



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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SUMMARY RECORDS OF THE 4TH SESSION

(ROME, 25 TO 28 MAY 2009)

(Prepared by the Secretariat of UNIDROIT)

1. The Working Group for the preparation of the third edition of the UNIDROIT Principles of International Commercial Contracts held its fourth session in Rome from 25 to 28 May 2009. The session was attended by Berhooz Akhlaghi (Iran), Guido Alpa (Italy), M. Joachim Bonell (UNIDROIT), Samuel Kofi Date-Bah (Ghana), Bénédicte Fauvarque-Cosson (France), Paul Finn (Australia), Marcel Fontaine (Belgium), Henry D. Gabriel (United States), Lauro Gama, Jr. (Brazil), Arthur Hartkamp (The Netherlands), Alexander Komarov (Russian Federation), Ole Lando (Denmark), Takashi Uchida (Japan), Pierre Widmer (Switzerland), Zhang Yuqing (China) and Reinhard Zimmermann (Germany). Paul-André Crépeau (Canada), Michael Philip Furmston (United Kingdom) and Sir Roy Goode (United Kingdom) were excused. The session was also attended by the following Observers: Damos Dumoli Agusman for the Government of Indonesia, Eckart Brödermann for the Space Law Committee of the International Bar Association, Christine Chappuis for the *Groupe de travail contrats internationaux*, Changho Chung for the Government of the Republic of Korea, François Dessemontet for the Swiss Arbitration Association, Alejandro Garro for the New York City Bar, Attila Harmathy for the Arbitration Court of the Hungarian Chamber of Commerce and Industry, Emmanuel Jolivet for the ICC International Court of Arbitration, Pilar Perales Viscasillas for the National Law Center for Inter-American Free Trade, Marta Pertegás for the Hague Conference on Private International Law, Hilmar Raeschke-Kessler for the German Arbitration Institution and Giorgio Schiavoni for the Chamber of National and International Arbitration of Milan. The session was also attended by José Angelo Estrella Faria (Secretary-General of UNIDROIT) and Alessandra Zanobetti (Deputy Secretary-General of UNIDROIT). Paula Howarth (UNIDROIT) acted as Secretary to the Group. The list of participants is attached as APPENDIX.

2. After a short address of welcome by the Secretary-General in which he expressed his deepest appreciation for the work being carried out by the Group and confidence that the present session would be most fruitful, Bonell took the Chair and first of all introduced the two new Observers, Mr Damos Dumoli Agusman, Director of the Legal and Treaties Office of the Department of Foreign Affairs of Indonesia, and Judge Changho Chung, currently Legal Attaché at the Embassy of the Republic of Korea in Austria and the Permanent Mission to the International Organizations in Vienna. He expressed the hope that they both would find the discussion of interest.

I. EXAMINATION OF THE DRAFT CHAPTER ON UNWINDING OF FAILED CONTRACTS (UNIDROIT 2009 – Study L – Doc. 110)

3. Bonell then called on Zimmermann to present his draft Chapter on Unwinding of Failed Contracts.

4. Zimmermann recalled that the Group had already agreed on the black letter rules of the chapter and that the discussion should focus on the comments and illustrations. He drew attention to Comment 1 to Article 1 where he had made use of the concept of characteristic performance, well known in private international law, in order better to distinguish between contracts to be performed at one time and contracts to be performed over a period of time. Moreover, following the suggestions made by the Group at its previous session, he had indicated as examples of the former type of contracts not only sales contracts but also construction contracts such as turnkey contracts where the contractor was under an obligation to produce the entire work to be accepted by its customer at one particular time. Likewise in Comment 1 to Article 2 he had given a number of examples of contracts to be

performed over a period of time, including sales contracts where the goods have to be delivered in instalments.

5. Date-Bah thought the title of Comment 3 to Article 1 misleading since in his view allowance was just another form of restitution. He suggested replacing the opening sentence with the wording "If restitution in kind is not possible or appropriate, restitution by way of an allowance has to be made".

6. In order to meet Date-Bah's concern, Fontaine suggested changing the title of Comment 3 to read "Restitution in kind not possible or appropriate".

7. Zimmermann agreed.

8. Finn and Gabriel drew attention to the fact that the comments in Zimmermann's draft largely coincided with those appearing at present under Article 7.3.6 and wondered whether they should not be completely harmonised.

9. Bonell thanked them both for raising this point but suggested dealing with the issue only once the basic policy decision has been taken, i.e. whether to have a unitary set of rules on restitution or separate sets of rules concerning the different cases of failed contracts.

10. Zimmermann agreed.

11. Chappuis recalled the unitary draft rules on restitution proposed by Zimmermann last year and referred to in the Summary Records of the session (cf. UNIDROIT 2008 – Study L – Misc. 28, para. 111) and expressed her preference for that proposal.

12. On a separate matter Finn pointed out that at least for a common lawyer in case of termination an alternative relief to restitution was damages and that in his view this was the reason why he, as well as Goode and Furmston, had always insisted on the insertion of the words "or appropriate" in paragraph 2 of Article 1 so as to make it clear that in a given case not only restitution in kind but restitution itself were not appropriate remedies and that in such a case damages might be the appropriate alternative remedy. He felt that the comments should clearly spell that out by expressly referring to Article 7.3.5 paragraph 2 stating that "termination does not preclude a claim for damages for non-performance."

13. Zimmermann agreed with Finn but drew attention to the second paragraph, second sentence, and to Illustration 3 in Comment 1 to Article 2, where there was an express reference to Article 7.3.5(2).

14. Finn preferred to have a reference to damages as an available remedy on termination right at the beginning of the Chapter in the Comment to Article 1.

15. Zhang wondered whether there should not be a special provision dealing with benefits.

16. Bonell recalled that the Rapporteur himself had in previous versions of his draft proposed a black letter rule on benefits but that the Group, after lengthy debate, had decided not to have a provision on this matter. Accordingly the Rapporteur deleted the proposed provision and merely added a paragraph on this issue in Comment 6 to Article 1.

17. Zhang did not intend to re-open the issue but merely doubted the appropriateness of the sentence in the comment reading “In commercial practice it will often be difficult to establish the value of the benefits received by the parties as a result of the performance.”

18. Uchida agreed with the text proposed by the Rapporteur in Comment 6 but, with respect to Illustration 8 in Comment 4, wondered whether it really was a case of force majeure.

19. Zimmermann pointed out that the point he wanted to make in the illustration was that the event which destroyed the car and made its restitution impossible was something for which B was not responsible.

20. Fontaine referred to a discrepancy between Illustrations 1 and 2 in Comment 2 to Article 1 insofar as the facts were not exactly the same: in Illustration 1 the price for the painting has not been paid whereas it has in Illustration 2.

21. Zimmermann agreed with Fontaine and said he would redraft the illustration.

22. Chappuis had a problem with both Illustrations 3 and 4. Illustration 3 concerned a contract for the cleaning of windows of a business center and she thought that this was a case of a contract to be performed over a period of time and not a case of a contract to be performed at one time. In Illustration 4 it is said that B has to pay a reasonable sum to A measured by the true value of the rings which cannot be recovered, but in paragraph 1 of Comment 3 it is stated that “The allowance will normally amount to the value of the performance received for the recipient.” She thought there was a contradiction between the comment and the illustration.

23. Dessemontet agreed with Chappuis with respect to Illustration 3 since in practice the cleaning of the windows would normally be the subject of a maintenance contract for a period of six months or one year or so and not just of a one at time type of service.

24. Zimmermann agreed to redraft the illustration.

25. Fontaine wondered whether the whole problem could be solved by replacing Illustration 3 in Zimmermann’s draft by Illustration 3 appearing at page 229 of the current edition of the Principles.

26. Still with respect to Illustration 3 Gabriel raised a more general point. He thought that illustrations should in general be as self-contained as possible and therefore suggested that in Illustration 3 mention should also be made of the fact that B would normally be entitled to damages for A’s breach of the contract so that A’s restitutionary claim may well be outweighed by B’s claim for damages.

27. Gama, Raeschke-Kessler and Date-Bah agreed with Gabriel’s remark.

28. Zimmermann thought that illustrations were supposed to focus on one particular point and not to cover all legal implications of a given case. However if the Group wished him to do so, he was prepared to add a reference in Illustration 3 to the possibility of B having a right to damages vis-à-vis A.

29. Bonell drew the Rapporteur's attention to what appeared to be a typing error: in Comment 4, at page 5, reference is made to "the rule contained in paragraph 2" while it would appear that the reference should be to paragraph 3.

30. Zimmermann agreed.

31. Dessemontet, coming back to Chappuis' remark concerning Illustration 4, also thought that there was a contradiction between the statements in Comment 3 according to which "The allowance will normally amount to the value of the performance received for the recipient", i.e. the subjective value, and the illustration stating that the sum to be returned should be measured by the true value of the rings, i.e. the objective or market value.

32. Bonell recalled that originally the Rapporteur had used the notion of "value" leaving it up to the Group to decide whether to refer to the subjective or to the objective value, but was then asked by the Group to replace "value" by "allowance" which was not only commonly used in U.S. law but precisely on account of its vagueness permitted the adoption of a flexible approach.

33. Zimmermann acknowledged that there was a certain discrepancy between the comment and the illustration and announced that he would take care of it. He would also delete from the illustration the reference to the friendship between A and B and the fact that due to it A had sold the rings to B at less than their true value.

34. Gabriel saw an even greater problem in Illustration 4. At least in common law jurisdictions it was generally accepted that if A has performed its obligation but B has not paid the price, A would not be entitled to restitution but only to an action on the price. In other words, A could only sue for the contract price but not use restitution as a way to get out of a bad contractual bargain, which on the contrary is what would happen in Illustration 3. He therefore suggested deleting the Illustration altogether.

35. Chappuis could agree on the deletion of Illustration 4 but thought that an illustration of a case in which restitution was inappropriate was needed.

36. Estrella Faria suggested an example of work done on someone's premises but left unfinished: restitution would involve returning materials that in the meantime had become part of that facility so that it was unreasonable to return those materials.

37. Zimmermann objected that this was a case where restitution would be impossible and not just unreasonable.

38. Estrella Faria agreed and suggested thinking not of rakes and cement but of a semi-permanent fixture, for example communication devices installed into a conference room. If returning such devices required the dismantlement of the entire installation so that several of the walls of the conference room had to be torn open, restitution in kind would clearly be unreasonable under the circumstances.

39. Zimmermann announced that he would see how this example could be implemented.

40. Zimmermann then drew attention to a change in the black letter rule itself which the Group still had to accept. It was the replacement both in Article 1(4) and Article 3(4) of the words "necessary expenses" by "reasonable expenses". This amendment reflected the

discussion the Group had at its previous session where it was felt that the term “necessary” not only had never been used elsewhere in the Principles but appeared to be too rigid. In this context he referred to the new Comment 5 to Article 1 which was intended to explain the amendment to the black letter rule.

41. Both the amended black letter rule and the new Comment 5 were adopted by the Group.

42. Fontaine first of all raised a minor point with respect to Comment 1 to Article 2 where he suggested the words “of course” in the last sentence of the first paragraph be deleted. His main concern however related to the application of Article 1 (2), (3) and (4) in the case of contracts to be performed over a period of time. At present Comment 2 to Article 2 states that “The present article is a special rule excluding restitution, with regard to contracts to be performed over a period of time, for performances made in the past. As far as there is restitution under Article 2, it follows the rules under Article 1.” He thought that a mere reference in the comments would not be sufficient because Article 2 is not a special rule as compared to Article 1 which would be a general rule. Actually both rules are special rules. Article 1 applies to contracts to be performed at one time and Article 2 applies to contracts to be performed over a period of time. Consequently he suggested either to repeat the rules set out in Article 1 (2), (3) and (4) also in Article 2 or at least to include there a new paragraph stating “As far as there is restitution under Article 2, Article 1 paragraphs (2), (3) and (4) apply accordingly”; a third alternative would be to delete paragraphs (2), (3) and (4) from Article 1 and put them into a new Article 3.

43. While inviting comments on this proposal, Bonell wondered whether a fourth alternative would be to insert the present Article 2 in Article 1 as a new paragraph 2 followed by the present paragraphs 2, 3 and 4 as new paragraphs 3, 4 and 5.

44. Fontaine agreed but expressed a slight preference for his second alternative.

45. Zimmermann expressed some sympathy for Fontaine’s point but felt that Article 2 was in a certain sense a special rule insofar as under Article 1 restitution is always granted, whereas under Article 2 restitution is not granted with respect to performances exchanged in the past. However he was prepared to go along with Fontaine provided that there was sufficient support within the Group to address the matter not merely in the comments but in the black letter rules.

46. Bonell invited members to express their preferences but thought that if there was support for Fontaine’s proposal it would be advisable to put the different alternatives proposed on paper so that the Group could have a chance better to compare them before taking a final decision.

47. Fauvarque-Cosson was in favour of Fontaine’s third alternative.

48. Raeschke-Kessler too thought that the rule should be somehow expressed in the black letter rule.

49. Bonell invited the Rapporteur to present the different alternatives in writing so as to enable the Group to take a final decision.

50. Zimmermann agreed.

51. Zimmermann informed the Group that during the coffee break he had had a discussion with Chappuis and Finn and that Finn had suggested the addition of another illustration to be placed after Illustration 1 explaining what was actually meant by restitution. At least Common lawyers would find such an illustration helpful and if the Group so agreed he was prepared to draft it.

52. It was so agreed.

53. With respect to Comment 1 to Article 2 Bonell, recalling that the notion of “agency contracts” was very generic, asked the Rapporteur what kind of contract he was actually referring to.

54. Zimmermann said that he was referring to what in German law were called *Handelsvertreterverträge*, i.e. where an agent acts on a permanent basis on behalf of a principal with a view to promoting the conclusion of contracts between the principal and third parties.

55. Bonell thought that it might therefore be preferable to speak of “commercial agency contracts” and to include them in the list of service contracts set out in brackets.

56. Bonell furthermore noted that in the illustrations the only currency referred to was the Euro and urged all the Rapporteurs to use also other widely used currencies in their illustrations.

57. Chappuis questioned the meaning of the reference to “damages for the present value of the future rentals” in the last sentence of Illustration 2. She made the example of a lease for three years in which the first two months have been paid. What would the amount of damages be for the present value of the future rentals? Would all the rentals have to be paid at one time?

58. Gama suggested, in order to avoid misunderstandings, referring generically to “damages for breach of contract”.

59. Chappuis insisted that she still did not know what damages would amount to in the case she gave.

60. Zimmermann replied that it was a question to be decided in accordance with the general provisions on damages in the Principles.

61. Gama recalled that in practice in lease contracts there was usually a liquidated damages clause stating that in case of breach of contract the lessee would have to pay the amount of leases still due until the end of the contract. He therefore reiterated his proposal to refer in the illustration generically to damages for breach of contract.

62. Asked by Bonell whether he could agree on that, Zimmermann confirmed.

63. Gabriel too felt that a generic reference was sufficient all the more so if combined with the already present reference to Article 7.3.5(2).

64. Introducing Article 3 Zimmermann first of all referred to the change in paragraph 4, i.e. the replacement of the notion of “necessary expenses” by “reasonable expenses”. The reasons for the change were exactly the same as those with respect to Article 1(4) so that it

may be presumed that the Group agrees to it. The other changes concerned the Comments: thus in Comment 1 a reference to Article 6.1.11 concerning costs had been added as also a reference to Article 7.2.2(b) in paragraph 2 of Comment 2. In Illustration 5 he had made it clear that it was a case of avoidance for fraud. Finally, as in Article 1, a new Comment had been added on the question of benefits (see Comment 5).

65. Chappuis and Dessemontet drew attention to the last paragraph of Comment 2 where it is stated that “an allowance has to be made only if, and to the extent that, the performance received has conferred a benefit on the party claiming restitution” and thought that this was somewhat misleading since obviously what was meant was that a party may claim restitution only if its performance has conferred a benefit on the other party.

66. Zimmermann agreed to rephrase the sentence.

67. Gabriel suggested replacing in Illustration 6 the reference to a tornado with that of a hurricane since a tornado does not normally cause a flood.

68. Bonell suggested replacing in the same illustration the reference to a luxury car by one to goods used in business.

69. Zimmermann agreed.

70. Fontaine suggested deleting the word “cheap” in Illustration 1.

71. Dessemontet thought that in Illustration 8 it would be preferable not to refer generically to a horse which only rarely would be the subject of an international commercial contract and instead to refer for example to a luxury yacht owned by a corporation with respect to which the question of maintenance expenses would be equally relevant.

72. Zimmermann thought that his example permitted to demonstrate that what were reasonable expenses depended on the object, i.e. what is reasonable with respect to a race horse would certainly not be reasonable with respect to an ordinary farm horse. He failed to see how this point could be equally well made with respect to a yacht or a helicopter.

73. Fontaine suggested making it clear that in Illustration 8 the horse was a race horse.

74. Zimmermann agreed in the sense that it should be expressly stated that A has sold to B a race horse and that the recoverable feeding expenses are clearly different than those in case of a farm horse.

75. In the absence of further remarks, Bonell suggested suspending the discussion on the topic of unwinding of failed contracts until the Rapporteur submitted his announced paper concerning the final arrangement of the provisions on restitution.

76. In presenting this paper Zimmermann pointed out that there were two general restitution regimes, i.e., one for termination and one for avoidance, set out in the draft chapter on Unwinding of Failed Contracts, and two special restitution regimes set out in the draft Chapters on Illegality (Art. 5(3)(4)(5) and (6)) and on Conditional Obligations (Arts. 5 and 6). The regime set out in the draft Chapter on Illegality corresponded to that of avoidance, while the regime set out in the draft Chapter on Conditional Obligations corresponded to that of termination. In his view there were three options as to how to

proceed: (1) Things could be left as they were. However this would be unsatisfactory since, as Fauvarque-Cosson had stated, it would have the chapter on conditional obligations too heavily focused on restitution and the same could be said about the chapter on illegality. (2) There could be a special chapter on unwinding of failed contracts which would contain also provisions on restitution in cases of illegality and of fulfillment of resolutive conditions stating which of the two general restitution regimes would apply in the two cases respectively. (3) There would be no special chapter on unwinding of failed contracts and instead the rules on restitution in case of avoidance could be inserted in Chapter 3 of the Principles (probably after Art. 3.17) and the rules on restitution in case of termination could be inserted in Chapter 7 (replacing present Art. 7.3.6), while the chapters on illegality and conditional obligations could simply contain a rule referring, as far as restitution is concerned, to one or the other of these provisions. Originally his own preference was for the second option. However, in the light of the discussion within the Group, he was now prepared to accept also the third option. It would have the advantage of causing only a minimal amount of disruption within the Principles in their present form; moreover it would inform users about the consequences of termination/avoidance/illegality/fulfillment of a resolutive condition in the same place where termination/avoidance/illegality/fulfillment of a resolutive condition are dealt with; nor would it clutter the chapters on illegality and on conditions unduly with restitution matters and deal, in extenso, with restitution in only two (rather than four) different places in the Principles; lastly, it would make it possible to have a reference to the restitution regime for termination also in the chapter on hardship.

77. If the third option were to be adopted, Zimmermann proposed structuring the text as follows:

Chapter 3: Validity

Article 3.17

(Retroactive effect of avoidance)

Avoidance takes effect retroactively.

Article 3.18

(Restitution)

(1) On avoidance either party may claim restitution of whatever it has supplied under the contract, or the part of it avoided, provided that such party concurrently makes restitution of whatever it has received under the contract, or the part of it avoided.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for the reasonable expenses linked to the performance received.

The present Articles 3.18-3.20 would become Articles 3.19-3.21.

Chapter 7, Section 3: Termination

(Alternative 1)

Article 7.3.6

(Restitution with respect to contracts to be performed at one time)

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(3) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(4) Compensation may be claimed for the reasonable expenses linked to the performance received.

Article 7.3.7

(Restitution with respect to contracts to be performed over a period of time)

(1) On termination of a contract to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(2) As far as there is restitution, it follows the rules of Articles 7.3.6(2), (3) and (4).

(Alternative 2)

Article 7.3.6

(Restitution)

(1) On termination of a contract to be performed at one time either party may claim restitution of whatever it has supplied under the contract, provided that such party concurrently makes restitution of whatever it has received under the contract.

(2) On termination of a contract to be performed over a period of time restitution can only be claimed for the period after termination has taken effect, provided the contract is divisible.

(3) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(4) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(5) Compensation may be claimed for the reasonable expenses linked to the performance received.

Chapter [. . .]: Illegality

*Article 2
(Restitution)*

[. . .]
(3) *If restitution is granted, the rules set out in Article 3.18 apply with appropriate adaptations.*

Chapter [. . .]: Conditional Obligations

*Article 5
(Restitution in case of fulfillment of a resolutive condition)*

Restitution in case of fulfillment of a resolutive condition is governed, with appropriate adaptations, by the rules set out in Art[s]. 7.3.6 [and 7.3.7].

Chapter 6, Section 2: Hardship

*Art. 6.2.3
(Effects of hardship)*

[. . .]
(5) *In the case of termination, restitution is governed, with appropriate adaptations, by the rules set out in Art[s]. 7.3.6 [and 7.3.7].*

78. Bonell thought that for the reasons indicated by Zimmermann the choice was ultimately to be made between options 2 and 3 and invited comments.

79. Fontaine expressed a clear preference for option 3 which in his view was more user-friendly.

80. Widmer on the contrary preferred option 2 in view of the fact that the unwinding of failed contracts was a special topic which should be dealt with in a unitary way in a separate chapter.

81. Gama, like Fontaine, thought that from a practical point of view option 3 was preferable.

82. Chappuis, on the contrary, shared Widmer's view but raised two questions concerning conditions. First, what about the case where pending a suspensive condition performance is made and subsequently it becomes clear that the condition would never be fulfilled? Secondly, what if the parties agree that the condition has retroactive effect? In

such a case, should the rules on termination still apply?

83. Zimmermann pointed out that the answer should be left primarily to Fauvarque-Cosson, but since she had not yet arrived, he recalled that in her paper she had expressly addressed the first question and rightly observed that the performance rendered had certainly to be returned because made when there was no effective obligation but that this was a matter of unjust enrichment, a topic not covered by the Principles.

84. Finn agreed with Zimmermann's reply and felt that to address the matter in the Principles would mean opening a Pandora's box.

85. Chappuis failed to see why the Principles should refrain from dealing with the matter. In her view there was no difference between the case where a resolutive condition is fulfilled and that where a suspensive condition can no longer be fulfilled. Why deal with the former but not with the latter?

86. Widmer agreed with Chappuis.

87. Zimmermann expressed sympathy for Chappuis' concern but thought that the matter should be discussed with Fauvarque-Cosson.

88. Chappuis agreed but was still waiting for a response to her second question.

89. Hartkamp suggested that the Comments to Article 5 of the chapter on conditional obligations indicate that in principle the rules on retroactivity in case of illegality or in case of avoidance would also be applicable where the parties have agreed on the retroactive effect of the condition.

90. Lando was decidedly in favour of option 3.

91. Finn first of all also expressed his preference for option 3. However, with respect to the draft chapter on illegality, he wondered whether the reference to Article 3.18 was appropriate in the case where restitution was granted only to one of the parties.

92. Bonell thought that by specifying that the rules laid down in Article 3.18 apply "with appropriate adaptations" sufficient flexibility is provided so that Article 3.18 would not automatically apply if only one party is granted restitution.

93. Zimmermann agreed and thought that this could be made clear in the comments.

94. Finn agreed.

95. Uchida was in favour of option 2 and asked Zimmermann why he had changed his mind.

96. Zimmermann said that a first reason was that over the years he had sensed considerable opposition within the Group to the unitary approach. Moreover he had to admit that a unitary approach would have made sense only if the rules on restitution were really the same in all cases of failed contracts, whereas they were not.

97. Hartkamp was in favour of option 3 for the reasons given by Zimmermann.

98. Perales Viscasillas agreed.

99. Bonell noted that a decision had still to be taken between the two alternatives set forth in option 3 concerning the chapter on termination.

100. Date-Bah was in favour of Alternative 2.

101. Zimmermann, though seeing the advantages of Alternative 2, expressed a slight preference for Alternative 1 which in his view was clearer.

102. Fontaine agreed with Zimmermann.

103. Widmer too was in favour of Alternative 1.

104. It was decided to adopt Alternative 1.

II. EXAMINATION OF THE DRAFT CHAPTER ON TERMINATION OF LONG TERM CONTRACTS FOR JUST CAUSE (UNIDROIT 2009 – Study L – Doc. 109)

105. Bonell called on Dessemontet to introduce his draft Chapter on Termination of Long Term Contracts for Just Cause.

106. Dessemontet pointed out that the main novelty of his revised draft was the introduction of two alternatives concerning the effects of notice of termination, i.e. Alternative A according to which the notice has a constitutive effect and Alternative B according to which termination takes place only by means of a court order. Moreover under the heading "Scope of the provisions" under letter A he had tried to elaborate on the termination for just cause as distinguished from other excuses from performance such as force majeure and hardship as well as from contractual provisions concerning the termination of the contract, while under letter B, second paragraph an attempt has been made to provide a more precise definition of the contracts subject to the indeed exceptional rules on termination for just cause. He pointed out that the contracts in question did not coincide with the long term contracts addressed in Zimmermann's draft. Indeed their main characteristic was that they entail positive duties of cooperation between the parties. He gave the example of a licensing agreement where there were positive obligations on the part of the licensor towards the licensee, e.g. transferring some knowledge, training employees, correcting mistakes, giving technical assistance, etc., but also important positive obligations on the part of the licensee, e.g. actually to use the licensed technology, to communicate to the licensor any improvements made, etc. As a consequence contracts which were clearly long term contracts but with no or very few positive obligations, such as leases, loans of money, opening a line of credit, etc., would never come within the scope of this chapter on termination of long term contracts for just cause. However between the two types of contracts difficult problems of coordination clearly existed and it could be worthwhile exploring not only the differences but also aspects they had in common. This could possibly be done sometime in the future in the context of a special chapter dealing with what in Zimmermann's draft were called contracts to be performed over a period of time and what in his draft were referred to as long term contracts or relational contracts.

107. Bonell thanked Dessemontet for his interesting introductory remarks. He reminded the Group that for contingent reasons the Rapporteur had not been able to attend the meeting of the Drafting Committee held earlier in the year and that therefore his draft

was still in a preliminary stage, i.e. lacking comments and illustrations in the usual format. This meant that even if the Group were to agree on the substance of the draft chapter, it would be too late to have it adopted along with the others. As a matter of fact, as pointed out by the Secretary-General, the expectation of the competent organs of the Institute is that work on the new edition of the Principles should be completed by 2010 while the draft chapter on termination of long term contracts for just cause would by that date only have had a first reading. On the other hand the idea of resuming work on the topic sometime in the future in a broader context of a new chapter or part of the Principles devoted to long term contracts in general was extremely appealing, and he invited the Group to express its views in this respect.

108. Zimmermann entirely agreed with these remarks. He too found that Dessemontet's paper had raised many interesting issues which needed broader reflection and he was wholeheartedly in favour of reviewing the whole concept of long term contracts in the Principles which could be an excellent subject for a fourth round.

109. Raeschke-Kessler too agreed and recalled that long term contracts normally involving more than two parties were very often disputed in international arbitration as were intra-company disputes between shareholders and the company.

110. Date-Bah thought it very important that Dessemontet in his paper was not addressing all types of long term contracts but only those involving recurrent positive obligations and suggested renaming the draft chapter accordingly.

111. Bonell mentioned that Dessemontet himself had repeatedly referred to the notion of relational contracts.

112. Finn, referring to his experience as a judge dealing repeatedly with cases involving long term contracts, confirmed the importance of the issues proposed by Dessemontet. At the same time however he thought that the subject matter was still not sufficiently defined, i.e. the types of long term contracts to be taken into consideration.

113. Lando, while agreeing with those who had stressed the great importance of the subject, had some difficulties in distinguishing between termination for just cause and termination for breach.

114. Hartkamp expressed some reservations as to the idea of starting an entirely new project on long term contracts because it would inevitably lead to a need to restructure the entire Principles in their present form. He therefore suggested giving some further thought to this proposal before discussing it more in detail.

115. Fontaine on the contrary found the idea of dealing with long term contracts in general very attractive and in this context mentioned, in addition to hardship, termination, duty of good faith and cooperation between parties which the Principles already addressed, termination for just cause and managing the contract (contract managing committees and dispute boards) as new topics to be dealt with.

116. Akhlaghi entirely agreed with Fontaine.

117. Widmer expressed some disappointment as to the fact that apparently the topic of termination of long term contracts for just cause was not to be included in the third edition of the Principles. He strongly hoped that the topic would be taken up again in the

near future while he was a bit reluctant to envisage a revision of the Principles in their entirety with a view to preparing a special chapter on long term contracts in general.

118. Hartkamp wanted to make it clear that his previous intervention related only to possible future work on long term contracts in general. With respect to Dessemontet's draft on termination of long term contracts for just cause he wondered whether it was really too late to think of its inclusion in the envisaged third edition of the Principles and suggested that the Group give some more thought to the matter. This could be done by inviting all members to express their views on the essential elements of the draft and whether they were already sufficiently developed.

119. Bonell thought that this was a very good idea and asked the members for their views concerning specific aspects dealt with in the draft.

120. Hartkamp opened the discussion and wondered what the relationship between the notions of "in exceptional circumstances" in Article 6.3.1 of the draft and that of "cannot be reasonably expected" in Article 6.3.2 was. He thought that "cannot be reasonably expected" was rather loose while "in exceptional circumstances" seemed very strict.

121. Dessemontet pointed out that in substance there was no contradiction between the two. "Exceptional circumstances" have been added because the Group at its previous session wanted the exceptional character of termination for just cause to be stressed.

122. Raeschke-Kessler questioned the meaning of "recurring performance": did it mean repeated performance of the same obligation or did it also refer to different performances. For example, in the case of the construction of a power plant there is no recurring performance but hundreds of different things to perform.

123. Dessemontet confirmed that only recurring or repeated performances of the same obligation were meant.

124. Bonell urged the Group to focus on the basic issues of the draft leaving aside questions of detail for the time being.

125. Fontaine reiterated his reservations as to the appropriateness of dealing with this topic in the Principles. He recalled the criticism levelled by practitioners against the provisions on hardship and was convinced that the same if not even stronger criticism would be raised against the suggested provisions on termination for just cause. More specifically he mentioned that there were no concrete examples of just cause in the explanatory notes and thought that such examples would be very useful in order better to explain the scope of the proposed rules.

126. Date-Bah agreed with Fontaine's last remark. When reading in Article 6.3.2(b) "in case of loss of trust between the parties" he felt lost since it could hardly be that a party could get out of a contract merely by stating that it no longer trusted the other party.

127. Zimmermann first of all agreed with Fontaine and Date-Bah. In other words he too thought that the relationship between the rules on hardship and those on termination for just cause was not yet sufficiently defined. Moreover he was not sure what was actually meant by "contracts . . . entailing a positive, recurring performance of obligations by at least one of the parties" in Article 6.3.1 and urged the adoption of more precise wording and/or further explanation in the comments.

128. According to Lando also the suggested criterion of a duration of at least 8 years was rather questionable since for instance most distributorship contracts in practice for one reason or another end earlier.

129. Finn agreed with this last remark relating to duration and mentioned a case currently pending before his court and concerning a five year distributorship contract that had been renewed twice but then had broken down because of lack of trust and confidence: would it fall within the scope of a long term contract according to the suggested rules? Moreover with respect to the proposed automatic termination he was not convinced by the argument that it could always be challenged before a court: indeed once the contract was terminated the terminating party was inevitably in a stronger position and could force the other party to accept re-negotiation of the contract as an alternative to litigation. With respect to Article 7.3.5C on multi-party contracts he was rather reluctant to accept that termination automatically entails the liquidation of all assets. Indeed in actual practice it frequently happens that parties make their own arrangements concerning their assets.

130. Fauvarque-Cosson, like Fontaine, cautioned against the adoption of the proposed rule and recalled that in her country there was still considerable resistance to permitting judges to adapt contracts in case of hardship.

131. Prompted by this intervention Estrella Faria too thought that one should be very cautious about the impact of the proposed rules on the general principle *pacta sunt servanda*.

132. Gabriel recalled the concept of just price in medieval cannon law which also included just cause. However commercial law moved away from that notion five or six hundred years ago because deemed to be unduly open and took away from the parties the right to enforce their agreements. He felt that the proposed rules on termination for just cause in many respects meant jumping back seven hundred years and thought this should not be done in the Principles.

133. Uchida recalled that he had devoted most of his academic career to the study of relational contracts and found Dessemontet's paper very interesting. However he too was afraid that given the differences of opinion that had emerged among the members of the Group, there was not sufficient time left to reach agreement on this topic by next year.

134. Bonell in summing up the discussion pointed out that a number of extremely interesting remarks had been made and regretted that there had not been sufficient time for a more detailed discussion that would have permitted further clarification of the issues at stake. Thus for instance, the reluctance of several domestic laws to permit courts to adapt contracts, important as it may be in the context of hardship, would appear to be much less relevant in the present context where what was at stake was not keeping the contract alive but on the contrary putting an end to it since due to supervening exceptional circumstances continuation of the contractual relationship could no longer be reasonably expected from one or all of the parties. Also the analogy between avoidance of the contract for lack of a just price and termination of the contract for just cause would require further exploration: indeed while the first remedy was clearly a relic of the past, the second is definitely a recent development as shown by its increasing acceptance by e.g. Swiss courts or even statutory recognition by e.g. § 314 of the German BGB. In any case he wanted whole-heartedly to thank, also on behalf of the entire Group, Dessemontet for his extraordinary contribution and

expressed the hope that his draft might be taken up again in one way or another in the near future, possibly in an even broader context.

III. EXAMINATION OF THE DRAFT CHAPTER ON CONDITIONAL OBLIGATIONS (UNIDROIT 2009 – Study L – Doc. 113)

135. Bonell called on Fauvarque-Cosson to present her draft Chapter on Conditional Obligations.

136. Fauvarque-Cosson pointed out that there were no significant changes in the black letter rules except the addition of Articles 5 and 6 but that she had considerably expanded the Comments and added more Illustrations also thanks to the input she had received from individual members of the Group as well as the *Group de travail contrats internationaux*. In this context she particularly mentioned with respect to Article 1 the new Comment 6 on closing which she had prepared in collaboration with Bonell and Estrella Faria.

137. Zimmermann raised three small points. With respect to Article 1 he suggested moving the word “only” to before “takes effect” as it clearly related to both types of conditions. The second point related to the numbering of the illustrations which should be progressive for each Article. More importantly, in Illustration 1 in Comment 3 to Article 1 the opening words “The contract is concluded under the suspensive condition” should be deleted since the purpose of illustrations was to give examples of what is stated in the text of the comments without making positive statements as to their legal qualifications. The third point related to Articles 5 and 6 which in his view should be discussed after having decided the basic approach to be adopted with respect to restitution in the different cases of winding up of failed contracts.

138. Gabriel, though with some reluctance in view of the fact that the issue had already been repeatedly discussed, proposed the deletion of the terms “suspensive condition” and “resolutive condition” appearing between brackets in the text of Article 1. These terms were unfamiliar to common lawyers and after all their use was no longer necessary since the black letter rule itself provided a definition of the two different types of condition.

139. Zimmermann pointed out that the Group had already decided to use these terms notwithstanding the fact that they are not the ones used in common law jurisdictions and he was against re-opening the issue at this stage. After all on other occasions in the Principles terminology unfamiliar to civil lawyers has been used without causing them too great problems. Last but not least the terms “suspensive condition” and “resolutive condition” were used further on in the chapter and it would be extremely difficult to phrase the respective provisions without them.

140. Finn, though understanding Gabriel’s hesitations, tended to agree with Zimmermann, all the more so since the corresponding terms used in common law systems, i.e. conditions precedent and conditions subsequent, were far from univocal even to common lawyers.

141. Chappuis agreed with Finn and recalled that the U.S. Restatement only spoke of “conditions precedent” and did not use the term “conditions subsequent”.

142. Also Akhlaghi and Raeschke-Kessler agreed with Zimmermann.

143. Estrella Faria thought that it would have been preferable to avoid in the black letter rules terms of art unfamiliar to many legal systems but admitted that it was too late to look for a new and neutral terminology.

144. With respect to Comment 2 to Article 1, Gabriel suggested either deleting the second paragraph altogether or deleting the reference to civil law countries since on this point he saw no difference between civil law and common law systems.

145. Zimmermann too suggested deleting the reference to civil law countries but wanted to keep the rest of the sentence which rightly stressed the difference between a future uncertain event and a future certain event. With respect to the first paragraph he also suggested a slight change in the wording so as to make it clear that the term “condition” has a variety of meanings, some of which are known only in some legal systems, but that in the context of the present chapter the term was used in the sense of a future uncertain event on the occurrence or non-occurrence of which the parties want their obligations to depend.

146. Bonell wondered whether the reference to “time of performance” in the third paragraph was appropriate or whether it was not more appropriate to speak of the time within which the condition must occur.

147. Finn agreed.

148. With respect to the third paragraph of Comment 1 to Article 1 Hartkamp wondered whether the statement “When a public requirement imposed by law is stated as a condition in the contract, the rules of this chapter will apply” was correct. At least in his legal system it would not be correct.

149. Estrella Faria raised a similar question with respect to the next statement in the comment “When compliance with a country’s law which is not the law applicable to the contract is agreed upon by the parties, this condition is of a contractual origin”.

150. Zimmermann warned against being over-ambitious and suggested keeping only the first sentence of the paragraph without entering into further details concerning conditions imposed by law.

151. Hartkamp agreed but drew attention to the fact that a number of illustrations dealt with either an export license or an anti-trust clearance being a condition in the contract.

152. With respect to Comment 2 Hartkamp noted that Illustration 5 does not end with the usual ending of illustrations, namely with a sentence explaining the relationship between the illustration and the preceding text of the comment.

153. Fauvarque-Cosson agreed to add such a sentence in this and other illustrations in which it was likewise missing.

154. Turning to Comment 3 Hartkamp said that Illustration 3 was completely incomprehensible to him.

155. Fontaine agreed and suggested replacing it by a simpler example saying for instance that the contract for the assignment of such and such would be terminated if B were

to come under the control of another company or if new technology were to make the know-how licence obsolete and so on.

156. With respect to Illustration 2 Uchida pointed out that if the lessee fails to pay the rent this amounted to a breach of contract entitling the lessor to terminate it. Therefore he thought that the illustration did not concern a case of a resolutive condition.

157. Fauvarque-Cosson agreed and offered to delete Illustration 2.

158. With respect to Comment 4 on impossible conditions, Hartkamp thought that the statement "A condition must be possible" was true only for suspensive conditions while if a resolutive condition is impossible then the contract would stay.

159. To meet Hartkamp's concern, Zimmermann proposed not positively saying that a condition must be possible but merely stating what happens if a condition is impossible and in this respect of course differentiating between suspensive and resolutive conditions.

160. Bonell drew attention to the last sentence in Comment 4 stating "The rules on illegality apply to conditions", which he thought might be considered a bit too cryptic.

161. Still with respect to Comment 4 Gabriel noted that Illustrations 2 and 3 ended with a reference to the rules on restitution which he thought inappropriate in this place and which should therefore be deleted.

162. Bonell agreed and suggested that the same illustrations could be taken up again with the final sentence in the context of the comments to Articles 5 and 6.

163. Fontaine agreed. Moreover he suggested being more specific in all three illustrations in Comment 4 which deal with the effects of impossible suspensive conditions and should therefore all end with the statement that the obligation cannot take effect.

164. Finn suggested deleting in the first paragraph of Comment 4 the words "there is no state of pendency".

165. Fauvarque-Cosson agreed merely to state "There is no obligation".

166. With respect to the last sentence stating that "the rules on illegality apply to conditions", Date-Bah thought that it should be kept maybe with the addition of the phrase "with appropriate adaptations".

167. Bonell agreed that such a reference was appropriate with respect to the very notion of "illegal condition" but felt that it would still leave open the question as to the impact of an illegal condition on the contract. In this respect he recalled that at domestic level different approaches were adopted, e.g. according to Italian law an illegal condition would always lead to the invalidity of the contract as a whole while according to Swiss law it all depended on the intention of the parties, etc.

168. Zimmermann first of all drew attention to the fact that in Comment 4 all three Illustrations dealt with legal requirements that have not been complied with or have been disregarded and thought that they could therefore also be understood as referring to cases of illegality and not of impossibility. For these reasons he supported Hartkamp's earlier suggestion not to choose different examples concerning legal requirements such as export

licenses and the like but cases of factual impossibility. With respect to illegal conditions he preferred to postpone a final decision until the chapter on illegality had been discussed. Indeed, there one might find a provision on partial illegality stating that the effects would depend on what was reasonable under the circumstances and the same approach could then be applied with respect to illegal conditions.

169. Harmathy agreed with Zimmermann concerning the references in Illustrations 2 and 3 to public permission requirements. Since conditions imposed by law did not fall within the scope of the chapter he suggested deleting these illustrations.

170. With reference to Comment 5 on conditions entirely dependent on the will of a party, Hartkamp called for the rephrasing of Illustrations 1, 2 and 3 so as to make it clear that what was conditional was not the conclusion of the contract but its performance. Indeed there was no point in saying that the contract is subject to the condition that there is consensus between the parties because this is the requirement for a contract coming into existence and the same can be said with respect to the approval by the supervisory board without which the contract has not yet been concluded.

171. Gabriel disagreed with Hartkamp with respect to Illustration 3 in which in his view the contract had been concluded but was conditional on approval by the supervisory board of one of the parties.

172. Asked by Bonell for her view on this point, Fauvarque-Cosson said that her intention had been precisely to show that this was not really a condition but that parties in practice frequently called it such.

173. Bonell drew attention to the fact that the illustration appeared under the heading "Condition entirely dependent on the will of a party", and that this concept was, at least prima facie, inconsistent with the very nature of a condition.

174. Gabriel disagreed pointing out that if there was a supervisory board of the seller, presumably it would have made its decision on the basis of some objective criteria.

175. Gama on the contrary thought that the illustration concerned a contract not yet concluded.

176. Finn thought that the contract had already been concluded and the approval by the supervisory board was a suspensive condition of its performance but since opinions within the Group varied in this respect he suggested deleting the illustration.

177. Gabriel agreed.

178. Harmathy offered the following illustration taken from an actual arbitration case: a distributorship agreement did not fix the distributor's fee but provided that it was conditional on the calculation of the principal. In other words it was completely dependent on what the principal wanted. This was clearly a case of a contract clause formulated as if it were a condition while in fact it was not.

179. Zimmermann felt that the first two illustrations were already sufficient to indicate that in practice even what is called a condition in the contract not always is a condition, all depending on the intention of the parties. He therefore suggested the deletion of Illustration 3.

180. Gabriel insisted that in Illustration 3 there was already a binding contract and gave as another similar example the case of loan agreement: it was common practice that the client fills out all the required loan applications but the granting of the loan is contingent on the bank's loan committee's approval which would be given or denied on the basis of objective criteria. Yet there was already a binding contract and the client certainly could not under normal circumstances simply walk away before the loan committee's determination.

181. Fauvarque-Cosson recalled a meeting of the *Group de travail contrats internationaux* where these issues had been discussed at length and the majority view was that it all depended on the extent of dependence between the person negotiating the contract and the supervisory board: if there was no such dependence, as one may presume to be the case in Illustration 3, there would be no contract until the supervisory board gave its approval, whereas if, as may be the case with the bank, there was dependence, approval by the supervisory board may be a real condition. In any case she too was inclined to delete Illustration 3.

182. Estrella Faria also thought that even if, as civil lawyers generally tend to do, one concludes that in Illustration 3 the contract is concluded only if the supervisory board gives its approval, the discretion of that organ may not be unlimited. He wondered whether along these lines the differences between common lawyers and civil lawyers could be overcome.

183. Bonell observed that at least in civil law systems the normal case was that the supervisory board was absolutely free to decide as it wished.

184. Gabriel on the contrary insisted that in common law systems the situation was exactly the opposite and he gave the example of the well known Gibson vs Cranage case in which a man commissioned an artist to make a painting of his deceased daughter, but would have paid for it only on the condition that the painting met his satisfaction. It was held that the man was not absolutely free to refuse the painting and that the subjective test was subject to good faith.

185. Bonell insisted that in civil law systems the rule was exactly the opposite and in this context he cited the so-called "*vendita con riserva di gradimento*" of Article 1520 of the Italian Civil Code, where the buyer is absolutely free to refuse the goods if they fail to meet its satisfaction and nobody thinks that before the buyer communicates its decision there is a binding contract. At the same time however he pointed out that at least in the cases where the result of the negotiations between the parties has to be approved by the supervisory board of one or both of them the general principles of *culpa in contrahendo* would apply.

186. In view of the sharp differences between the two systems, Fauvarque-Cosson wondered whether Comment 5 should be deleted altogether.

187. Zimmermann disagreed and suggested rephrasing Comment 5 so as to flag out the problem and indicate that it ultimately all depended on the intention of the parties whether a contract had already been concluded or not and whether the discretion granted one of the parties was unlimited or subject to some objective test.

188. Chappuis and Widmer agreed with Zimmermann.

189. In summing up the discussion Bonell noted that there was considerable support for having a comment on condition entirely dependent on the will of a party in which mention

should be made of the different approaches adopted at domestic level in this respect and parties should be urged to make up their minds and to state their intention as clearly as possible, i.e. whether or not they intend to be bound by a contract and whether or not the discretion conferred on one of them is unlimited or subject to some objective test.

190. Turning to Comment 6 on closing, Gabriel suggested deleting in the opening sentence the words “in most cases” since he was not sure whether this qualification reflected actual practice.

191. Fauvarque-Cosson suggested as an alternative “in many cases” even though from what she had seen in practice nearly all the time parties provide for a long list of what they call “conditions precedent” but which are not true conditions because they depend on the will of one party.

192. Estrella Faria suggested the wording “the parties often . . .” .

193. It was so agreed.

194. Zimmermann suggested replacing “conditions precedent” in paragraph 2 by “conditions” without inverted commas.

195. Hartkamp found the whole Comment interesting but a bit too long.

196. Fauvarque-Cosson pointed out that the topic of closing was of considerable importance in practice and that Comment 6 was an absolute novelty since none of the other soft law instruments such as PECL and the DCFR address it. She acknowledged that the comments might somehow be shortened but at the same time drew attention to the fact that closing in actual practice had many facets all of which ought to be addressed so as to provide a sufficiently comprehensive picture.

197. Fontaine agreed. He also thought that Comment 6, including the advice given to parties in the last paragraph, served a very useful purpose. Moreover, in view of the fact that closing affects the formation of the contract, he suggested having a reference to closing also somewhere in the chapter on formation.

198. Bonell drew attention to the fact that in Comment 6 there was already a reference to Article 2.1.13 and to Comment 2 to that article and thought that Article 2.1.13 could be the appropriate place for a reference to Comment 6.

199. Raeschke-Kessler thought that all the illustrations seemed to have been taken directly from Anglo-American contract practice and wondered whether this was necessary.

200. Bonell recalled that “closing” was the product of Anglo-American contract practice and doubted that there were corresponding civil law styled clauses to which reference could be made.

201. With respect to the advice given to parties at the end of the comment, Finn wondered whether one should go that far and even suggest specific language to be used in the contract.

202. Estrella Faria suggested simply saying: “Thus parties wishing to be bound by the contract only on “closing” should expressly state that one of the conditions to be satisfied at

the closing date is “closing” itself, i.e. the finalisation and signature of the Agreement containing all terms and conditions which are mutually acceptable including the acknowledgment that other conditions are satisfied”.

203. Turning to Article 2 Hartkamp found the way in which this provision was phrased not very convincing as the words “unless the parties otherwise agree” at first sight appear to mean that the relevant obligation does not take effect at all and not only relate to the retroactive effect.

204. Zimmermann agreed and suggested changing the title of the article to “Effect of conditions”.

205. Fauvarque-Cosson agreed and recalled that this was the title also in PECL .

206. Widmer agreed.

207. Chung wondered whether, instead of speaking of “effect of the condition” it would be more appropriate to speak of “effect of fulfillment of condition”.

208. Bonell agreed but observed that titles should be as concise as possible even at the risk of being not entirely accurate.

209. Gabriel suggested changing the word order of both paragraphs 1 and 2 to start with “unless the parties otherwise agree”.

210. Bonell wondered whether it would not even be better to have the wording “unless the parties otherwise agree” as a chapeau followed by “(a) upon fulfillment of a suspensive condition the relevant obligation takes effect; (b) upon fulfillment of a resolutive condition the relevant obligation comes to an end.”

211. With respect to Illustration 3, Hartkamp thought that in the opening sentence “no” should be replaced by “a” and suggested to rephrase the third sentence so as to read “If the resolutive condition has retroactive effect, seller is considered as having never sold that factory” so as to avoid any reference to the proprietary effects which are outside the scope of the Principles.

212. Date-Bah thought that in Comment 2 paragraph 3 the opening words should be “when the resolutive condition is fulfilled”.

213. Gabriel suggested rephrasing the last sentence of Illustration 2 so as to read “The obligation comes to an end”.

214. Fontaine thought that the title of Comment 3 should be changed to read “Anticipatory non-performance of an obligation under a suspensive condition and remedies”.

215. Raeschke-Kessler noted that in Comment 3 neither of the illustrations deal with the fulfillment or non-fulfillment of a condition but with breach of contract and therefore wondered about the usefulness of Comment 3 altogether.

216. Zimmermann agreed.

217. Fauvarque-Cosson had no objection to deleting Comment 3.

218. It was so agreed.

219. Turning to Article 3 Fauvarque-Cosson Article 3 recalled that the black letter rule had already been thoroughly discussed and agreed upon last year and invited comments on the comments and illustrations.

220. Bonell thought that the language between brackets in the last paragraph of Comment 1 was not all that clear.

221. Fauvarque-Cosson recalled that when consulting the *Group de travail contrats internationaux* she had learned that in practice parties quite frequently went even further than Article 3 and stipulated the duty “to use best efforts to cause the conditions to be satisfied”.

222. Chappuis felt that the last paragraph should be combined with the second paragraph.

223. Perales Viscasillas thought that since Article 3 referred in both paragraphs not only to good faith and fair dealing but also to the duty of cooperation, in paragraph 1 of Comment 1 there should be a reference also to Article 5.1.3.

224. With respect to Comment 2, Zimmermann thought it rather awkward to have six illustrations one after the other and urged the Rapporteur to divide Comment 2 into at least two sub-headings, one on the reliance on the non-fulfillment of a suspensive condition and one on the reliance on the fulfillment of a resolutive condition, and to distribute the illustrations accordingly.

225. Fontaine agreed with Zimmermann and also suggested not merely to quote in the illustrations the language used in the black letter rule, i.e. that the party “may not rely on the non-fulfillment of the condition”, but to explain the formula, e.g. but stating that the party may not invoke the fact that the contract did not take effect because the condition was not fulfilled.

226. Chappuis urged avoiding colloquial language such as “walking out of the contract”.

227. Estrella Faria found that the illustrations should be limited to the point to be made and not speculate about other possible scenarios such as in Illustration 2 (“... but he may perform if he chooses”), let alone Illustrations 4 (“In that situation, it is possible . . . to order a new expertise based on proper information. Right to performance of the contract can then be ordered provided it meets the requirements of Article 7.2.2”) and 5 (“This clause is valid provided that the contract is not unlawful due to the fact that a necessary condition such as an authorisation is not fulfilled”).

228. Bonell thought that the point was well taken with respect to all illustrations and in addition asked the Rapporteur to follow the usual model and structure each illustration around specific parties such as Seller / Buyer or the like, or A, B and C, etc. which would definitely facilitate comprehension of the illustration.

229. Finn agreed with Estrella Faria’s remarks. The illustrations should not explain specific contract clauses but the rules laid down in the articles.

230. Hartkamp too agreed and moreover noted that a number of illustrations concerned conditions imposed by law. He was not against having such illustrations in the comments notwithstanding the fact that conditions imposed by law were outside the scope of the chapter but suggested dealing with them in a more systematic manner such as explaining with respect to each article whether the black letter rule was or was not applicable by analogy to conditions imposed by law.

231. Finn hesitated to follow Hartkamp in this respect. More in general he thought that it was misleading to say “conditions imposed by law cannot be made contractual conditions”. Indeed, it was clearly open to the parties - and it was absolutely normal in his country – that parties determine what contractual effect a particular condition imposed by law would have. Thus one of the parties may assume the risk of getting a licence or both parties may make it a condition of the contract so that the contract will have no effect without the licence and neither party can claim damages.

232. Bonell recalled that the Rapporteur herself had included a statement in this sense in Comment 1 to Article 1 but that the Group had decided to delete it.

233. Zimmermann thought that the comments and the illustrations should be limited to real conditions and not conditions imposed by law. Only at the end of the chapter could there be a brief mention of the fact that in practice parties may transform the latter into contractual conditions. In this respect he referred to the similar approach adopted in PECL.

234. Fauvarque-Cosson confessed that she was a little puzzled and asked the Group for guidance. Was the Group still of the opinion that her statement in the third paragraph of Comment 1 to Article 1 should be deleted or should it be kept there or should it be placed somewhere else such as at the very end of the chapter?

235. Finn saw no difficulty in stating somewhere in the comments that if the parties wanted to give contractual effect to a condition imposed by law they may do so and the consequence would be that said condition would fall under this chapter.

236. Hartkamp disagreed. If the law says the contract is only valid or the obligations take effect only after a public permission has been granted, then of course the parties may always state the same in their contract, i.e. that the obligation only takes effect after public permission has been granted. But this added nothing to what was law. In his view Finn was referring to something else, i.e. the allocation between the parties of the risk concerning the granting or refusal of a licence. This concerned the law of non-performance and the term conditions was used in the sense peculiar to common law, i.e. a contract term stating that if something does not happen one or the other party is liable.

237. Zimmermann agreed.

238. Raeschke-Kessler observed that normally the contract would say that it was the duty of either the seller or the buyer to obtain the export licence so that if the seller fails to apply for the export licence because it thinks it has made a bad deal the condition would not be fulfilled.

239. Alpa referred to an actual case of a contract between the Government of Albania and an Italian company for the sale of shares of a State-owned company which stated as condition for the entry into force of the contract that the purchaser has received within a

given period of time the required authorisation by the public administration. This was clearly a *conditio iuris* or a condition imposed by law. When the public administration asked the seller to provide further documents and information, the seller, which in the meantime wanted to sell the shares to another company, refused to do so in order to prevent the condition from being fulfilled. He was not sure whether this would be a case of non-performance of the contract or of an undue interference with the fulfillment of the condition, although he personally thought that the latter was the case.

240. Dessemontet thought that the discussion had now reached a crucial point and disagreed with Hartkamp. Indeed the Principles already contained in Articles 6.1.15 - 6.1.17 provisions dealing with public permission requirements, who is supposed to apply for them, what the consequences are of the refusal of the permission, or of the permission being neither granted nor refused, etc. However it was perfectly conceivable that the parties want to address these and other related issues in their contract and possibly regulate them differently. He made an example very similar to the one made by Alpa. Suppose that State X decides to privatise a given company and the contract for the sale of the company's share provides as a suspensive condition the granting of approval by a Governmental agency. If, as may well happen, another branch of State X which wants to avoid the privatisation interferes with the administrative procedure of the approval this would clearly amount to a case of interference according to Article 3 whereas if the contract between the State and the private investor is silent on the granting of the approval the effects of the interference by the respective branch of State X would have to be determined according to Articles 6.1.15 et seq. with the consequence that the answer would be far from clear. In conclusion he would definitely favour keeping the sentence in the third paragraph of Comment 1 to Article 1 stating that "when a public permission requirement imposed by law is stated as a condition in the contract, the rules of this chapter apply".

241. Fontaine agreed with the idea of applying this chapter also to conditions imposed by law when they have been incorporated in the contract because these types of conditions are among the most frequent in practice and there can be no doubt that at least some of the provisions – such as Article 3 but probably also Article 4 – would be applicable to them.

242. Harmathy on the contrary agreed with Hartkamp.

243. Asked by Bonell whether in the light of the discussion she would be prepared to retain the statement at present contained in the third paragraph of Comment 1 to Article 1, and possibly elaborate it a little more and certainly add one or two illustrations, Fauvarque-Cosson confessed that she was rather reluctant to do so since she was not certain that there everybody agreed on the basic assumption that conditions imposed by law should be excluded from the present chapter. Indeed, since in practice parties in their contracts very often merely restate what the law already provides with respect to such conditions, she failed to see what the difference in such a case was between conditions imposed by law and conditions imposed by law but incorporated in the contract.

244. Hartkamp suggested adding at the end of the chapter a new article stating that the provisions of this chapter are applicable by analogy to the conditions imposed by law and as far as he could see problems would arise only with respect to Article 3 which provided that as a consequence of interference the condition is to be considered as fulfilled whereas the law says that there cannot be a valid contract without the required public permission. But even in this respect he was confident that this article could be applied with some caution thereby avoiding any real problems.

245. Harmathy made a suggestion which he hoped would help the Rapporteur. Illustration 3 in Comment 2 to Article 3 begins with the words “Under a joint venture agreement, a party is bound only if it obtains a building permit from the local authorities” and then goes on to state “This party deliberately omits to submit all the relevant documents in order to obtain this permit in due time”. He thought it would be preferable to state “Under a joint venture agreement, a party is bound to obtain a permit within a given period of time” so as to make it clear that according to the parties the condition was not simply the obtaining of the permission but obtaining it within a given period of time.

246. Lando felt that it was very difficult if not impossible to overcome the differences between what he called the dogmatists and the positivists, i.e. those who want clear cut principles and those who focus on what is going on in practice and therefore suggested taking a vote as to whether to keep or not the controversial statement in Comment 1 to Article 1.

247. Alpa wondered whether the differences depended on the remedies to be applied in the two cases. In other words if the remedies were different in the two cases there was no point in going in the direction suggested by Hartkamp since any application by analogy was excluded from the outset.

248. Chappuis warned against the dogmatic approach since in practice the distinction between the various types of conditions was not always easy and sometimes even impossible.

249. Gama thought that a distinction could be made in the sense that conditions imposed by law are within the realm of administrative law with the effect that if they are not fulfilled there will be an administrative sanction, e.g. the contract subject to a public permission requirement will be considered illegal or ineffective with regard to administrative law, whereas if the same condition is incorporated into the contract then there will be contractual effects between the parties.

250. Bonell insisted that a solution could be found along the lines suggested by the Rapporteur herself in the third paragraph of Comment 1 to Article 1 while he saw greater difficulties with the suggestion by Hartkamp. Indeed to state that the provisions of this chapter apply, though by analogy only, to conditions imposed by law was a very interesting idea but maybe too far reaching.

251. Hartkamp objected that he was referring only to conditions imposed by law that have been incorporated in the contract.

252. Bonell thanked Hartkamp for this clarification which he thought would definitely help the Group reach consensus.

253. Zimmermann and Finn thought that it would be sufficient to keep the statement at present contained in the third paragraph of Comment 1 to Article 1.

254. Fauvarque-Cosson had a slight preference for the suggestion made by Hartkamp. Indeed, in the light of the lengthy discussion the Group had just had on the distinction between conditions imposed by law and conditions imposed by law but incorporated by the parties in their contract, which significantly enough had not emerged in the context of Comment 1 to Article 1 but in the context of Article 3, she thought that it would be more

appropriate to add at the end of the Chapter a new article stating what is now contained in Comment 1 to Article 1 together with comments and illustrations.

255. It was so agreed.

256. Turning to Article 4 Fauvarque-Cosson recalled the discussion the Group had on it at previous sessions and since she was still unsure whether the provision would be kept she had prepared only rather succinct comments without illustrations.

257. Zimmermann reiterated the reasons why he was not in favour of the article. Article 1 states what is meant by a condition. Then Article 3 sets out one specific consequence of what happens if a party acts contrary to good faith during the state of pendency. Why should there now be an Article 4 stating in general terms what the parties may do during the state of pendency. In his view it would be much more logical to transfer – maybe in a more elaborate way - what is now in Article 4 to the comments to Article 1 what is at present laid down in Article 1.

258. Dessemontet on the contrary favoured keeping Article 4 and in this respect recalled that many people around the world are going to read only the black letter rules of the Principles in electronic format via the Internet.

259. Akhlaghi observed that in his country the comments and illustrations of the Principles were as important as the black letter rules.

260. Fontaine too was in favour of retaining the article but urged the Rapporteur to distinguish in the comments between suspensive and resolutive conditions since in the case of a resolutive condition the contract has full effects so that the requirements under Article 4 would be considerably less stringent than in the case of a suspensive condition. In other words, a person who is enjoying the benefits of the contract subject to the possible fulfillment of a resolutive condition can hardly be expected to have the same standard of cautious behaviour that he would have if the contract was subject to a suspensive condition.

261. Lando was not sure that he had fully understood what Article 4 actually aimed at.

262. Fauvarque-Cosson made the example of the sale of property under the suspensive condition that the buyer will obtain a loan. Pending the condition the seller may not destroy the property or completely fail to maintain it.

263. Chappuis still failed to see what was covered by Article 4 which was not already covered by Article 3.

264. Dessemontet made the example of the purchase of property for development of something where human beings will live. While waiting for the authorisation the seller may not contaminate the land by stocking oil or toxic matter on it because this would determine for the buyer a very high cost to remove it.

265. Alpa strongly supported keeping Article 4 but thought that it might be preferable to switch Article 4 and Article 3, thereby stating first the general duty to act in good faith pending the condition and then more in particular that a party should not interfere with the fulfillment of the condition. He then gave another example of the present article. If there is an agreement for the purchase of shares subject to a suspensive condition the seller should not reduce the value of the share pending such condition, e.g. indebting the company or

doing something in the factory which could reduce the value of the goods owned by the company.

266. Also Widmer was in favour of retaining the present Article 4.

267. Date-Bah was agnostic but in case the article should be kept supported Alpa's proposal to invert the order.

268. Gabriel, like Widmer and Alpa, supported Article 4.

269. In view of the fact that the majority was in favour of keeping the article though inverting the order, Zimmermann no longer insisted on its deletion but thought that the Comments should spell out more clearly the consequences of a party's violation of the duty of good faith. He also suggested a slightly changed formulation "Pending fulfillment of the condition a party may not act so as to prejudice the other party's rights in case of fulfillment of the condition contrary to the duty of good faith and fair dealing".

270. Chappuis agreed with Zimmermann on the necessity of spelling out in the Comments the consequences of violating this duty. With reference to the example given by Dessemontet there should definitely be a right to damages by the buyer but at the same time she thought that a generic reference to the rules on damages could cause problems since they presupposed a case of non-performance while in this case there was no contract yet. She proposed that the comment should say that the duty under Article 4 was a duty under the Principles which existed irrespective of the existence of a contract.

271. Fauvarque-Cosson asked for further guidance as to whether in addition to the right to damages one might also envisage the right of the buyer to no longer stick to the contract because its rights have not been preserved.

272. Finn raised the general question as to whether or not pending a suspensive condition the contract already existed.

273. Fauvarque-Cosson definitely thought so but admitted that in practice it might often be difficult to establish what the intention of the parties in this respect actually was.

274. Uchida felt that the title of the article was not very clear.

275. Zimmermann agreed.

276. Dessemontet, referring to his and to Alpa's examples, pointed out that what was actually at stake was not a party's right or rights but the economic value of the property or of the share sold.

277. Alpa suggested focusing on the parties' behaviour and thought that a title such as "Parties' behaviour pending the condition" which was the title of a corresponding provision in Article 1358 of the Italian Civil Code would be preferable.

278. Bonell asked the Rapporteur to give further thought to the issue and possibly to change the title in the light of the various suggestions made.

279. With reference to Articles 5 and 6 Fauvarque-Cosson thought that discussion should be postponed until a final decision had been taken with respect to Zimmermann's draft.

280. It was so agreed.

281. In closing the discussion, Bonell, also on behalf of the entire Group, thanked Fauvarque-Cosson for her most valuable contribution which had permitted the Group to make considerable progress.

IV. EXAMINATION OF THE DRAFT CHAPTER ON ILLEGALITY (UNIDROIT 2009 – Study L – Doc. 111 (rev.))

282. In introducing the discussion on the draft Chapter on Illegality, Bonell recalled that the black letter rules, with very few exceptions, had already been thoroughly discussed and basically adopted at last year's session so that the only novelty on which the Group should focus its attention this time were the comments and illustrations. Admittedly, given the complex nature of the subject, they could prove to be quite controversial, and he urged the members to express their views including any critical remarks they might have to make.

283. Estrella Faria made one general comment on the draft chapter and two specific comments on Article 1. He was aware that the Principles were primarily the product of the Working Group and not of the Secretariat of UNIDROIT. He admired the courage of the Working Group in tackling a subject as sensitive and intricate as illegality. However he thought that the Principles must not only be a distillation of legal principles acceptable in theory among various legal systems but also a product of practical value to arbitrators and practising lawyers not only at the stage of conflict resolution but also at the stage of conflict prevention and of drafting contracts. For this reason it was important that the Principles do not contain rules that, rather than promoting legal certainty, open the door for further litigation. In his view Article 1 in its present form was a wide open door inviting parties to litigation. Indeed, he, at least, did not know what the fundamental principles referred to were, who approved them, and the degree of authority they enjoyed throughout the world. As to his specific comments, first of all he would have preferred speaking of absence of legal effects instead of using the rather vague term illegality. Secondly, he noted that the corresponding provision of PECL gave a certain level of legal certainty by referring to the "principles recognised as fundamental in the laws of the Member States of the European Union", whereas Article 1 referred to "principles widely accepted as fundamental in legal systems throughout the world". How many jurisdictions needed to accept these principles? Although he was sure that all these questions had been discussed before by the Group, he felt it his duty - maybe even more a duty to himself than to the Group - to make all these remarks clearly.

284. Bonell thought that, since the Secretary-General was attending a session of the Group for the first time, it was only fair to permit him to express his views even if they were rather critical. On the other hand of course he was sure that Estrella Faria had read all the documents and reports which show that a number of the questions, if not all, he had just raised not only had been thoroughly discussed but had also met with the approval of a substantial majority.

285. Alpa, though understanding Estrella Faria's remarks, urged the Group to see the problems from the perspective of arbitrators. If faced with an illegal contract, what could they do? If they looked at the civil codes they would not find there specific rules concerning

illegal contracts and respective remedies and therefore have great discretion in determining what is legal and what is not. By contrast the proposed rules on illegality in the Principles would provide arbitrators with at least some guidance which they would certainly very much appreciate. Yet the chapter on illegality was important also from a political point of view. Indeed, if the Principles were not to contain such rules they could lead to the conclusion that illegality was not an issue in the context of international commercial contracts. This was clearly not the case.

286. Bonell thanked Alpa for his remarks and expressed the hope that the Group would not reopen discussion on the basic policy decisions underlying the black letter rules it had already previously agreed but rather focus on the comments and illustrations which were there for the first time.

287. Gabriel recalled that, unlike what happened with respect to the other chapters, the chapter on illegality had not been seriously looked at until last year. And on that occasion the Group had discussed the text to some degree but in terms of trying to develop commentary that would permit it to understand better the black letter rules. In other words no final decision had been taken yet with respect to the black letter rules. This was true among others of the very notion of “illegal contracts”. Where did it come from? Looking at PECL, “illegality” appeared only in the title of Chapter 15 whereas the black letter rules spoke of “contracts of no effect”, as did the U.S Restatement Second, which spoke of contracts or terms which were “unenforceable”. By contrast in his view the notion of “illegal contracts” implied the idea that there were no remedies at all and this was clearly not the case.

288. Raeschke-Kessler, like Alpa, thought that the whole chapter was extremely important above all for international arbitrators. Concerning the notion of “principles widely accepted as fundamental in legal systems” he was perfectly happy with it and recalled the lengthy discussion the Group had on it not only last year but also at previous sessions where it had been correlated to the notion of *ordre public international*.

289. Finn recalled that he had always been rather sceptical vis-à-vis the whole chapter. Though admitting that his minimalist position did not get the support of the majority he wanted to stress once again that in his view the Group was going in the wrong direction.

290. Akhlaghi thought that even if the Principles did not make an express reference to “principles widely accepted as fundamental in legal systems” or to *ordre public international*, arbitrators and judges would in any event take them into consideration. He therefore strongly supported Article 1 as it stood.

291. Chappuis, despite the criticism made by some members, saw great merit in the whole chapter. If it was intended that the Principles be capable of being chosen as the law applicable to the contract then provisions on illegality were absolutely needed since it was not possible to conceive party autonomy without limits. This was also the general view expressed on the occasion of the international conference on the OHADA project held two years ago in Burkina Faso where it was repeatedly stressed that in order to have an acceptable text for African States there was a need to limit party autonomy, and if this was not achieved as it has been in French law by the notion of “cause” there was no other way than to provide rules of the kind contained in the present draft chapter. If the notion of “illegality” did cause some concern to some members of the Group, she was ready to replace it with other similar notions, e.g. with “invalidity”, while the reference to fundamental principles in Article 1 was deliberately flexible since at international level it is not possible to be more precise.

292. Concerning the notion of “illegality”, Bonell recalled the extensive discussions the Group has had in the past and that on those occasions there were those who had suggested replacing it with “no effects” or something similar. However there were differences of opinion even among the common lawyers insofar as Goode and Furmston had insisted on the use of the notion of “illegality” while Gabriel and to some extent Finn had preferred to speak of “unenforceable contracts”.

293. Dessemontet thought it important to read Article 1 in conjunction with Article 3 so as to avoid the impression that under the Principles only “principles widely accepted as fundamental in legal systems throughout the world” were relevant, while in fact also statutory prohibitions had to be taken into account provided that within the respective legal systems they amount to international public policy.

294. Zhang first of all questioned the appropriateness of the reference in Comment 2 lit. a) to Article 1 to mere Recommendations or Declarations since these instruments had no binding force. Moreover, with respect to Illustration 2 he wondered what the solution would be if both parties belonged to the religious group in question but the contract was governed by, for instance, the law of a given U.S. State or the law of a European country which did not positively state the prohibition in question. Would the contract be illegal? Finally he questioned the very existence of “principles widely accepted as fundamental in legal systems throughout the world”. For instance, China cannot accept the Inter-American Convention against Corruption or the OECD Convention: why then should a court in China declare a contract invalid because contrary to those instruments?

295. Estrella Faria insisted that his previous intervention was not to be understood as an invitation to re-open the discussion on the policy underlying the chapter or even to delete it. He, like Zhang, simply wanted to express some doubts as to the appropriateness of the formula “principles widely accepted as fundamental in legal systems throughout the world” which was somewhat ambiguous and clearly not identical to the notion of “principles accepted as fundamental throughout the world”. Moreover, with respect to the last sentence of Comment 2 lit. a) to Article 1 he wondered what the situation would be if both parties belonged to a region or group where a specific principle was not only not accepted but openly opposed. Should an international arbitral tribunal nevertheless apply such a principle merely because it was “widely accepted as fundamental in legal systems throughout the world”?

296. Pertegás found that the discussion was of greatest interest also to a conflict lawyer such as herself. While admitting that it was extremely difficult, if not impossible, to define or even just try to encapsulate concepts such as “contrary to fundamental principles”, she urged the Group to pursue its efforts and hoped that it could come up with some indications as to the effects of the application of such fundamental principles and mandatory rules. In this context she mentioned the project on the law applicable to contracts currently underway at the Hague Conference on Private International Law where the notions of public policy and mandatory rules as possible limits to the application of a particular law will certainly be one of the key questions to be addressed.

297. Gabriel too thought that Comment 2 lit. a) to Article 1 was somewhat misleading since it referred on the one hand to “principles widely accepted throughout the world” and on the other to principles peculiar to particular geographical areas or ethnic and religious groups. This was clearly a contradiction because one could not talk about universal principles and at the same time include also merely regional principles. Moreover he found Illustration

1 not very helpful: indeed it seemed to suggest that if the transmission of the data was prohibited also in country X, such prohibition would amount to a fundamental principle under Article 1 which would clearly not be correct.

298. Zimmermann failed to see the contradiction mentioned by Gabriel. In his view the first paragraph of Comment 2 lit. a) to Article 1 exactly reflected the outcome of a lengthy discussion the Group had last year on the formula “principles widely accepted as fundamental in legal systems throughout the world” which already then appeared in Article 1 and with respect to which the Group urged the Rapporteur to highlight in the comments its flexibility. Also the reference to international instruments including mere Recommendations and Declarations, which now appeared in the second paragraph of Comment 2 lit. a) to Article 1, had been expressly requested by the Group, and he thought that it provided a very useful guide for arbitrators faced with the problem of deciding whether a given principle was to be considered fundamental for the purpose of Article 1.

299. Estrella Faria entirely agreed with Zimmermann on this point but reiterated his doubts as to the situation where both parties belong to a region and/or religious group where an internationally widely recognised fundamental principle was not only not accepted but openly opposed. He thought that it would be unacceptable that one of the parties could invoke the internationally widely recognised principle to invalidate the contract although neither of them ever contemplated the application of such principle because it was not considered at all fundamental in their region and/or religious group.

300. Gabriel insisted that there was a contradiction between the black letter rule referring only to “principles widely accepted as fundamental in legal systems throughout the world”, i.e. global principles, and the comments where reference was also made to merely regional or sectorial principles. Personally he was not against such a reference but simply wanted to stress that it was in contradiction with the formula used in the black letter rule.

301. Bonell would never have thought that “principles widely accepted as fundamental in legal systems throughout the world” were only global principles. He recalled that the formula was flexible enough and had deliberately been chosen so as to encompass also purely regional or sectorial principles.

302. Harmathy, though with some reluctance because he had not participated in the Group’s work from the outset, expressed serious concerns with regard to the entire chapter. The concepts used therein were too vague to make it possible to foresee what would be the result in a given case. Admittedly concepts such as “ordre public”, “fundamental principles”, “statutory prohibitions”, etc. were difficult to define even within a given domestic law; to propose them at an international level could only be a source of greatest uncertainty and unpredictability. If he had to advise a client whether to adopt the Principles including the proposed chapter on illegality, he would feel obliged to advise against it.

303. Bonell wondered whether the hypothetical client would have a clearer picture as to the validity of its contract without the support of the Principles and its chapter on illegality.

304. Raeschke-Kessler suggested adding at the end of Article 1(1) the words “or in the geographical region to which all parties belong”. This would take care of many of the objections so far raised.

305. Dessemontet agreed with Zimmermann that the notion of “principles widely

accepted as fundamental in legal systems throughout the world” was an evolving notion which by its very nature could not be defined with absolute certainty. Concerning Comment 2 to Article 1 he thought that Illustration 1 should be deleted first of all because it referred to a case of non-application of a fundamental principle while one should definitely first of all provide illustrations relating to cases where a fundamental principle was applicable. Moreover he missed in Illustration 1 a reference to the relevant conflict of laws rules which may lead to the application of one or another domestic law.

306. Brödermann first of all suggested rephrasing the last sentence in the first paragraph of Comment 2 to Article 1 to read “In this latter case such principles may become relevant only if the contract involves parties belonging all to the same region or group.” However even with such an amendment he felt that there would still be quite sensitive problems. Thus, what precisely was meant by “parties belonging all to the same region or group”? He made the example of two parties originating from a region where the Sharia is applied but who have been educated in the western world and decide to conclude a contract for the production of a pork processing plant. Such a contract clearly violates Sharia but what if the plant was to be constructed in a country of Western Europe and the contract be governed by Swiss law with an arbitration clause providing for arbitration in Switzerland. Would the arbitrator nevertheless have to apply the Sharia and its prohibition of such an activity?

307. Fauvarque-Cosson first of all agreed with those who saw great merit in having a chapter on illegality in the Principles. Admittedly the subject was very complex and even domestic laws did not provide hard and fast rules in this area. With respect to the question concerning the relevance of merely regional or sectorial principles, she felt that one might apply by analogy conflict of laws rules, and in particular the concept of *Inlandsbeziehung* or proximity to a particular place. As long as both parties belonged to the same region she saw no particular problem involved. The situation was different where only one party belongs to the region where a particular principle is considered fundamental. Here the principle of proximity could provide some guidance in the sense that the respective principle could apply if the contract had been concluded and/or was to be performed in that same region.

308. Coming back to Gabriel’s remark concerning the supposed contradiction between the black letter rule and the comments, Zimmermann insisted on the flexible wording in the black letter rule which in his view covered also purely regional fundamental principles. With respect to the amendment suggested by Raeschke-Kessler, he thought that it would not solve the problem since the notion of “geographical region” did not cover what was meant here. For instance Australia, England and the United States may well have the same public policy though not belonging to the same geographical region, and he suggested that the comments should also mention such a possible scenario.

309. Dessemontet disagreed with Fauvarque-Cosson as to the utility of the proximity test in this respect. As an alternative criteria he recommended one which is well known in the context of international arbitration and according to which the arbitral tribunal should ensure to the greatest possible extent the enforceability of its decision with the consequence that it should take into consideration the *ordre public* of those countries where it was likely that enforcement of the award would be sought. Moreover he suggested deleting from Article 1 the final words “in legal systems throughout the world” so as to refer only to “principles widely accepted as fundamental”, leaving it to practice further to define what was meant by that.

310. Zhang considered it necessary to provide precise criteria for the determination of which fundamental principles would be applicable in a given case.

311. Fontaine recalled that the formula “widely accepted as fundamental in legal systems throughout the world” was the result of lengthy discussions the Group had had in the past and that most of the arguments now raised had already been raised in the past but the Group had eventually found this formula adequate. He was however attracted by Dessemontet’s suggestion to delete the words “in legal systems throughout the world” and suggested that the Comments further explain the different situations that may arise in practice, i.e., principles universally accepted as fundamental, principles accepted as fundamental only within certain regions, principles considered fundamental in countries which, even though geographically distant one from the other, have a common cultural heritage, etc.

312. Date-Bah also expressed his preference for the shorter formula proposed by Dessemontet. Furthermore he thought that Illustration 2 was misleading and therefore it would be better to delete it. Asked by Bonell whether he was suggesting the deletion, also in the text of Comment 2 a), of a reference to principles peculiar to particular ethnic or religious groups, he confirmed: indeed, although personal laws as opposed to territorial laws do exist they were clearly a minority and should therefore not be expressly mentioned in the Principles.

313. Finn on the contrary was against the shorter formula which in his view made it even more difficult for the average user of the Principles to know which fundamental principles would under the Principles become relevant in the context of illegality.

314. Fauvarque-Cosson was in favour of the shorter formula and insisted on the proximity criterion in order to determine which principles may be relevant.

315. Akhlaghi thought that Illustration 2 was misleading. Indeed even in Muslim countries doing business on Friday, though prohibited by religious rules, may not be prohibited by law.

316. Chung wondered whether the relevance of merely regional principles could be determined in applying by analogy Article 1.9(2) on usages.

317. Lando found it extremely difficult to envisage precise criteria for determining the meaning of “principles widely accepted as fundamental in legal systems throughout the world” since, contrary to PECL which has the European Union as a term of reference, the Principles have a much wider – universal – scope. After all what really counted were the overriding mandatory rules or *lois d’application immédiate* addressed in Article 3. He therefore suggested deleting Article 1 altogether.

318. Gabriel expressed his sympathy for the arguments put forward by Lando, all the more so since Article 1 definitely addressed only very exceptional cases.

319. Jolivet was in favour of the short formula suggested by Dessemontet and recalled that this would have been in line with the ICC experience in drafting international contracts. It was important to delete the reference to “legal systems” which could be understood as restricting the applicable principles only to those positively stated in a particular domestic law.

320. Hartkamp on the contrary found the suggested short formula too vague.

321. Bonell noted that the discussion had so far focused on the fairly marginal cases of fundamental principles limited to a particular region or ethnic or religious group. He urged the Group to address the much more important issue of principles considered as fundamental throughout the world, examples of which were indicated in the second paragraph of Comment 2 lit. a) to Article 1, and to express its views with respect to Comment 2 lit. b) and Illustrations 3 to 9.

322. Raeschke-Kessler could live with either the present formula or the shorter one proposed by Dessemontet but insisted that Article 1 be kept as it was particularly needed in international arbitration.

323. Finn agreed with Bonell but suggested addressing only corruption which was definitely a universally accepted principle. To go further in his view was inappropriate in an instrument such as the Principles. Asked by Bonell whether he wanted to suggest amending also the black letter rule so as to restrict Article 1 to corruption, he confirmed: indeed, to go beyond the contract formation process would mean opening a Pandora's box.

324. Pertegás agreed that the scope of Article 1 should be kept very narrow. To make this clear she first of all suggested inserting in the black letter rule the word "manifestly" between "it is" and "contrary" and focusing in the comments on the effects of the performance of the contract.

325. Raeschke-Kessler disagreed with Finn insofar as in his view money laundering, drug trade and forced labour were in practice just as important as corruption.

326. Finn agreed in substance but recalled that money laundering, drug trade and forced labour were normally prohibited by statute and would therefore fall under Article 3.

327. Zimmermann repeated his preference for the present wording of Article 1 possibly amended by the inclusion of the word "manifestly". He agreed that corruption was the most important instance of illegality but thought that it was sufficient to stress this in the comments by having most of the illustrations deal with corruption. To refer only to corruption also in the black letter rule could give the impression that under the Principles the violation of other fundamental principles was irrelevant which would clearly be unacceptable.

328. Bonell thought that the discussion had reached a turning point. There were basically two approaches on the table, the one reflected in the draft and just now supported by Zimmermann, the other suggested by Finn. He urged the Group to focus on the illustrations set out in Comment 2 lit b) and test them against the formula at present contained in Article 1. This would make it possible to have a better idea of the approach ultimately to be chosen.

329. Date-Bah expressed his support for what had been said by Lando. Indeed he too felt that hardly any of the fundamental principles which so far had been referred to in the discussion were not expressly prohibited by the various national legislatures so that they would ultimately be covered by Article 3.

330. Chappuis disagreed and pointed out that even with respect to corruption there might be considerable differences in the way in which it was prohibited by statute. She therefore insisted on the necessity of having a general rule of the kind laid down at present

in Article 1 and suggested adding in the comments also the African Union Convention on Preventing and Combating Corruption of 2003 signed by 21 States.

331. Bonell called for comments on Illustrations 3 and following.

332. Lando pointed out that Illustration 3 was perfectly covered by Article 3.

333. With respect to Illustration 4 Estrella Faria suggested amending the facts so that there would be an agreement between two bidders according to which one gets the contract on one occasion and the other gets another contract on another occasion.

334. Gabriel agreed with Lando that Illustration 3 would be covered by Article 3 and this prompted him to suggest more in general the deletion of Article 1 which in his view was too vague and would only produce uncertainty in practice.

335. Concerning the argument that virtually all cases envisaged under Article 1 would be covered by Article 3, Bonell recalled that Gabriel himself had admitted that for instance in the United States international corruption had been prohibited by statute only recently.

336. Gabriel objected and recalled that the U.S. Act on Foreign Corruption had been enacted in the mid-1970s for a very specific reason, i.e. not that there were no laws in other countries prohibiting corruption, but they were just not being enforced and the Act brought them within the ambit of U.S. law.

337. Returning to Lando's argument, Hartkamp pointed out that Article 3 referred to Article 1.4 of the Principles which significantly enough speaks of "mandatory rules", not of "mandatory laws", thereby making it clear that reference is made not only to specific statutory provisions but also to the unwritten public policy of the respective national legal systems.

338. Raeschke-Kessler pointed out that as an arbitrator he had some problems with Article 3. There were arbitrators who call such mandatory provisions "laws of convenience" meaning they may or may not apply them depending on their convenience. In practice it may well be that in an arbitration in Switzerland one of the parties, particularly if a State or State agency, invokes with respect to a contract governed by Swiss law a mandatory prohibition of its own domestic law according to which the contract would be invalid. In order to override Article 3 which could be used to justify the application of such statutory prohibitions, arbitrators needed Article 1 containing the overriding principle.

339. Lando found Raeschke-Kessler's observations very interesting but objected that what he had pointed out with respect to the mandatory provisions referred to in Article 3 could likewise apply also with respect to the fundamental principles referred to in Article 1 which too allowed arbitrators great discretion as to the application of such principles.

340. Chappuis feared that by deleting Article 1 and retaining only Article 3 there would be no room left for the *ordre public international*.

341. Hartkamp confirmed that in such a case under the Principles there would be no international public policy.

342. Chappuis found that if Hartkamp's analysis were correct the conclusion would be unacceptable since it made no sense to draft rules for international contracts without

reference to international public order which was clearly different from purely domestic public order.

343. Bonell insisted that according to Article 1.4, if the Principles applied as the law governing the contract, only the internationally mandatory rules would be applicable.

344. Dessemontet objected and referred to Comment 2 to Article 1.4.

345. Bonell disagreed and referred to Comment 3 to Article 1.4.

346. According to Dessemontet the notion of internationally mandatory rules was different from that of international public policy and as a matter of fact for instance corruption was not mentioned among the examples in Comment 3.

347. Bonell admitted that the comments had been drafted in a different perspective and therefore would have to be amended in the light of the Group's current discussion.

348. Brödermann thought that Article 3 with its reference to Article 1.4 was not sufficient since it left the parties and ultimately the arbitral tribunal in a situation of uncertainty as to which mandatory rules were applicable in a given case according to the relevant conflict of laws rules. He therefore strongly advocated keeping Article 1.

349. Bonell invited further comments on Lando's proposal to build into Article 1.4 the bulk of this chapter or alternatively to keep the present structure, i.e. both Articles 1 and 3.

350. Zimmermann insisted that Article 1 was needed but suggested that the Group finish its discussion of Article 1 and proceed to Article 3 since quite a few members appeared to make their decision dependent on how Article 3 was to be interpreted and how it would operate.

351. Widmer, like Zimmermann, was in favour of keeping Article 1 but supported the suggestion to move on to Article 3. He thought ultimately the order of the two Articles should be inverted.

352. Bonell saw sufficient support for the proposal to move on to Article 3 and invited comments.

353. In order to show the limits of Article 3, Raeschke-Kessler made the example of a State entering into a contract containing an arbitration clause but once a dispute arises objecting that under its domestic law it was prevented from accepting arbitration as a means of dispute settlement. Such an objection could prove to be valid according to Article 3 referring to Article 1.4 since according to the relevant conflict of laws rules the capacity of a State to enter into an arbitration agreement may well be governed by the domestic law of that State.

354. Bonell wondered why the result would be different under Article 1.

355. Raeschke-Kessler replied that Article 1 would justify the disregarding of such domestic law in view of the fact that it was a fundamental principle that a State cannot enter into an arbitration agreement and later on invoke its own law prohibiting such agreements.

356. Bonell thought that the same result could probably be achieved by simply applying Article 1.8 of the Principles.

357. Date-Bah expressed his surprise in hearing that the purpose of Article 1 was to override Article 3. In his view this was absolutely not the case and both articles were pushing in the same direction. With respect to Article 3 he further agreed with Hartkamp that the reference via Article 1.4 was not only to statutory laws but also to unwritten principles of public policy. For instance even if in a given country international corruption was not prohibited by statute it would be considered illegal according to public policy. He therefore concluded that the scope of Article 3 was broad enough to cover virtually all cases envisaged under Article 1.

358. Zimmermann agreed in principle but thought that, if this was the opinion of the entire Group, it should be clearly expressed at least in the comments to Article 3 and Article 1.4. However he personally still thought that Article 1 should be kept also in view of the fact that the notions of *ordre public*, *gute Sitten*, etc. were far from uniformly understood within the various countries. He agreed with Widmer that the order should be inverted, i.e. that in order to highlight its importance, present Article 3 should become Article 1 and be followed by present Article 1 as a sort of reminder – or flagging out – that there was still something like international public policy left.

359. Dessemontet agreed with Date-Bah that Article 3 covered the most important cases of illegality. At the same time he, like Zimmermann, thought that there was still a need for a fall back provision such as Article 1 referring to principles of international public policy which were different – narrower - from the domestic *ordre public*. The notion of international public policy had been developing considerably over the last fifteen years and had turned from a purely negative notion into a positive one.

360. Gabriel agreed in principle but thought that the Group would not be able to agree on a sufficiently precise definition of international public policy so that it was preferable to delete Article 1 altogether. At the same time he suggested amending the Comments to Article 1.4 so as to make it clear that the notion of “mandatory rules” should be understood in a broad sense so as to cover also unwritten principles and rules of public policy.

361. Bonell proposed for the time being to disregard Article 1(1) and to move on to Article 3(1). In the light of the discussion he saw two possibilities: either to retain the present text stating that “A contract is also illegal if, whether by its terms, performance or otherwise, it infringes a mandatory rule applicable under Article 1.4 of these Principles” or to get rid of the notion of “illegal” and to use the more neutral formula adopted in Article 15:102 PECL according to which “Where a contract infringes a mandatory rule of law [...] the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule”. In either case Article 4 could further determine the effects of such infringement if not determined by the mandatory rule itself.

362. Hartkamp was in favour of the PECL formula and moreover proposed deleting the words “whether by its terms, performance or otherwise” which he thought were redundant at least with respect to the distinction between “by its performance” and “otherwise”.

363. Zimmermann also supported the PECL approach but with respect to the effects of the infringement urged not to follow paragraphs 2 and 3 of Article 15:102 PECL but to stick to paragraphs 2 and 3 of Article 4 of the Principles.

364. Akhlaghi agreed with Zimmermann.

365. Raeschke-Kessler too agreed but only on condition that the title “illegality” be kept.

366. Bonell personally saw no difficulty in keeping the original title which after all was also the title of the corresponding chapter of PECL but suggested addressing the issue at a later stage.

367. Finn found that “illegality” was too ambiguous a term and suggested adopting “Contracts infringing mandatory rules” as the title.

368. Bonell insisted that the issue of the title of the chapter be better discussed at a later stage but at the same time recalled that on previous occasions only Gabriel had objected to such a title while all the other common lawyers of the Group, and in particular Furmston, had insisted that this was precisely the notion that would be used in this context in their own domestic laws.

369. Bonell then asked for comments on Hartkamp’s suggestion to delete the words “by its terms, its performance or otherwise” and noted that there was general consensus to do so.

370. Brödermann thought that the reference to performance was important since there might well be contracts which by their terms are absolutely valid but when performing them one of the parties violates a mandatory rule. He made the example of an agency contract where, contrary to what the parties have agreed, the intermediary uses part of the funds to bribe somebody or omits to register as an official intermediary thereby violating mandatory law: if this were the case the principal should no longer be obliged to pay the agreed commission.

371. Bonell wondered whether by deleting the phrase “whether by its terms, performance or otherwise” the language would not be sufficiently broad to cover also the cases where the infringement is not by the contract itself but only by its performance.

372. Fontaine agreed but suggested that the comments should give an example of the two cases.

373. It was so agreed.

374. In summing up the discussion Bonell wondered whether the Group was prepared to agree on the following wording of what was at present Article 3 but would become Article 1: “(1) Where a contract infringes a mandatory rule of law applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule. (2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable. (3) In determining what is reasonable regard is to be had in particular to: (a) the purpose of the rule which has been infringed; (b) the category of persons for whose protection the rule exists; (c) any sanction that may be imposed under the rule infringed; (d) the seriousness of the infringement; (e) whether the infringement was intentional; and (f) the closeness of the relationship between the infringement and the contract.” This new Article 1 could then be followed by a new Article 2, paragraph 1 of which would correspond to paragraph 1 of the

present Article 5 and read “Where there has been performance under a contract infringing a mandatory rule under Article 1, restitution may be granted where in the circumstances this would be reasonable”, meaning that even if under Article 1 one or both of the parties are denied any contractual remedy there would still be the possibility of granting a restitutionary remedy provided that in the circumstances this would be reasonable, while paragraph 2 of the new Article 2 could provide that “In determining what is reasonable, regard is to be had, with appropriate adaptations, to the criteria referred to in Article 1 (3)”.

375. Zimmermann and Hartkamp supported this approach but Hartkamp suggested inserting between the two proposed new Articles 1 and 2 a provision dealing with partial illegality or ineffectiveness.

376. Concerning the proposed new Article 1 Fauvarque-Cosson found that the wording in paragraph 2 “[...] the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable” rather vague and suggested that some guidance be provided – as indeed Article 15:102 (2) does provide – as to the kind of remedies envisaged.

377. Zimmermann on the contrary found the formula used in the PECL even less precise, insofar as it referred generically to “full effect”, “some effect” and “no effect” while the formula proposed in Article 1(2) made it clear that at stake were the contractual remedies, i.e. specific performance, termination, damages, but not restitution which was addressed in a separate provision.

378. Fauvarque-Cosson insisted that without an express mention in the text it was far from obvious to her that the remedy of specific performance may be granted even if the contract was illegal. She therefore urged mentioning this possibility at least in the comments, making it clear that it was a very exceptional case.

379. For Finn, Fauvarque-Cosson’s doubts confirmed the necessity to get rid of the notion of illegality – which by itself implied the idea that the contract was of no effect whatsoever – and simply to refer to contracts that infringe mandatory rules and then provide that such contracts may have quite different effects, ranging from all the ordinary contractual remedies to mere restitution or not even that depending on the circumstances of the case.

380. With respect to paragraph 3 of the new Article 1 Chappuis found the list of criteria very helpful but wondered whether one might not add also the first criterion appearing in § 178 of the Restatement Second on Contracts, i.e. the parties’ justified expectations.

381. Gabriel strongly supported this suggestion since the parties’ justified expectations represented an important supplement to the other criteria, all of which were related to the infringement of the mandatory rule and therefore covered only half of the problem, the other half clearly being the parties’ expectations.

382. Bonell wondered whether according to the Restatement reference is to be made to the expectations common to both parties?

383. Gabriel confirmed although what ultimately mattered was the expectations of both parties objectively understood by the court called upon to interpret the contract.

384. Finn would have preferred that also the justified expectations of only one party should be taken into account, just to avoid the scenario repeatedly reported by Raeschke-

Kessler that one party creates a legitimate expectation and later invokes a mandatory provision of its own law in order to nullify that expectation leaving the other party without any remedy.

385. Estrella Faria, echoing Chappuis' and Finn's concern, quoted a passage of the recent Report of the English Law Commission on the reform of the illegality defence system in England and Wales stating that the decision as to whether restitutionary remedies should be granted or not should take into account the unjust enrichment that may result from such decision and he suggested mentioning this also in the Comments of the Principles.

386. Bonell wondered whether the suggestion made by Chappuis was carried and whether the Group also agreed on Finn's interpretation.

387. It was so agreed.

388. Bonell then solicited comments on the proposed provision on restitution.

389. Fontaine suggested that also in Article 2 there should be as there was in Article 1 a proviso that the granting or not of restitution depends first of all on what the mandatory rule infringing expressly stated in this respect.

390. Bonell thought that the point was absolutely well taken although as a matter of fact cases of a mandatory rule expressly prescribing or denying restitution in case of its violation were extremely rare.

391. Zimmermann thought that Fontaine's point may be taken care of if one considers that Article 1(1) stating that "Where a contract infringes a mandatory rule of law applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by the mandatory rule", used a very broad formula that could well be understood as referring also to restitution.

392. Fontaine merely feared that this might not be immediately understood by the average user of the Principles.

393. Alpa suggested mentioning in the comments that of course Article 2 would not apply if the mandatory rule expressly provided that in case of violation even restitutionary remedies were excluded.

394. Raeschke-Kessler on the contrary objected to the idea of according in all cases prevalence to the express provision of the mandatory rule in question and made the example of a mandatory rule of the applicable law expressly excluding even restitutionary remedies in case of violation thereby permitting for instance the new Government that had invoked the illegality of a contract allegedly entered into by its predecessor due to corruption to get the construction almost completed by the foreign constructor for free.

395. Dessemontet agreed and pointed out that precisely for this reason the suggested new Article 2 provided that it all depended on the circumstances of the case – this was, by the way, precisely the current position of Swiss case law that has abandoned the traditional *in pari turpitudine* rule in favour of a more flexible approach taking into consideration for instance which party was more responsible for the infringement, etc.

396. Alpa objected that if the mandatory rule at stake provided that the *in pari turpitudine* rule applied, the Principles could hardly claim to prevail over such *ius cogens*.

397. Bonell thought that if the Principles applied as the law governing the contract, such a mandatory rule could possibly be disregarded as it would hardly amount to a principle of *ordre public international*.

398. Hartkamp thought that the problem could be solved by doing what Fontaine proposed, i.e. to insert in Article 2 a new paragraph 1 stating that in first instance the restitutionary regime expressly prescribed by the mandatory rule infringed applies because in that case a general rule such as the one mentioned by Raeschke-Kessler could never be invoked.

399. Zimmermann agreed that via Article 1.4 it should not be possible to apply the general rules on unjust enrichment including *in pari turpitudine* of a particular domestic law so that the only open question concerned the admittedly very rare case that the infringed mandatory rule itself expressly provides whether a restitutionary remedy should be granted or not. He personally thought that the question was already taken care of by Article 1(1) but could also agree on the approach suggested by Fontaine and Hartkamp.

400. Concerning Hartkamp's suggestion to insert between Article 1 and Article 2 a separate Oprovision on partial infringement, Bonell noted that while PECL addressed this issue in a specific provision (Article 15:103), the DCFR no longer dealt with it specifically but merely referred to its general rules on unjustified enrichment (Article II.-7:303).

401. Zimmermann proposed the following provision: "If only part of the contract infringes a mandatory rule applicable under Article 1.4 the remaining part remains unaffected unless giving due consideration to the circumstances it is reasonable to hold otherwise".

402. Hartkamp would have preferred a wording similar to that of Article 15:103 of PECL: "If only part of a contract is rendered ineffective ... the remaining part continues in effect unless ...". Indeed what matters was not that only part of the contract infringes a mandatory rule but that as a consequence thereof that part becomes ineffective which is not always the case since infringement need not mean ineffectiveness.

403. Finn thought that given its new structure Article 1 covered also the case of partial ineffectiveness. Indeed, by stating that if a contract infringes a mandatory rule the parties have the right to exercise such remedies as are reasonable in the circumstances it refers not only to the cases where the contract remains enforceable or becomes unenforceable in its entirety but also to the case where only part of the contract remains enforceable or becomes unenforceable.

404. Dessemontet suggested that in case of partial infringement one should also envisage the remedy of contract adaptation.

405. Bonell wondered whether the broad formula used in Article 1 already included also such remedy which under the Principles is expressly provided in case of hardship. If so he felt that a mention to this effect in the comments would be sufficient.

406. Dessemontet thought that on this point the Comments to Article 1 of this Chapter and those to Article 3.16 should be aligned and wondered whether the safeguards for

adaptation provided for in Article 3.10(3) should not be extended also to the cases of partial invalidity and partial ineffectiveness.

407. Bonell felt that this was certainly a possibility and asked for comments.

408. Raeschke-Kessler would have preferred indicating contract adaptation as a possible remedy in the black letter rule itself.

409. Gabriel on the contrary thought that, in view of the broad formula used in Article 1, a mention in the comments was sufficient.

410. Bonell felt that the time had come to revert to the old Article 1 and to decide whether the general rule therein stated should be kept as a sort of last resort provision following the provisions so far discussed and dealing with the infringement of mandatory rules applicable under Article 1.4.

411. Hartkamp thought that the advantage of keeping the rule laid down in the old Article 1 was very limited as compared to the content of the new Article 1 in combination with Article 1.4 of the Principles. In addition the old Article 1 would certainly raise considerable opposition not only among practitioners who did not know what it meant but also within the Governing Council of UNIDROIT which would be called upon in one or two years' time to approve the new edition of the Principles. He therefore favoured, also for purely tactical reasons, deleting the old Article 1.

412. Bonell agreed with Hartkamp that at stake was a politically sensitive question and that therefore the Group should in its decision also take into account the possible reaction of the Governing Council, UNIDROIT'S highest scientific organ, which would ultimately be called upon to approve the entire project. Under these circumstances he thought it would be advisable to hear first the opinion of the other members of the Group who, like Hartkamp, were also members of the Governing Council.

413. Harmathy, like Hartkamp, was against keeping the old Article 1.

414. Gabriel too was in favour of deleting the provision since in his view on balance the problems that it might cause outweighed the possible benefits.

415. Bonell, noting the unanimous view expressed by the three members of the Governing Council present in the Group, called on the other members of the Group to express their opinions.

416. Lando, though reminding the members of the Working Group that they should always decide only according to their best conscience, confessed that he felt relieved to see that all three members of the Governing Council shared his view that the old Article 1 should be deleted. It would be very difficult to explain the difference between the new Article 1 and the old one and he could not help but consider the latter provision just odd and redundant.

417. Bonell pointed out that of course the Group should feel absolutely free to take, on this as well as on any other matter, whatever decision it thought most appropriate: his previous remarks were simply intended to remind members and observers that the Group's decision would ultimately have to be approved by the Governing Council which would certainly attach greatest importance to the fact that within the Group all three of its members had expressed strong reservations about keeping the old Article 1.

418. Finn favoured the deletion of the provision.

419. Zhang fully agreed with Hartkamp's comments.

420. Uchida too voted for the deletion of the old Article 1.

421. Widmer on the contrary decidedly supported the provision.

422. Akhlaghi preferred to abstain from taking a position in favour of or against the old Article 1 but wanted to congratulate the Rapporteurs on their excellent work.

423. Zimmermann, though admitting that the practical impact of the provision was rather limited, was personally in favour of keeping it because of its symbolic value. However, in view of the fact that already no less than six members of the Working Group had expressed their strong reservations he saw little if any chance of getting sufficient support for the provision and would therefore no longer insist on keeping it.

424. Date-Bah was in favour of deleting the article.

425. Alpa on the contrary supported the provision all the more so as it had now clearly become a last resort rule which however in his view was of great symbolic value and would definitely help arbitrators in deciding highly sensitive cases according to internationally recognised values.

426. Gama, like Zimmermann, thought that in view of its controversial nature the article should be deleted.

427. Fauvarque-Cosson declared that after careful consideration she was convinced by Hartkamp's and Lando's arguments against the provision. At the same time however she drew attention to the fact that if both old Article 1 and old Article 2 were deleted there would no longer be a rule expressly denying the parties any remedy under the contract whenever each of them knew or ought to have known of the infringement. She wondered whether this could lead to the conclusion that under the new approach remedies, including specific performance, may be granted even where both parties acted in full knowledge of the violation of a mandatory rule or principle.

428. Fontaine confessed that, though originally in favour of the provision, in the light of the discussion he was prepared no longer to insist on keeping it. He urged however that the comments to the new Article 1 be redrafted so as to make it clear that the new provision encompasses also some of the cases envisaged by the old Article 1.

429. Asked about his opinion Bonell said that for obvious reasons he preferred to abstain and invited the observers to express their views.

430. Dessemontet reiterated his strong support for the provision and thought that its deletion was a great mistake: the recognition of an international public policy was one of the most important developments in this area in recent years and by simply ignoring that notion the Principles run the risk of appearing outdated.

431. In view of this strong plea in favour of the provision, Bonell wondered whether the Group could agree to rewrite the Comments to Article 1.4 so as to explain that the reference to “mandatory rules” was intended to cover also principles of *ordre public*.

432. Chappuis too was strongly in favour of the old Article 1 and insisted that if the provision was ultimately deleted at least the Comments to Article 1.4 should address the problem of international public policy.

433. Brödermann wholeheartedly agreed with Dessemontet and Chappuis. However, if the old Article 1 were to be deleted he too urged that the Comments to Article 1.4, and in particular Comment 4, be rewritten so as to take care at least in part of the problem of the international public order.

434. Perales Viscasillas entirely agreed with the last three interventions.

435. Garro found it difficult to follow the discussion since in his view the idea underlying the old Article 1 could hardly be questioned by anybody. He was somehow disappointed by the fact that at a time when everybody was trying to put the international trade and finance system under some kind of umbrella of universally accepted ethical rules a body such as UNIDROIT engaged in drafting rules on international commercial contracts would forego the possibility of reaffirming and further defining the notion of international public policy.

436. Pertegás agreed with Garro and thought that the old Article 1 was important not just for symbolic reasons but because there was a gap between the mandatory rules referred to in Article 1.4 and other emerging international principles. As Dessemontet had rightly pointed out there was no set of private international law rules which did not provide for the exception of public policy and she hoped that The Hague Conference would be more successful than UNIDROIT in dealing with the matter.

437. Raeschke-Kessler entirely agreed with all those who had spoken in favour of keeping the old Article 1 and feared that without such a last resort provision States could be tempted to circumvent, by means of special legislation, the principles of justice and fairness in their relationships with foreign companies.

438. Also Jolivet would have preferred keeping the old Article 1 but could live with the sort of compromise solution proposed.

439. Chang suggested making the old Article 1 more concrete by supplementing it with the old Article 2 and its knowledge test. If this proposal were not to be acceptable, he favoured the deletion of the provision.

440. Agusman preferred to abstain from taking a decision in favour or against the provision.

441. In summing up the discussion Bonell noted that the Group was definitely split: while virtually all the observers strongly supported the old Article 1, the overwhelming majority of members was against it. Also in view of the fact that all three members who were also members of the Governing Council were among the most convinced opponents, he saw no sufficient support for the provision and concluded that it was therefore no longer carried. At the same time however he pointed out that also the opponents of the old Article 1 agreed on rewriting the comments to Article 1.4 of the Principles so as to make it clear that the

reference there was not only to statutory rules but also to unwritten principles of domestic and international public policy as the case may be. He also thought that the Group might wish to see the new Articles 1 and 2 in writing and suggested postponing the final examination of these two provisions until the Secretariat produced such a document. On that occasion the Group might also wish to examine the comments and illustrations at present accompanying Articles 1 to 5 in order to see to what extent they would fit also in the context of the new Articles 1 and 2.

442. Zhang agreed on such course of action.

443. On the contrary Date-Bah and Finn felt that any in depth discussion on the comments and illustrations could only be made in conjunction with the amended comments, yet to be prepared, to Article 1.4 since they were part of the entire package.

444. Chappuis on the contrary thought that at least an attempt should be made already during this session to test the illustrations against the new black letter rules. Otherwise she feared that one might repeat the experience of the previous two sessions where because of the lack of pertinent and adequately presented illustrations it had not been possible fully to appreciate the implications of the black letter rules.

445. Widmer and Zimmermann entirely agreed with Chappuis.

446. Bonell, also in view of the fact that the next session of the Working Group would be the last one, expressed the hope that the Group might already at this session have at least a first exchange of views on the comments and illustrations that should accompany the new Articles 1 and 2.

447. Estrella Faria stressed his satisfaction with the decision taken by the Group with respect to the old Article 1. He felt that without that provision not only would it be easier to secure final approval of the entire chapter by the Governing Council but also the promotion of the Principles in practice would be very much facilitated. As to the argument that there was now a gap in the text he felt that by properly amending the Comments to Article 1.4 it would be quite possible to include in the system also those fundamental principles such as the prohibition of corruption, money laundering, child labour, etc. which had been discussed in the context of the old Article 1.

448. Gabriel, Hartkamp and Harmathy wanted to make it clear that, despite the reservations they had expressed against keeping the old Article 1, within the Governing Council they would obviously have supported the decision of the Working Group even if that decision had been in favour of keeping the provision.

449. Bonell adjourned the session on illegality until the new draft Articles 1 and 2 had been prepared in writing.

450. The new draft Articles read as follows:

Section X: Illegality

Article 1

(Contracts infringing mandatory rules)

(1) Where a contract infringes a mandatory rule applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

- (a) the purpose of the rule which has been infringed;*
- (b) the category of persons for whose protection the rule exists;*
- (c) any sanction that may be imposed under the rule infringed;*
- (d) the seriousness of the infringement;*
- (e) whether the infringement was intentional; and*
- (f) the closeness of the relationship between the infringement and the contract.*
- (g) the parties' reasonable expectations.*

Article 2

(Restitution)

(1) Where there has been performance under a contract infringing a mandatory rule under Article 1, restitution may be granted where in the circumstances this would be reasonable.

(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 1 (3).

(3) Where either party may claim restitution of whatever it has supplied under the contract, or the part of it that is illegal, such party concurrently must make restitution of whatever it has received under the contract or the part of it that is illegal.

(4) If restitution in kind is not possible or appropriate, an allowance has to be made in money whenever reasonable.

(5) The recipient of the performance does not have to make an allowance in money if the impossibility to make restitution in kind is attributable to the other party.

(6) Compensation may be claimed for the reasonable expenses linked to the performance received.

451. In presenting the new draft Articles Bonell asked for comments not only on the black letter rules but also on the illustrations that should accompany them, considering in particular to what extent those contained in Doc. 111 (Rev.) were suitable also in the new context.

452. With respect to Article 2 Fontaine, in reiterating his suggestion to align it to

Article 1 to the effect that also as far as restitution was concerned the first criterion should be the prescription of the infringed mandatory rule itself, gave the example of a statutory rule prohibiting trade in certain goods such as drugs, weapons or exotic animals and prescribing as sanction of its violation the confiscation of the goods. In such a case any restitutionary remedy was obviously excluded from the outset.

453. Bonell thanked Fontaine for his very pertinent example but thought that even in his case it was not the mandatory rule as such that expressly excluded restitution but it followed from the criterion under lit. c), i.e. the sanction imposed under the rule infringed.

454. Fontaine agreed and suggested that the case be mentioned in the comments.

455. Lando proposed inserting in Article 1(1) after the words “a mandatory rule” the words “whether of national, international or supranational origin” which appeared in Article 1.4 but should for pedagogical reasons also be repeated here.

456. It was so agreed.

457. Finn questioned the very title of the draft chapter. The notions of “illegality” and “illegal” had been extirpated from the black letter rules so why keep them in the title? A possibility would be to replace it by “Contracts infringing mandatory rules” though he admitted that this title could be equally questionable in view of the fact that the Principles themselves contained mandatory provisions.

458. Bonell recalled that the chapter under discussion had from the outset been entitled “Illegality” and thought that also in order to accommodate the views expressed by those members and observers who would have preferred keeping the old Article 1 instead of having only a reference to unwritten principles of international public policy in the comments to Article 1.4 it would be wise to keep the original title.

459. Gabriel agreed that the original title was “Illegality” but pointed out that in the meantime the scope of the chapter had been substantially reduced. Or, better say, while it still covered contracts that may be considered illegal because they infringe fundamental principles applicable under Article 1.4, it referred also and above all to contracts infringing statutory prohibitions such as the carrying out of certain professional activities without the necessary permission to do so which nobody would consider as illegal. He therefore suggested changing the title in order to avoid any misunderstanding as to the real scope of the chapter.

460. Bonell noted that precisely for the reasons indicated by Gabriel also the alternative title “Contracts infringing mandatory rules” could be misleading. He therefore thought that unless other alternative proposals were put forward the original title which had been used over the last four years should be kept for the time being. After all, one thing was the notion of “illegal contracts” which no longer appeared in the black letter rules and another thing was “Illegality” as an overall title of the entire chapter which as far as he could recall was commonly used in the same context at least in English textbooks.

461. Date-Bah suggested as an alternative title “Non-compliance with applicable law”.

462. With respect to the remarks made by Fontaine, Perales Viscasillas thought that one could speak in Article 1(1) in general of the effects of the infringement whether upon

the contract or not and speak only in Article 1(2) of the “effects upon a contract”.

463. In the absence of further remarks concerning the black letter rules Bonell invited comments on the Illustrations accompanying the old Articles 3 and 4.

464. Lando suggested starting in the comments to the new Article 1 with three illustrations referring to an infringement, respectively, of a truly international or global mandatory rule, of a supranational mandatory rule and of a national mandatory rule.

465. Fontaine thought that one should first think of the illustrations to be added in the new comments to Article 1.4 to illustrate the broadened scope of the Article which referred no longer only to statutory provisions but also to unwritten principles of public policy, and then consider the illustrations to be included in the comments to the new Articles 1 and 2 focusing on the effects of an infringement of the mandatory principles and rules referred to in Article 1.4.

466. Chappuis wondered whether the illustrations appearing at present under the old Articles 1 and 2 would eventually disappear. She would very much regret such an outcome and made the example of corruption which was certainly a current phenomenon in international trade relationships and should therefore not be completely ignored in the Principles simply because the old Articles 1 and 2 were no longer there.

467. According to Bonell one could hardly disagree with Chappuis on this point. He thought that corruption should certainly also be mentioned in the comments to the new Article 1 as one of the most important examples of contracts infringing mandatory rules, the sole difference being that more attention would be paid to the fact the prohibition of corruption follows from a mandatory rule or principle applicable in the case at hand under Article 1.4.

468. With respect to the illustrations at present contained in the Comments to the old Article 3 Gabriel thought that, while Illustration 1 should be deleted because rather trivial, Illustrations 2 and 3 were perfectly suitable under the new Article 1, subject of course to editorial changes such as the replacement of “illegal” by “infringement of mandatory rules”, etc.

469. Zhang agreed as to the scarce interest of Illustration 1 in the present context.

470. Finn shared Chappuis’ concern and suggested that the comments to the new Article 1 should refer first of all to those statutory prohibitions which are virtually universal in character in the sense that they reflect principles widely accepted at international level of the sort presently referred to in the old Article 1, and then refer to mandatory rules that are peculiar to particular regions, while much less emphasis should be put on mandatory rules which may be enacted only by single countries.

471. Hartkamp noted that much of what he wanted to say had already been said. He too suggested starting with the most serious cases of infringement such as corruption and in this respect provided two illustrations, one referring to a case where in Country X there was a statutory prohibition on bribing civil servants and another referring to a case where in the same Country X, although there was no statute prohibiting the bribery of persons that are not civil servants, the prohibition on bribery of persons working in the private industry is considered as being contrary to public policy.

472. Bonell thanked Hartkamp for his very helpful suggestions and thought that along the same lines one might reconsider also the other illustrations at present contained in the Comments to the old Article 1.

473. Date-Bah wondered whether, in view of the fact that in the black letter rule the wording “whether by its terms, performance or otherwise” had been deleted, the comments and illustrations still needed to conform to that structure.

474. Bonell agreed.

475. Harmathy thought that a possible case for an illustration was selling hard drugs which in some countries is permitted while in others is prohibited.

476. In particular this last intervention prompted Bonell to make a comment of a more general character: to what extent should the illustrations address the conflict of laws aspect which inevitably arises once one no longer refers to an “internationally widely recognized principle” but to a statutory prohibition enacted e.g. in Country X but not in Countries Y and Z? What if the contract is entered into between a party situated in Country X and a party situated in Country Y and has to be performed in Country Z? He personally felt that the Principles should definitely abstain from entering into these kinds of problems.

477. Gabriel like Hartkamp thought that the comments and illustrations should show some logical progression starting with statutory violations and then moving on to violations of a recognized public policy and maybe also of religious prohibitions reflected in the law, ending up with violations of public international policy.

478. Bonell again raised the conflict of laws question: since the illustrations would inevitably relate to international contracts, the statutory prohibitions, the public policy, etc. of which country(ies) should be taken into account? One possibility would be to use the generic formula “... of the law applicable according to the conflict of laws rule of the forum”, but what if – as is normally the case – the disputes are to be decided by an international arbitral tribunal lacking a *lex fori*?

479. Gabriel agreed with Bonell that a conflict problem existed and he too thought that the Principles should not address it but leave it to the courts or arbitral tribunals to resolve it according their conflict of laws rules.

480. Bonell wondered whether one could agree on the following technique: to refer in the illustration to a particular statutory prohibition or public policy prohibition of Country(ies) X (and Y and Z) followed by the standard formula “If according to Article 1.4 of the Principles such prohibition(s) is(are) relevant, as a consequence ... (specifying the effects of the infringement upon the contract)”.

481. Date-Bah suggested that in the illustrations there should also be a reference to those cases where in a given country a particular prohibition laid down in an international convention becomes directly applicable even in the absence of formal ratification of that convention simply because international conventions may be automatically incorporated in the domestic law of the country in question.

482. Bonell thanked Date-Bah for this important remark and suggested the formula “If that provision contained in the Convention X is applicable in Country(ies) A (B and C)...”.

483. Lando thought that the conflict of laws issues involved should not be completely neglected and mentioned the “strong governmental interest test” of the U.S. Restatement as a possible criterion to be used to indicate which mandatory rules of national, supranational and international origin should be taken into consideration in a given case. He made the example of currency regulations enacted by a country with a weak currency. If the contract provides for payment in that country’s currency its domestic mandatory rules might have to be taken into consideration in view of that country’s strong interest in imposing them even if the law governing the contract was that of another country.

484. Chappuis too felt that a simple reference to Article 1.4 of the Principles was not sufficient for the determination of the mandatory provisions to be taken into account for the purpose of the validity or invalidity of a given contract. Indeed this would not make it possible to escape under the Principles the application of “silly” domestic mandatory provisions that are clearly not suited to international commercial contracts such as e.g. the Swiss rule according to which parties to a service contract are not permitted to stipulate a certain duration of the contract because such contracts, falling under the general regime of mandate, are considered to be by their very nature terminable at any time.

485. Bonell respectfully disagreed with Chappuis insofar as in his view the reference in Article 1.4 to the “relevant” rules of private international law would make it possible to disregard “silly” domestic mandatory rules at least whenever the Principles are the law governing the contract as may well be the case if the dispute is to be decided by an international arbitral tribunal.

486. Fauvarque-Cosson agreed with Bonell and referred to Comments 2 and 3 to Article 1.4 where the distinction between mandatory rules that are mandatory only in internal matters and internationally mandatory rules or *lois d’application nécessaire* that apply irrespective of which law – be it a particular domestic law or the UNIDROIT Principles – governs the contract is expressly mentioned although it might be even further explained.

487. Jolivet entirely agreed with this last intervention.

488. Brödermann suggested adding in Article 1.4 after the words “relevant rules of private international law” the words “and procedure” so as to make it clear that also recent developments in international procedural law, particularly in the field of arbitration, should be taken into account in determining which mandatory rules are applicable in a given case.

489. Bonell, while hesitating to open a discussion on the suggested amendment of the black letter rule of Article 1.4, thought that the comments should definitely address the issue and refer for instance, as already suggested by others in the course of the discussion, to Article 35 of the ICC Rules of Arbitration which by requesting arbitrators “to make every effort to make sure that the Award is enforceable at law” in substance invite the arbitrators to take into account the internationally mandatory rules of those countries where it is likely that enforcement of the award might be sought.

490. With reference to the comments and illustrations of the new Article 1 Chappuis wondered whether the Group could agree on a more clear-cut structure along the lines suggested by Finn and Gabriel.

491. Finn proposed starting off with examples – e.g. the three most important examples of corruption: bribery, extortion and collusive activity – where the activity in question is widely regulated throughout the world, be it by an international, a supranational

or a national instrument. There was a second group where the subject matter of the contract is covered by the same wide-ranging international instruments, for instance labour laws or anti-terrorist legislation, and with respect to the latter one may think of the sale of fertilizers intended to be used by the buyer to produce explosives and the seller may know or not know of that intended illegal use. Then there may be a third group where the mandatory rules are infringed by the performance of the contract and the examples may concern licensing requirements or administrative regulations governing the carriage of goods. Finally reference may be made to idiosyncratic statutes of particular religious groups and again only those laws should be taken as examples which may be relevant in international commercial contracts.

492. Bonell thanked Finn for his very helpful remarks concerning the structure and order of presentation of the comments and illustrations and found that many of the existing illustrations would already perfectly fit into the suggested scheme subject of course to being rephrased and put in a different order.

493. Fauvarque-Cosson too considered Finn's scheme a very good start but wondered whether cases of restraint of trade should be added as well, also in view of its special relevance under EU law.

494. Bonell thought the cases of restraint of trade, though very frequent for instance in connection with employment contracts, sales of businesses or supply contracts, were too controversial even within one and the same jurisdiction and would therefore not seem a particularly helpful example of infringement of mandatory principles and rules at international level.

495. Fauvarque-Cosson suggested two other topics worth being included in the list: environment and bioethics.

496. Bonell found both suggestions extremely interesting and felt that in particular the violation of administrative rules for the protection of the environment enacted by the State on whose territory a foreign investor intends to set up its plant represented an excellent example of infringement of mandatory rules in the context of international trade.

497. Finn agreed and pointed out that of course his list was just a tentative one which could clearly be integrated by other examples such as money laundering or the ones just now proposed.

498. Estrella Faria thought that there should be some latitude in describing in the illustrations the relevant mandatory principles and rules: especially with respect to the fundamental principles or principles of international public policy one might well use a generic formula so as to include also principles which were not laid down in international conventions ratified by a particular country but nevertheless were considered as fundamental by courts and scholarly writings of that country.

499. Bonell entirely agreed and recalled that a similar recommendation had already been made by Date-Bah without giving rise to any objection.

500. In closing the discussion on the draft chapter on illegality Bonell assured the Group that the Secretariat would do its best to revise the comments and illustrations in the light of the numerous and most valuable suggestions put forward during the session.

V. EXAMINATION OF THE DRAFT CHAPTER ON PLURALITY OF OBLIGORS AND/OR OBLIGEES (UNIDROIT 2008 - Study L – Doc. 107)

501. Bonell called on Fontaine to introduce his draft Chapter on Plurality of Obligors and/or Obligees.

502. Fontaine recalled that most of the black letter rules of the two sections in which the draft was divided had already been discussed and agreed but there were still some with respect to which no final decision has yet been made and he had therefore prepared alternative solutions. On the contrary the comments and illustrations were new and should therefore be examined by the Group. Starting with Article 1.1 on definitions he pointed out that there were no substantial changes with respect to the text approved last year.

503. Date-Bah, as a matter of presentation, suggested adding at the end of each of the four illustrations in Comment 1 a final sentence indicating the plurality of various obligors, e.g. in Illustration 1 “Companies A, B and C are plural obligors”.

504. Chappuis suggested indicating also the obligation concerned: for instance in Illustration 1 that it was not the obligation of the bank to pay the loan but the obligation of the three companies to reimburse the loan. She also suggested using the same examples on the reverse in the context of plurality of obligees.

505. Gabriel suggested replacing in Illustration 4 the term “mother company” by “parent company” and finding in Illustration 5 another word for “conceived”. More importantly he wondered whether in each illustration it should be made clear whether the obligors were jointly and severally or separately liable.

506. Fontaine replied that what mattered in the illustrations under Article 1.1 was that there were several obligors involved while the question of the kind of obligation at stake in a given case was addressed in Article 1.2.

507. Gama, with respect to Comment 2 to Article 1.1, suggested moving the last sentence of Illustration 5 to the text of the Comment 2, more precisely, after the second sentence at page 4.

508. Bonell observed that he too had some problems with the last sentence of Illustration 5 insofar as it was not entirely clear what was meant by “They are [...] subject [...] to the respectively applicable legal provisions”.

509. Brödermann suggested replacing in Illustration 4 “suretyship” by the more neutral term “security” since “suretyship” was a specific type of guarantee which in some legal systems gives rise to a joint and several obligation while in others such as Germany “suretyship” to a subordinate obligation.

510. Finn objected that to a common lawyer the term “security” might imply the idea of a secured interest which was clearly not intended.

511. Gabriel suggested the word “guarantee” be used.

512. Moving on to Article 1.2 Bonell wondered why there was the qualification “towards the same obligee” which did not appear in Article 1.1.

513. Fontaine agreed to speak instead of “towards an obligee”.

514. Bonell suggested aligning the opening sentence of the three illustrations with the standard formula used so far in the Principles, i.e. “The facts are the same as in Illustration [...] except that”.

515. Moving on to Article 1.3 Fontaine pointed out that Articles 1.3 to 1.9 formed a group of provisions on their own dealing with the relationship between the obligee and the joint and several obligors, more precisely Article 1.3 dealing with the main effect between the obligee and obligors and Articles 1.4 to 1.9 dealing with defences. Since Article 1.3 was adopted last year, he suggested proceeding to Article 1.4.

516. Gabriel thought one should not speak of “suing” since the provision applied also without there actually being litigation and suggested wording such as “Where a claim is being made against a joint and several obligor by the obligee ...”.

517. With respect to Article 1.5 Bonell wondered what in Illustration 2 was meant by “Company A could only reimburse” and Fontaine admitted that it should read “Company A only reimbursed”.

518. Brödermann noted that in Illustration 2, in the second line the reference should be to Companies B and C.

519. With respect to Article 1.6 Fontaine recalled the lengthy discussion the Group had last year on the then separate provisions, one dealing with release and the other with settlement. In view of the fact that the Group ultimately agreed that the two provisions should have basically the same content, he thought it might be preferable to have them merged into one article.

520. Brödermann first of all suggested having in Comment 2 an illustration with the facts being the same as those in Illustration 1 except that Bank X and Company A conclude a settlement agreement at EUR 20,000. The consequences would be the same, i.e. B and C would be still released for EUR 100,000, but he thought it worth expressly mentioning settlement since it was a very frequent scenario in practice. More important, he wondered about the internal relationship between B and C. What if B is close to bankruptcy and C is rich? Could it be that because of the settlement A gets out by paying EUR 20,000, and if B goes bankrupt, C would have to pay the full amount of EUR 200,000? This would not seem to be fair to him.

521. According to Gabriel C had already assumed that risk when entering into the transaction together with A and B.

522. Brödermann objected that at least under German law the settlement agreement between X and A would be invalid because concluded to the detriment of a third party, i.e. C.

523. Widmer on the contrary was of the same opinion as Gabriel.

524. Bonell wondered whether Brödermann would be willing to prepare a comment and illustration explaining his problem.

525. Brödermann promised to do so and Chappuis kindly enough announced that she would cooperate with him.

526. Fauvarque-Cosson raised a general point. She noted that in the black letter rules the phrase “unless the circumstances indicate otherwise” sometimes appeared. Did this mean that in all other cases the parties could not derogate from the rules laid down in the respective articles?

527. Fontaine pointed out that obviously this was not the case. The fact that sometimes the non-mandatory nature of the provision is highlighted by the phrase “unless the circumstances indicate otherwise” merely means that in those cases it is particularly frequent that a different result is agreed upon between the parties or otherwise derives from the circumstances of the case.

528. With respect to Article 1.7, Fontaine pointed out that the rule laid down in paragraph 1 had already been adopted by the Group last year whereas paragraph 2 was new and was based on a suggestion made by Fauvarque-Cosson.

529. Estrella Faria suggested adding in paragraph 1 the words “for the exercise” after the words “expiration of limitation period”. This was the terminology used elsewhere in the Principles and it would make it clear that the limitation period does not extinguish the rights themselves.

530. Garro suggested amending the second sentence of the first paragraph of Comment 1 to read “This will not prevent the obligee from exercising its claim against other co-obligors whose obligations are not yet affected by the expiration of a period of limitation”. A similar amendment could also be made at the end of the second paragraph of Comment 1.

531. Uchida was not sure whether the rule laid down in paragraph 2 was appropriate in case of A.D.R. Indeed if there was no contract provision imposing recourse to A.D.R. but after a dispute has arisen the obligee invites all co-obligors to initiate A.D.R. procedure and only one of the co-obligors agrees, why should the suspending effect of that procedure be extended also to the other co-obligors?

532. Fontaine replied that he had just aligned this provision with the general provisions in the chapter on limitation periods and that he hesitated introducing here special rules.

533. Komarov shared Uchida’s reservations.

534. Fauvarque-Cosson on the contrary was very much in favour of the rule as at present laid down in paragraph 2.

535. Finn agreed.

536. With respect to Article 1.8 Fontaine recalled that the provision had been there since the beginning.

537. Gabriel wondered whether the result indicated in Illustration 1 was correct. In his view once the Court has rewritten the contract to which both obligors are bound, they both should have the advantage of the Court’s decision.

538. Fontaine replied that if B was not a party to the proceedings it should neither be in a position to take advantage of the judgment or be prejudiced by it.

539. Finn first of all did not agree that in the illustration the Court had rewritten the contract. What was certain was that in a proceeding to which only A was a party, the Court accepted that A had to pay only GBP 600,000. This would mean that if A pays that sum it discharges the obligation A and B had vis-à-vis the auction house but B would still have to pay GBP 400,000 to A. He thought that such a result would definitely unduly favour A.

540. Fontaine admitted that Finn's understanding of the illustration was correct and that the rule laid down in Article 1.8 would lead to such a result. However he thought that this was an incentive to A to call also B to take part in the same proceedings.

541. Lando, like Gabriel and Finn, thought it a rather formalistic argument to say that if B was not a party in the proceedings it should not benefit from the fact that the Court finds that the picture is not worth more than GBP 600,000.

542. Harmathy too had some difficulty with the provision which in his view had been formulated in too general terms. Indeed there were cases, e.g. where the very existence or the validity of the contract was in question, where a Court could not render a judgment unless all parties to the contract were present.

543. Fauvarque-Cosson, while being in favour of the black letter rule, thought the illustration concerned a case which fell outside the scope of Article 1.8. Indeed what was at stake was not the liability to the obligee of one of the joint and several obligors as stated at the beginning of Article 1.8 but the price to be paid by all the co-obligors under the contract.

544. Estrella Faria thought that if Fauvarque-Cosson's analysis was correct then a different example should be given in Illustration 1.

545. Hartkamp agreed.

546. Fontaine too agreed with Fauvarque-Cosson and asked for suggestions of a more appropriate illustration.

547. Gabriel on the contrary insisted that the illustration as it stood was perfectly consistent with the black letter rule but since the result indicated in the illustration appeared to him unacceptable, he had strong reservations with respect to the black letter rule itself. With respect to the distinction between the liability of the co-obligors vis-à-vis the obligee and the obligation to pay the price as suggested by Fauvarque-Cosson, he confessed that he was just unable to understand such a subtlety.

548. Widmer saw a certain parallelism between the present rule and the ones dealing with release and settlement insofar as both dealt with the individual obligations of the co-obligors vis-à-vis the obligee. However also in the light of the doubts expressed by Gabriel he wondered whether this could be made clearer in the text.

549. Finn said that in the context of Article 1.8 the only case where he could envisage the kind of situation indicated by Widmer was where one of the co-obligors had a defence vis-à-vis the obligee which was not available to the other co-obligors. Yet if his assumption was correct he preferred deletion of the provision altogether because the risk of misunderstandings was too great.

550. Estrella Faria, in support of Finn's suggestion, felt that Article 1.8 added very little to what would already follow from Article 1.4.

551. Fontaine was not so sure that the article was superfluous and gave another example where it would prove useful. Suppose the co-obligors were jointly and severally liable to render some services: if the obligee sues only one of the obligors for defective services and asks for, and is actually granted, damages, under this rule the damages would be only the obligation of the obligor that was sued and could not be imposed on the other co-obligors.

552. Garro thought that while the general rule set out in Articles 1.5 and following was that any modification affecting a joint and several obligation could not but have the same effect on all co-obligors, Article 1.8 introduced an exception with respect to a judgment rendered only vis-à-vis one co-obligor, and like Gabriel and Finn he was not convinced of the appropriateness of such an exception.

553. Widmer too felt that if the *ratio* of the rule laid down in Article 1.8 was to induce an obligee to sue all the co-obligors and/or to induce those co-obligors who have not been sued by the obligee to join the proceedings, this was hardly consistent with the philosophy underlying joint and several liability.

554. Hartkamp, on the contrary, supported the idea of distinguishing between the changing of the contract and the principle obligation arising out of it which of course should always affect all the co-obligors, and the liability for, say, cost, rent and so on, for which the rule laid down in Article 1.8 appeared to him perfectly suitable.

555. Fauvarque-Cosson entirely agreed with Hartkamp and made further example of the liability for defective services or for late delivery, which she thought could be mentioned in the comments so as better to explain the black letter rule.

556. Gabriel reiterated his doubts about the rule laid down in Article 1.8 lit. a) but pointed out that the rule in lit. b) was perfectly sensible and should in any case be kept.

557. Komarov was in favour of keeping the article as it stood.

558. Chappuis wondered what situation would be in the case where the contract was avoided. In her view in such a case clearly nobody would have to pay the price any longer but if this was correct how could one state that such a judgment would not affect the liability of the others.

559. In view of the fact that the Group was fairly divided on this issue, Fontaine proposed that he would prepare two alternative versions of the Article with appropriate illustrations so as to permit the Group to take a final decision at its next session.

560. Fontaine in introducing Article 1.9 pointed out that, after the provisions dealing with the relationship between the obligee and the co-obligors, Articles 1.9 to 1.13 concerned the relationship between the co-obligors. Article 1.9 stated that as between themselves joint and several obligors as a rule were bound in equal shares.

561. Fauvarque-Cosson suggested rephrasing in Illustration 1 the last sentence so as to read “[...] A’s and B’s shares will be 5,000,000 each”.

562. Garro thought that in the fourth paragraph of the comment instead of “an own interest” it should read “its own interest”.

563. Chappuis suggested replacing in the same paragraph “surety” by “guarantee”.

564. In introducing Article 1.10 Fontaine pointed out that it was just a corollary of Article 1.9.

565. Brödermann wondered whether there should not be a reference to Articles 1.6(2) and 1.8(2).

566. Turning to Article 1.11 Fontaine recalled that while initially this provision had not provoked any controversy, last year it gave rise to considerable discussion mainly because it turned out that the meaning of the concept of subrogation was considerably different in civil law systems than in common law systems. Asked by the Group to undertake further comparative research he had summarised the results of his research in a note to Article 1.11 in Doc. 112 the main lines of which were that civil law systems are divided on the issue of precedence vs proportionality, but they all take it for granted that subrogation can be partial. On the contrary in common law systems, at least in English law, there can be no subrogation until the obligation has been fulfilled in its entirety; finally PECL (Art. 10:106, 2°) and DCFR (Art. III-4:107,2°) provide for subrogation “subject to any prior right and interest of the creditor”. In his draft he had prepared six proposals for the different variants envisaged last year. Variant 1 would be to have no provision at all on this matter; Variant 2 would be to keep the provision as submitted before (“*A joint and several obligor to whom article 1.10 applies may also exercise the rights of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor’s unperformed share*”); Variant 3 would be to limit subrogation to the case where the obligee has received full performance (“*When the obligation has been performed in full, a joint and several obligor to whom Article 1.10 applies may also exercise the rights of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor’s unperformed share.*”); Variant 4, inspired by PECL and the DCFR, would be to make subrogation subject to any prior rights and interest of the obligee (“*A joint and several obligor to whom article 1.10 applies may also, subject to any prior right or interest of the obligee, exercise the rights of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor’s unperformed share.*”); Variant 5 would be to make subrogation subject to causing no harm to the obligee (“*A joint and several obligor to whom article 1.10 applies may also, provided this causes no harm to the obligee, exercise the rights of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor’s unperformed share.*”); and finally Variant 6 which, being his preferred choice, he had proposed as the black letter rule in Article 1.11 of the draft:

“(1) A joint and several obligor to whom article 1.10 applies may also exercise the rights of the obligee, including accessory securities, to recover the excess from any of the other obligors to the extent of each obligor’s unperformed share.

“(2) An obligee who has not received full performance retains its rights against the co-obligors to the extent of the unperformed part [, with precedence over co-obligors exercising contributory claims].”

The passage between brackets, which corresponded to the traditional solution of some jurisdictions, should be deleted if the Dutch and Italian solutions of proportional allocation were to be retained.

567. Bonell expressed, also on behalf of the Group, deepest appreciation to Fontaine for his extraordinary work.

568. Gabriel, with respect to paragraph 1 of Article 1.11, suggested replacing “accessory securities” by “accessory rights”.

569. Bonell recalled a similar debate that had taken place with respect to Article 9.1.14 in the course of which the notion “accessory rights” was heavily criticised, in particular by members of common law jurisdictions. Ultimately the Group adopted the less technical wording “all rights securing performance of the right”.

570. With respect to the precedence rule laid down in square brackets in paragraph 2 of Article 1.11, Estrella Faria wondered to what extent such a rule would apply in the context of insolvency proceedings.

571. Fontaine admitted that the mandatory rules of insolvency proceedings would prevail and saw two possibilities: either to keep the rule at present in square brackets and explain in the comments that of course it might be neutralised by the mandatory rules of insolvency proceedings, or to delete the rule.

572. Garro could agree with Gabriel’s proposal to use the term “accessory rights” in paragraph 1 of Article 1.11 but thought that the more neutral formula used in Article 9.1.14(b) preferable. With respect to the precedence rule in paragraph 2, though admitting that it might be overridden by the applicable mandatory rules of insolvency proceedings, he thought that it should nevertheless be kept since it simply provides for a precedence between two competing creditors, i.e. a partially paid obligee and the co-obligor having a right of contribution, and it may well be that the insolvency rule defers to the applicable substantive rule in determining priorities.

573. Hartkamp felt that with the rule proposed in paragraph 2 Fontaine had admirably struck the right balance between the two conflicting views that had emerged on this point last year. He definitely favoured also keeping the rule which appears at present in square brackets.

574. Brödermann and Uchida agreed with Hartkamp.

575. There being no further comments Bonell concluded that Article 1.11 as proposed in the draft had been carried including the rule within square brackets.

576. Turning to Article 1.12 Bonell wondered whether the title should be more precise so as to make it clear that the provision dealt with defences in contributory claims and has therefore nothing to do with the general rule laid down in Article 1.4.

577. Fontaine agreed and suggested as a new title “Defences in contributory claims”.

578. Estrella Faria wondered why the available defences were limited to those that had not been asserted by the co-obligor against the obligee. Why should it not be possible to raise defences which had been asserted previously but unsuccessfully.

579. According to Widmer the idea behind the provision was that there was a kind of solidarity between the co-obligors so that if they were sued or simply asked to pay by the

obligee they have, in the interest of all the others, to raise any common defences; if they fail to do so they cannot claim reimbursement to that extent from the others.

580. Fontaine confirmed.

581. Hartkamp, like Estrella Faria, suggested deleting the words “that have not been asserted by the co-obligor against the obligee and referred to the similar provision in Article 1.4 where likewise no distinction is made as to whether the defences have or have not been previously raised.

582. Fontaine agreed.

583. Brödermann too favoured the deletion of the last words in the first sentence of the Article.

584. Finn on the contrary suggested replacing the present wording by “that should have been asserted by the co-obligor...”.

585. Komarov and Widmer agreed with Finn.

586. Chappuis wondered whether it should be made clear that if a co-obligor fails to raise an available defence and performs the whole obligation it should not be allowed to have recourse for what it has paid in excess of its share.

587. Estrella Faria thought that this was exactly what Article 1.12 was all about, while he still wondered whether it was appropriate to treat the case where a defence has not been asserted differently from that where it had been asserted but unsuccessfully.

588. Gabriel shared Estrella Faria’s concern and recalled that the respective law suits may well be brought in different jurisdictions with different rules of substantive and procedural law governing the defences in question, with the consequence that a particular defence may be successful in one country and rejected in another.

589. Brödermann wondered whether Estrella Faria’s and Gabriel’s point could be met by inserting in the second sentence of Comment 1 the words “under the circumstances” between “which” and “would have extinguished or reduced the obligation”. Moreover, by adding at the end of the sentence the words “*pro rata*” it would be made clear that the second co-obligor should not profit by and take advantage of the negligence of the first.

590. Fontaine proposed, as an alternative to the formula proposed by Finn, the wording “that are available”.

591. Gabriel agreed with Fontaine.

592. Finn also agreed and proposed the following wording “that were available to be asserted by the co-obligor against the obligee”.

593. It was so agreed.

594. Gabriel, in view of the fact that the Principles are often used in arbitration and not in law suits, proposed replacing “a joint and several obligor sued” by “a joint and several obligor subject to a claim”.

595. Fauvarque-Cosson raised a policy question, pointing out that in her view a joint and several obligor which has not raised against the obligee an available defence should not be barred afterwards from raising it towards the other co-obligors.

596. Chappuis thought that when the relation between one of the co-obligors and the obligee is at stake one should use the term “obligor” while when it is a matter of the internal relation among the co-obligors the term “co-obligor(s)” should be used.

597. Widmer agreed and suggested that in the fourth line of Article 1.12 the term “obligor” be used.

598. Summing up Fontaine said he would change the title to “Defences in contributory claims”, replace “that have not been asserted” by “that were available to be asserted” and find a more neutral wording to replace “sued for reimbursement”; with respect to the use of the terms “obligor(s)” and “co-obligor(s)”, he would give further consideration to the matter.

599. Turning to Article 1.13 Fontaine recalled that there were no changes with respect to the text approved last year except for the title which has been changed from “Insolvency of a co-obligor” to “Inability to recover”.

600. In introducing Section 2 on Plurality of Obligees Fontaine pointed out that the most important questions to be decided concerned the types of plural claims to be mentioned in the black letter rules and what the default rule should be. With respect to the first question he indicated that following the suggestion made by Zimmermann in Article 2.1 he had, in addition to separate claims and joint and several claims, included communal or joint claims as a third type of claims. As to the second question he had undertaken extensive empirical research – and in this connection he wanted to thank in particular Chappuis and Harmathy for their most valuable contributions – to determine what in practice was the most frequent situation. The results, as also demonstrated by the concrete examples listed in his introductory Note (Doc. 112, pp. 27-29), were quite contradictory: apart from the fact that the terminology used in practice was far from uniform and not always consistent, the types of claims co-obligees have vis-à-vis the obligor seemed to vary considerably from trade sector to trade sector. However it was his impression that the type most frequently chosen was that of separate claims and he therefore in his draft proposed them as the default rule (cf. Article 2.2).

601. Bonell thanked Fontaine for his admirable work. At the same time he confessed that it was sometimes rather frustrating to realise how little practitioners care about the rules: in other words, while groups of experts invest years of work in laying down the rules that might be most appropriate to meet the needs of practice, practitioners often either completely ignore such rules or use them for quite different purposes than intended.

602. Garro too expressed his appreciation for Fontaine’s efforts and made the following suggestions concerning the comments: to use the term “communal” rather than “joint” in Comment 3 to Article 2.1; to delete the words “not necessarily” in the first sentence of the second paragraph of Illustration 2; to include in the first line of Illustration 3 after “Company X” the words “for a total claim of 12 million dollars; and finally to delete the word “together” at the end of the last paragraph of Comment 3.

603. Fontaine, while thanking Garro for the last three suggestions, expressed some doubts as to the proposal to replace “joint” by “communal” also in view of the fact that in practice the former term was absolutely predominant while the latter was virtually unknown.

604. Gabriel suggested including somewhere in the comments a sentence stating that the term “joint” is used as equivalent to “communal”.

605. Fontaine agreed.

606. Brödermann thought that Illustration 2 related to a case which was rather exceptional in practice since at international level most construction contracts are concluded on a turnkey basis with the consequence that A and B would act as one consortium and therefore claim one payment for all their services.

607. Fontaine agreed to consider this remark when revising the comments and illustrations.

608. Perales Viscasillas noted that while the text of Comment 1 mentioned co-insurance as one example of plurality of obligees, there was no illustration relating to co-insurance.

609. Fontaine agreed to add such an illustration.

610. Moving on to Article 2.2 Fontaine reiterated that the reason for proposing separate claims as the default rule was that in practice in situations involving several obligees that type of claims appeared to be the most frequent one.

611. Finn thought that, while the proposed default rule might be appropriate in case of monetary claims because of the difficulties in the accountability between the obligees, it would not work in the case of claims for services which are normally indivisible and with respect to which the presumption should be in favour of joint and several claims. He wondered whether this could be made clear in the comments and thought that language to this effect should be added in Comment 2.

612. Fauvarque-Cosson supported Finn’s proposal.

613. Fontaine agreed to amend Comment 2 accordingly.

614. Komarov had difficulties in accepting the proposed default rule. Maybe such rule was acceptable in developed legal systems but in countries in transition it would not reflect the obligees’ expectation. Indeed in case of a plurality of obligees, not different from the case of plurality of obligors, the obligees’ expectation would be that their claims be joint and several.

615. Bonell thought that Komarov’s remarks were very important and wondered whether they could be reflected as well in Comment 2 by stating that the circumstances, e.g. practice in particular business sectors and/or in particular regions, may indicate otherwise.

616. Harmathy agreed with Finn concerning the distinction between monetary claims and claims for other performances. At the same time however he drew attention to the fact that sometimes even in construction contracts the rule might be that of separate claims and in this respect recalled a recent decision in this sense of the Hungarian Supreme Court with

respect to the claims of the co-owners of a building for defective performance by the constructor.

617. Widmer confessed that while originally in favour of the proposed default rule after the interventions of Finn and Komarov he began to have doubts as to its appropriateness. He wondered whether a default rule was really needed and in this respect he found it rather odd to have default rules in favour of separate claims followed by several provisions all dealing with joint and several claims.

618. Gabriel first of all recalled that in his country the presumption was in favour of joint and several claims but that it was a very weak presumption in the sense that everybody agreed that ultimately it all depended on the circumstances of the case. He thought that Widmer's proposal was an excellent one: after all, as Finn had already pointed out, yet another reason for doubting the appropriateness of presuming separate claims was the necessity to avoid a multiplicity of law suits, all the more so since at international level multiple investors may come from different countries.

619. Finn entirely agreed.

620. Fauvarque-Cosson recalled that neither the DCFR nor the European Principles provide for a default rule.

621. Date-Bah too thought it preferable not to have any default rule.

622. Perales Viscasillas on the contrary supported the proposal to have a presumption in favour of joint and several claims.

623. Brödermann too was in favour of having a default rule in view of the fact that in actual practice in many cases parties fail to give the question of the type of claims the necessary attention, if any at all. However he supported the present presumption in favour of separate claims which corresponded to a risk sharing perception prevailing in practice.

624. Chung agreed with Brödermann.

625. Chappuis and Lando on the contrary agreed with those who preferred having no presumption at all.

626. Bonell noted that the Group was fairly divided between those who were against any presumption and those who were in favour of a default rule, either one or the other, and thought that it was by no means by chance that the former belonged to highly developed legal systems while the latter admittedly took into account the existence of less sophisticated legal systems and/or lawyers. In this respect it was likewise significant that the European Principles and the DCFR, both intended for developed legal systems, did not provide for a default rule. On the contrary, given the global sphere of application of the Principles, he urged the Group to take into account the needs and expectations of less developed systems and in this context first of all asked the Rapporteur to express his views in the light of the discussion so far.

627. Fontaine, though appreciating the arguments put forward in favour of having no presumption at all, was still in favour of having a default rule and in this respect confessed that he was impressed by Bonell's arguments.

628. Chappuis insisted that either of the suggested default rules had their shortcomings: the rule in favour of separate claims whenever the claim related to services, the rule in favour of joint and several whenever the claim related to the payment of a sum of money. She was therefore still in favour of having no presumption at all.

629. Bonell thought that from Chappuis' argument one could draw likewise the conclusion to have – why not – two default rules, one for monetary claims and another for other claims.

630. Brödermann agreed with Bonell and suggested that there be a presumption for separate claims in case of monetary claims and another presumption for joint and several claims in case of other claims, each time with the proviso unless circumstances indicate otherwise.

631. Gabriel was still against establishing a presumption: after all what mattered was not whether the claim was a monetary or non-monetary one but whether the claim related to a type of obligation that was divisible.

632. Garro on the contrary was in favour of a presumption which in his view would clarify matters whenever the parties have failed to indicate the type of claims themselves and supported the idea of having a presumption in favour of separate claims if performance is divisible and joint and several if performance is indivisible.

633. In order to come to a conclusion on this matter Bonell urged all members to express their preferences.

634. Fauvarque-Cosson reiterated her support for the presumption at present laid down in Article 2.2.

635. Finn was still in favour of not having a presumption but if the majority was in favour of a presumption he would definitely favour a presumption in favour of joint and several claims, the reason being that the obligor is the one that needs to be protected and the obligor would expect to be able to discharge its obligation vis-à-vis the co-obligees by making a single payment and not having to make a separate payment to each co-obligee and eventually to be sued all of them.

636. Lando was against any presumption mainly because of insufficient empirical material showing the actual trend in practice.

637. Gabriel entirely agreed with Lando.

638. Uchida was in favour of the present text.

639. Hartkamp was in favour of a presumption for joint and several claims for exactly the same reasons given by Finn.

640. Widmer and Akhlaghi agreed with Hartkamp.

641. Fontaine too was prepared to revert to the presumption in favour of joint and several claims.

642. For Brödermann the most important thing was to have a presumption and he still had a preference for separate claims. Yet if the majority was for a presumption in favour of joint and several claims he could go along with that.

643. Chappuis was not convinced of the advantages of either of the two presumptions and insisted on having no presumption at all.

644. Bonell concluded that there was a clear majority in favour of having a presumption and in particular a presumption in favour of joint and several claims and, also in view of the fact that the Rapporteur himself had declared that he could very well go along with such a rule, he wondered whether those whose first choice was for not having a presumption could accept this result as well.

645. Fauvarque-Cosson confirmed.

646. Moving on to Article 2.3 Fontaine recalled that the article in its version presented last year had a third paragraph stating that “When the obligor has been sued by a joint and several obligee it can no longer perform to the other obligees”. However in view of the fact that this provision had given rise to considerable discussion it has been deleted and a new comment - Comment 4 - added.

647. Gabriel noted that paragraph 1 of Article 2.3 almost literally corresponded to Article 2.1 No. 2 and wondered whether it was actually needed.

648. Fontaine admitted that there was a certain overlapping but on the other hand thought that given the different purposes of the two articles - Article 2.1 No. 2 defining joint and several claims and Article 2.3 dealing with the effects of such claims – even paragraph 1 was still necessary.

649. Komarov wondered whether the obligor, even after having been asked by one obligee to pay, was still entitled to pay another co-obligee.

650. Fontaine recalled that the purpose of the former paragraph 3 of Article 2.3 was precisely to provide an answer to this question. Now that this paragraph has been deleted the black letter rules no longer provided a clear cut answer and only in the comments were there some recommendations for the parties as to how to deal with this problem.

651. Also Bonell thought that in the absence of a black letter rule specifically addressing the issue Komarov’s question had to be answered in the affirmative since the general rule laid down in paragraph 2 should be read in conjunction with the recommendation expressed in Comment 4 that the parties act in good faith.

652. Komarov agreed but felt that this should be expressly stated in the comments.

653. Chappuis and Finn raised a small drafting point: in Comments 2 and 3 to use the words “render performance to any of the obligees” instead of “render performance in the hands of any of the obligees”.

654. Perales Viscasillas raised yet another small drafting matter: in both Illustration 2 in Comment 2 to Article 2.3 and Illustration 6 in Comment 2 to Article 2.4 W should be replaced by X.

655. Turning to Article 2.4 Fontaine recalled that in the previous draft the general rule laid down in paragraph 1 was followed by two separate paragraphs, one addressing specifically release for which a special rule was provided, and the other dealing with the other defences such as performance, settlement, expiry of a limitation period and effect of judgment. Now that the Group has decided to treat, in Section 1, release in exactly the same manner as all other defences, it would seem consistent with such an approach to do likewise in Section 2. As a consequence the former paragraph 2 has been deleted and the former paragraph 3 has become paragraph 2 with the sole difference that there is now a reference also to Article 1.6 dealing with both release and settlement.

656. Widmer favoured this new approach.

657. Lando too agreed but had difficulty in understanding Illustration 1. Why should Producer X invoke his mistake against Company A if he cannot invoke it against Company B and Company C with the result that the latter two could still require from him performance which would ultimately benefit also Company A.

658. Fontaine admitted that the problem which had already been discussed with respect to the corresponding provision in Section 1 existed and announced that he would address it in the comments.

659. Bonell thought that the title of Article 2.4 should be amended so as to read "Availability of defences against joint and several obligees".

660. Garro suggested adding in Illustration 2 "by companies A, B and C" after the words "use of child labour".

661. Fontaine agreed and added that also the term "illegal" had to be replaced by another term.

662. With respect to Article 2.5 Fontaine suggested inserting in both the title and in paragraph 1 "joint or" before "joint and several obligees".

663. Perales Viscasillas suggested deleting in Illustration 2 the words "probably" and "eventually".

664. Fontaine agreed.

665. There being no further remarks Bonell closed the discussion on the chapter but not before thanking wholeheartedly Fontaine for the extraordinary work he had done in preparing his draft for the session.

VI. DATE OF THE GROUP'S NEXT SESSION

666. Bonell announced that the Group's next session would be held in Rome from Monday 24 May until Friday 28 May 2010 and it would be the Group's last session.

667. Zhang wanted to know whether this meant that the Governing Council would give its approval to the third edition of the Principles at its session in 2011.

668. Bonell confirmed and envisaged between now and the Governing Council's session in 2011 the following course of action. The Rapporteurs – and the Secretariat for the chapter on illegality - will be asked to revise their drafts and comments in the light of the Working Group's discussions by the end of this year at the latest. Early in 2010 the Drafting Committee will meet to coordinate the drafts also with a view to making suggestions as to their proper allocation in the new edition of the Principles. The drafts will then be submitted to the Governing Council for consideration at its next session to take place early in May 2010. On that occasion the Council will also be seized of a list of the most important and/or controversial issues on which to express its views which will then be transmitted to the Working Group for consideration at its last session to take place late in May 2010. After the Group's 2010 session there will be another meeting of the Drafting Committee early in September 2010 after which the Secretariat will proceed to the necessary editorial work on the new edition. This should be completed by the end of February/early March 2011 so that the final draft of the new edition will be submitted to the Governing Council for formal approval at its session to be held in Spring 2011. Publication of the volume can be expected to follow within four to six weeks.

669. Finn wondered whether the revised chapter on illegality, which had proved to be particularly controversial, could be circulated among the members of the Working Group in time for them to make comments for the Governing Council.

670. Bonell thought that this could certainly be done. The only difficulty he could see was timing. Indeed after the meeting of the Drafting Committee, expected to take place by the end of January/first half of February, a new version of the draft will have to be prepared and the time this would take will obviously depend on the kind of amendments proposed by the Drafting Committee. However the Secretariat will do its best to permit the suggested consultation of the members of the Working Group.

671. In closing the session Bonell pointed out that, notwithstanding the extreme complexity of the topics addressed throughout the week, the session had been very successful. He wholeheartedly thanked all the Members and Observers of the Group for their constructive cooperation and outstanding contribution to the discussion and looked forward to welcoming them again in Rome in a year's time.

APPENDIX

**WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3RD)
4th session, Rome, 25 – 28 May 2008**

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