditor have access to the money, that the important thing here was that the beneficiary's bank had access. As he recalled it they had had a long discussion and a decision had been taken. He had suggested that the decisive point should be when the creditor had access but he had been out-voted and the reason was that the creditor's bank was considered to be the agent of the creditor and delays which might occur between the moment when the credit was received by the bank and when the bank credited the creditor's account ought to be borne by the creditor. He still had reservations, but he felt bound by this decision. In this respect he felt that Sono's proposal did not change anything in substance.

Bonell agreed with Drobnig. He did not think that either of the two versions gave an answer to the rather far-reaching questions regarding the relations between the banks, between the creditor and the receiving bank etc. He also recalled that this had been the subject of a lengthy discussion in which they had ultimately decided that it would definitely go too far to enter into all these details. Fontaine had proposed an open-ended formula which would, as far as the determination of the time of discharge was concerned, leave it to actual bank practice. As to the argument put forward by those who favoured Sono's proposal because it represented the future and should therefore be accepted, he recalled the discussions which had taken place within UNCITRAL and the very difficult process which had been undergone before reaching a consensus on a one-page long definition of what was meant by acceptance. This instrument did have the support of a body as prestigeous as UNCITRAL but so far not one single State had ratified it. Should this become the internationally accepted practice, the Principles as they stood would not prevent this from being operational because they left the question of when the transfer became effective open.

Lando observed that they needed to know whether banks really did accept the transfers before they could decide on whether or not to use this term.

Bonell observed that in the UNCITRAL rules it was a term of art and what was meant was not an acceptance in the sense of a statement saying that the bank accepted the crediting. What was meant was that it definitely was in the sphere of risk of the bank. He suggested leaving the formulation of the provision neutral and then referring to the UNCITRAL rules in the comments.

Sono observed that Art. 4 UCC also used the term "acceptance" and that it was well understood among bankers.

Hirose though that this type of matter was fixed rather rigidly because it dealt with money and changes in the value of the money. He therefore favoured Sono's opinion.

Voting on the last part of Sono's proposal which related to acceptance, 5 voted in favour and 5 against. The text therefore remained as it stood.

Introducing his proposal for Art. 5.1.17, Sono referred to Fontaine's proposal, of which he had combined para. (3) and (4) into his para. (2). Apart from the preceding parts of Art. 5.1.17, he had made some changes in para. (4) of Fontaine's proposal: where the latter said "if the debtor has not paid at the time" he said "if the debtor did not pay by the time" because these days whenever one owed certain amounts in foreign currency one watched the exchange rate fluctuations and at the right moment, even before the due date, one would make the payment. It all depended on the exchange rate. As long as the payment was made by the time payment was due, he had thought that the rate prevailing at the time of actual payment should prevail. In para. (4) of Fontaine's proposal, he tried to say that the exchange rate should be borne by the debtor if the debtor did not pay at the due date.

Returning to the problems dealt with in Fontaine's proposals for new paras. (3) and (4) to Art. 5.1.17, Bonell asked Sono whether the solutions he offered were any different.

Brazil agreed with Bonell that there was no difference.

Sono agreed that the solutions he offered were no different, but did not agree with Fontaine's remark that a traditional rule had been incorporated, as the approach adopted was a very modern one. In the United States, for example, the traditional rule had been that national currency had to be used in judgments with the exchange rate at the time of the day of judgment or at the time of the breach, but New York judiciary law now provided that foreign currency could be used in judgments and also the

Restatement on the foreign relations law of the United States provided that although courts in the United States ordinarily gave judgments in the United States currency, they were not precluded from giving judgments in the currency of the obligation. Furthermore, now the date of actual payment was used. However, if the due date had passed, and if the debtor delayed payment and the currencies declined, there was of course an interest for the debtor to delay payment and this kind of currency speculation should not be allowed. The United States had therefore changed, Japan had not, Canada still required the judgment to be rendered in national currency. In the case of Japan there were also endeavours by the Central Bank to maintain control over monetary supplies. The developments which had taken place however made it possible to support Art. 5.1.17, with some deviations from Fontaine's formulation. As to paras. (1) and (2) of the existing Art. 5.1.17, he had excluded para. (1)(a) as no one really knew what was freely convertible and in any case this rule should be without prejudice to exchange restrictions or regulations. Para. (1)(b) expressed this in a different manner.

Taking first the issue of the particular rate of exchange, Drobnig turned to the latter part of the first sentice of Sono's proposal which was the equivalent of para. (3) in Fontaine's proposal. As he saw it, the difference was that Fontaine said that the applicable rate of exchange was that when payment was due, whereas Sono said that the exchange rate was that of the time of actual payment. He had indicated as reason that the debtor who paid early would look for the exchange rate which was the most favourable to him and then make payment, but he thought that that was contrary to the intention of the parties. If there was a fixed currency of account and there was a fixed date of payment, then the payment had to be made at the fixed date and the creditor took the risk of the rate existing at the time, it was not the debtor who should look out for a more favourable rate which might prevail at some earlier date. He thought that that was a substantive change which deviated from Fontaine's proposal and also from the PECL proposal and one he could not support. As to the second sentence of para. (2), which was equivalent to para. (4) of Fontaine's proposal, the only substantive change was that while Fontaine spoke about the debtor not having paid at the time of payment Sono said by the time when payment was due and this change made sense to him and he could accept it.

Hartkamp preferred a simple rule stating that payment should in all cases always be made at the rate of exchange prevailing at the date of payment because if that created damage for delayed payment the creditor should be entitled to additional compensation.

Sono observed that the only difference in Fontaine's approach was to take care of the damage situation in the case where the currency depreciated, in which case the creditor had the option of either when the payment was due or the time of actual payment.

Furmston was puzzled, because he had thought that Art. 5.1.17 was describing the obligations of the parties and not the remedies for the breach of those obligations. There seemed to be a separate question what the remedies were if the debtor did not do what he was supposed to do but the primary if not exclusive purpose of Art. 5.1.17 was to describe what the actual obligations were and not the remedies.

Bonell admitted that Furmston was correct from a conceptualist point of view. He recalled, however, that when this had been discussed at The Hague it had been felt that para. (4) was a provision which affected also the remedy aspect. It had a non-remedy aspect which was that of indicating which rate of exchange had to be applied because payment had to be made. Whether damages would then be granted was a different question. As Sono had said, there was a fairly general tendency to try to rationalise matters and to give the creditor that right of option immediately. If the creditor then proved that there was an additional loss, the normal remedy of damages would come into play. He recalled the Strasbourg Convention on the payment of international debts which had adopted the same solution as that Sono had referred to as a US law. It was a fairly common approach and its appearance here and not in the remedy section could be discussed, but at least here they had the whole package. The remedy section would in any event play a role whenever this was appropriate. He saw it as a sort of cover transaction: why should the debtor oblige the creditor to receive payment at a rate of exchange which was less favourable to him only later to ask the debtor to pay him the difference under the title damages? It was easier if the creditor immediately had the choice.

Brazil wondered what the significance of Art. 5.1.12, which dealt with the question of earlier performance, was in this regard.

Bonell stated that in this respect he had to disagree with Sono. In the first case, which was addressed by para. (3) of Fontaine's proposal, Sono referred to the time of actual payment, i.e. he had stated that if the debtor foresaw a depreciation of the currency he might prefer to pay in advance and should then be granted the rate of exchange at the date of actual payment, but this was earlier performance as Brazil suggested. Art. 5.1.12 provided that earlier performance as such was not admitted, i.e. the obligee could reject an earlier performance unless he had no legitimate interest in doing so, and he felt that this would include payment.

Drobnig did not think that they had thought about this particular situation and that this would be a special rule which would prevail over Art. 5.1.12. He would admit an exception for payments and therefore did not agree with Sono's proposal. He felt that the exchange rate at the due date of payment should count. He did not agree with the debtor looking for the most favourable rate of exchange in order to aleviate his burdens. If the debtor wanted to pay in advance he could do so, but he had to make an adjustment if the exchange rate changed to the creditor's disadvantage.

Sono observed that what the parties had agreed was an amount in foreign currency. What they were saying was that if that was the unit of payment that should be paid. That was the basic rule. Para. (2) of his draft spoke of the situation when one could not provide that foreign currency as a result of provisions of law. In this case it permitted payment in the local currency. The basic obligation was to pay an amount in foreign currency.

Drobnig observed that the payment in the local currency was to be made on the agreed date of payment, on the agreed date of payment, and that therefore also the exchange rate at that date had to apply, whereas under Sono's proposal the debtor had the choice of finding a very favourable exchange rate prior to the date of due payment and utilising it, which might even permit him to make a profit while at the same time disadvantaging the creditor.

Sono observed that both parties started from the same amount, so if the creditor wanted to he could always convert it to the foreign currency and keep it to the due date.

Drobnig indicated that that would be risky and would add expenses, all of which should be borne by the debtor. The parties had agreed on a date of payment and for the debtor to anticipate the payment because the exchange rate was more favourable to him was a breach of contract.

Hartkamp felt that the discussion showed that one should not mix the currency exchange rate at the date of payment and the obligations of the debtor. He therefore came back to his proposal that the date of payment was decisive for the exchange rate.

Furmston wondered whether there was not a latent ambiguity about what they meant by "exchange rate". He had taken it that the obligation of the debtor was to provide the creditor, if he was not paying in the currency of account, with sufficient currency, in whatever the debtor was paying, to enable the creditor to receive the acutal amount he was owed. In other words costs of conversion had to be borne by the debtor and if that was so, the argument about one getting an advantage by paying earlier did not seem to him to apply, unless one were dealing with non-convertible currencies. In convertible currencies it did not apply because one could go back to the bank the next day and reverse this. Certainly, one could not simply say that the rate in lire was worth so many dollars today and here was the payment in lire, because the creditor must be entitled to walk away with the right amount of dollars if dollars was the currency of the debt. All the conversion costs should be on the debtor. He assumed that was implicit and if it was implicit the problem would arise only for non-convertible currencies.

Bonell stated that the exception of the non-convertible currencies was a very important exception and it was precisely for these cases that

they needed the rules laid down by Fontaine in paras. (3) and (4), because this was where speculation might occur. The debtor might come wanting to pay a week in advance because he foresees, quite rightly, that the value of the currency will go down.

Furmston observed that Art. 5.1.12 would cover that case because the creditor would have a legitimate interest in rejecting the earlier performance.

Bonell agreed with this.

Voting on para. (3) of Fontaine's proposal, on the understanding that if it were rejected the sentence in Sono's proposal which corresponded to it would be put to the vote, 10 voted in favour. Para. (3) of Fontaine's proposal was therefore adopted.

Para. (4) of Fontaine's proposal was also adopted.

It was therefore decided that paras. (3) and (4) of Fontaine's proposal be added to Art. 5.1.17.

Turning to his proposal for Art. 5.1.17(1), in which he referred to "unit of payment", Sono explained that the difficulty he had encountered was that in his text he had indicated that when the parties agreed to pay in a foreign currency it had to be paid in that currency, but when he had looked up para. (1) of the original text, he had found that it was only in the case of lit. (b) that that had to be done, i.e. parties had to agree that payment should be made only in that currency. In practice however, it would be very rare for such a specific indication to be made. Another difficulty he had had was para. (2) of the original text which said "If it is impossible". He was not certain of the meaning of this impossibility: was it force majeure or prohibited by law? He felt that it was rather difficult to bring in the concept "impossible" here when the Principles had force majeure, hardship, etc. He had considered that as they were not preparing a text that was prejudicial to foreign exchange restrictions or regulations, these were outside the scope of the Principles, it would be clearer to make it prohibited by law.

Bonell recalled that this provision had been brought to the attention of the Governing Council of Unidroit the year before and had been discussed extensively. The result of that discussion was a vote and by a slight majority the Governing Council had expressed support for the existing text. A change had thereupon been introduced, as the version which the Council had discussed contained the word "effectively" in para. (1)(b). This had been taken from the Geneva Convention on Bills of Exchange and it had been felt that this was not a fortunate expression as in practice it was very rare that parties expressly stated in their contracts that payment had to be made "effectively" or "actually". The change which had been introduced was that the parties "have agreed that payment should be made only in the

currency" which meant that the language in which the parties chose to express such an agreement could vary greatly. Now he saw a proposed change in substance.

Farnsworth felt bound by the Council's decision, although his proposal had been identical with Sono's.

Turning to the question of the terms "unit of payment" and "unit of account", Maskow felt that it would be good if they drafted a new provision that took care of units of account.

Drobnig pointed out that the word "currency" was used also in the Sono text. He thought that it was not technical to speak of "unit of payment". He wondered whether Sono was attaching any special meaning to the terms "unit of payment" and "unit of account". If one spoke of "unit of payment", one would in this context refer to the currency of payment, the "unit" was only the figures.

Bonell recalled that at an earlier stage the Principles had mentioned the "currency of account" and the "currency of payment" and it had then been decided to abandon this terminology, to use more neutral language and to avoid referring to the concept as such.

Drobnig recalled that they had also been thinking about whether for example, the ECU and the SGR would be covered by the text, but that would not be changed by Sono's text.

Sono indicated that they could of course use "currency of account" and "currency of payment" instead of "unit of payment" or "unit of account" as these were frequently used interchangeably, but when it came to the ECU, Art. 5.1.17 spoke of payment in a currency meaning that the ECU was not covered at all. If the contract was expressed in terms of ECU he thought that this same text could be construed to mean the unit of account following Chapter 1.

Bonell asked for confirmation from the Group that the provision should be interpreted in the broad sense so as to cover also the possible use of units of account. Fontaine as Rapporteur should if so be notified of this so that he could take care of this in the comments.

This was accepted.

Article 5.1.18

Turning to Article 5.1.18, which was still in square brackets, Bonell recalled that it had been discussed by the Governing Council which had reached a conclusion following a proposal presented by Farnsworth as the result of the meeting of lawyers which had taken place in the United States

to examine the draft. A large majority in the Council had in fact favoured a modified version of the American proposal which read "If the contract does not indicate the currency in which a monetary obligation is due, payment must be made in the currency of the due place of payment" (see the Report of the Governing Council discussion in C.D. (70) 22, p. 36).

Drobnig wondered whether the phrase "If the contract does not indicate the currency in which a monetary obligation is due" referred to the currency of account or to the currency of payment.

Farnsworth explained that the American group had commented that the last two lines of the bracketted text beginning "usually agreed" would provoke litigation and controversy, that it was better to have a bright-line rule, and had therefore suggested "the currency of the place of payment". That had been the only suggestion made by the group and that had been the only suggestion that the Council voted on. Goode had inserted the word "due place of payment" which to him seemed slightly awkward. There had been no discussion on the question raised by Drobnig.

Hartkamp suggested that that should be read in the same way as Art. 5.1.17, i.e. to mean that if a monetary obligation was not expressed in a particular currency Art. 5.1.18 would apply.

Bonell agreed that this was probably the intention of the provision.

Garro felt that they had to choose between the present formulation of Art. 5.1.18 "If the contract does not indicate" and the formulation of Art. 5.1.17 "If the contract does not express in which currency" as there was an inconsistency in terminology between the two provisions and this might lead to confusion.

Hartkamp suggested that if the formulation were to be changed, "If a monetary obligation is not expressed in a particular currency" might be suitable although he was not sure that the formulation needed to be changed, as coming after Art. 5.1.17 it was clear what was meant.

Lando wondered whether the "due place of payment" was the one indicated in Art. 5.1.13 and he suggested that this be indicated.

Bonell observed that it might be another place if so contractually agreed.

Hartkamp suggested "the place where payment is due" rather than "due place of payment".

Hyland indicated that the wording he had come up with to align the wording with Art. 5.1.13 was "must be made in the currency of the place at which the monetary obligation is due".

The wording of the whole provision would therefore be "If a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place at which that obligation is due".

Hartkamp observed that the Principles had never used the formulation "where the obligation is due", they always said something like "where payment is to be made".

Bonell recalled that the Governing Council had decided that "place of payment" should be changed to "place for payment" in Art. 5.1.17.

Tallon pointed out that the Governing Council itself said that what it gave were indications to the Working Group, so the Working Group was not obliged to follow these indications.

Farnsworth stated that if the existing text said "place of payment" and the Group was not unhappy with that, Goode's suggestion of "place for payment" was a slight improvement and he could see no reason to further improve on that.

Drobnig stated that the decisive matter was whether the actual place of payment selected by the debtor somewhere in the world was the one that counted, or whether it was the contractual place of payment. He thought that Goode's specification intended to make it clear that it was the contractually agreed place of payment which counted and this was correct.

Farnsworth and Bonell agreed that this was the idea.

Drobnig wondered whether "place for payment" was defined, and whether this was in harmony with their definition of "place of payment". They used "place of performance". He thought that it was difficult to catch this, because then "place of payment" had two meanings, one as defined and one the actual place of payment. It must be clear that they meant the contractually agreed place of payment, i.e. the one which was determined by the Principles.

Garro observed that they had several proposals: one was the original "place of payment", the other was "place of due payment", the third was "place for payment", the fourth "the place where payment is to be made", and the fifth was "the place at which the monetary obligation is due", which was the one he preferred.

Tallon observed that in French it would be impossible to distinguish between the "place of payment" and the "place for payment" as in both cases it would be "le lieu pour le paiment".

The formulation "the place where performance is to be made" was accepted by the Group for Art. 5.1.18. The text of Art. 5.1.18 would therefore read: "If a monetary obligation is not expressed in a particular

currency, payment must be made in the currency of the place where payment is to be made".

Drobnig stated that he did not agree with this formula as it mixed up the currency of account and the currency of payment. The provision had been harmonised with the formulation of Art. 5.1.17(1) ("If a monetary obligation is expressed in a certain currency ...") which referred to the currency of account. Consequently, what they now said was that payment had to be made in the currency of the place of payment if nothing had been said about the currency of account.

Bonell pointed out that it was if nothing was said of the currency at all.

Tallon stated that if no currency was indicated it was not a monetary obligation, which was why the formula was rather ambiguous. To him this referred to where the currency of payment was not indicated as one would have to have a currency indicated somewhere or it would not be a monetary obligation.

Furmston gave the example of a contract of sale with no price.

Hyland wondered what the difference was between the concept of monetary obligation and that of payment. At times they seemed to be interchangeable, at times it seemed as if they meant the same thing. Art. 5.1.13 spoke about the place of performance of monetary obligations and the immediately following articles dealt with the mode of payment and that impled that there was some distinction between the two and he did not think that there was one.

Brazil indicated that a distinction could be put in terms of the distinction between the currency of account and the currency of payment, but they had great trouble drafting for that sort of situation. What was in Art. 5.1.17 was the solution that had been adopted to handle that sort of problem, but it needed to be supplemented by a residual rule and that was what was in Art. 5.1.18.

Hyland wondered why the word "payment" was not used in Art. 5.1.13(1)(a) instead of "monetary obligation".

Bonell felt that this was merely a matter of cosmetics. It had just been felt that a party was to perform as they spoke of "place of performance", and then the different kinds of obligations were addressed. He felt that the difference between "monetary obligation" and "payment" was clear.

Hyland stated that to him the term "monetary obligation" did not seem to have any content. The Principles seemed to present two different concepts, i.e. monetary obligation and payment, when they otherwise were

extremely reluctant to create concepts.

Bonell indicated that this was intentional, because one performed a monetary obligation by payment. This was to make what one intended clear, as the French terminology could cover all performances.

Drobnig asked for an example of a case which was to be solved by this provision.

Bonell gave the case of no price at all having been fixed by the contract, and that of a penalty clause which was formulated only in terms of a percentage of the price, or the case of damages.

Drobnig objected that in the case of a penalty clause that would refer back to the currency of the main obligation, but he conceded that the case of damages might be different.

Lando brought up the case of an obligation expressed in ECU, as one could not pay in ECU.

Drobnig felt that that was covered by Art. 5.1.17.

Bonell wondered whether it really was all that impossible for international contracts to have the price merely expressed as "one million" with no indication of the currency.

Drobnig felt that that was then a matter of interpretation of the contract, of the intention of the parties.

Bonell did not think that it was a matter of interpretation. A different intention of the parties would always prevail if one could prove it, but that was just a rule of interpretation intended to provide a first answer to the problem.

Drobnig stated that then he thought it a bad rule, because the place of payment could be fixed from the currency point of view, but then the debtor would be obliged to pay the price which happened to prevail at that place, because they were mixing the *quantum* with the *modus* of payment.

Maskow stated that as he understood the rule, there was Art. 5.1.14 ("Price determination") which gave a certain rule for the case where the price was not fixed. Then the currency could be deduced by means of Art. 5.1.18, according to which the price was to be expressed in that currency. The rule as expressed by the Governing Council was not without problems because if one had a country with a non-convertible currency as the place of payment it would be problematic if one had to pay an international contract in that currency.

Lando wondered what the situation would be if for example A promised

to pay B 100 "dollars" when both countries had the dollar as its currency. He wondered whether this would be covered by the rule in Art. 5.1.18 or was it a question of interpretation?

Brazil and Tallon stated that it was a question of interpretation. Brazil added that at the end of the day it would come within the residual rule.

Drobnig stated that he had understood the vote taken by the Group as having referred only to the specific question of how to express "due place of payment" and not to the whole provision. He therefore asked for a formal vote on the whole provision.

Tallon added that there was also Sono's proposal to delete Art. 5.1.18.

Hartkamp wondered what the Council had actually decided, whether it had decided to have the article as set out on p. 36 of the report (C.D. (70) 22) in any case, or had it decided to have an article with this wording if there was to be an article at all?

Brazil indicated that his understanding had been that, to the extent that the Governing Council decided these matters, it had decided that there ought to be a provision and that it ought to be along the lines of the proposal transmitted by Farnsworth.

Farnsworth thought that it had been implicit that if the latter part was to be changed there should be something to which that part was to be appended, but he did not think that there had been any restraint on the Working Group further improving it.

Hartkamp stated that that had also been his impression, so the Group therefore had the freedom to decide that there would be no article at all and if so the drafting proposed by the Council would not be relevant at all.

Voting on the proposal to delete Art. 5.1.18, 6 voted for deletion and 8 voted for the retention of the provision.

With reference to the proposed text of Art. 5.1.18, Bonell wondered whether the formulation "If a monetary obligation is not expressed in a particular currency" was not an indirect way of expressing the concept. It might formally be very correct, also with a view to the way Art. 5.1.17 was formulated, but what businesspeople wanted to know when they read the provisions was that the contract did not indicate the currency for possible monetary obligations. If the Group were to adopt the version proposed, they would in any case need to change the title.

Maskow indicated that he preferred the text which was in Doc. 40 Rev.

9 to that proposed.

Farnsworth wondered what the relative roles of the Working Group and the Governing Council were on this. The last time this problem had arisen it had been suggested that because the Governing Council generally did not take votes but just views were expressed, the Working Group did not have to follow the wishes of the Council. In this case a vote had been taken: 11 for the Council text, 5 for a text proposed by Loewe the text of which was unclear, and no support for the existing text. As a member of the Council he felt that it would almost be a total waste of time if the Working Group were simply to reconsider and reject the view of the Council when it was 11 to nothing for a specific text as amended.

Bonell added that independently of whether or not the vote was an indicative one, it was a very strong indication on the part of the Governing Council. It was not a question of either the Working Group or the Governing Council surrendering, if, even in the case of a clear indication of the Council, the Group thought more or less unanimously, that they could not understand why the Council had given a certain indication for this or that other reason, because the Council must have overlooked this or that other aspect which the Group had instead considered in its lengthy discussions. He thought that questions could be reopened and if there was such a strong support for the text of the Working Group they could say that in that particular instance the Governing Council might be wrong. Here there was no such clear cut a case.

Farnsworth stated that it was simply a question of whether they wanted a bright-line rule or a rule that he thought would clearly be provocative of dispute. On this he did not think that the Council had overlooked anything and he did not think that that had been suggested. He added that many times in the United States he had been asked by the twenty or so people who met where they should submit their suggestions and he had answered that they should submit them to the Council. It seemed to him that if this Group took a decision against the Council amendment the answer he had given was wrong and the Working Group should have circulated its text and the suggestions presented to the Working Group. There was an important matter of procedure and participation unless this was just a document to be produced by a group of people sitting in a closed room.

Voting on the approaches adopted in the formulation of Art. 5.1.18 contained in Doc. 40 Rev. 9 and in the formulation before the Governing Council, 4 voted in favour of the former and 7 voted in favour of the latter.

Voting on the opening words of Art. 5.1.18 as stated in Doc. 40 Rev. 9 ("If the contract does not indicate in which currency a monetary obligation is due") as against the opening words of the proposed version ("If a monetary obligation is not expressed in a particular currency") 4 voted in favour of the former and 5 in favour of the latter.

Art. 5.1.18 as adopted therefore read

"If a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made".

Turning to the question of the title of the provision, Bonell wondered whether, as the provision now used the language "If a monetary obligation is not expressed in a particular currency", it was possible to keep the present title "currency not specified".

Farnsworth suggested "currency not expressed".

This was accepted by the Group.

Tallon came back to the question of the relationship between the Governing Council of the Institute and the Working Group. He suggested it might be a good thing to ask the Governing Council what it wanted.

Farnsworth wondered for how much more of the Principles this question would be relevant. His impression was that there was only one more piece that would go to the Council.

Bonell confirmed that only Chapter 1 and Chapter 7 Section 4 still had to be transmitted to the Council. As the Group had been working so hard for so many years and with such great success, and they were so immersed in the subject-matter, it might seem to them that a member of the Governing Council did not have an over-view of the Principles as a whole and had therefore put forward an argument which was not all that convincing. This was, however, something which was inevitable. One thing had to be made clear, i.e. that Unidroit had a certain structure and that the Governing Council was the competent supreme body of the organisation. The Council, also because the Working Group itself had urged it to take a more active role, had decided three years previously to be more actively involved in the exercise, particularly in view of the fact that the Principles would not be submitted to a committee of governmental experts, nor would it be adopted by a diplomatic conference. Therefore, as a responsible organ must have adopted them for them ultimately to have the *imprimatur* of Unidroit, this could only be the Governing Council. If there were two conflicting absolutely irreconcilable points of view, the last word would therefore have to be the Governing Council's. He was sure that *de facto* a *modus vivendi* would be found for the future, such as they had had so far.

Brazil added that they would be able to proceed on the basis that both sides would respect in an appropriate way the competences of the other side in this area. As far as the Working Group was concerned, there was a competence there which was very real in the full professional sense. This was the professional body that was engaged in settling these Principles. He would expect the members of the Governing Council to carry this sort of

attitude in the Governing Council meetings. At the same time the Working Group had to respect the competence in its own role of the Governing Council. It was not necessary or desirable at this stage to take what might be perceived to be a very formal approach.

Tallon felt that it was fine for the Governing Council to suggest that a formulation was not very good and might be improved, but not for it to draft a text which the Working Group was then obliged to adopt. It was the duty of the Council to review the text and to ask the Group to look at something again.

Farnsworth thought Tallon might be misconceiving the role of the Council. He came to the meetings of the Working Group without discussing the drafts with anyone, unless he happened upon someone who had some interest in it, but he went to the Council meeting informed by a document which Bonell had prepared and circulated by December, enabling the Americans to have a meeting of roughly 20 people which lasted for roughly half a day. The last one had taken place at a meeting of the American Bar Association, and a memorandum had been prepared as a result of this meeting that was circulated by Evans to the members of the Council. That was the only feed back that he got. He would therefore have to say that to some extent the Council meeting played a very different role from the meeting of the Working Group and he thought that it would have been possible to reorganise the system so that Bonell would have prepared a comparable document for the Working Group and then he could have come to the Working Group to make these additional suggestions, many of which were not actually his own personal suggestions. That was however not the way it had been, it had been the Council, and he thought that it was unfortunate that there was no French text so there was a linguistic limitation as to who could use this consultation process, but it certainly was not correct that he came to the Council meeting with drafts off the top of his head.

Furmston had the impression that the position of the United States was unusual in this respect, that other Council members had not been consulting, so those who had not consulted then really respresented no more than their own opinion. In England they always tried to sweep these questions under the carpet. His strong impression was that they should stop discussing this and forget about it.

Farnsworth felt that there was much more interest in the Principles in the United States than in other countries.

Turning to the articles which had to be examined in other parts of the Principles (as contained in Doc. 40 Rev. 9), the discussion opened on Art. 2.20 ("Conflict between standard terms and individual provisions") part of which was still in square brackets ("[which is not a standard term"], Bonell indicated that as it stood now, the provision spoke of a conflict between a standard term and another term. The rule was clear, and the other term should prevail. The question was whether they should specify

that that other term was not a standard term or whether it was self-evident. Originally the formulation had been something like "individually stipulated term", but it had been pointed out that this was a very vague concept. The feeling had therefore been that it might be better not to attempt to provide further clarification in this respect. The alternatives were therefore having the provision either with or without the words in square brackets.

Maskow felt that the text within brackets was redundant. If it said that there was a conflict between a standard term and another term what other term could it be if not a non-standard term?

Farnsworth and Tallon agreed with Maskow and added that a comment could explain this.

Garro pointed out that the title of the article was "Conflict between standard terms and individual provisions" and suggested that it be made consistent with the text by saying "Conflict between standard terms and other terms".

Crépeau stated that in the French version he had suggested that the distinction be between standard terms ("clauses-type")and negotiated terms ("clauses négociées"). The reason he had thought of "negotiated terms" was because of the definition which was given under Art. 2.17(2): "Standard terms are provisions which are prepared in advance for general and repeated use by one party *and which are actually used without negotiation with the other party*". That being a characteristic feature of the definition, it seemed to him that any other term in that context would be one which would be negotiated between the parties. He therefore wondered whether they could use "If there is a conflict between a standard term and a negotiated term the negotiated term will prevail", which in French would be "En cas d'incompatibilité, les clauses négociées l'emportent sur les clauses-type".

Maskow felt that if this were the case the reference to the negotiated provisions could be taken up in the titles in both language versions. He felt that it would be clearer than merely to refer to "another term", as that could be taken as a reference to for instance an implied term.

Garro pointed out that the definition of the term "standard term" in Art. 2.17(2) included two essential elements, only one of which was "without negotiation". He was therefore concerned that if "not negotiated" were used as an identification of a term which was not standard, they were not including the other essential element of standard terms which was that they were prepared in advance for general and repeated use. This was the reason he had a lot of questions for his Spanish translation of "standard terms" - a Mexican colleague and he were in fact still discussing this question. Setting aside how they were going to translate this term, which was a separate matter, at this point he did not agree with the suggestion

that a non-standard term should be equated with a negotiated term. He thought that this would be dangerous.

Crépeau pointed out that the two elements were not linked by an "or", they were linked by an "and" and therefore the standard terms here were both the "clauses-type" and the "clauses d'adhésion". The contrary to that was a freely negotiated term.

Garro stated that a term which was freely negotiated but not prepared in advance for repeated use would be a non-standard term.

Bonell indicated that one could also say that it was by implication: a negotiated term could not be prepared in advance.

Garro agreed, but added that that included an element of uncertainty which he thought was not present if they distinguished between standard terms and non-standard terms.

Hartkamp recalled the extensive debate in German legal doctrine about what was and what was not a negotiated term. It was possible for there to be a term which was prepared in advance and used in a number of contracts, but nevertheless negotiated, even if not changed, and then it was no longer a standard term under the German Standard Terms Act. It was dangerous to pick out one element of this elaborate definition in order to define a concept.

Hirose stated that in Japan they had problems with the definition of "*allgemeine Geschäftsbedingungen*". This was the main reason for which they were not enthusiastic about introducing the German AGB-Gesetz into Japan. He wondered whether in the case where there was a standardised contract but one of the parties before using it deleted one sentence and put some words in by hand and gave it to the other party, the term was not negotiated, but the party deleted it and wrote down another and this might mean that it was not a term which was negotiated, but it was not a standard term either. He therefore hesitated to use the word "negotiated". In Germany there was a big debate about whether or not this was included under the definition of "*allgemeine Geschäftsbedingungen*", about whether or not there was the possibility to negotiate and to change this clause, in which case it would fall outside the AGBG.

Drobnig indicated that if there was merely a possibility to negotiate this would not take the printed form out from under the AGBG.

Hirose indicated that that was not what he meant. If A negotiated with B but without the possibility to make changes, then it meant that the terms still fell under the AGBG. There were cases in Germany which indicated that one had to have the possibility to make changes if one thought that this was not the AGBG.

Bonell wondered whether, in the light of the last interventions, they were not better off sticking to the English version, with or without the words in square brackets. He recalled that when the present formula had been arrived at, the Group had found that first to find a sufficiently acceptable definition of "standard term" was extremely difficult. What Crépeau was suggesting was to add a further difficulty by introducing a new term of art: "individual provision" or "negotiated provision". They then again had to question what it really meant. The rule simply wanted to make clear that whatever was different from a standard term should prevail. They knew that in many cases the different terms would be a so-called "individual term" negotiated between the two parties, but he wondered whether they could not leave the question of what this actually meant to interpretation on a case-by-case basis. There were certainly so many border-line cases that by introducing a change such as the one suggested one simply created difficulties without there being any need to do so. If they simply stated "standard terms and any other term which is not a standard term" they at least did not have the pretention of introducing a new concept which then had to be defined.

Drobnig admitted that Bonell was correct, but felt that it was necessary to be as explicit as possible and therefore to include the words which were in brackets. With these words it was relatively water-proof. Of course there still were possibilities of doubt under Art. 2.17(2), but that was on another level. At least the border-line between standard terms and non-standard terms was very clear.

Hyland preferred Crépeau's suggestion to use the word "negotiated" because of the danger of an implied term being considered to be one of the other terms which could prevail over the standard term. This issue should be faced before they decided whether they wanted to change the wording here. The UCC's broad definition of contract to include implied terms might lead American lawyers to think that implied terms were other terms which then should prevail and there were certain scenarios under § 2.207 in which that in fact happened. All the problems raised in the discussion on "negotiated" were extremely well taken, but none of those problems seemed to be such that they could not be resolved in the comments.

Hartkamp suggested that the word "another" could be deleted and the formulation be left as "a term which is not a standard term". He felt that this would be what was most clear.

Maskow indicated that to him individual terms and negotiated terms were the same thing. As they did not want to include terms implied by law they had to state that reference was being made to negotiated terms.

Lando stated that it very often happened that one party for individual use prepared a draft contract and used some standard form contracts at the same time. Neither of these contracts were negotiated, they were just presented to the other party who then accepted them and

signed the contract. He had once seen a Swedish contract where there was first a standard form and then an individual form with contradictions between the two, but both of which had been signed by the other party without any negotiation. In this case this rule should apply. He thought that the individual would prevail over the standard, but he was not so happy about the definition because very often documents were used by a party who had not prepared them.

Crépeau felt that it was a matter of the meaning given to the word "negotiation". For there to be a negotiation it might be sufficient simply to say that a particular clause was perfectly acceptable and here was another clause. Negotiating was not necessarily an embarrassing procedure, it could be acceptance of another person's proposals.

Lando observed that with that philosophy general conditions could also be negotiated.

Komarov favoured the present wording. That proposed by Crépeau was narrower in meaning and he did not think that it was acceptable. The message of this provision was that a standard term was not just a negotiated term, it was a term which was not part of the standard form which was the basis of the contract. If the message of this article was just to stress that it was not a part of the first standard contract it was better to have the present wording as improved by Hartkamp.

Voting on Crépeau's proposal to use the word "negotiated" in the article, 2 voted in favour. The proposal was rejected.

The modification of the present text proposed by Hartkamp was accepted. The provision therefore read:

> "If there is a conflict between a standard term and a term which is not a standard term the latter prevails".

The title was changed to "Conflict between standard terms and non-standard terms".

Introducing the discussion on Article 6.2.5, Bonell stated that this article had been one of those brought to the attention of the Governing Council the week before. The draft report of the Governing Council meeting was before the Working Group. He recalled that within the Working Group those who had supported the second alternative had clearly understood it in the sense that in the light and in the application of the general principle of good faith there might be cases where one could not just from one second to the other change one's mind without incurring in one form or another of liability. The preference for the second alternative also within the Governing Council was explained by the fear that the mechanism envisaged in para. (1) would be too uncertain and open to controversy. This was a point on which the Council had not expressed any firm views, so he would take it

that the Group was quite free to take the decision it considered to be the most appropriate.

Farnsworth observed that the group in the United States had said that the second bracketted alternative seemed preferable, as "The first might discourage cooperation by the aggrieved party by giving the defaulting party additional time". He agreed with this himself.

Drobnig instead felt that the first version would encourage that kind of cooperation, whereas the second discouraged giving time because the party could immediately change his mind.

Farnsworth indicated that what the American group was saying was that if they had the first alternative the aggrieved party might hesitate because cooperation would preclude that party from changing its mind, i.e. the second alternative did not penalise cooperation.

Hartkamp felt that neither of the two alternatives was satisfactory. The first one induced the belief that one had to fix a period of time and if one had not done so one had to wait until the period had elapsed and only then was one allowed to do something. The second alternative created the impression that one could ask for performance, and then when the other party was preparing to perform and was making all the necessary preparations for performance, all of a sudden the aggrieved party was allowed to change his mind and to ask for performance. He wondered whether in order to accommodate the problems the American group had had it would not be wise in principle to take the second alternative as a point of departure but to add some language to make it clear that this could not be done all of a sudden because then one could surprise the other party who was making preparations necessary for performance. He suggested language such as "[...] is not precluded from invoking any other remedy if performance is not made as soon as is reasonable in the circumstances".

Hyland wondered whether this did not come under good faith. This seemed to be the perfect case where good faith should play a role, and the second alternative already included it.

Hartkamp observed that then one had to explain in the comments what the role of good faith was.

Drobnig stated that if one had to have recourse to good faith one had recourse to an argument which created counter-arguments and doubts and uncertainty. He thought that what was proposed was already in the first alternative of para. (1) in the phrase "or otherwise within a reasonable period of time". This would take care of the justified apprehensions which had been expressed. On the other hand, the first part of the first alternative took care of the case where the aggrieved party voluntarily set a period of time, and then of course he should wait until the expiry of the period. These were two important situations which one could regard as

expressions of good faith which he preferred to have in more specific terms and they were set out in the first alternative which was the one he preferred.

Brazil recalled that in the Council he had said that he thought that the second alternative was preferable, on the basis that this was an area where good faith could become relevant. The basic reason for preferring it was that if a party in a commercial transaction had given a further time for performance after the due time then he should not be the party penalised.

Crépeau observed that the fact pattern which was seen there was that a party had a non-monetary obligation, had to perform by a certain date and had not performed at that certain date. The creditor then required performance. Was it at that time that the period was fixed, or otherwise within a reasonable time? For cases of non-monetary obligations he preferred the first alternative.

Bonell recalled that according to those who favoured the second alternative this had to be read in conjunction with the general clause on good faith and this should then certainly be stated in the comments. It could therefore not be assumed that under the second alternative one could always change one's mind suddenly without incurring in any liability whatsoever. The ultimate result of the two alternatives would be more or less the same, it was just that the first alternative stated it expressly while the second stuck to the rule but was open to exceptions.

Garro agreed with Bonell. To a certain extent the first alternative was the second alternative read in the light of the provision on good faith. He favoured the second alternative because of the impression that the first alternative might give as to the lack of teeth and force of the aggrieved party in the mechanisms of enforcement. He urged that the comment make clear not only the reference to good faith, but also that in the light of the provision on good faith the provision could be understood as providing that a reasonable period had to elapse before the creditor turns around and requires the debtor to do this or that within a few days. A cosmetic issue was why the last part of the first alternative said "any other remedy for non-performance", whereas the second alternative merely referred to "any other remedy". Presumably "for non-performance" was redundant.

Huang wondered about the connection between Arts. 6.2.5 and 6.3.2(2).

Drobnig stated that Art. 6.3.2 envisaged the situation where performance was late and the aggrieved party had not required immediate performance. In Art. 6.2.5 the aggrieved party had instead required performance.

Voting on alternative 1 of Art. 6.2.5, 8 voted in favour. Voting on

alternative 2, 6 voted in favour. Alternative 1 was therefore adopted. It was further decided that the last words "for non-performance" should be deleted.

Turning to Art. 6.5.2(2), Bonell recalled that at the meeting of the Council Loewe had suggested aligning the wording with that of Art. 28 CISG ("If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention").

Drobnig observed that the CISG formula was quite different from the one in the Principles. He felt that the one in the Principles was much better, because they had introduced the right to performance for non-monetary obligations under Art. 6.2.2 and that meant that Art. 28 CISG was not needed. Para. (2) assumed that a judicial decision for performance had already been rendered, whereas Art. 28 merely envisaged that any court was free to render or not to render a decision depending on its existing domestic law. He could not see that there was any connection between the provisions.

Hartkamp suggested that the second clause of para. (2) could be modified to read "[...] the aggrieved party may invoke any other remedy".

Brazil and Drobnig agreed.

Crépeau suggested that if the words "for non-performance" were deleted, it might be preferable to add something such as "any other appropriate remedy", as it could not be just any other remedy: if one was in non-performance one could not take an action in nullity, one could not avoid the contract. It was a remedy within the category of remedies within which the problem was stated.

Drobnig stated that it was a remedy within the terms of the remedies which the Principles offered, and the remedies were those set out in Chapter 6 on non-performance. There was no action for nullity or avoidance.

The Group decided to keep para. (2) but with the amendment suggested by Hartkamp. Art. 6.2.5 as adopted therefore read as follows:

> "(1) An aggrieved party who has required performance of a non-monetary obligation and who has not received performance within a period fixed or otherwise within a reasonable period of time may invoke any other remedy.
> (2) If the decision of a court for performance of a non-monetary obligation cannot be enforced, the aggrieved party may invoke any other remedy."

Hyland remarked that in para. (1) the wording "who has not received performance within a period fixed" was confusing to him. If what was meant by "who has required performance" was an aggrieved party who had fixed a period for performance of a non-monetary obligation and who had not received performance within that time or otherwise within a reasonable period, then wording to this effect might be more convincing.

Brazil agreed that that was what was meant and that it was a drafting point.

Crépeau observed that that did not correspond to the answer he had received when he put the question. He had asked whether the period fixed was fixed after the creditor had required performance, e.g. a contract provided for a *delai* of 15 days, 15 days passed and then the creditor required performance but the other party did not perform, the creditor then said to the debtor that he would give him 10 days. Thus as he understood it the period fixed was a period fixed after the creditor had required performance.

Bonell observed that the two were done together.

Drobnig indicated that the period was fixed either together with the request for performance or after it.

Crépeau thought that the understanding was that it was the period fixed for performance.

Drobnig observed that it was a little ambiguous and felt that the drafting might have to be improved.

Hirose wondered whether Art. 6.2.5 included the case where the debtor was late in performing but without fault. In the case where the debtor was not at fault, was the result the same? Art. 6.2.2 did not refer to fault or to negligence, so this system did not have much to do with fault or negligence. He felt confused because the case would depend on whether the debtor was at fault for the late performance or the non-performance.

Drobnig stated that under German law the same question would arise, but here they were drafting the Unidroit Principles and they departed from German law, Japanese law and lots of other legal systems. The Principles were a completely different system, as were the instruments adopted by UNCITRAL.

Structure of the draft Principles

Bonell recalled that on previous occasions members of the Group had questioned the present order of the chapters and the appropriateness of certain divisions.

Maskow indicated that Chapter 4 on Interpretation could be placed more close to the beginning, possibly after the general provisions. He was aware that the chapter related to the interpretation of contracts while here they first had to make clear that a contract was concluded and valid and then one could interpret it. On the other hand the rules on interpretation were of a general character and the problems concerning substantive validity also had to be seen in the light of interpretation, and therefore Chapter 4 could be placed earlier on in the text. The second problem related to termination. If they wanted to be logical it would be better to place termination after damages and exemption clauses since damages were possible also if the contract was not terminated and termination was the last stage. Furthermore, termination was now seen mainly as a sanction for non-performance but termination could also be contractual termination and therefore certain parts of the termination regulation should perhaps be applied to normal termination. It might therefore be better to have it less integrated in the chapter on non-performance.

Tallon did not agree with Maskow. He found the logical order to be how a contract was concluded and then how it was interpreted. He did not think that whether it was the second chapter instead of the fourth was of great importance, but the logical sequence should be: general provisions, formation, validity, interpretation.

Drobnig, Lando and Brazil agreed with Tallon.

Hartkamp observed that the chapter on interpretation was also concerned with a party's statements and other conduct and not merely with contracts, so it might even apply to an offer or to a declaration of acceptance. He would, however, leave the chapter where it was. It would in any case also apply to unilateral statements.

The order of Chapters 1, 2, 3 and 4 was therefore kept as it was.

As to the proposal to move the section on termination to the end of the chapter on non-performance, Lando preferred keeping the order as it was. Damages could be claimed both in cases of right to performance and in cases of termination and was therefore best placed at the end.

No support being forthcoming for this proposal the order of the sections of Chapter 6 was left as it stood.

Crépeau could not see the reason why there was chapter 2 on formation and chapter 3 on substantive validity. When one looked at a contract and asked oneself what the requirements were for it to come into existence or for its validity, one found that there was consent, but there were also the qualities of consent and these were dealt with in the chapter dealing with mistake, threat, gross disparity etc. It seemed to him that there should be one chapter dealing with how a contract came into existence which should

contain the provisions which were found in Chapters 2 and 3. They knew the difficulties they had had in dealing with Art. 3.1 which now had the surprising formula that a contract was concluded, modified or terminated by the mere agreement of the parties, "without any further requirement". It was true that they knew what this meant and the problems that they had wanted to eliminate, such as the problem of consideration and cause, but when one read it at its face value, it was simply not true that a contract was concluded or terminated by mere agreement between the parties without any further requirement. If they put all the provisions that dealt with the formation and the validity of the contract together, they would have all of the requirements for a contract to be validly entered into in one chapter after which they could deal with the next issues. A number of rules had been introduced into the chapter on performance which he felt did not belong to performance, i.e. Arts. 5.1.1 and the following that dealt with the content of contracts. He was well aware that he was referring to a long cultural tradition, but these articles which dealt with performance in general were provisions which in continental civilian tradition were dealt with under the caption "effects of contracts": once a contract had been held valid, what did it contain, what were the elements dealing with the respective obligations of the parties? He therefore proposed that Chapters 2 and 3 be merged and that a chapter dealing either with the contents or the effects of contracts be separated from performance and that it deal with the obligations arising from a contract, i.e. the obligations could be either express or implied, there could be obligations of result or of diligence, etc. Such a chapter would contain Arts. 5.1.1 to 5.1.6.

Maskow wondered what the situation would be with regard to Art. 5.1.14.

Crépeau felt that the price regime of how the price was to be paid belonged to performance, whereas the idea that there should be a price belonged to content. If as a matter of principle the idea were to be retained, one could go through the Principles and see where each of the provisions might belong. He had noticed at the very beginning the rule in Art. 1.4 which stated that "A contract validly entered into is binding upon the parties" and he would be inclined to think that the best place for it might not be the general rules, but the chapter on content, as it might very well be that once a contract was entered into one had to realise that that contract was the law unto the parties and was binding upon them.

Furmston felt that the first thing to do was to decide what the purpose of the exercise was, why they had the text split up into chapters - presumably that was to make it more accessible to readers. He took it for granted that the text was to be read as a whole and therefore as far as deciding what the meaning was it did not actually matter whether they threw all the provisions on the ground and put them back together in a completely different manner. He did not think that the order would be familiar to any common lawyer: no common lawyer would expect to find things in the places where they were if they proceeded from what they were used to in their own

system. He understood from what Crépeau was saying that that was true also of civil lawyers. It did not seem that that mattered very much, provided that it made sense and one could learn very quickly where things were.

Tallon indicated that as he came from the same legal tradition as Crépeau he strongly supported his proposals. An ordinary civil lawyer would not understand the difference between formation and substantive validity: when one spoke of consent and of the vitiating of consent one did it without separating the two. They did not deal with everything related to formation, nor did they deal with every condition for validity. It would therefore be much better to have one chapter on the conclusion of the contract, one on performance and one on non-performance and to divide them into sections, i.e. to have in the chapter on the conclusion of the contract one section on general provisions saying that they dealt with this (offer and acceptence, vitiating factors) and not with that (capacity, agency, immorality, illegality). At first what they dealt with: first, offer and acceptence, second, vitiating factors, then there were the problems of fraud, because in Art. 3.1 they said "mere agreement", which meant only that there was no need for a Statute of Frauds and no need for consideration. This could be deduced from Art. 3.18 if it were placed at the beginning. Then there were the rules from Art. 2.16 - 2.20 which related to the form of the contract, which did not mean that a form was required, but that when there was a form of the contract - the contract is a *contrat d'adhésion* or a standard form contract, etc. - this had some legal consequences. Thus, in chapter 1 one would have 1: general provisions on the conclusion of the contract; 2: offer and acceptance; 3: vitiating factors; and 4: form. He agreed with having a chapter on content - he preferred not "effect" because that mean e.g. *force obligatoire* which was dealt with elsewhere.

Garro considered that the points which had been raised had some merit, although one could find some arguments against them. For example, taking the suggestion to merge the chapters on formation and substantive validity, there was an onthological difference between when a contract was valid and when it was in existence. The same notion that in natural law might be non-existent or null and void. He therefore saw good reasons to have two separate chapters, one on formation and the other on substantive validity. On the other hand, he saw no chapter, section or provision outrageously out of place. There were a couple of topics which he felt might be put in another place, but he did not feel very strongly about it. The first was Art. 2.20 which covered an area which almost obviously came within interpretation and not formation. Secondly, Arts. 3.18 - 3.20, the content of which he would have preferred to have at the beginning of the chapter and not at the end, because as a reader he would like to know what the scope of the chapter was, and therefore Art. 3.19 was better placed at the beginning rather than at the end. The same applied to Arts. 3.18 and 3.20.

Lando observed that for the Scandinavian legal system the questions

of validity belonged to formation. However, he did not think that this mattered. He thought that the rules they had there divided between the conclusion in chapter 2 and the *vice de consentement* in chapter 3 were very clear and easily understood. He pointed out that even in French International Private Law they made a very clear distinction between *conclusion* on the one hand and *vice de consentement* on the other.

Drobnig also preferred retaining the present sub-division. His reasoning went along the same lines as Lando, not because some legal system had this division, but for the practical reason that CISG had a chapter on formation and there was a uniform law on the formation of sales contracts, so this narrow conception of formation had already received some international standing. He felt that they should continue along these lines.

Bonell agreed with Drobnig. He also felt great sympathy for Garro's remarks, but felt that the decisive argument was really that the international legislation in this field, i.e. CISG, first referred to formation and then excluded validity. Scholars and courts would of course question what validity really meant, and of course there were doubtful borderline cases where one had to find an internationally acceptable division, but the idea was there. It was very useful from a marketing point of view to have this division, even if it later became clear that this was not just a copy of CISG because the Principles had twice as many articles and dealt among others with standard term contracts, with the consequence that the Principles filled a very important gap in CISG relating to formation. Then they said that the Principles even had substantive validity. How many arbitrators would not be happy because they found something here which they could relate to Art. 4 CISG which did not indicate what validity meant. As to the division of the performance chapter, he had greater hesitations about the present structure and wondered whether it really commended itself to speak of performance in general and to put everything into it, and then to have hardship. Here he felt much more convinced by the arguments put forward in particular by Crépeau. As regarded the chapters on formation and validity he very much preferred not to touch them.

Crépeau agreed that international instruments were the result of compromise. He could well understand that there was some basis for doing here what was done elsewhere, but he did not think that the theory of precedent was necessarily applicable. He wondered whether the other members of the Group agreed that the rules of consent related to the substantive validity of a contract. The word "substantive" was generally opposed either to "procedural" or to "formal". In the Chapter on substantive validity they had put both the rules of substance and the rules relating to form, but consent was also very much a substantive requirement for a contract. So as a matter of compromise he wondered whether the Group was prepared to say "General provisions"; "Formation" and then simply "Validity" and to have that only dealing with the defects of consent. Otherwise they were saying

that the question of consent was not a matter of substantive validity and he did not think that that was true.

Tallon did not even like "validity". He stated that he would refute the argument of CISG. The division between formation and the rest was very bad. It was impossible to explain this, it was there only because the Scandinavians had indicated that if the rules on formation were imposed upon them they would not ratify the convention. Also he could not see why this should be a precedent. They could do better.

Lando suggested that Tallon distorted history because the formation chapter of CISG came from ULIS and ULIS had been made under the leadership of Paul André Tunc.

Hartkamp suggested having one chapter called "Formation and validity" divided into two sub-chapters, one on "Formation" and the other on "Validity".

Bonell recalled that the Principles were not addressed to scholars and academics, but to practitioners and they would need guidance. If one started by having first general provisions and then "formation and validity" with sub-sections, the utilisers would wonder why the two sub-sections were put together into a chapter and not simply put into separate chapters one after the other. In this perspective he was attracted by Crépeau's proposal to delete "Substantive". A common practitioner would in fact wonder what the difference was between "Substantive" validity and simple "validity".

Drobnig also felt that the word "substantive" was somewhat alien, may be even objectionable, to common law lawyers. Perhaps in that connection they should consider whether Art. 2.16 ("Form of the contract") should be moved to the chapter on validity so that all the questions on validity were together and all the questions of form were together.

The Group agreed to delete "Substantive" from the title of Chapter 3 and to move Art. 2.16 to the chapter on validity. Its final location within the chapter was left to the Editorial Committee.

Turning to Crépeau's proposal to have a chapter on the contents of contracts, Drobnig put forward a compromise solution derived from the PECL which had a chapter called "Terms and performance of the contract". This chapter was not subdivided, but he proposed that the present Chapter 5 of the Principles be sub-divided into "Terms of the contract", "Performance in general" and then "Hardship".

Garro wondered whether Drobnig really liked to use the words "Terms of the contract" for the provisions of Arts. 5.1.1 to 5.1.6. He suggested "effects of the contract" or something like that.

Bonell indicated that continental language clearly used "content".

Lando agreed with Drobnig that there should be a chapter called "Effects and performance of the contract", perhaps "Terms and performance of the contract", but he had hesitations about making a distinction between on the one hand "effects" and on the other "performance". Price, for example, was something of performance, but they could also say that it was something of the term or the effects of the contract. Some provisions were in other words on the borderline between terms and performance. It was very difficult to make a logical distinction between the two and he therefore did not favour making such a distinction within the chapter, even if he fully agreed that the chapter should be called "terms and performance".

Crépeau stated that he would have no qualms in accepting Drobnig's proposal in as much as the first four or five articles which really dealt with content were not mixed up with other rules. The Editorial Committee might very well scan the document and decide to move the articles.

Bonell preferred not to have two concepts in one title. He suggested having "terms of the contract", "performance in general" and "hardship" as sub-sections of Chapter 5.

Drobnig felt that it was not possible to have "terms of the contract" as part of performance.

Voting on contents as a separate chapter, 7 voted for and 5 voted against. The proposal was therefore accepted.

Hirose observed on the basis of this vote that interpretation had something to do with content, e.g. the question of the intention of the parties and the interpretation of statements and other conduct which was quite similar to implied obligations. He therefore wondered whether at least a part of the chapter on interpretation should not be placed in the chapter on content.

Bonell observed that they had decided to be more analytical and to have a separate chapter in order to break up the heavy Chapter 5. He feared that this positive effect would be eliminated by the incorporation of the chapter on interpretation. The reasons for doing so might be very valid, but there were equally valid reasons for having a separate chapter. He felt that they could live with having the chapters on interpretation, then content and then performance. The reader would be very grateful for this.

It was decided that the title of the new Chapter 5 should be "Content".

Hyland observed that if the word "content" were used as the heading, he would think that that was where he was supposed to look to find out what he was supposed to write in his contract. He had never heard the effects of

the contract called "content".

Brazil and Farnsworth shared Hyland's doubts.

Furmston instead observed that he would certainly call it "contents".

Farnsworth observed that in the United States they would probably do what Hirose had suggested and have a chapter entitled "scope and meaning" with interpretation and this included.

Hyland felt that "meaning" went in the right direction: he had spent five minutes looking for the article on implied terms in the interpretation chapter without finding it.

Crépeau suggested that it would have been easier to find it if it had been under "content".

Editorial Committee meeting

The Rapporteurs met as the Editorial Committee of the Working Group under the Chairmanship of Farnsworth.

Farnsworth opened the meeting by recalling that a suggestion had been made for there to be "co-Rapporteurs", or "advisers" as he preferred to call them. Bonell had drawn up a list with first the Rapporteur and then the Co-Rapporteur indicated for each section, and this list was as follows:

Chapter 1 (General Provisions)	Bonell/Hartkamp
Chapter 2 (Formation)	Bonell/Farnsworth
Chapter 3 (Validity)	Drobnig-Lando/Crépeau
Chapter 4 (Interpretation)	Bonell/Komarov
Chapter 5 (Content)	Fontaine/Date-Bah
Chapter 6 Sec. 1 (Performance in General)	Fontaine-Maskow/Date-Bah
Chapter 6 Sec. 2 (Hardship)	Maskow/Garro
Chapter 7 Sec. 1 (Non-Perf. in general)	Furmston/Di Majo
Chapter 7 Sec. 2 (Right to Performance)	Drobnig/Huang
Chapter 7 Sec. 3 (Terminaton)	Lando/Hirose
Chapter 7 Sec. 4 (Damages & Exemption Clauses)	Tallon/Brazil.

Bonell indicated that the purpose of the meeting of the Editorial Committee was to formalise the beginning of the last round, in that the Rapporteurs were called upon to revise and prepared the final version of the comments. The assumption was that, if the suggestion of having advisers were agreed upon, once the Rapporteurs had finished their work, their chapter or section would be sent to the adviser appointed for that chapter or section who would be asked to return the papers to the Rapporteurs with their comments. The outcome should be ready at a time to be determined, when the Editorial Committee would meet to settle issues raised that were

of common interest and related to both the formal structure and language of the Principles, as well as to their substance. The Rapporteurs would send their chapters or sections directly to their advisers.

Tallon pointed out that he wrote his comments in French and that Brazil did not read French. His section would therefore require more time, as he had to send it to the Institute to have it translated before he could send it to Brazil.

Farnsworth suggested that when the Rapporteurs sent their documents to the advisers, if they wanted responses in a particular form it would be good to ask for it. For example, his own inclination as Bonell's adviser would be to write on the paper he received and not to have a separate letter with points. The question was then what happened if the Rapporteur did not think much of the suggestion. His sense was that the Rapporteur had to have a lot of discretion on that.

Bonell wondered whether it would be possible, also considering that the Institute would have to produce the final version of the whole of the Principles, for Rapporteurs to use a computer, preferably the program Word 5.0 which would facilitate matters. Other programs could be converted. These diskettes could then be sent to the Secretariat.

Drobnig observed that some kind of uniformity was desirable for the comments and wondered which model the Rapporteurs should use.

Farnsworth recalled that in Bristol there had been favourable informal reference to Fontaine's comments. Bonell's comments would be of some help. There were to be no Rapporteur's Notes, everything was to be in the comment or not to be there at all. As decided in previous meetings of the Group, domestic legislation was not to be cited, and international laws or instruments should be cited sparingly. Personally he felt that it would be easier to read if the citations were placed at the end of the paragraphs so the discussion was not interrupted, but the Rapporteurs had to use their own discretion on that. Illustrations were of course not warranted for every article.

Bonell added that they could perhaps agree on having titles for individual sections of the comments whenever appropriate. The titles should give as clear an indication as possible as to what was to follow. He also took it that it was agreed that within the same article the illustrations should be numbered consecutively. He suggested that they agree on keeping the comments as concise as possible and that it might be appropriate to have more sub-headings as this helped the reader, instead of a long sub-section split into three sub-sub-sections without headings but just divided by illustrations. He suggested having as many headings as possible and to have the illustration at the end of each heading.

Drobnig and Tallon indicated that they would rather have the

illustration very near to the point.

Lando indicated that in the PECL they had opted for short sub-divisions with illustrations at the point and observed that this had not broken up the narrative. Also, Furmston's book on the Law of Contract had the cases inserted where the point was discussed and it did not break off the narrative. The idea was that if they had an illustration which brought a point, instead of writing "see illustration 3" at which the reader would then have to go to illustration 3, one gave the reader the illustration at once.

Furmston also felt that the illustrations should be close to the text they were illustrating.

Farnsworth concluded that what they were saying was that it was permissible to have illustrations in the middle of a paragraph, but that they should try not to break them up.

Drobnig wondered whether there was a prescribed hierarchy of symbols if one had several sub-divisions, especially if there were sub-sub-divisions. He suggested that the numbering of the comments be changed to start with Arabic numerals and then to have the sub-sections with small letters.

This was agreed by the Group.

Lando suggested that the titles should be as short as possible.

Bonell thought that a middle way might be best, so that the titles were short but long enough to help the reader. He wondered whether it was agreed that they should not only never quote national legislation in the text, but that they would not even say that a particular rule was, for example, based on French law or that it corresponded to a solution adopted in the US Restatement.

Farnsworth thought that that had already been agreed, and that the example given had been not to mention the German *Nachfrist*.

Evans observed that if one knew that a certain rule was inspired by a national system one did not need to be told and if one did not know it one was probably not very interested anyway.

Bonell added that once one mentioned one, one would wonder why one was not mentioning all the rest. He next wondered what the situation would be as regarded international instruments, in particular CISG. He added that he had felt it necessary to quote the Model Law on Arbitration and the ICSID Convention in order to show that there was a framework within which the Principles could operate. If he were now to re-write his comments on the formation chapter, he would, notwithstanding the references in Chapter

1 to the Model Law on Arbitration and ICSID, refrain from saying that the relevant provision on offer was almost literally taken from CISG.

Maskow instead felt that such an indication should be given.

Farnsworth thought that for show-casing the Principles one would not want to begin by saying that this was in substance the same as CISG, one might have a general paragraph and then in the end in brackets say that it was taken from CISG.

Bonell observed that if this were agreed upon it had to be done systematically.

Evans observed that when one started doing that one ran the risk of making a semi-commentary on CISG because when one started explaining where the differences lay, which might indeed be a question of interpretation, it could become very lengthy.

Bonell gave the example of the provision on modified acceptance which had omitted the last paragraph and therefore had a difference in substance. Should he mention that paras. (1) and (2) were taken literally from CISG but that para. (3) was no longer there? If he was to mention it he would have to explain the reason for this.

Lando objected that it had to be mentioned as people would recognise the rule from CISG and would notice that there was no indication that it was taken from there.

Tallon felt that it was difficult to say that a priviledged position should be given to CISG and no indication be given that a particular provision had been inspired by a national legal system.

Evans and Bonell indicated that the Preface to the Principles as a whole would take into account the main sources which had been used.

Lando observed that if the Preface indicated that this or that other part was inspired by this or that, then they did not need to go into this. He thought of EEC legislation: would that be included under national legislation?

Drobnig had doubts as a result of considerations of the authority the Principles would have considering that they were not based on an international convention between States. In view of this it was useful for users to know the degree to which the major points were in harmony with generally or widely accepted international instruments such as CISG, of course without going into details of the differences.

Bonell objected that in many cases one had to go into the differences, as for example in the case of modified acceptance. In this

case it was not possible to say that while the first two paragraphs were taken literally from CISG the third paragraph was no longer there, and leave it at that. He would have to develop it and state that this was so because it had been felt that with the third paragraph the preceeding two paragraphs lost much of their weight etc.

Farnsworth disagreed. One possible solution was what was done in the UCC if they had a section which was essentially the same as, for example, the previous Uniform Sales Act, i.e. simply to say "see Uniform Sales Act § .." without any explanation as to why it was different if it were different. It seemed to him that one purpose was to avoid that the reader thought that they were stealing things without acknowledging them, and the other was to ensure that the knowledgable reader who knew that it came from CISG would not be advantaged over the innocent reader who had no idea where it came from. If one said "based in part on" or "modified version of" the reader could find the various commentaries and look it up. Such an indication could be placed in brackets.

Bonell saw that this was a different technique which avoided many of the inconveniences he was referring to, but if CISG was to be quoted in this way throughout the text of the operative provisions, and he thought that they agreed that this had to be done systematically, what should he do with the Rome Convention in Chapter 1?

Farnsworth observed that in the case of CISG almost the precise words had been copied, whereas the precise words had not been copied of any other convention. As to, for example, the *Nachfrist*, he thought there would be no harm in saying in the Preface that in some cases they had adopted national rules such as e.g. the *Nachfrist*. He thought that CISG had been given special treatment and that none of the other conventions was in the same position. The rest was just inspiration.

Furmston agreed that that was the only instrument from which they had lifted substantial sections.

Tallon felt there to be a problem as regarded national legislation. He wondered whether it would not be difficult not to say, e.g., that for penalty causes they had deviated from the common law tradition or that for damages after termination they had rejected the German rule, because some texts were deliberately written in order to set aside some national rule or other.

Drobnig agreed that in those cases it would be necessary to say very generally that it had been taken in lieu of a contrary rule in cerntain countries, even if the rule was self-evident in some legal systems.

Farnsworth observed that the disadvantage of mentioning the systems was that then the third world reader or the reader from a small country would get the impression that the Principles were inspired only by English

common law, German law, French law. He thought that there was no harm if one said "in common law countries" or "in some common law countries" or "in civil law countries". He thought that that would be helpful, but recalled that part of the discussion in Bristol had turned on not making this appear as much inspired by a few legal systems as in fact it was.

Lando wondered whether that did not leave them open to criticism, because it was generally a rule of scholarly writing that such borrowings be acknowledged. If they now said "contrary to some legal systems" the critical or scholarly reader would say that they were making allegations without substantiating them.

Bonell agreed. He was intellectually attracted by an approach which already in this framework took existing laws into the greatest consideration possible, but it worried him. For example, for the penalty clause one could say that there were difficulties in the common laws systems, but what words should one use? "Difficulties in accepting it", "absolutely unknown", "absolutely invalid"? Already here one entered into very delicate matters. Again, the good faith clause: what should he say? If they thought that it was appropriate to make even such indirect references to domestic law he could certainly not say that good faith as such was unknown in common law systems, then he had to start with English law, but why should he mention English law and not say that this was unknown in Nigeria?

Drobnig observed that this was a case which was different from that referred to by Tallon, because the case mentioned was a general rule which was not directed against certain legal systems and he would not mention anything about national origin. There were very few, maybe two or three, instances in which they had made a specific rule directed against one specific country or against a few specific countries, and only those cases should be singled out if the rules as such were not understandable to others.

Farnsworth suggested that for good faith one could simply say that this was a long-established principle in some systems and increasingly accepted in others and let it go at that. It seemed to him that if they now decided that if possible they should avoid picking out any particular country whose rules were rejected and then if one or two of the Rapporteurs felt that they simply could not live with this rule and that they had to make an exception, that was what they would have another meeting for. The important thing was to get a principle that they would try to apply most of the time.

Bonell suggested that the Group might have noticed that in the comments in Doc. 51 there was no such reference whatsoever. He had felt that once one started writing a comment with the idea in mind that one had to give the background information, even in generic terms, then one started an entirely different commentary than if one only had to explain the

operation of the rule.

Furmston observed that they had not agreed on the date by which they had to complete their work.

Bonell indicated that according to the tentative time-table made by the Secretariat the Rapporteurs should complete their revision by 31 October and send them to their advisers.

Evans pointed out that the chapters should be sent also to the Secretariat as the Secretariat would have to start the general job of editing even before what the advisers were going to say was known.

Bonell indicated that the advisers would then have another three or four months to go through what the Rapporteurs had written, i.e. to 28 February.

Evans added that even if some reports came in later, that would be no problem as they could not all be edited at the same time. If therefore some came in at the beginning of November and the rest in the course of the month but no later than the end of November, that would be all right.

Resumption of Plenary

At the resumption of the Plenary, Farnsworth reported that the conclusion of the Editorial Committee was the proposal that there be an adviser for each Rapporteur. The Rapporteurs would attempt to have their papers with the text and revised comments ready by 1 November ideally, and put their reports in the hands of the Institute and also directly in the hands of their advisers. The Institute would then begin to work on the comments and the advisers would also work on the comments at the same time and send their observations to the Rapporteurs by 1 March, the understanding being that the Rapporteurs would try to send them with a wide margin, double spaced so the advisers could do whatever editorial work they thought advisable on the document itself. The Rapporteurs would exercise discretion on whether or not to accept the suggestions of the advisers. At the final meeting of the Group it would be open to anyone, the adviser or anyone else, to raise points that had not been accepted.

The list of Rapporteurs and advisers was submitted to the Working Group and was accepted.

Farnsworth indicated that what exactly would happen would depend a lot on the particular adviser and to some extent on the Rapporteur. His own inclination would be to do actual editorial work, i.e. if he were a Rapporteur he would want to know not only if something was inadequate, but also to receive suggestions as to what to do about it. He suggested that the advisers should try to give as much help as possible.

Tallon supposed that the object was not to reopen questions which had been discussed and settled. Problems of comprehension could be raised by the adviser.

Lando suggested that it would help advisers if they had all the background documents available, earlier drafts, etc.

Bonell observed that at this stage it was not an easy task to trace back all the preparatory versions even if it ultimately could be done. He wondered if this really were necessary. He thought that what was important was to have the report of the session where the final text was discussed.

Farnsworth agreed with Lando in the sense that there had been instances where in the course of even early discussions someone had suggested that a particular point could be dealt with in the comments and those points would not be picked up unless the Rapporteur or the adviser or both looked for such remarks. On the whole his sense was like Tallon that the adviser should put him/herself in the position of someone who knew nothing of the Principles and was reading it for the first time.

Maskow suggested that the advisers should indicate to the Secretariat what additional documents they need as the Rapporteurs would in most cases have the documents and only in some cases would the odd document be missing. As to what the advisers should do, he felt that they should not limit themselves to general remarks such as that something needed to be elaborated or something was not convincing. If the advisers felt that something was not done in the best way possible they should do it themselves, i.e. finalise the text. If they sent their opinions to the Rapporteur they should be satisfied that the comments were now complete, and then it would be up to the Rapporteur to decide whether or not to accept the additions.

Farnsworth informed the Plenary that the Editorial Committee had discussed the question of the location of the illustrations, and come to the conclusion that illustrations could come right in the middle of a paragraph discussing a point and need not be collected at the end of the paragraph, but that to prevent illustrations from chopping up paragraphs more than necessary it was thought desirable that there be fairly short paragraphs. Each paragraph should have a heading somewhat similar to the ones in Doc. 51, with the suggestion that if possible the titles of the paragraphs be as short as possible. No reference was to be made to any national legal system, with the possibility that there might be a preface that might say something about the debt of the Principles to national legal systems. CISG was to be treated specially in the sense that they had actually taken language, sometimes literally, from CISG but had not done so from other international documents. It was permissible to cite international documents, but this was to be done very sparingly. For sections that took or took in a modified form, or even took part and rejected other parts of, CISG provisions the comments could, perhaps

should, say that this had been done but without there being any need to justify or indicate the reason why something had been done which was different from what CISG had done. There had further been some discussion of changes in the numbering system, but that would be evident from the revised version of the comments.

Bonell added that the basic assumption was that as the comments were not intended to be a comparative law treaty there was no point in providing background information in the comments on the extent to which the rule was new or less new or corresponded to this or that other national system or instrument. The main, if not exclusive, purpose of the comments was that of illustrating the *rationale* of the rule and how it could and should work in practice, what sort of issues, questions or practical problems it addressed and would hopefully help to settle.

Farnsworth observed that they had concluded that it was all right in some cases to say that this rejected a rule of many common law systems, or of some civil law systems, without identifying the systems.

Bonell stated that in the case of, for example, the rule that "A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement" (Art. 3.1) one should help the reader by saying that this meant that consideration and *causa* were excluded.

Crépeau recalled that one of the problems encountered in providing the commentaries to the Québec new Civil Code had been the question of whom they were addressing, at what level the language should be pitched.

Farnsworth indicated that his assumption was that they should be addressing people who were not particularly familiar with any legal system other than their own and not particularly familiar with international transactions. He assumed that while they might strive for the French ideal of preparing a text which was suitable for who was not even law-trained and just walked in off the street, he felt that that was perhaps an aspiration which they could not fulfil.

Maskow felt that as to degree of sophistication the text already showed a certain coherence. What they had done should be the guideline for future work. It was not too sophisticated and experienced people, even if perhaps not people who were completely lay, could grasp the ideas which then the illustrations would make clear. Also the self-restraint they had imposed upon themselves led to the result that too high a degree of sophistication was avoided.

Lando agreed with Maskow. He added that he would avoid Latin, and that he would also try to use the style used by the ICC which was one aimed at the same type of *clientèle*, i.e. at business people not knowledgeable of the law.

Bonell turned to the question of the preparation of the French version of the Principles. He indicated that a first draft of the text had been prepared by an équipe at McGill University led by Crépeau. Clearly also the expertise of the other members of the Group, particularly that of Tallon and Fontaine, was called upon, and they should be actively involved in the finalisation of the text. He wondered whether they would be prepared to be involved in this exercise.

Crépeau indicated that he certainly would like any kind of collaboration by the Francophone members of the Group, but that he could certainly send the text to everyone because there might be very fruitful indications which might improve the final draft.

Bonell thought that everyone would of course very much appreciate that, on the understanding that the ultimate responisbility could not but be that of the French speakers of the Group. In this respect he thought that sooner or later it might be necessary for them to convene and to have an exchange of views. He informed the Group that also other language versions were being prepared: a German version was being prepared by Drobnig and Maskow in consultation with himself, a Spanish version was being prepared by Garro, a Chinese version was being prepared under the coordination of Huang, and Komarov was preparing a Russian version. An Italian version would also be prepared shortly.

Maskow suggested that to facilitate the revision of the translations it would be good to have a text in which the latest amendments were indicated.

Tallon agreed with Maskow. He also indicated that the French version should be coordinated with the PECL where there was correspondence.

Crépeau wondered when the text as finalised at this meeting could be ready.

Bonell thought that the new version of the Principles could be prepared already the following week.

Crépeau wondered whether a change in the text proposed by one of the groups would be the subject of a future meeting.

Bonell indicated that the text stood as it had been agreed upon by the Group as a whole. The exercise of the Rapporteurs and of the advisers was not that of re-opening questions of substance relating to the text. He could imagine that very exceptionally when the French and other language versions were being prepared it might be almost impossible to find a text which corresponded exactly, and then those preparing these texts might feel tempted to introduce a different concept which in that particular legal terminology more properly reflected the basic idea behind the concept used in the English text. In certain instances this would be almost inevitable

and a certain discretion on the part of those responsible for the other language versions should be allowed. He recalled, however, that it had been decided that the titles of the provisions on hardship and force majeure should remain "hardship" and "force majeure" in the different language versions because of the greater appeal to practitioners. This was a decision of substance. On the other hand for "good faith and fair dealing" it had already been decided that there would not be a word-by-word translation but that the French would be only "bonne foi". As to the schedule for the future work, he recalled that they had now completed the final reading of the text, they had also set up the Editorial Committee and appointed the advisers. The Rapporteurs were asked to prepared their new version of the comments by the end of October, middle of November 1992. The Rapporteurs would then send the new texts to their respective advisers as well as to the Secretariat. The advisers were asked to complete their task within February 1993. The Secretariat would, under the guidance of the Secretary-General, start the editorial work *strictu sensu* already in November. The Governing Council was scheduled to meet 19 to 23 April and on that occasion the Council would be asked to comment on the controversial points of Chapter 1 and Chapter 6 (now 7) Section 4. A meeting of the Editorial Committee was envisaged for that same period, possibly the week after the Governing Council, when the Rapporteurs would have had the comments of the advisers. Following the suggestion put forward by the Governing Council, the English text and comments (even if the comments would still not be in their final version) and the French text could then be sent to govenments of Unidroit member States for comment. A formal consultation procedure such as that adopted for draft conventions was, however, not envisaged. Given the particular nature of the Principles, which would be high-lighted in the cover letter, governments would be informed of the project and of the results so far achieved and the text and the comments submitted to their attention, with a request for any advice, observations or comments that they might consider appropriate and an announcement that the final product would not be an internationally binding instrument. Too long a period of time would not be allowed for these comments so as not to delay the completion of the work, nor would they run the risk of having to begin all over again because one or other government began to argue about all the articles of the draft. Comments could of course be received, as they were from corresponding collaborators, and to the extent that they clearly showed commonly shared difficulties with particular provisions they would be taken into account. The deadline for these comments would be set at September 1993. In September 1993 the Institute would have the observations of the Governing Council on the sections it so far had not examined, possible strongly urged comments and suggestions for amendments by governments and/or corresponding collaborators, and an indication of possible difficulties on the part of Rapporteurs and advisers. These would then all be points to be discussed by the Group, which could meet in early January 1994 for the final round. After this they only had to wait for the Governing Council session which could take place in the spring, or even in the February of that year depending on the timing of the diplomatic conference for the adoption of

the cultural property convention. Once the Governing Council had approved the Principles, the printing, publication and diffusion of the project could be achieved in a very short period of time. The assumption was that for a number of reasons, financial as well as the need to come out as soon as possible, the pubblication would be taken care of by the Institute. With the technology available it was possible to prepare a camera-ready version which could then be taken to the printers.

Evans wondered whether April was realistic as the date for the meeting of the Editorial Committee considering that the Rapporteurs might not receive the comments of their advisers until the end of February or early March, that they then would have to go through these comments, digest them and make any modifications they considered appropriate, after which this had to be circulated to the other members of the Editorial Committee.

Farnsworth also had the same question. The people who were coming to the meeting would have to have something in their hands by early April. The Rapporteurs had in fact almost no time to decide what to do. It would be very hard for there to be any exchange between the Rapporteurs and the advisers.

Bonell indicated that what was envisaged was not having a discussion between Rapporteurs and advisers.

Tallon pointed out that there still would be a partial discussion as the comments of the Governing Council would not be ready. He suggested that it might be better to have the meeting later and then to be able to discuss everything.

Bonell agreed that as far as Chapter 1 and Chapter 6(7) Section 4 were concerned this was a possibility. On the other hand he was afraid that this would delay the whole exercise too much. Past experience showed that the Governing Council was so impressed by the quality of the work that there would not be many strong suggestions for change.

Farnsworth pointed out that in the United States meetings were planned at least a year ahead so if it was decided that the date should be fixed later he might not be able to participate.

It was decided that the next meeting of the Group as a whole would be in January 1994.

Huang wondered when the members of the Group would get all the comments. As she understood matters, they would only get the chapter or section for which they were acting as advisers. She thought that it would be useful to have the comments as a whole.

Bonell thought that once the Editorial Committee had met and finalised the comments, they would be transmitted immediately also to the

other members of the Group. This would be towards the beginning of the summer, which would leave them sufficient time before the meeting in January.

Drobnig indicated that already the word "Principles" gave rise to controversies for the translation. It was in fact not only a question of translation, it was also a question of the level at which the Principles should be read. Maskow and he had discussed this with Bonell, with reference also to an article the latter had written in German in which he had not up-graded, but rather down-graded, the Principles. This had led him to wonder whether they should really stick with the idea that these were principles, perhaps even general principles, or whether a more correct, concrete and modest description would not be more appropriate. Most of the rules were not really principles, they were rather specific rules which in his view in many cases were operative rules for solving concrete situations, and depending on the purpose of the whole exercise this should perhaps be reconsidered. If the Principles were an instrument that should be made available to businessmen, he was afraid that if they stuck to the term "Principles" businessmen and their advising lawyers would from the beginning say that they were nothing for them as principles was something for academic lawyers and not for practical lawyers. He therefore had a certain inclination to suggest "Rules" ("*Regeln*" in German), maybe "General Rules".

Bonell agreed with Drobnig that the problem did exist, and not only in German, or even in Italian in which "*princìpi*" was really something very abstract, but in all versions, including the English one. They now had come to the point at which they had to adopt a title, which they had not done so far. The documents read *Principles for International Commercial Contracts*. This could clearly not be the title, parties could never refer in their contract to "Principles for international commercial contracts", because even if they quoted the provisions, who would know what principles these were? He thought that "Unidroit" must be built into the title, which should therefore be something like "Unidroit Principles for [...]". In English it sounded quite attractive, but in German and in Italian it did not sound right.

Farnsworth recalled that the project had originally be called "the progressive codification of international trade law". He thought that that was worse. "Restatement" had been considered, but at the time there had been a discussion in the United States about a "Restatement" of the law of corporate governance and managing corporations that became very controversial and which people said did not restate anything, so they had decided to call it "Principles of corporate governance". He recalled in the Governing Council having suggested that the project be named "Principles" and this had been agreed to. These were different from the Principles of corporate governance because one major purpose was to have these incorporated by reference and one did think of incorporating rules rather than principles. He had no strong feeling about it, but did think that in

English it was perfectly good. They would not say the rule of good faith and fair dealing, they would say the principle of good faith and fair dealing. A great many of the black letter provisions they would descibe as "principles" and not as "rules". In addition in English there was something catching about principles: "The Unidroit Principles" was something, whereas "The Unidroit Rules" were not - everyone had rules.

Crépeau observed that the difficulty in choosing a term always related to the content one gave to the term. If one looked through the over 100 articles that were to be found in the document one found that there were very few principles, most of the provisions were rules, very specific rules dealing with formation, validity, content, etc., and intersperced here and there there was a principle. In French, when one spoke about the "Principes" one set the tone at a very high level and then the question was whether one did not disappoint the reader by saying that the level set was much higher than the contents provided. For example, on p. 14 of doc. 51, he read that one of the aims of the Principles was to provide "a comprehensive system of rules in the field of contract which, because of its well-balanced and cosmopolitan content, is equally acceptable to businesspeople and/or judges and arbitrators throughout the world". He was a little afraid of such self-laudatory remarks. He thought that it was better to leave the readers to provide a judgment on the validity of the rules. On the other hand, when one spoke of the Hague Rules that was a very important and very prestigeous document and the fact that it was called the "Hague Rules" did not prevent the document from being an important document in international trade. He therefore suggested that if they were to choose a term, they should not choose "Principles" but possibly "The Unidroit Rules".

Brazil referred to Art. 1.1 which stated that "These Principles set forth general rules for international commercial contracts". As a member of the English-speaking members of the Group he agreed with Farnsworth. The document did contain both rules and principles and might in fact contain more rules than principles, but perhaps they gave the principles more weight by using "Principles".

Hartkamp wondered how this problem had been solved by the European Commission.

Drobnig, Lando and Tallon indicated that it had not yet been solved, even if the present title was "Principles".

Hartkamp thought that it would be very strange if the title were to differ in the different languages, and be "Principles" in English and "Règles" in French, "Regeln" in German etc. That could give rise to questions.

Hyland suggested that a further consideration might be what they wanted to do with the document. He had noticed a laudable modesty among the

members of the Group but he wondered whether the real purpose was not that of having it adopted as the governing law of various contracts. As a result of a whole series of difficulties in private international law that might turn out to be a difficult thing to do. If it were simply called "Rules" that did not give much of a lever to those who wanted to argue that this was actually an independent law that could actually govern a contract and this seemed to speak against using the concept of "Rules". "Principles" was such a rare term that it might do the job.

Maskow preferred to use the word "Rules" as he hoped that people would adopt this document as the law governing their contract and his feeling was that businessmen would find it easier to approach rules rather than principles, that they might in fact show greater interest in them if they were rules.

Lando felt that this question should be decided separately for each language. For the English version there seemed to be a majority for "Principles".

Evans recalled that when the title "Progressive Codification" had been discussed and rejected by the Governing Council "Rules" had also been considered, but had been rejected as it was felt that it gave the impression that the instrument was mandatory, even if it was well-known that there were non-mandatory rules of, for example, the ICC. Furthermore, the name "Principles" had by now been given great exposure. Personally he would also prefer "Principles". He stressed that they had to bear in mind the possible confusion which might result if the title differed in the different language versions.

Komarov suggested having both "Principles and Rules" as this problem was connected with the problem of the status of other language versions. He could imagine a Russian-German contract being concluded on the basis of these Principles and problems could arise as to which version of the Principles was being referred to. He thought that they had to consider the question of the status of the other language versions. The translations into languages other than English and French, which could be the offical languages, could pose some problems. Another connected problem was that of copyright and whether the Principles would be covered by copyright: could anyone who wanted to publish the Principles do so without Unidroit's permission? If they were not covered by copyright this should be made clear.

Bonell wondered whether it really was all that unthinkable that in contract negotiations between, for example, parties from England and France one party referred to the "Unidroit Principles" and the other to the "Règles Unidroit", i.e. was it impossible to live with different titles in the different languages?

Garro felt that they would find many instances in which there would

be a certain awkwardness between the different langauages. Many problems were revealed when one started translating into another language. He did not feel that this was one of those cases. The problem raised by Drobnig was not one of translation, because the term "Principles" was vulnerable in English as well as in Spanish, French or German. It was more a question of substance. It was true that to practitioners the word "Principles" might sound too arrogant or pompous. However, independently of the language they were considering, he would favour a term which would do justice not so much to the urge to sell the product as to the actual articles which the instrument contained. He felt that most of them agreed that there were principles such as *pacta sunt servanda*, freedom of contract and good faith, which were really more than rules, and on the other hand there were also the hard and fast rules. He would therefore be inclined to agree with the proposal to have both terms.

Sono observed that when they were considering the terms "Principles" and "Rules", they might think in terms of their operation. Art. 1.2(1) stated that the "Principles shall be applied when the parties have agreed that their contract be governed by them", but at the same time para. (2) stated that the Principles "may be applied (a) when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like" and para. (3) stated that the Principles "may provide a solution [...] when it proves impossible to establish the relevant rule of the applicable law". He wondered how aggressive they wanted to be, whether they wanted to put a lot of emphasis on Art. 1.2(1), whether they would sell it aggressively to the parties as the law applicable or whether they were more idealistic. If they wanted to be more idealistic they should keep "Principles", if they wanted to be aggressive they should use "Rules". Personally he favoured "Principles".

Tallon preferred "Rules". He did not like to have both "Principles and Rules" as a title had to be short. He felt that if one had "Unidroit Rules" the "Unidroit" would settle both questions: it would indicate that the instrument was not mandatory as Unidroit had no legislative power, on the other hand "Unidroit" would also raise the level of the rules to something more important.

Bonell wondered whether there was strong opposition to having different titles in the different languages.

Maskow indicated that in his experience in legal practice "principles" had another significance, in that one turned to principles if one was not able to establish rules.

Drobnig felt that the discussion had shown that different languages attached different meanings to the words "principles" and "rules". As to the German version, they would be grateful if they could be free to use the word which was the most appropriate for their language and the same freedom should apply to all the languages. He asked for an express decision on this

point.

Huang pointed out that in China "Principles" had two different levels, so in Chinese she had to use "general principles" or possibly "general rules", but only "principles" or only "rules" would not be appropriate.

Hartkamp indicated that in Dutch it would be "rules".

Hyland stated that the beauty of the document was that it forged a unified vocabulary for discussing these issues, it contained a whole series of concepts which were new and which they had been at great pains to unify. It would be completely contrary to the spirit of this document to have the titles different in the different languages. He thought that there was nothing wrong with having a title which sounded somewhat wrong in all of the languages, just as "gross disparity" and "hardship" sounded odd.

Farnsworth stated that although his personal preference was for "Principles", he preferred to have "Rules" to having different things in different languages.

Voting on having the title as "Unidroit Principles" in English and allowing the other languages to use the word which was most appropriate for the language concerned, 5 voted in favour and 7 voted against.

Brazil pointed out that the question of the title would be one of the items to come before the Governing Council in 1993 and although he thought it likely that the Council would go along with the views of the Group, theoretically it was possible that the Council would take the view that "Principles" was how it appeared on the Work Programme and was how it had begun to be known in the international community so the name should stay "Principles". He recalled that Prof. Enderlein had reported to the Council that the Principles had recently been used in an important arbitration in Berlin, on which occasion they were referred to as "Principles" as the text available had been the English one with that title. He wondered whether any decision the Group took now would be something to be implemented immediately or whether it would be something to report to the next session of the Governing Council.

Drobnig indicated that such a transmittal should be made on the understanding that the Governing Council should authorise those in charge of translations to use the term which is equivalent to whatever is chosen for the English version. Thus, even if "Principles" were to be chosen for the English version, the equivalent of "Rules" might be chosen for the other versions.

Evans felt that that went without saying. He would imagine that the Governing Council when it finally adopted the Principles (or Rules) would have before it the versions in the working languages of the Institute, i.e.

English and French, even if other language versions were available. As to the other languages, he did not think that the writ of the Council would run to that, it would be up to those who were responsible for the versions together with the Unidroit Secretariat to decide what they wished to use.

Lando stated that the same problem would arise in the EEC Group. There were many conflicting issues here, because if this Group agreed on "Rules" the EEC Group would also have to reconsider its terminology and they might also reach the same conclusion. He indicated that "Rules" was definitiely a solution here, and he would vote for "Rules" being the definite solution of the EEC Group as well, but he did not know what the EEC Group would do and it was quite possible that it would decide to stick to "Principles" or decide that each language could find its own terminology.

Sono wondered whether in fact the Group had taken a decision. He felt that it was up to the outsiders to call this instrument the "Unidroit Principles", and it might in fact be called that as an abbreviation, but these were not "Unidroit Principles", they were principles of international commercial contract law and there could not be diverse versions. They were "The Principles elaborated under the auspices of Unidroit". In the case of the UNCITRAL Arbitration Rules it had been decided to call it that because there were many different arbitration rules, but in this case he wondered whether there could be for example "The UNCITRAL Principles".

Voting on whether to use the word "Rules" instead of "Principles" in the title, 6 voted in favour and 6 voted against.

Farnsworth understood that in the case of a tie there was no change, even if this was a question which was fundamental. He was not sure that the Council would want to have all this ventilated again, but suggested that it might be appropriate to convey to the Council that this had been discussed. He would not want to raise the point in the Council but if someone were to want to do so, it was a matter of sufficiently general importance for it to be done.

Drobnig stressed that it would be important to mention to the Council that the understanding was that the translators were not bound.

Turning to the question of whether "Unidroit" should appear in the title of the Principles, Bonell saw two alternatives: either one could have a hyphen "Unidroit-Principles" which would then be the official title, even if he could imagine that graphically it might not be all that easy to have this on the cover of a book; or one have something like the ICC in its publications, i.e. to have Unidroit on the top and then "Principles [...]" underneath. In legal writing preference would probably be given to "Unidroit Principles". Unless there was a strong preference for the first alternative he felt that it was a problem which was almost inexistent.

Farnsworth stated that in the United States as the only Restatement was done by the American Law Institute, it was usual to call it "The Restatement" but sometimes people said "The American Law Institute's Restatement". If the Principles became relatively well-known that would be the case if the second alternative were followed. Until the Principles became generally known they would be called "The Unidroit Principles" whatever one did.

Lando commented that as the Principles of European Contract Law would also recommend themselves for use by practitioners the more one could distinguish between the two the better. Furthermore Unidroit deserved credit for the Principles, and he therefore suggested they be called the "Unidroit Principles".

Drobnig felt that as the indication was that other language versions would use "Rules", it would be necessary for the translations to have "Unidroit" in the title but it would not be possible to put it in the title of the translations if it was not in the official English and French titles.

Bonell saw the point raised by Drobnig. On the other hand he could see the German cover with "Unidroit" and then beneath "Regeln für internationale Handelsverträge". However they would be quoted, and one could have an indication on the inside stating that they should be quoted as "Unidroit-Regeln", he could not see why the title itself should have the hyphen.

Brazil pointed out that the English title would be "Unidroit Principles" without any hyphen as hyphens were not used in this way in English.

Drobnig pointed out that the cover would have the name of the Institute in full, which was much too long and even if one put "Unidroit" in brackets this did not mean that it would become part of the title and he felt that it should be in the title.

Maskow felt that the Group itself should decide what the full title should be and how it should be quoted, this should not be left to the translators and the users. He could not see what was wrong with this approach.

Voting on whether "Unidroit" should appear in the title of the Principles, 8 voted in favour and 2 voted against. The proposal was therefore accepted.

Comments of the Governing Council of Unidroit on the sections on hardship, general provisions on non-performance, right to performance and termination (C.D. (71) 18)

Bonell informed the Group that the first question which had been raised in the Governing Council in relation to the section on Hardship concerned the very title of the section. Both the French speakers and the group of American lawyers convened by the State Department, whose conclusions had been referred to the Council by Farnsworth, had wondered whether the choice of the word "hardship" was all that fortunate. He had reported to the Council that this issue had been discussed by the Group and that it had been a deliberate choice to have "hardship" here and "force majeure" in the exemption provision, the reason being that this was terminology which was used practically universally in contract practice. Once this terminology was discarded, it became very difficult if not impossible to find other terminology. As he understood the discussion, the Council had not insisted on this point after hearing his explanation.

Maskow agreed with Bonell that the Group had discussed this matter and that the conclusion had been that for the English version the terminology adopted was the best one. As regarded the terminology to be used in the other language versions, the words used would not be literally the same. For example in German the words "veränderte Umstände" were used.

Bonell stressed that his understanding was that the Group had adopted these concepts on the understanding that they would be used in all language versions. "Force majeure" had also been chosen because this was the terminology which was common in international contract practice. To begin with the French version, he had understood that "Hardship" would be the title also in that version.

Tallon stated that "hardship" was not used in French contract practice, that they spoke of "*imprévision*".

Drobnig objected that in a German title one could not use words from two different languages. He proposed that the German equivalent be used and as a concession to the international character of the instrument the English title could be added in brackets. He felt that that was the most one could concede. If one wanted a German translation one had to use German words. This concept had been developed autonomously in Germany and was understood by German lawyers in German terms and not in English terms.

Farnsworth mentioned that at the meeting of American jurists, which had been chaired by Prof. Anita Hill and which he had been unable to attend, it had been mentioned that the word "hardship" was not in the regular vocabulary of the average American lawyer, it was only familiar to lawyers who had had some kind of experience with it in international transactions. The domestic lawyer in the United States would be as likely to think of the term "gross inequity" which was a term which was used for

the same purpose in energy contracts. The American group had therefore thought that it might be helpful if in the comments the term "gross inequity" were put in so that American lawyers would understand what hardship meant. One should therefore not assume that the term "hardship" was a self-evident concept even to American lawyers.

Lando pointed out that the ICC had issued a pamphlet on force majeure and hardship of which the English version used "force majeure" and the French version used "hardship".

Hyland observed that what the Group had managed to do was to create a number of new concepts that bridged the dialogue between various legal systems. The word "hardship" was used to discuss such different concepts as "*imprévision*", "impossibility", "*Wegfall der Geschäftsgrundlage*", etc, and therefore this word had its own new important contribution to make. The only question was what to do about this term in other languages. There were two possibilities: one was simply to say "hardship" in French, the other would be to create in each of the other languages a word which looked just like hardship, in other words to use this as a way of creation in the other languages and then have a series of concepts which would be French but would also point to this unique new concept which had been created.

Bonell indicated that following that line of thought he could imagine "*Härtefälle*" in German, but he was lost in Italian because there was nothing comparable unless one entered into a zone in which similar terms were used, but were used for other purposes. The decisive argument was what should be done about force majeure. He wondered whether Drobnig would translate that with "*Höhere Gewalt*". In German legal terminology that was a very clear concept and they knew that the concept of force majeure in the Principles was different. In Italian he would never be able to translate it with "*forza maggiore*" because then it was clearly intended to be what in Italian law was "*forza maggiore*". He did not think that the understanding of the Group was to use these terms in their peculiar national meaning but to adopt the concepts which were currently most commonly used by the international business community. That was why it had been thought that the French could use "hardship" and the English "force majeure". What did force majeure mean to an English lawyer? They would know that this was the area but nothing else, they would certainly never say that this was force majeure according to the French *Code civil*. He had thought that the decision of the Group had been to use these terms in a neutral manner, but to use them in all the different language versions.

Brazil indicated that in Australian texts on contract law the words "force majeure" did not appear at all.

Tallon disliked "force majeure" in an international text just as he disliked "hardship" because if one spoke of hardship with French lawyers they would think of the "*clause de hardship, clause de sauvegarde*" which only meant renegotiation, it did not mean revision of the contract by the

judges which was the point here. It was the same for force majeure, because for a French lawyer it would have one meaning and for an English lawyer it would have a different meaning. He would therefore prefer "impossibility" or some neutral expression.

Bonell disagreed that "impossibility" was neutral.

Garro indicated that the Governing Council had nowhere taken the stand that hardship should be used in all the translations. Mr Plantard had in fact considered that different terms should be used. The analytical alternatives had been illustrated by Hyland and he thought that each language version would have to make up its mind. He felt that there was no compelling force to adopt the English term "hardship". If in his own language he found something equivalent which made sense, or made as much sense as "hardship" did to American lawyers, then he would adopt it.

Bonell stated that if one questioned the use of the word "hardship" in the French or in other language versions then one also questioned the use of "force majeure" in the English text which left one in the air. He insisted that as he recalled the deliberations of the Group the two terms had been chosen after giving up so-called neutral terms. They had considered "change" or "fundamental change of circumstances" and "exemptions". Ultimately they had decided to use the concepts of "hardship" and "force majeure", also on the strength of the extensive research conducted by Fontaine who for one of his publications had examined numerous contracts from different countries which had used this terminology. Strictly speaking the use of this terminology was not on the agenda.

Drobnig stated that he did not question the use of "hardship" and "force majeure" in the text which was before them, and that had been the framework in which this question had been discussed. They were now speaking of translations into languages other than English and French and for the German text he felt free to use the equivalent German fixed terms which were understandable to German lawyers. He thought that it was very clear that even the word "contract" was used in a different way than the equivalent word "Kontrakt" in German law. Every legal term which was used in the Principles had a specific meaning and that was why he favoured including the word "Unidroit" in the title. It was not necessary to invent a new term for "contract" as it was the Unidroit Principles of contract. This was true of everything.

Brazil concluded that the English version would continue to have "hardship" and "force majeure" and that the French version would be along the lines they had been told.

Turning to the suggestion to add "substantially" or "greatly" as a qualification in Art. 5.2.2 (now 6.2.2) Bonell had had the impression that the Council questioned the qualifications of the cost of the party's performance having increased or the value having diminished, as they had

wondered whether also a slight change was sufficient. He had tried to draw attention to the opening sentence where "fundamentally alters" was clearly stated. He wondered whether in the light of such a reading there really was any point in having both the "fundamentally" at the beginning and then something like "greatly" or "substantially" before both the increase in the cost and the diminishing of the value. No view of the Governing Council as such had been expressed. Prof. Goode had further pointed out that in Art. 5.2.1 "the *performance* of the contract becomes more onerous [...]" and then Art. 5.2.2 spoke of "fundamentally alters the *equilibrium* of the contract". It had been argued that the different language used must imply different meanings. The question was therefore what did they really mean: did they only refer to the performance (which still had to be made) and therefore restricted application of these Principles to executory contracts, or did the different language used in Art. 5.2.2 imply that it was even possible to question performances already rendered? He had replied that the different language had not been chosen on purpose, that the substance was what mattered. As to whether the Principles should apply only to contracts all the performances of which still had to be made, this was not the case, but they also excluded contracts which already had been performed *in toto*. There were two situations which could be envisaged for the operation of the Principles: firstly if both performances still had to be rendered, and secondly if only one performance still had to be rendered. Goode had insisted that if this was the case the language had to be changed, because as they were drafted now he was confused.

Tallon indicated that the problem was that all hardship situations arose in successive contracts which had been partly executed.

Maskow stated that hardship should apply to those cases where the performance affected had not yet been rendered. If someone paid in advance and it then became much more onerous for the other party to deliver what already had been paid for, then hardship came into play even if one performance had been rendered. It could perhaps be expressed more clearly.

Farnsworth indicated that if they looked at Goode's intervention they would find that it was in response to Enderlein's intervention and there had been a misunderstanding between the two, so he found that it was a non-issue.

Brazil stated that the conclusion was that this did address executory contracts but it was sufficient if they were executory simply on one side. Even if one party had performed, if the other one had not completed performance he would be entitled to invoke hardship.

Bonell brought up an issue raised by two corresponding collaborators of the Institute: under lit. (a) it was required that the events occurred or became known to the parties after the conclusion of the contract. They queried whether this really really was a fair provision, as taken literally it would allow the non-disadvantaged party to avoid the application of the

rule by proving that he knew of the event already when entering into the contract as they required it to have become known to both parties after the conclusion of the contract, so the *argumentum a contrario* was that it would be sufficient for the non-aggrieved party to say that he knew it to block the other party. The suggestion was therefore to say "[...] the events occur or become known to the disadvantaged party after the conclusion of the contract".

This was accepted by the Group.

Farnsworth observed that Art. 5.2.1 said that the fact that a contract became more onerous did not make any difference, subject to, etc., and then Art. 5.2.2 began by saying that there was a case of hardship not only when it became more onerous to one party, but when the value of the performance to the other party had diminished. The American Group had drawn attention to the fact that both of the cases in Art. 5.2.2 were not covered by the general language in Art. 5.2.1 and that they might like to cover them both.

Maskow thought that the second case was already covered because if the performance became more onerous for a party it would be less advantageous for that party.

Farnsworth suggested that this could be dealt with in the comments by saying that "onerous" was used in a very abstract way.

Drobnig wondered whether it would not be necessary to limit this in terms of time, because the moment in time could only be that when the party received the performance, not some time afterwards as that was at the risk of the receiving party. This should be made clear.

Bonell felt that this was implicit in the very concept that it applied only to performances which still had to be rendered.

Coming back to Art. 5.2.2(a), Hyland thought there seemed to be an over-lap between this doctrine and the doctrine of mistake. If the required event occurred after the conclusion of the contract there was no over-lap with mistake, but if if the provision included also becoming aware of the events and especially considering the example of when a party knows and does not inform the other party, there might be overlap and he wondered whether this had been considered.

Bonell observed that *mutatis mutandis* the same problem arose with respect to force majeure. The underlying philosophy of the Principles was that whenever there was a breach remedy the breach remedy prevailed. He referred to the force majeure article which deliberately left open the question of whether this could also refer to an event which already existed when the parties entered into the contract.

Farnsworth wondered whether this was on the agenda. The change did not raise this point, the problem phrase was in the original draft.

Brazil turned to another change suggested by Goode in relation to Art. 5.2.2(b), i.e. that as well as referring to events which could not reasonably have been taken into account the words "or their effects" should be added. Personally he did not feel that the words were necessary.

Farnsworth felt that this could also be taken care of in the comments.

Turning to Art. 5.2.3(4), Bonell indicated that a suggested modification which had met with the approval of the Council had been the addition of an explicit indication that the court always had the option not to do anything, i.e. to neither terminate nor to adapt, but to leave the contract as it stood.

Maskow felt that the indication "Having found hardship [...] if reasonable" was sufficient, because the case referred to would be one where the court had not found hardship.

Brazil indicated that the point was that as formulated if the court found hardship it may terminate or adapt the contract, but even if it had found hardship the court might consider it unreasonable to terminate or to adapt the contract, with the end result that the contract would stand.

Farnsworth indicated that hardship was a concept that was unfamiliar to many American lawyers who were mistrustful of it, and a great many people had looked at this in the Council and in the United States, and there was the general view that it would be good to make it explicit.

Bonell wondered whether if this was done "if reasonable" should be kept.

Farnsworth thought that the main thing was to add language which specifically mentioned the option of letting the contract stand.

Hartkamp suggested that it would be odd to add a separate litera stating that having found hardship a court may leave the contract as it was. He felt that it would be better to add it in the chapeau of para. (4), by stating that "Having found hardship a court may, unless it deems it reasonable to let the contract stand as it is, [...]".

Lando felt that this should go into the comments.

Bonell however observed that the Council had unanimously felt it necessary to state this explicitly. As it was not a question of substance because they all agreed that this third option existed, he wondered whether this could not be made explicit. He felt that Hartkamp's suggestion was a

good one.

Hyland suggested instead "Having found hardship, a court may, if reasonable, (a) maintain the contract as it is; (b) [...]".

Crépeau wondered whether it was not strange that having found hardship, which meant that there was a fundamental disequilibrium between the prestations of the contract, the court might come to the conclusion to maintain the contract. If one eliminated "Having found hardship" one could very well say that a court in examining the case (a) may maintain, because there was no hardship and then (b) if there was hardship either terminate the contract or modify it. He found it difficult to see the situation where there was hardship, with all the conditions that they had seen, and yet the court could simply maintain the contract.

Garro did not feel that the records of the discussion within the Governing Council evidenced such a strong opinion. He felt that this should be dealt with in the comments as otherwise it was a contradiction in terms, because one could not say that having found hardship the contract should be left as it stood, because then there was no hardship. It was impossible to make sense of it.

Bonell observed that the hardship concept in the Principles went further than frustration. He wondered whether it really was so shocking for a court in a common law jurisdication which was not prepared to adapt the contract (this was after all the reality and it was for this reason that "if reasonable" had been inserted) and did not want to terminate the contract to state that the contract should remain as it was.

Hyland did not think that it was a question of being nice to American courts, but that there were cases in which the structure of the contract was so complex that even if hardship were found, it might even be worse to terminate or adapt it and that the best solution was to live with it.

Lando stated that that was implicit in the words "may, if reasonable".

Garro objected that in order to find hardship the court had to take into account all the circumstances of the case, and he felt that the complexity of the transaction was one of them. If the court reached the conclusion that the contract should remain as it stood, this was because all things considered there was no hardship.

Bonell disagreed. Here they had focussed on adaptation and had tried to introduce this new concept. As a concequence they had introduced also the fairly new concept of hardship which was in between force majeure, frustration and *pacta sunt servanda*. It was a new area where the frustration test was not met, where there was no force majeure but there was something more than just a change in circumstances. In these in between

cases he could very well imagine that a court would say that they would call it hardship because it was not a minor change, but state that it was not prepared to terminate the contract and that adaptation should be forgotten because it was inconceivable.

Tallon referred to his comment on the same article of the PECL for which he was responsible, and which stated "Le juge peut intervenir de différentes façons: il peut tout d'abord rejeter la demande. Le texte précise bien (we say "may") que les solutions énumérées sont des facultés. Le juge rejètera la demande s'il estime par exemple que le remède serait pire que le mal notamment s'il devait engendrer une nouvelle situation d'imprévision au détriment de l'autre partie". When the provision said "may" this did not mean that the court must either adapt or terminate.

Crépeau could understand the policy, but wondered whether this was not made difficult by introducing in para. (4) "Having found hardship" as they had defined it. He wondered whether it could not be more simply said that "Upon failure to reach agreement within a reasonable time either party may resort to the court and a court may, if reasonable, maintain the contract, terminate the contract or alter the contract". This allowed a greater flexibility in the appreciation of the facts.

Drobnig observed that that was an open point in their considerations because there was a general aversion against giving power to the courts to alter contracts except under very special conditions, the condition being that hardship had been found. Only then could the court intervene and not without having made such a finding. He felt that that should not be touched.

Crépeau observed that if one did not touch it, one still allowed a court to maintain the contract.

Garro observed that the United States had adopted a clause on unconscionability in the Uniform Commercial Code, and he wanted to consider what was covered in § 2-302 to see if there was any difference with the approach taken here. § 2-302(1) UCC said that if the court found the contract to have been unconscionable it may refuse to enforce the contract or may enforce the contract without the unconscionable clause or may so limit the application of any unconscionable clause as to avoid any unconscionable result. It did not say "or it may let the contract stand". Unconscionability was also unfamiliar to American lawyers and this provision had very rarely been applied by US courts. He found that the drafting style of the Principles was not all that different from that of § 2-302(1) UCC.

Hyland suggested that the way it was formulated there was a tense problem, and suggested saying "If a court finds hardship it may".

This was agreed.

It was also agreed to indicate clearly in the comments that the option of letting the contract stand would be available for the court under that particular article even though there had been a finding of hardship.

Turning to Art. 6.1.4 ("Additional period for performance") Farnsworth referred to the suggestions of the American group which had examined the Principles. There were two separate points: "It was observed that while this article may implicitly give the defaulting party a right to cure a failure of performance it might be desirable to have an explicit provision to this effect". If this were the only point this could be dealt with in the comments. In the circumstances in Art. 6.1.4 it was contemplated that the non-performing party would have the right to cure the non-performance, but the group had gone on to point out that it would be desirable to have a general right to cure in the provisions. Art. 6.2.3 was entitled "Cure of defective performance" but although the word "cure" was of American origin this was not what cure meant. In America "cure" was the power of a party who was in breach or who had not performed to remedy the non-performance, whereas what was dealt with in Art. 6.2.3 was the aggrieved party's right to compell the defaulting party to remedy the defect. As a matter of style he wondered whether some word other than "cure" might be used in Art. 6.2.3 because it would confuse anyone familiar with cure in the American legal system. More importantly, he felt that it would be useful to have a general provision that said that a party who was in breach or otherwise had not performed had, subject to some limitations, the right to remedy the performance and that the other party could not always resort to a damage remedy if there still was time to cure.

Bonell wondered whether there was general agreement that if the non-defaulting party fixed such an additional period of time asking for performance the defaulting party had the right to cure if this was appropriate in the circumstances under Art. 6.1.4 and if so that this should be stated clearly in the comments.

This was considered to be settled.

Bonell then turned to the proposal to have a special provision in the Principles on the right to cure in general.

Lando referred to Art. 3.104 PECL which stated that "A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental non-performance". The idea was that one could do it not only before the time of performance but also until the delay became fundamental. So in the case of a contract where a defective tender had been made and refused, the defaulting party would be able to make a new tender before the time of performance had arrived or even after such time if he could do so before there was a fundamental breach of contract in terms of delay. If the delay was fundamental he could not do so any more.

Sono imagined that the notion of conforming tenders included repairs.

Lando confirmed that this was so.

Farnsworth stated that one of the things that was litigated in the American legal system was whether it was always necessary to tender a replacement that was perfect or whether one could repair, and if they had such a provision it would be clear that sometimes one could repair, even if not always. This was the sort of provision that the American group had in mind.

Hyland wondered whether it would be possible just to say "within a reasonable time". The real question was that if it was done in that straightforward way, what it effectively did was make it extremely difficult to really fix a time of performance, because the party who had to perform then always had until the moment of fundamental breach to perform. The way the provision was written it was almost impossible to prevent that.

Lando recalled that the PECL also had the *Nachfrist* procedure, so the aggrieved party could fix a time.

Hyland observed that the American cure provision had additional limitations when the cure came after the time of performance. That prevented it being an open-ended right.

Lando felt that as regarded the open-endedness this in effect was a general question of when a late performance was fundamental and this came in not only in this situation but in all situations. To avoid the uncertainty as to when a non-performance or a delay became fundamental they had the *Nachfrist* procedure.

Hyland indicated that what was fundamental about this issue was the extent to which one wished to make the agreement binding upon the parties.

Farnsworth referred to Art. 37 CISG which stated "If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quality of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention". It only applied to the case where the seller had delivered the goods before the date for delivery. Nevertheless there would in come cases be good reasons to allow a right to cure to last for a longer period. In the UCC there was such a right in some cases and he understood the text of the PECL to give such a right and he thought that also the provision they were looking at that had an implied right to cure seemed to extend the right to cure for at least the additional period of the *Nachfrist*. He thought that

by taking Art. 37 CISG, § 2-508 UCC, and the relevant provision of the PECL it might be possible to come up with something the Group could work with.

Maskow was not sure that these problems should be approached from both sides. On the one hand one could say that a party was entitled to terminate a contract if the delay amounted to a fundamental breach. This meant that up to that point this party was not entitled to terminate, or in other words the first party was entitled to deliver. This problem was already covered by the Principles so it was not necessary to say that the party in delay was entitled to deliver. This was implicit. He did not think that a special rule was needed for cure, because as long as the aggrieved party was not entitled to terminate the contract the defaulting party was entitled to perform. The main cases were non-performance, non-performance in the form of non-quality performance, before the date for performance. It would then not be a question of damages to the extent that that party performed in the right manner up to the date for performance.

Farnsworth wondered about two situations: the non-fundamental breach where the aggrieved party says that he wants to take the defective performance somewhere else to be fixed and will ask the non-performing party for money and the supplier indicates that considering the state of his foreign exchange he prefers to fix it himself and the receiver of the services refuses that. Where did they say that the seller was entitled to a chance to fix it up rather than that he had to pay money, which may in some circumstances be quite different? Secondly, if there was a fundamental breach but, before the buyer or recipient of services has taken any action, the supplier offers to fix it but the buyer indicates that he has decided against that, what did the Principles say about that?

Maskow indicated that if in the case of non-quality performance one were allowed immediately to terminate the contract there would be a need for such a rule, but if this was not the case CISG at least said that the breach must be fundamental for termination.

Bonell indicated that this was also the case of the Principles. With reference to the latter case, there had already been a fundamental breach but nonetheless Farnsworth was suggesting a rule according to which the defaulting party might say that the aggrieved party could not terminate because he was intending to cure.

Farnsworth observed that Art. 37 CISG did not qualify the right to cure in relation to the breach being non-fundamental. He realised that there might be a difference if one focussed on the quality. Under the UCC the usual case in which a right to cure was invoked was where otherwise the buyer would have a right to reject the goods.

Drobnig thought that the fact that there were questions about the situation of the defaulting party would indicate that it might not be clear and that it might therefore be preferable to insert an express provision.

Tallon thought that two different problems had to be distinguished. First whether it was a remedy for the aggrieved party, whether he could require cure from the non-performing party. This was the rule in the PECL. Secondly whether the defaulting party was entitled to require that he be allowed to cure. This was a different question and in this case one had to limit the right because the aggrieved party was after all the aggrieved party and he must not be limited in his right to ask for such and such a remedy. He would therefore not be very favourable to cure by the defaulting party when the aggrieved party did not accept it.

Bonell agreed that one had to move from this distinction but he had taken it that the Principles had the first rule and the PECL had the second one.

Sono pointed out that Art. 6.2.3 only spoke of the right for the aggrieved party to require repair but did not speak of the right of the defaulting party to repair, and wondered if modifying Art. 6.2.3 might do it. For example if Art. 6.2.3 instead of referring to the right to performance said "performance includes in appropriate cases repair, replacement or other forms", the right to require performance would then fall under Art. 6.2.2, and then there was also Art. 6.1.4 (additional period for performance).

Brazil thought that a possible problem with that was that then when one spoke of cure by the defaulting party one really had to lay down some conditions and he was not sure that that was done by that sort of drafting.

Hyland stated that leaving aside the right of the aggrieved party to require cure, there were three instances for which cure had to be considered: the first was whether cure was permitted if performance took place before the time for performance was due. Art. 37 CISG spoke clearly to that question. The second issue was what happened if the offer of cure took place before the moment of fundamental breach. Maskow had suggested that if one looked at the structure of the article this was implicit as one could cure up until the moment of fundamental breach. The third question was what happened after fundamental breach, whether there were circumstances in which they still wanted to permit the defaulting party to cure and it was in that perspective that the UCC became interesting because there was a possibility to cure even after the aggrieved party had the right to terminate the contract. The difference was that the UCC had a very different structure as far as fundamental breach was concerned. Whereas fundamental breach in the Principles required a really serious breach, in the UCC imperfect tender meant that any breach was fundamental, and a cure provision had a certain function to mitigate the harshness of the imperfect tender.

Drobnig suggested that the cut-off date should not be the date of the fundamental breach but the date at which termination for fundamental breach had been declared.

Bonell suggested that in CISG the distinction was clearly first that there was a right to cure up to the time of performance (Art. 37), then, after the time of performance, Art. 48 stated clearly that there was such a right to cure subject to certain qualifications and, as it referred to Art. 49, subject to the condition that the breach was not a fundamental breach. The choice the drafters of CISG had made was therefore fairly clear. Thus the approach in the Principles would be different from that of the UCC, but they might very well adopt the CISG solution which would then more or less end up very close to the PECL provision.

Lando found that CISG was unclear, especially considering the reference to Art. 49. For example, there was a delivery of defective goods on the last day delivery was possible, and this was fundamental. The delay had not yet become fundamental as it was not a *fix-Geschäft* so you would wait for your four days more. Under the delay provision you could terminate, but if it was defective you were not able to terminate. He was not clear under these conditions what you were allowed or what you were not allowed to do.

Bonell indicated that in the case of defective performance if the defect amounted to a fundamental breach which would permit the aggrieved party to terminate the contract, and the aggrieved party discovered the defect he could immediately terminate and thereby block the defaulting party's right to cure. This was the meaning of the proviso in Art. 49. If it was only a delay question one had to put in action the whole *Nachfrist* procedure and in the meantime the defaulting party could cure under Art. 48.

Farnsworth thought that when Art. 48 CISG said that the seller may cure "subject to Article 49" and Art. 49 said that the buyer may declare the contract avoided for a fundamental breach, he would understand that to mean that if the buyer had not declared the contract avoided then there still was a right to cure even if there had been a fundamental breach, which was what Drobnig had said.

Bonell thought that they agreed that if the aggrieved party did not exercise his right to termination the defaulting party could come and say that he wanted to cure.

Farnsworth stated that this suggested that in all three cases prospected by Hyland there should be a right to cure.

In view of the discussion and of Furmston's absence during the discussion, it was agreed that Hyland should draft a provision on cure as he had had the advantage of participating in the discussion. He would then consult with Farnsworth before passing on the provision to Furmston.

Coming back to Art. 6.2.3, Farnsworth suggested eliminating the word "cure" in the text by saying "the right to require repair, replacement or

to otherwise remedy a defective performance".

Drobnig pointed out that the Principles used "remedy" as a noun and not as a verb, so it would be better to find another word.

Bonell thought that only the title was important, as the text explained what was meant.

Hyland suggested that if the concept of cure was established as the right of the defaulting party to cure it would be better to keep that word for that particular concept and not to use it here. He suggested saying only "repair and replacement".

Tallon indicated that this would refer to goods: he could not see how one could repair or replace a service.

Lando wondered whether the situation where the seller did not have the right to the things was covered by "repair and replacement".

Bonell pointed out that the situation covered here was that where the buyer had the right to require performance.

Lando agreed and gave the example of the buyer wanting the seller to pay off a mortgage.

Drobnig suggested that this could not be covered in the title. The title could not cover everything. It would be covered by the words "or other cure" in the text.

Brazil thought that the virtue of "repair and replacement" was that it was descriptive. One got the beginning and then the rest was derived from the text.

It was finally agreed that the title of Art. 6.2.3 should be "Repair and replacement of defective performance".

Turning to Goode's comments on the structure of Art. 6.1.4, in particular in relation to paras. (2) and (3) of that article, Brazil observed that para. (3) when read with para. (4) introduced the notion of a delay in performance which was not fundamental, but that when one looked at para. (4) it nevertheless had to be a delay that related to something more than a minor part of the defaulting party's contractual obligation. If one went back to para. (3) the delay was not fundamental although it related to more than a minor part of the defaulting party's contractual obligation and if the notice was issued in reliance of para. (3), then provided the time allowed was of a reasonable length the last sentence of para (3) provided that "The aggrieved party may in his notice provide that if the other party fails to perform within the period allowed by the notice the contract shall automatically terminate". Goode had said that it would be desirable to have

another close look at para. (3) and the way it operated and the way para. (2) operated as it made no reference at all to delays being fundamental or to the delay being in respect of more than a minor part of the defaulting party's contractual obligation. Ultimately, Goode's point seemed to be that there was a lack of correspondence between the various parts of the article. His own view was that while it was a difficult provision to read, and he had wondered whether it might be simplified from a drafting point of view if para. (4) were put into para. (3), the provision nevertheless did form a harmoneous whole.

Bonell agreed with Brazil's evaluation, although if Goode, who looked at the project from the outside and was very competent, had difficulties then perhaps something was wrong with the presentation. He recalled that they had thought that the *Nachfrist* procedure, in the sense of fixing an additional period of time for performance in order to freeze the situation and to give that additional possibility to the defaulting party, was good and they had therefore felt it appropriate to generalise it and this was done in paras. (1) and (2) which related to any case of non-performance, i.e. even of a minor part. The consequences were then laid down in para. (2). Paras. (3) and (4) addressed an entirely different issue, i.e. in some cases this procedure may be used to transform a non-fundamental breach into a fundamental breach in case of delay. The addition of para. (4) deviated from CISG because they had thought of construction contracts and similar contracts, where, apart from a conceptual difficulty in exactly distinguishing between cases of delay and of defective of performance, the proviso in para. (4) had been added to avoid that, for example, one defective window in a whole building could transform the non-performance into a fundamental non-performance. An additional point which had been raised by Prof. Loewe in the Council related to the second sentence of para. (3) ("If the additional period allowed is not of reasonable length it shall be extended to a reasonable length"). The language chosen might not be all that fortunate as it could induce one to think that the intervention of a judge or arbitrator was necessary for the granting of this extension. This was clearly not the intention, so it might be better to choose a language which could avoid such a misunderstanding.

Crépeau wondered who then decided on the reasonability of the period of time.

Bonell indicated that ultimately it would be the judge, but one did not need to go to a judge to have it extended. If A granted B only three days, B may on the basis of this rule say that it was not reasonable and that he would perform in five days. If on the fifth day A insisted on the three days and B stated that this was not reasonable and that he had taken it automatically as extended to five days, then they would have to end up before a third party, but B did not have to go to the third party immediately in order to have it extended from three days to five.

Drobnig suggested saying that it was "deemed to be extended".

Maskow suggested "a period of reasonable length shall be substituted".

No decision was taken on this point.

Bonell suggested that the comments might make this clear.

Turning to Art. 6.3.1 ("The right to terminate the contract"), Brazil recalled that Loewe had wondered whether or not the enumeration in para. (2) was exhaustive and had suggested that this should be made clear.

Bonell commented that as he recalled it the understanding of the Group had always been that it was not an exhaustive list.

Brazil concluded that it was then a question of whether this should be reflected in the comments.

With reference to Art. 6.3.1.(2)(d) which gave as a significant circumstance whether the non-performance gave the aggrieved party reason to believe that he could not rely on the other party's future performance, Brazil indicated that the suggestion in the Council on this point was that non-performance might not be the only factor that lead the aggrieved party to believe that it could not rely on the other party's future performance. Another question had been whether there should be a reference to other circumstances that gave rise to such a belief in addition to non-performance.

Lando pointed out that there was a rule on anticipatory non-performance.

Brazil recalled that there had been queries as to whether or not para. (e) belonged in the list. As he had understood the thinking behind that, this was a list of things which directly affected the aggrieved party so why did they have to look at how much the defaulting party would suffer from the point of view of deciding whether or not there had been fundamental non-performance.

Lando could not quite understand the comment which Goode had made in the Council and wondered what it was that he wanted them to do: did he want them to take it out or to change the wording? As he recalled it the provision had been inspired by the Restatement. Personally he preferred to have the provision.

As Bonell recalled it, Goode had wanted the provision to be deleted.

With reference to Art. 6.3.5, Goode had pointed out that it did not refer to previously acquired rights and liabilities where there had been termination of a contract, although he did seem to accept that it was implicit in the text that they were not *ipso facto* disturbed by risk of

termination.

Farnsworth recalled that Goode had not been the only one to make this comment. He had distributed a letter he had received from Prof. Amelia Boss of the Temple University School of Law, who chaired the American Bar Association Commercial Law Committee which was both large and influential, and who was also a member of the permanent Editorial Board of the Uniform Commercial Code. This point had been raised independently by the group which had met at the American Bar Association meeting, and related to Arts. 6.3.5 and 6.3.6. The essential thrust of the objection was that by saying that each party had a right to restitution in those circumstances, it rolled back the transaction to where the parties were at the time the contract was made in the same way that one would if there were mistake. It seemed strange that relief in the case of breach would be the same as relief in the case of mistake. For example, if both parties had made a mistake, perhaps each party could say that he wanted to return everything and go back to the beginning, but where one party was in breach and the other party was not, for the party in breach to have the right to say that they should return everything and go back to the beginning seemed more than a little curious.

Lando felt that the arguments raised by Boss were very pertinent and the examples given very convincing. He therefore felt that if the additions suggested could help, they should be made. He felt that in the examples given one should not be forced to return the performance and this could perhaps be taken care of if the words "or appropriate" were added in Art. 6.3.6, but he wondered about Art. 6.3.5.

As to Art. 6.3.5, Farnsworth suggested that if one went back to the text Goode had preferred, there would not be this intervention in connection with Art. 6.3.6, or at least it would be different. He did not think that the two provisions could be separated.

Bonell did not agree with this. He wondered whether they agreed that the modification introduced in the present Art. 6.3.5 was just a change of language in order to avoid the cross references in the previous versions. The results were the same.

As to the alternatives suggested by Boss, Farnsworth suggested that the first thing to do was to see whether something ought to be done and the insertion of the words "or appropriate" seemed to him to be the minimal change that would accomplish the desired result with a helpful comment to push it along.

Bonell commented that to a certain extent it was the end of restitution, because "or appropriate" was a fairly broad concept.

Lando did not think that it would be easy to draft a provision which was more specific than "or appropriate" and which took care of the problems

envisaged in the two examples given.

Hartkamp agreed that the remarks were convincing, and added that in Dutch law this problem had been solved by giving each party the right to set aside a contract *in toto* or partially, so if part of the performance had been rendered the aggrieved party should be allowed to set aside or to terminate the contract only to the extent that the performance had not been rendered and in this case the aggrieved party would be allowed to retain everything he had received and would be allowed to terminate the contract for the part he had not received. The concept of termination might therefore be changed, if one introduced the concept of partial termination. Otherwise the issue would have to be solved within the concept of restitution but he was not very clear on how that should be done. There was also a provision that if a partial performance had been rendered the aggrieved party had the choice, within the concept of restitution, to retain what he had received paying what the contract provided, or, if there had also been non-performance as to the quality, paying what the performance was really worth.

Tallon added that this approach was followed also in French law. He could not understand the problem raised by Boss, because partial termination was simply the answer.

Bonell felt great sympathy for this approach.

Hyland wondered whether para. (2) could not be altered in a very simple way to include partial termination. The provision seemed to be before and after termination and if one took Boss's examples that was not exactly the right division. Art. 6.3.6(2) said "[...] restitution can only be claimed for the period after termination has taken effect" and it should read "if the contract is divisible".

Crépeau stated that that did not suppose that there had been performance until that time, it presupposed that there had been a contract, for example, of lease and hire, with payment to be made over three years or ten years but surely there could not be restitution of the former prestations.

Hartkamp suggested that a paragraph should be added stating that the aggrieved party had the choice either to claim restitution of everything which had been performed, or to retain what it had received for the contract price or less if it was worth less.

Maskow felt that the examples given could be solved by means of the existing Principles. In the first example given by Boss in her letter, the party had to decide whether or not to accept the delivery of the 100 widgets. If he accepted them, he could ask for the rest and if it was very important for him to get the rest and he did not get them, then it would be a fundamental breach and he could terminate the rest. If it was not a

fundamantal non-performance he could give the other party an additional period of time and then terminate the rest of the contract. He wondered whether they really needed a special provision which said that the aggrieved party was allowed to terminate only for the rest.

Tallon observed that the aggrieved party could terminate the whole contract and return the 100 widgets.

Drobnig thought it necessary to be explicit because the Principles clearly proceeded from the assumption that only the whole contract could be terminated and not parts of the contract, because otherwise the drafting would have been different. It would not be very difficult because one part of this approach was already expressed in para. (2), but it would be necessary to add a sentence before the present one to make it clear that the aggrieved party had the choice of terminating only part of the contract. One could perhaps have an addition to Art. 6.3.6 saying that termination could be restricted to performances not yet rendered. It might also be possible to have it in Art. 6.3.1.

Tallon and Hartkamp agreed with having it in Art. 6.3.1.

For Lando the problem was not easy, because he understood the two examples given as being examples where the aggrieved party had the choice either to keep the 100 widgets or keep the siding on the roof. He instead thought of situations where the conditions of Art. 6.3.6(3) were not fulfilled, as when the contract was not divisible, but should one still always give the aggrieved party the option? Were there not situations where restitution was impossible, and where the aggrieved party had had benefit and should not have the option, where he should simply accept as provided what he had received and give the defaulting party some consideration for that. For example, A asks B to dig as channel. After B has dug a quarter of the channel B leaves the job. A could not return B's performance and had to hire other people to dig the rest of the channel. The question was whether B was entitled to some payment for the quarter of the channel he had dug (he disregarded the question of damages). In a way this contract was not divisible, or did one say that each metre one dug was divisible from the rest?

Bonell thought that this example was a classical example for the application of the second sentence of Art. 6.3.6(1), i.e. an allowance should be made in money, so he could not see any problem whatsoever. This was in fact his own concern with reference to the proposed addition "or appropriate", because then one opened the door for everything and forgot about restitution. The aggrieved party who was left arbitrarily to choose between restitution or damages.

Hartkamp observed that one also left it to the aggrieved party if one accepted the concept of partial termination. So it did not matter very much where one put it, one should just give the aggrieved party a choice.

Tallon stated that you had to pay the price of the contract or a just indemnity, there might be a difference.

Bonell was sure that there was a cost/benefit analysis behind this and he wondered what it was as it might be worth considering. At an international level it might be more rational to avoid moving goods back and forth and to facilitate a quicker settlement of the open question by simply transferring funds.

Hyland pointed out that this provision on restitution was a very small one. Did they really want a restitution provision here? Did they want to eliminate the play of national restitution law here, or did they not simply want to provide for termination and to let whether restitution was to take place be governed by national law.

Lando observed that in some legal systems this kind of restitution came in the field of contracts. In other systems it was a specific institution. It was also closely linked to the question of damages.

Maskow suggested having a special article stating that whenever a party is entitled to termination it may also be entitled to partial termination. He could imagine that in some cases partial termination might be unacceptable to the other party, for instance if the most important things had been delivered and the others could no longer be delivered, and therefore it would be unfair to the other party to allow partial termination. These were however exceptional cases. The rule should be that a contract was performed to the greatest extent possible. If it was possible to have it partially performed and the recipient was happy with that, then it should be allowed.

Hartkamp suggested that the easiest thing might be not to change the concept but to split Art. 6.3.6(2) into two sub-paragraphs such as "(a) However, if performance has been made partially [part of the performance has been made] the aggrieved party has the right to choose whether or not to pay what he has received; (b) If performance has extended over a period of time [present text]".

Bonell wondered whether there really was a difference in substance and, if not, if it would not be easier to deal with the matter in the way suggested by Boss, i.e. just to include "or appropriate" in the first paragraph.

Hartkamp did not think that "or appropriate" made it clear that the choice was the aggrieved party's. This had to be clear or it could be understood that the matter had to be decided by the court or arbitrator.

Brazil indicated that the option in para. (1) was available to both parties.

Hartkamp suggested that "is not possible" suggested a different situation from the aggrieved party not wanting. They should therefore have "however" in para. (2) and then set out this specific case.

Lando wondered whether they agreed that in the example of the sidings the aggrieved party had a right to refuse the siding and to take off the roof, because the rule Hartkamp had formulated would lead to the result that there would be such a right.

Hartkamp agreed but indicated that this was always so unless it was not possible to take off the roof - possible in the sense that it was so expensive to do so that in a way it was not possible.

Lando stated that if it was that uneconomical there should be no choice.

Hartkamp agreed with this.

Hyland stated that there were two situations which decided when it was very difficult and when impossible. He was not sure that one would want to make them pay the contract price, at that point it might be restitution, it might be the value, whereas if it was possible and the aggrieved party said that he wanted to keep it, at that point he paid the contract price.

Bonell wondered whether they really needed a rule if they were really prepared to pay the contract price. If A terminated because of a defective or partial delivery, but he was prepared to pay the contract price, B must be happy and could not complain. He felt that this introduced a new perspective, which he thought was outside any regulation because it was self-evident. He had thought that they were only speaking of cases where one decided to keep it or was prepared only to make restitution in the form of an allowance in money.

Maskow observed that if one kept part of the performance then of course one had to pay. It was only in the exceptional case where one party wanted to terminate and was not allowed to terminate and nevertheless had to keep what he had already received, that only the value was to be paid for.

Bonell wondered whether Fransworth interpreted the suggested addition "or appropriate" to mean that it might be just at the discretion of the aggrieved party, that the aggrieved party did not have to give evidence of something which objectively rendered it inappropriate.

Farnsworth thought that that was correct.

Hartkamp thought that there were in fact two problems: there was the problem of the aggrieved party wanting to retain what he had received, and there was the problem of the term "not possible", because "not possible"

should not exclude cases where it was economic nonsense to make restitution, although it was physically feasible. He suggested that one could combine the last proposal by Boss ("If restitution in kind is not possible or appropriate allowance may be made in money") and add "[For the purposes of the previous phrase] a restitution is not appropriate if the aggrieved party has received part of the performance and wants to retain that part". That would make it clear that "appropriate" could cover both situations.

Lando suggested that this could perhaps go into the comments and that the text suggested by Boss be adopted.

This was agreed, with the modification "or appropriate allowance should be made in money". The second sentence of para. (1) as adopted therefore read: "If restitution in kind is not possible or appropriate allowance should be made in money".

As to Boss's suggestion to the effect that the party claiming restitution must "make[s] restitution of whatever benefit he has received", it was felt that this could go in the comments.

Tallon suggested that the comment on Art. 6.3.1 refer to the question of partial non-performance and partial termination. One could for example say that when there was partial performance the aggrieved party had the right to terminate the contract when the conditions were met, and of course with partial restitution. In this case the rules in Art. 6.3.6 would apply.

Hirose added that also partial performance should be explained in the comments in relation to Art. 6.2.3 ("Repair and replacement [...]").

As to the words "whenever appropriate" at the end of para. (1) which had now been considered not to be necessary, Bonell recalled that they had been added on purpose to make it clear that there might be three alternatives: restritution, no restitution with an allowance in money, and no restitution without paying anything. If this was correct he suggested that the words "whenever appropriate" should be kept.

Lando agreed, but suggested that one might say "whenever reasonable".

This was accepted. Art. 6.3.6(1) therefore read

> "On termination of the contract either party may claim restitution of whatever he has supplied, provided that he concurrently makes restitution of whatever he has received. If restitution in kind is not possible or appropriate, allowance should be made in money whenever reasonable".

Drobnig commented that partial termination would imply that for the part of the performance for which one did not terminate one had to pay the

contract price and that was not what was intended and achieved by the Art. 6.3.6 amendment. Art. 6.3.6 as revised would give less than the contract price. Where instead restitution was to be made of the value of the performance, the measure of restitution which was to be paid was rather vague. It was not partial termination.

Hyland was not certain that he agreed with Drobnig and Bonell that the parties could always agree on keeping part of the performance and paying the price. The question was whether the aggrieved party had the right to keep it, and that might have to be specified in a specific provision. The second question was whether they by this restitution paragraph meant to eliminate national law on restitution in these questions. The Restatement had a fairly detailed provision on restitution to the party in breach and that was in a certain way covered by this article. If they intended to refer to that the comments should perhaps say so, because they referred to restitution and then in Art. 1.7 they said that everything included within the Principles had to be interpreted within its framework. This was an area in which it would simply be unclear to him as a lawyer whether they were allowed to look outside the Principles or whether they were meant to develop their own rule of restitution within them.

Bonell felt this to raise a question of a more general character. It was very difficult to say in general terms to what an extent one should be alllowed to have recourse to national legal systems which had a very developed law on certain concepts. He thought that to adopt here a basic rule on restitution was very useful, because to a certain extent it completed the whole. Here, as in many other respects, a number of issues were not expressly addressed and settled. He agreed that this could then be the subject of dispute among scholars but thought that they had to live with these grey zones.

Drobnig supported Tallon's suggestion that the comments to Art. 6.3.1 mention that partial termination was possible with the consequence that the aggrieved party could retain as of right the performance received, but had to pay the contract price. Then one could say that a different, but in some respects somewhat similar, situation was addressed in Art. 6.3.6 and one might also point out the differences.

In connection with the reference to Art. 6.3.6 Farnsworth wondered about the situation where one could retain the performance but one had to pay the contract price. That would be expressed in a common law system in terms of divisibility, which was a term now used in Art. 6.3.6. If this were generally the case, it would be helpful if such a comment were to make that clear.

Bonell did not think that there was a total coincidence between what was termed "partial termination" with "termination of a contract which was divisible".

The Group decided to terminate the discussion on this point.

Crépeau stated that in preparing the French version he had come up with some questions which related to the English. Art. 3.10(1) stated "Where a fraud, a threat, a gross disparity or a party's mistake is imputable to, or is known or ought to be known by, a third person for whose acts the other party is responsible, the contract may be avoided under the same conditions as if it had been concluded by the other party himself". His problem was with the "other party". As he read the article, it was as if it had been concluded by the third party. According to civil law, frauds had to come from the other party, whereas threats could also come from a third party. Para. (2) dealt with the case where the other contracting party knew of the threat although he was not responsible for them.

Drobnig gave the illustration where A concludes a contract with B and C, for whom B is responsible, commits a fraud and it is under the impression of that fraud that A contracts with B. B does not know and has not perpretarted the fraud himself, but A is then entitled to avoid the contract as if B had perpretrated the fraud on A.

Tallon suggested that one should say "committed" and not "concluded".

Crépeau indicated that the solution was either as if it had been concluded by the third party himself, or as if it had been committed by the other contracting party.

Brazil stated that it was the second.

Farnsworth pointed out that one did not commit a gross disparity.

Bonell recalled that this was intended to cover the agency situation, where B is the agent of C and the contract is concluded between A and B. The mistake, fraud or threat is imputable to B and at that point C cannot claim that it had nothing to do with the agent's defects, they were imputable to C, because C was responsible for B.

Crépeau pointed out that threats might very well come from a third party who was not an agent in the proper sense of the term, but was one for whom the other party was legally liable.

Maskow observed that Bonell started from the assumption that the party who committed the fraud etc. made the contract.

It was decided that the Rapporteurs for Chapter 3 should consider this problem.

Turning to Art. 5.1.8, Crépeau stated that he had wondered when he was translating about the "notice of reasonable length", which he compared to

Art. 6.1.4(3) which spoke of "notice allowing an additional period of time of reasonable length".

Bonell did not think that the same language could be used in both provisions.

Hyland suggested "by giving reasonable notice". That meant that the form of the notice had to be appropriate as well as the time period. He thought that that was what was meant, not simply the time period.

Brazil indicated that under Australian law "reasonable notice" would primarily mean a period of a reasonable length of time.

Lando disagreed with Hyland. What they really wanted to say here was that the notice had to be for a reasonable period of time. If one said "reasonable notice no one would really understand that. The PECL said "A contract for an indefinite may be ended by either party by giving notice of a reasonable length" (Art. 2.109). He thought that Art. 5.1.8 had been taken from Art. 2.109 PECL. He recalled that the English speaking members of the European Group had pointed out that "notice" had two meanings, in that it could refer both to the message itself and to the period of time.

Hyland indicated that the way the provision read now, it meant that the length of the written notice had to be reasonable. He suggested that one could have "reasonable notice" and then the comments could explain more precisely what was intended.

Drobnig suggested that a formulation should be found which was understandable also to people who were not native English speakers. "Reasonable notice" did not convey what was intended to non-native English speakers. He suggested adapting the more lengthy formula in Art. 6.1.4(3) ("notice [giving a] period of time of reasonable length").

The final drafting was left to the Editorial Committee.

As to Art. 5.1.22, Crépeau observed that it stated "Where the law of a State requires a public permission affecting the validity of the contract or making its performance impossible", he suggested one should say "affecting the validity or the performance of a contract", because the public permission could not make its performance impossible, the point was that one applied in order to make it possible, as public permissions were required either to enter into a contract or for allowing the performance of certain prestations.

Bonell added that as they used neutral language for the contract, they should use neutral language also for performance.