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

WORKING GROUP FOR THE PREPARATION OF
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3RD)
1st session
Rome, 29 May -1 June 2006

UNIDROIT 2006
Study L – Misc. 26
(English only)
October 2006

SUMMARY RECORDS OF THE 1ST SESSION

(ROME, 29 MAY TO 1 JUNE 2006)

(Prepared by the Secretariat of UNIDROIT)

1. The Working Group for the preparation of a third edition of the UNIDROIT Principles of International Commercial Contracts held its first session in Rome from 29 May to 1 June 2006. The session was attended by Guido Alpa (Italy), M. Joachim Bonell (UNIDROIT), Paul-André Crépeau (Canada), Samuel Kofi Date-Bah (Ghana), Benedicte Fauvarque-Cosson (France), Paul Finn (Australia), Marcel Fontaine (Belgium), Michael Philip Furmston (United Kingdom), Henry D. Gabriel (United States), Sir Roy Goode (United Kingdom), Arthur Hartkamp (Netherlands), Alexander Komarov (Russian Federation), Ole Lando (Denmark), Takashi Uchida (Japan), João Baptista Villela (Brazil), Pierre Widmer (Switzerland), Zhang Yuqing (China) and Reinhard Zimmermann (Germany); A. Akhlaghi (Iran) was excused. The session was also attended by the following Observers: Ibrahim Al Mulla for the Emirates International Law Center, Christine Chappuis for the *Groupe de travail contrats internationaux*, François Dessemontet for the Swiss Arbitration Association, Alejandro Garro for the New York City Bar, Emmanuel Jolivet for the ICC International Court of Arbitration, Richard Mattiaccio for the American Arbitration Association**,** Hilmar Raeschke-Kessler for the German Arbitration Institution, Giorgio Schiavoni for the Chamber of National and International Arbitration of Milan, Jeremy Sharpe for the Center for American and International Law, Institute for Transnational Arbitration, Matthew Sillett for the London Court of International Arbitration and Renaud Sorieul for the United Nations Commission on International Trade Law (UNCITRAL). Mohammed Aboul-Enein (Cairo Regional Center for International Commercial Arbitration), Christian von Bar (Study Group for a European Civil Code), Pilar Perales Viscasillas (National Law Center for Inter-American Free Trade) and Yeo Yee Ling (Regional Centre for Arbitration Kuala Lumpur) were excused. The session was also attended by Paula Howarth (UNIDROIT) who acted as Secretary to the Group. The list of participants is attached as APPENDIX.

2. In his address of welcome, the Secretary-General of UNIDROIT, Herbert Kronke, stressed the great importance the Institute attaches to the project. Of the recent developments confirming the success of the Principles both at regional and universal level he mentioned in particular the OHADA draft Uniform Contract Act based on the Principles and currently before the competent organs of OHADA, and the draft EC Regulation on the Law Applicable to Contractual Obligations which, in providing that parties may choose “principles and rules of contract law recognised at international or at Community level” as the law governing their contract, expressly mentions as an example the UNIDROIT Principles. Moreover, the Secretary-General informed the Group that UNCITRAL was considering giving its formal endorsement to the Principles at one of its future plenary sessions.

3. On the suggestion of Hartkamp, seconded by Crépeau, the Group unanimously confirmed Bonell as Chairman. Bonell stated that he was much honoured by the trust placed in him by the Working Group and expressed his hope that the other members of the Group would assist him, as in the past, in this arduous task.

4. Before turning to the agenda, Bonell asked for a minute of silence in memory of Professor E.A. Farnsworth, one of the pillars of the Group in the past, who had recently passed away.

5. Bonell then welcomed the new members of the Group: Sir Roy Goode, Pierre Widmer, Zhang Yiquing and Henry Gabriel, members of the UNIDROIT Governing Council, as well as Guido Alpa, Bénédicte Fauvarque-Cosson, João Baptista Villela and Reinhard Zimmermann, all very distinguished and well known scholars. He also welcomed the numerous observers present on behalf of different international or regional organisations and arbitration centres. Their willingness to attend the Working Group’s sessions clearly showed

the great interest the international legal and business communities attach to the project, and their contribution to the discussions would certainly enrich the Group's work.

I. PROMOTING AND MONITORING THE USE OF THE UNIDROIT PRINCIPLES IN PRACTICE

6. The first substantive item on the agenda was how best to promote and monitor the use of the Principles in practice (UNIDROIT 2006 – Study L – Doc. 99, paras. 2-8).

7. In opening the discussion Bonell reported that from 18 to 20 May 2006 in Recife the 2nd Euro-American Congress was held under the auspices of a number of Brazilian Universities and other academic Institutions and that on that occasion Professor Lauro Gama Jr. of the Catholic University of Rio de Janeiro and himself had made presentations on the UNIDROIT Principles, followed by a lively discussion which showed the great interest in the Principles in Brazilian academic and professional circles as well as their increasing importance in arbitration practice also in the light of the new 1996 Brazilian law on international commercial arbitration.

8. Bonell also informed the Group that Mr Aboul-Enein, while regretting his inability to participate in the session, had announced his intention to organise a seminar at the Cairo Regional Center for International Commercial Arbitration (CRCICA) devoted to the Principles, and to send out a questionnaire to interested individuals and institutions in the Arab world with a view to gathering information on how the Principles are being used in practice in this important region of the world.

9. Widmer announced that a Colloquium on "The UNIDROIT Contract Principles 2004 - Their Impact on Contractual Practice and Jurisprudence, as well as on National, Regional and Supranational Codification" would be held in Lausanne from 8 to 9 June 2006, organised by the Swiss Institute of Comparative Law (ISDC).

10. Komarov pointed out that the Principles played a very important role in Russia and neighbouring countries both in legal education and contract and arbitration practice. This was demonstrated, among others, by the impressive sales figures of the Russian version of the Principles: more than 5000 copies of the 1994 edition while the 2004 integral version was under press. Yet increasing interest in the Principles was also shown by the numerous seminars devoted mainly, if not exclusively, to the Principles organised in his country for practitioners and a seminar of this kind was also planned for a select group of Russian lawyers to be held at UNIDROIT in October.

11. Uchida recalled that the Japanese translation of the integral version of the 1994 edition of the Principles had been published two years ago and that he had already translated the black letter rules of the 2004 edition. He hoped that the translation of the integral version would follow soon. The Principles were becoming more and more popular among Japanese students; there was an inter-college debate competition on international trade law in Japan and the Principles were designated as the applicable law in this debate. Finally, he mentioned that the Japanese government had decided to reform the law of obligations and that he would be responsible for drafting the respective provisions and for that purpose would certainly take into consideration the Principles.

12. Zimmermann recalled that in 2002 the German law of obligations had been reformed and that on that occasion the Principles, though only in their 1994 version, had played a role. Moreover he informed the group that an international group of young scholars,

coordinated by two former members of his Institute, are preparing a commentary on the Principles in a comparative perspective.

13. Lando referred to the discussions on the advisability of preparing a Global Commercial Code and pointed out that in his view the Principles should be formally incorporated in such a Code. He definitely favoured the transformation of the Principles into a binding instrument.

14. Fauvarque-Cosson first of all mentioned the recent publication of an *avant-projet* for the reform of the French law of obligations. Although in its preparation the Principles had not always been adequately taken into account, in the present discussions among academics they were often taken as a term of comparison. She also mentioned a seminar jointly organised by the *Société de Legislation Comparée* (of which she was the Secretary-General) and the ICC on arbitration in the XXI century to be held in Paris next September where the Principles would certainly play a major role.

15. Fontaine informed the Group that he had attended a seminar in Hanoi about one and a half years ago and that on that occasion many speakers referred to the Principles which were quite well known thanks to the existence of a Vietnamese translation. Likewise in the context of the OHADA project the existence of a Portuguese version of the Principles (1994 edition) was very much appreciated in Guinea Bissau, and one could only hope that also the 2004 edition would soon be available in Portuguese.

16. Goode stressed the need to promote the Principles among students. It would be interesting to conduct a survey to see to what extent the Principles were already being used as teaching materials in law schools. Bonell referred in this respect to the very encouraging data collected by UNIDROIT in an enquiry conducted two years after the publication of the 1994 edition of the Principles.

17. Furmston pointed out that it was precisely the soft-law character of the Principles which explains their considerable success in Britain as demonstrated, among others, by a recent decision of the English Court of Appeal containing a reference to the Principles as a possible source of inspiration for a new approach in the field of contract interpretation.

18. Crépeau pointed out that as a consequence of the bilingual, bicultural and bisystemic approach of the legal studies at McGill University, the Principles were widely being used as teaching materials.

19. Finn stressed the increasing importance of the Principles in inspiring courts and scholars in Australia when attempting to modernise Australian contract law. He also mentioned their frequent use in arbitration, and that a major conference would be held in Sydney in the first two weeks of July in which a whole day would be devoted to the Principles and CISG.

20. Also Dessemontet and Raeschke-Kessler stressed the increasing role the Principles played in international arbitration practice. If the Principles on the contrary were still not frequently used in ordinary court proceedings, the reason may be that judges are too busy to look for new sources of law. It would therefore be advisable to organise workshops specially designed for judges.

21. Chappuis, speaking as a member of the *Groupe de travail contrats internationaux* (an international group of corporate lawyers, professors and members of the bar working on

the basis of clauses members take from their own professional experience), recalled that in its current discussions on choice-of-law and jurisdiction clauses the Group had been shown only one clause in favour of the Principles. Apparently the main reason for the reluctance of practitioners to choose the Principles as the law governing the contract was the fact that the Principles were still far from being a comprehensive system of contract law. One way of overcoming such resistance might be to recommend the adoption of a choice-of-law clause in favour of the Principles supplemented by a particular domestic law, as indicated by one of the model clauses appearing as a footnote to the Preamble. Speaking as a professor, she announced that she would use the Principles as teaching materials in a forthcoming PhD programme on "International Harmonisation of Law". She also wondered whether it would be a good idea to refer to the Principles in the context of the Vienna Vis Moot Court at which some 150 universities from all over the world participate.

22. Goode agreed with the analysis of Chappuis concerning the difficulties practitioners have in choosing the Principles as the applicable law. In his view another way of getting around the problem was to recommend parties simply to incorporate the Principles into their contract with the effect that they would bind the parties only within the limits of the mandatory rules of the applicable domestic law. A similar technique was commonly used with respect to the ICC Uniform Customs and Practices for Documentary Credits; in practice the result would be pretty much the same as if the Principles were chosen as the applicable law since domestic contract laws were, at least as far as contracts between business persons were concerned, predominantly if not entirely of non-mandatory character.

23. Concerning the possibility of choosing the Principles as the law governing the contract, Bonell urged the European members of the Group to contact their Governments in order to solicit their support for the proposed amendment of Article 3 of the 1980 Rome Convention permitting parties to choose the Principles even as the exclusive *lex contractus*.

24. As to the reference to the Principles in the context of the Vienna Vis Moot Court competition, Garro entirely agreed with Chappuis but recalled that the Principles had already played a role in previous editions. Concerning the use of the Principles as teaching materials he mentioned that already this was the case in a number of law schools in the U.S. Further promotion could be achieved by the American Association of Law Schools and possibly also by the New York Bar. He also urged wider promotion of the Principles in South America and expressed the hope that Villela would use his influence to this effect. Admittedly a Spanish and a Portuguese version were absolutely necessary, and he announced that the Spanish translation would be completed by the end of 2006.

25. Gabriel agreed with Garro that it was an excellent idea to have the American Association of Law Schools, which had in the past organised several sessions on CISG, deal with the Principles and he would do his best to have such a seminar held at the Loyola Law School.

26. Sorieul confirmed that preparations were underway for a formal endorsement of the Principles by UNCITRAL expected to take place at the plenary session in 2007. In this respect he stressed the importance of the existence of an Arabic and a Spanish version.

27. Mattiaccio stressed the importance the American Arbitration Association (AAA) attached to the Group's efforts for a new enlarged edition of the Principles. Although the Principles were quite well known to experienced international arbitrators, there were still a large number of arbitrators who did not know them at all. He promised to do his best to have

the AAA organise a seminar in New York to promote the Principles and discuss their relationship with CISG.

28. Jolivet first of all recalled the recent publication of the Special Supplement to the ICC International Court of Arbitration Bulletin containing not only the Acts of the Joint UNIDROIT/ICC Colloquium held in 2004 on the new edition of the Principles but also a selection of ICC awards referring to the Principles. The volume has been distributed in more than 90 countries. Moreover he pointed out that all new ICC model contracts contained a choice-of-law clause referring, though not on an exclusive basis, to the Principles. As to the use of these model contracts in practice it was not of course possible to provide precise figures. However the sales figures were quite encouraging: several thousand copies had been sold, most of which of the model sales contract. As to the actual use of the Principles in the context of ICC arbitration, while cases in which the parties have chosen them as the applicable law were still rare, it was becoming more and more common to see individual provisions of them referred to in parties' pleadings as well as in the decisions themselves, mainly in support of the arguments developed therein.

29. Date-Bah agreed on the necessity of properly informing and educating the legal profession in the various countries about the different ways in which the Principles can be used in practice. Even with respect to binding instruments it often happens that States implement them without making sure that the legal profession becomes aware of them and actually uses them.

30. Zhang pointed out that the Principles were being extremely well received in China. Many provisions of the Principles had been incorporated in the new Chinese contract law. Moreover some 3000 copies of the Chinese version of the new edition of the Principles had already been sold. He himself had been invited on several occasions to introduce the Principles to major Chinese arbitrators and lawyers whose reaction was generally very positive for they felt that the Principles as compared to CISG were more comprehensive. Likewise in arbitral proceedings reference to the Principles was considered very useful whenever the applicable domestic law, including the Chinese contract law, did not provide a (clear) solution for the issues at stake. What was still lacking was an adequate reporting system of Chinese decisions referring in one way or another to the Principles. Bonell admitted that the database UNILEX so far did not contain any Chinese decisions and urged Zhang to think of possible ways of providing UNILEX with at least abstracts in English of relevant Chinese decisions of which he and his collaborators might become aware.

31. Alpa mentioned that while the Principles were being taught in many Italian law schools, the situation was by far less satisfactory with regard to court practice. Indeed judges seemed to have little, if any, familiarity with the Principles.

32. Al Mulla recalled that while at the beginning in the Gulf States common law prevailed, in the last 20 or 30 years written civil law had become everywhere predominant also because it appears to be more compatible with the Sharia. He expressed great appreciation for the Principles which he intended to disseminate as much as possible not only in his country but also in the other Gulf States. In his view the Principles would be received quite favourably in this Region first because they were contained in a written text and second because they provided many clear solutions to problems so far not adequately dealt with at domestic level.

33. Concluding the discussion on this item of the Agenda, Bonell thanked all the speakers for the extremely useful information provided concerning practical experience with

the Principles in their respective countries, as well as for their suggestions as to ways to increase awareness and actual use in practice of the Principles. In this respect he considered the preparation of as many language versions as possible of the 2004 edition an absolute priority. Moreover, as had been repeatedly stressed, the holding of seminars on the Principles specially tailored for practitioners, as well as the teaching of the Principles in law schools, were of utmost importance. He urged all members to continue in their efforts to monitor the implementation of the Principles and to share their information and/or personal experiences with the Secretariat and to provide UNILEX whenever possible with, if not the full text, at least abstracts of relevant decisions/awards.

II. PREPARATION OF A THIRD EDITION OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

34. The Group then proceeded to the second substantive item on the Agenda which was the preparation of a third edition of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT 2006 - Study L – Doc. 99, paras. 9-37).

35. In introducing the item Bonell recalled the enquiry made by the Secretariat among the members of the former Working Group and other interested individuals on what new topics should be dealt with in the next edition of the Principles. The result was a rather large variety of topics listed in Annex I to Doc. 99. The list was submitted to the Governing Council for a preliminary discussion at its 2005 session, and the Council decided that work should be limited to five topics, namely, unwinding of failed contracts, illegality, plurality of debtors and of creditors, conditions and termination of long-term contracts for cause. It was now up to the Group to embark on a more in depth discussion on these topics with a view to defining further their scope and the approach to be taken when drafting the respective chapters. He then asked for comments of a general nature.

36. Zhang, recalling that the preparation of the second edition of the Principles, containing some 65 additional articles, had taken almost ten years, wondered about the time-frame of the envisaged third edition.

37. Bonell first of all recalled that the preparation of the second edition had in fact required no more than six years. While setting precise deadlines for the third edition would at this very early stage appear to be premature, one might envisage 2010 as the earliest date for completion of the work. This would mean that in a year's time the Group would have to discuss the position papers on all five topics so as to permit the Rapporteurs to prepare the preliminary draft chapters in good time for the 2008 session.

38. Furmston thought 2010 definitely a good date, also because it would permit envisaging 2016 as a possible date for the fourth edition which might see the participation of many of the present members of the Group. On the other hand he admitted that in this case the time at the Group's disposal would be rather short.

39. Crépeau wondered whether with respect to those suggested new topics that have already been dealt with in the Principles of European Contract Law (PECL) the Group might wish to adopt as a sort of basic philosophy to follow as closely as possible the solutions adopted by the latter.

40. Bonell thought that on this point it was particularly important to hear the opinion of Lando, Chairman of the Commission on European Contract Law.

41. Lando was of the opinion that, while in general one might in fact wish to follow the approach of PECL, this should not be a strict rule and the Group should feel free to depart from PECL whenever appropriate.

42. According to Gabriel precisely because the Group was not drafting a binding instrument it should not be bound by any existing instrument but feel free to take inspiration from all possible sources provided they offer viable solutions.

43. Finn and Widmer agreed, also in view of the fact that the Principles are intended to address an audience much wider than that of PECL.

(a) Unwinding of Failed Contracts

44. Zimmermann, in stressing the great importance of this topic, thought there were basically five main aspects to be addressed at this preliminary stage:

- Was the suggested topic really a matter of contract law or should it be dealt with under a separate cover such as the law of restitution or of unjustified enrichment in civilian terms? In his view it was a matter of contract law: first, because many legal systems treat it as such; secondly, also PECL, CISG and the Principles themselves, though in a very a-systematic manner, follow the same approach; thirdly, it intellectually relates to contract law.
- One set of rules or several sets of rules? He definitely was in favour of a single uniform regime since if a failed contract had to be unwound it did not in principle matter for what reason the contract had failed. After all, with respect to avoided contracts and terminated contracts, the Principles already provide substantially similar solutions.
- The current rules of the Principles can very well serve as a starting point, but they need to be streamlined, harmonised and supplemented.
- One very important issue had not been properly addressed so far: the question of risk distribution. Who must bear the risk of accidental loss? In his view it should be the recipient of the performance – the buyer in the case of a sales contract – because there should be a correspondence between risk and control. But there should also be an exception to this rule when loss of or damage to the goods is attributable to the seller, e.g. because the goods were defective or the seller was fraudulent.
- Finally, there should be special rules in the case of long-term contracts where a substantial part of the performance has already been rendered over the years and it would be very difficult if not impossible to unwind them.

45. Alpa entirely agreed with Zimmermann and pointed out that in practice it was often controversial whether by virtue of the arbitration agreement the arbitrators are entitled to deal not only with the effects of breach, but also with the effects of the avoidance or illegality of the contract. If the Principles were to deal also with these last two issues, they would help to solve a question of great practical importance. As far as the distinction between ordinary sales contracts and other types of contracts was concerned he mentioned the case of the acquisition of a company: if the buyer was obliged to return the company to the seller even after having started to run it, this could give rise to a lot of problems.

46. As to the question whether the provisions on restitution should be grouped together in a new chapter on unwinding of failed contracts in general or be placed in the context of each single case of failed contracts covered by the UNIDROIT Principles, Goode expressed his preference for the second option. Moreover he recommended not dealing with insolvency in

this context. Bonell confirmed that insolvency was by its very nature outside the scope of the Principles.

47. With respect to long-term contracts Raeschke-Kessler wanted to add to Zimmermann's remarks that this kind of contract was rarely isolated. For instance, a contract for the construction of a power plant would very often be a bundle of contracts with numerous parties. If the main contract fails, what happens to the other contracts closely related to it?

48. Gabriel first of all agreed with Zimmermann that sales contracts should not be used as the sole model. He suggested thinking also in terms of service contracts and more in general in terms of transfer of rights, thus covering not only sales of goods but also leases, licensing agreements and other contracts relating to intellectual property rights. Moreover he questioned what exactly the Group was considering now: the different reasons for failure of contracts or only the consequences of such failures or both?

49. With respect to this last question Bonell thought that what was at stake were only the consequences of the different types of failure, at least with respect to those types of failure already dealt with in the Principles such as avoidance, termination, hardship, force majeure, etc.

50. Fontaine wondered whether the subject under consideration was really limited to the unwinding of failed contracts. He thought the problem of unwinding might arise also where the contract has not failed but simply has come to an end either by having expired or by agreement between the parties, and he gave the example of contracts for the outsourcing of accounting, computing and human resources departments: even if these contracts were successful, at their end there would be a need to restore the preceding situation by giving back all the information, documents and so on. In practice, in order to cope with this problem, the parties usually include in their contract a so-called reversibility clause.

51. Bonell, though fully agreeing with Fontaine's analysis, wondered whether the cases he had referred to should be left to the parties to deal with in their contract.

52. Uchida mentioned that when discussing this topic with Japanese practicing lawyers they had said there should be special provisions about the restitution of goods containing software. From a practical point of view they had stressed in particular the need for a provision about the duty of confidentiality.

53. Date-Bah felt that, instead of considering the unitary approach or the differentiated by failure-type approach as an alternative, one might well envisage a combination of the two approaches, i.e. to have a chapter dealing with the principle of restitution in general and in addition more detailed provisions on the effects of the failure of the contract within the single chapters dealing with the different types of failure.

54. Bonell assured Date-Bah that the basic approach to be followed in the Principles was still open for discussion and that his suggestion for a combined approach would certainly be taken into account by the Rapporteur.

55. Furmston expressed his support for the view expressed earlier by Goode, i.e. to deal with the unwinding of failed contracts in the context of the different types of failure. He thought it would be rather odd to deal for instance with breach of contract in a special chapter but not to address in that same chapter also the effects of breach but instead to

refer in this respect to a chapter on unwinding of failed contracts in general in which after all it might well be that, apart from a general principle, different rules would be provided for the different types of failure. Maybe this was the approach generally adopted in civil law systems, but certainly it was unfamiliar in common law systems.

56. Bonell recalled that this was certainly not the case of a number of codes and in this respect he expressly mentioned the Italian Civil Code where the effects of the different types of failure were dealt with in the respective sections.

57. Crépeau raised a fundamental question: should the envisaged rules on restitution in the context of unwinding of failed contracts cover also propriety rights, i.e. were the effects of a particular type of failure (e.g. avoidance; nullity; termination) intended to be limited to the parties or were they to affect also third parties' rights?

58. Bonell recalled that as a matter of general policy proprietary rights had, at least so far, been excluded from the scope of the Principles, and indeed the existing rules on the effects of avoidance or termination for breach only concerned the relationship between the parties and did not address the effects of such failures on third parties.

59. Crépeau wondered whether questions such as total loss, alienation of property subject to restitution, partial loss, revenues on the property and the cost of restitution could ever be excluded from the envisaged chapter on unwinding of failed contracts. Or was it intended to restrict its scope to service contracts, excluding sales contracts?

60. Dessemontet said he was impressed by Crépeau's arguments. He too found that even if the Principles were not to deal with proprietary rights, there still was a need for a general part on restitution dealing with the various issues mentioned by Crépeau. This would not mean that in the chapters on the different types of failure there could not be additional rules dealing with the special effects of each of them. A similar approach had been adopted also by the American Law Institute in preparing the Restatement on Restitution in addition to the Restatement on Contracts. Furthermore he drew attention to the fact that there might be a need for special provisions dealing with multi-party contracts, i.e. contracts with e.g. three parties, two of which continue the contract while the third has stepped down. This was neither a case of avoidance nor a case of termination.

61. Bonell recalled that he had had a chance to attend some meetings of the Restitution Group at the American Law Institute and on several occasions the question had been raised as to whether a particular issue should be dealt with in the Restatement on Restitution or in the Restatement on Contracts or why not in both though not necessarily in the same way. He mentioned that experience had shown that the combined approach could lead to difficult questions of coordination among the general section on restitution and the different chapters dealing with the various type of failure of contracts.

62. Coming back to Crépeau's question, Lando recalled that the Commission on European Contract Law had tried to deal with proprietary rights but with no success in view of the huge differences among the various legal systems concerning the transfer of ownership. As to the choice between the unitary approach and the separate approach, he agreed with Goode and Furmston who favoured the latter. Also in his view the separate approach was preferable because business persons would expect to find in the chapters on avoidance, termination, etc. a comprehensive set of rules on the respective failures of the contract, including rules on restitution.

63. Hartkamp basically agreed with Lando, also because the rules applying to the different situations are not necessarily identical. Furthermore he found Raeschke-Kessler's remarks concerning the case where there was a set of contracts but termination or nullity affected only one of the contracts very pertinent. He referred to a recent decision by the European Court of Justice in a case involving a credit transfer and a sale transfer linked to each other: after one transaction had been avoided the question arose as to the fate of the other. What struck him was that in this relatively simple case it had been rather difficult to find the right solution, and that the European Court had decided it quite differently than how the Dutch Supreme Court had decided a similar case three years ago. He concluded by pointing out that it would of course be very interesting to try and have some clue as to what the solution would be under the Principles. At the same time he wondered, however, whether it would be possible to find a general rule for so many quite distinct cases.

64. Finn was impressed by Zimmermann's arguments in favour of one set of rules dealing with the general aspects of unwinding of failed contracts, one of which, for instance, was the distribution of risk: indeed, such questions could hardly be properly dealt with by a fragmentary approach. On the other hand, he agreed with his other common law colleagues who had urged caution as to including some general rules on restitution – whatever that may mean – in an instrument dealing with contract law, as opposed to restitution for specific phenomena.

65. With respect to this last remark Bonell pointed out that the very fact that the topic under consideration was termed "unwinding of failed contracts" and not "unjust enrichment" or "restitution" meant that what was at stake was certainly not a set of rules addressing unjust enrichment or restitution in general.

66. Goode wanted to come back to Crépeau's point on transfer of property and thought that even if the effects of a failure of the contract on third party rights were outside the scope of the Principles, the problem of the effects on the parties themselves still had to be answered. For example, Art. 3.17 at the moment simply said that on avoidance "either party may claim restitution of whatever it has supplied under the contract". Yet he wondered whether the provision was talking here about a personal right or a real right, in other words, was it simply stating that one party may say to the other "I would like to get a re-transfer of what I have transferred to you" or did it mean that no transfer had ever taken place at all. If the meaning was the former, should the effects of avoidance with respect to rights acquired by third parties be governed by the otherwise applicable domestic law? He thought that the point had to be clarified.

67. Komarov first of all suggested that the envisaged rules on unwinding of failed contracts should deal also with the failure of negotiations. In his view there was no substantial difference between the unwinding of a null and void contract and the effects of failed negotiations implying pre-contractual liability. He furthermore thought that instead of a unitary or fragmentary approach the ultimate solution could very well be an in-between approach, i.e. to have general rules and specific rules in one and the same chapter on "unwinding of failed contracts".

68. With respect to Komarov's first remark, Bonell drew attention to the second bullet point at page 5 of Doc. 99, where very similar ideas had been formulated. Komarov agreed but thought that the kind of failure envisaged in Art. 2.1.15 should be expressly mentioned.

69. According to Fauvarque-Cosson the terminology chosen was not irrelevant for the substantive approach taken in this field. When speaking of "unwinding" of failed contracts,

the focus was clearly on the various types of failure of contracts, while by using the concept of "restitution" in case of failed contracts the unitary approach would be a natural consequence, with the result that the focus would be on general aspects of restitution, e.g. how to calculate restitution, whether the judge could raise the question of restitution *ex ufficio*, etc.

70. Schiavoni, recalling that the question of the distribution of risk, already referred to by Zimmermann, was of utmost importance in works contracts which by their very nature were long-term contracts, suggested focusing the discussion for the time being at least on this specific question.

71. Gabriel, agreeing on this point with Hartkamp, Finn and Komarov, thought there could not be a single unified approach to the unwinding of failed contracts.

72. Bonell understood Gabriel's last intervention as an invitation first to discuss the rules to be adopted for the various cases of failed contracts and only afterwards to decide where to place them. In this respect he asked for comments on the question raised in bullet point no. 2 in para. 15 of Doc. 99, i.e. whether in addition to avoidance, termination and illegality the Rapporteur should deal also with the other cases of failed contracts referred to therein.

73. Goode wondered whether it was not preferable to postpone the discussion on the unwinding of failed contracts in general until the specific chapters on illegality, conditions, termination for good cause, etc. had been prepared.

74. Also according to Date-Bah the task of the Rapporteur on unwinding of failed contracts should be to see whether it was possible and/or advisable to harmonise or even unify the rules laid down in the different chapters on the various cases of failure of contracts.

75. Zimmermann suggested that the Rapporteur should start examining the existing rules on unwinding in the cases of avoidance and of termination for breach in order to see whether they could be further supplemented and possibly harmonised. These rules should than be tested against the other cases of failure of contracts while for the time being the Rapporteurs on those other cases should not deal with the consequences in their respective chapters.

76. While Crépeau basically agreed with Zimmermann, Goode objected to the suggested approach since he, like other previous speakers, was not convinced that it was possible and/or advisable to deal with the topic in a single unitary context. He suggested the two things be done in parallel, i.e. seeing whether it was possible to prepare a single unitary set of rules on unwinding of failed contracts and at the same time to elaborate specific rules within the chapters dealing with the different cases of failure. At a later stage it would be rather easy to decide which approach should ultimately be taken.

77. Raeschke-Kessler expressed his strong support for the single or unitary approach suggested by Zimmermann which also in his opinion was exactly what practitioners needed.

78. With respect to the question raised by Bonell, Garro thought that the unwinding of failed contracts should be addressed in all possible cases of failure and not only with respect to avoidance, termination for breach and illegality. Since most domestic laws did not deal with such issues, the Principles could be a real pioneer in this field. As to the choice between a unitary and a fragmentary approach, he favoured the fragmentary approach which in his

view would also be easier for users of the Principles coming from different legal systems to understand.

79. Furmston reiterated his support for the fragmentary approach, pointing out that for instance with respect to illegality one could take it for granted that the rules on the unwinding of the contract would not be the same as the ones provided for with respect to avoidance and to termination.

80. Bonell wondered whether the Group could agree on Goode's proposal, i.e. to invite the Rapporteur on unwinding of failed contracts to prepare draft rules intended to cover all cases of failure of a contract and at the same time to ask the Rapporteurs on the envisaged chapters on illegality, conditions and termination of long-term contracts for good cause to deal with respect to each of these individual cases of failure also with the restitutionary consequences thereof, and to postpone the decision as to whether to take ultimately an unitary or a fragmentary approach - or maybe a combination of the two – until the respective sets of rules were ready for further consideration by the Group.

81. Gabriel agreed on this proposal, all the more so since in his view the scope of illegality or immorality as well as of termination for cause would necessarily be influenced by the envisaged consequences thereof.

82. Date-Bah agreed on this last point and thought that for all that had been said there was a clear need for close consultation among the Rapporteurs already at this preliminary stage.

83. Concluding the discussion on this topic Bonell too stressed the need for the Rapporteurs on the chapters in question to prepare their position papers and possibly preliminary drafts to be submitted to the Group at its next session in close consultation among themselves. He then announced that Zimmermann had kindly volunteered to act as Rapporteur on the topic of unwinding of failed contracts. The Group could hardly have found among its members a more competent Rapporteur on such a controversial subject, and he was absolutely confident that Zimmermann would perform his difficult task by taking into due account all the different opinions so far expressed.

(b) Illegality

84. Furmston stressed the importance of this topic which in his view should definitely be addressed by the Principles. At the same time, however, he acknowledged that there were considerable difficulties to be overcome. Thus, in the absence of a legislative body that could indicate which types of contracts were illegal, some basic principles had to be drawn up that could stand in the place of it. Another problem was how to avoid that parties, by choosing the Principles, could evade what in other systems would be mandatory rules. Yet he was confident that these problems could be solved.

85. Bonell referred to Doc. 99 and the succinct description of the approach adopted by PECL and the Restatement on Contracts with respect to the topic in question. The main difference was that PECL distinguishes between "immoral contracts" on the one hand and "illegal contracts" violating specific statutory provisions on the other hand, while the Restatement addresses the topic in a unitary manner referring in general to "contracts unenforceable on grounds of public policy" whatever this meant. One difficulty with the European approach was how to define immoral contracts, since the reference in PECL to

"contracts contrary to principles recognised as fundamental in the laws of the member States of the European Union" could not obviously be literally taken over by the Principles.

86. According to Date-Bah it was entirely unrealistic to think of a unitary world standard with respect to immoral contracts: instead he suggested adopting the notion of connectedness, i.e. to consider a contract immoral if it was against the values of the countries connected to the transaction. For instance, in a transaction connected with Ghana, Australia and Singapore, the values of these three countries should be given higher prominence in formulating the standard of immorality.

87. Raeschke-Kessler recalled the definition of international public policy as contained in the "Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards" adopted by the International Law Association in New Delhi in 2002, according to which "The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organisations" (Art. 1(d)), and "An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is antitrust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category" (Art. 1(e)). In his view this definition could well be taken over also by the Principles in order to distinguish between international public policy and purely domestic mandatory principles and rules. As an example he referred to a recent arbitration he was chairing in which a State party to the contract claimed the nullity of this contract because it lacked the authorisation by the competent governmental agency as required by its own domestic legislation. The State should clearly not be permitted to invoke such a reason to get rid of a contract it had previously entered into; otherwise the security of international trade and commerce would be highly endangered.

88. Gabriel first of all found Date-Bah's suggestion very interesting, since he too thought it might not be possible to come up with universal standards. Furthermore he suggested refraining for the time being from using concepts such as illegality, immorality, public policy, etc. which had special connotations in the various legal systems: it was preferable first to try and agree on the substance of the issues at stake before discussing terminology.

89. Goode recalled the rather agnostic approach adopted in this respect by PECL which, apart from immoral contracts, in Art.15:102 merely states that an illegal contract may be declared to have full effect, some effect, no effect at all or be subject to modification (para.2), and subsequently indicates the factors to be taken into consideration in order to decide in one way or another (para.3). This was clearly a minimalist approach but he found it to be the only realistic one. Indeed, at least according to English law there were contracts that were unlawful in the making and they could vary enormously from contracts fundamentally contrary to the policy of the State to contracts where there merely was an infringement of a highly technical regulation which could not really be said to be immoral in any sense at all. Then there were contracts that were unlawful in the performance but not in the making: here a distinction would be made according to whether both parties were involved or cognisant of the unlawful performance or only one, and the party who was ignorant and didn't take part could enforce the contract. Finally there were contracts which

were unlawful not in the making but in the purpose, and again if only one party had in mind an unlawful purpose and the other did not, the innocent party could enforce the contract. It was precisely because of such enormous variation in the various jurisdictions both in the type of illegality and in the way it arises and in the effects of it that he thought that in the context of the Principles it would be almost impossible to agree on substantive rules beyond cases of a very fundamental illegality and to go much further than PECL did.

90. Bonell added that also the Restatement on Contracts had taken an approach very similar to that taken in PECL.

91. Alpa expressed first of all doubts as to the appropriateness of the notion of "fundamental principles" and asked Lando to explain exactly what the drafters of PECL had meant by it. Were they referring to the general principles of community law, to general principles recognised by the EC member States, human rights, or what else? He then recalled that sometimes the violation of a fundamental principle, e.g. that of good faith, did not lead to an illegal contract but just to a breach of contract. Finally he stressed the different meanings the notion of "immoral contracts" had even within Europe let alone worldwide. For example the sale of blood was considered immoral in Italy but certainly not in all other European countries, and the same could be said of transactions connected with artificial procreation. All this led him to agree with Goode's proposal not to try to find general substantive definitions but rather to focus on specific cases.

92. Bonell recalled that according to the comments to Article 15:101 the formulation of the article was intended to avoid the varying national concepts of immorality, illegality, public policy, etc., and that guidance as to the fundamental principles in question might be obtained from the EC Treaty, the European Convention on Human Rights and the European Union Charter on Fundamental Rights.

93. Uchida raised the more general question of the legal nature of any possible provision on immorality and illegality in the Principles. The Japanese practicing lawyers with whom he had discussed the issue had expressed in this respect some concern or doubts. According to them the Principles' main purpose was incorporation into individual contracts and if this was correct a provision on immorality or illegality would appear to be totally out of place. Or could an explanation be found in the other purpose of the Principles, i.e. to be used as a model for domestic legislators?

94. Bonell recalled, first of all, that the Principles already contained a number of other mandatory provisions so that the provisions on illegality would not be the first mandatory provisions. Moreover, the two purposes mentioned by Uchida, important as they may be, were certainly not the only ways in which the Principles could be used in practice: thus, more and more domestic legislation on arbitration permitted parties to choose soft law instruments such as the Principles as the law governing the substance of their dispute, as well as the arbitral tribunal to refer to them even in the absence of an express authorisation by the parties. In all these cases, which the experience of recent years amply shows are becoming increasingly frequent, provisions on illegality or on contracts to be considered null and void *ab initio* because of their nature or content would appear, at least to him, to be quite useful and appropriate.

95. Uchida replied that, while the 1994 edition of the Principles could be easily used *en bloc* by businesspersons as supplementary terms of the contract, this was now becoming more and more difficult because of the inclusion in the Principles of a number of mandatory provisions.

96. Bonell thought Uchida had raised a very important issue that hopefully could be clarified although he failed to see on this point any substantial difference between the 1994 and the 2004 editions of the Principles. Admittedly the latter contained more mandatory provisions than the former but already the former contained mandatory provisions such as those on fraud, threat and gross disparity, on exemption clauses or on agreed payments for non performance, that parties wishing merely to incorporate the Principles as a sort of set of standard terms to supplement their individually negotiated terms could hardly have been expected to like and/or to accept.

97. With respect to illegality Komarov agreed with those who had expressed doubts as to the possibility of agreeing on a definition of illegality that could be accepted worldwide. Yet since the Principles were intended to represent a legal system of their own, one could think of defining as illegal contracts those contracts that violate the mandatory provisions in the Principles themselves. As to immorality, he thought it would be even less possible and/or advisable to try to define what was immoral while a generic notion of morality could suffice just as the generic reference to good faith, a notion equally not further defined in the Principles.

98. Bonell wondered whether, as an alternative to the agnostic approach suggested by Komarov and others, the Group might also wish to consider the possibility of adopting the ILA definition of international public policy cited by Raeschke-Kessler, at least as a starting point.

99. Zhang first of all pointed out that in his view the Principles should definitely deal with the topic of illegality because of its great importance in international contract practice where too often parties accused of breach of contract have tried to escape liability by claiming that the contract itself was illegal. With respect to the notion of fundamental principles he suggested great caution in using such very general concepts since the Principles were intended to be invoked in different parts of the world where such concepts might still have very different meanings. On the contrary he recommended being as specific and clear as possible so as to give as much guidance as possible to the parties and ultimately to the judges and arbitrators when called upon to settle disputes.

100. Lando first of all pointed out that the interesting discussion between Uchida and Bonell could be easily settled if – as he hoped – the Principles were to be adopted in the form of a binding instrument. As to the question of internationally accepted definitions of immorality and illegality, he thought that a distinction should be made between what the French called "*règles d'application immédiate*" and what the Group was talking about now, i.e. a possible common core of legality and morality. In his opinion there existed such a common core not only within Europe but also worldwide – he mentioned the prohibition of slavery and forced labour, the respect for privacy, the freedom of thought and of expression – all principles and values that even if not respected in every single country of the world should nevertheless be affirmed in the Principles.

101. Furmston expressed his strong support for Lando's point and gave the following example: in a contract subject to the Principles between a farmer in Ruritania and a merchant in Utopia for the sale of 10,000 tons of western white wheat a dispute arose because it became clear that the price of the wheat had been grossly inflated in order that – what in England was called – a backhander be supplied to the intermediary who had negotiated the contract. Should an arbitrator called upon to settle the dispute disregard such an allegation? He thought surely not.

102. According to Bonell the example was very pertinent just because on this specific issue national legislation and business practice differed considerably in various parts of the world.

103. Hartkamp first of all agreed with Goode in considering Art. 15:102 PECL a model to be followed also by the Principles, while with respect to immorality he thought it would not be possible to define the fundamental principles in the same sense as had been done in PECL because that would restrict the scope of the provision too much: on the contrary he was attracted by what Date-Bah had said about the connectedness of the legal systems to the contract. The comments could provide concrete examples of how this criterion would work in practice and of course there would also be exceptions to the general rule as shown by the case indicated by Raeschke-Kessler, but the important thing was that the black letter rule should merely lay down the basic criterion to be followed.

104. Zimmermann, like Gabriel, felt that terminology should be discussed only after having agreed on the substance and in this respect he suggested following the example of PECL and distinguishing between two categories of "illegal contracts" that, for want of a better term, could be called, respectively, "contracts contrary to fundamental principles" and "contracts infringing mandatory rules". The reason for making such a distinction was that it was nowadays generally felt that "illegality" should only in exceptional cases, i.e. where fundamental principles and values have been violated, deprive the contract of any effect, while in all other cases the consequences of infringement might vary depending on the relevant circumstances. With respect to the first category of "illegality" the main difficulty was to find a sufficiently precise definition of its scope, while with respect to the second type of "illegality" the most important thing was to establish the criteria for the determination of the consequences of infringement in each given case. He thought that a first answer to this latter question could be found in Art. 15:102 (2) and (3) PECL. Concerning the first category of illegality, he conceded that it would be difficult to propose at a universal level a definition analogous to that contained in Art. 15:101 PECL. At the same time, however, he was rather sceptical about taking such a relativistic approach as the one suggested by Date-Bah, since it was hardly acceptable that a businessperson, when concluding a contract with State A, could adopt one morality and when concluding a contract with State B could adopt another morality. He rather favoured the adoption of a substantive definition by using a formula centred on human rights, i.e. standards on which there was an increasing consensus worldwide. Admittedly this would be an extremely vague definition but, like Furmston, he thought that the comments could provide further guidance by indicating concrete examples. After all, also domestic laws operated with vague formulas such as "*gute Sitten*", "public policy", "*ordine pubblico*", etc., which necessarily had to be further specified in practice.

105. According to Goode precisely because, as pointed out by Zimmermann, it was so difficult to formulate a universally accepted concept of illegality, it was preferable to follow the approach adopted by the Restatement on Contracts which refrained from giving any kind of definition of public policy and simply stated that whether or not a given contract is unenforceable on grounds of public policy depends on a careful balancing of a number of factors, such as the strength of the policy involved, the parties' expectations, any forfeiture that would result if enforcement were denied, the likelihood that a refusal to enforce would further the policy, etc. After all, he was not sure that there were cases of illegality where everybody would agree that the contract was totally unenforceable: there were cases where it was generally accepted that if party A concludes a contract for a criminal purpose it should not be allowed to enforce it, while party B, if ignorant of A's criminal purpose, should be allowed to enforce it.

106. In view of the different approaches favoured by Zimmermann and Goode, Bonell asked the other members of the Group to express their preferences on this basic alternative.

107. Gabriel, though agreeing in principle with Goode, pointed out that since the Group's task was not to unify domestic laws but to lay down rules specifically designed for international commercial contracts, it might consider being a bit more ambitious than the drafters of the Restatement on Contracts and lay down positively standards it expects parties to respect in the context of international commercial relationships.

108. Raeschke-Kessler put the following question to Goode. Almost all Gulf States by statute prohibit the intervention of an agent in arms procurement contracts. Nevertheless there was practically no arms contract with a State in the Gulf region that did not employ an agent. Yet the agency agreements relating to these contracts were all subject to Swiss law and after delivery of the arms to the customer in the Gulf region the agent claims its fees in an arbitration in Switzerland. What should the arbitrator sitting in Geneva decide?

109. Goode thought that if such a case arose in England they would say that if the contract was unlawful according to the place of intended performance it would not be enforced in England. Other countries such as Switzerland may have a different conflict-of-laws rule. But maybe Raesche-Kessler was not asking the right question, because he was asking "how would this particular case be dealt with independently of the Principles", whereas the Group was concerned with how it should be dealt with by the Principles.

110. Bonell referred to para. 19 bullet point no. 3 of Doc. 99 where the issue under discussion had been specifically raised and urged comments by the Group.

111. Al Mulla warned against too narrow a definition of "illegal contracts" recalling that for instance in his country the concept itself was virtually unknown while it was up to the courts to decide on a case by case basis and in the light of ever changing current standards whether or not to enforce a contract infringing alleged principles and rules of a mandatory nature.

112. Finn raised a more general point concerning the very purpose of dealing with illegality in the context of the Principles. Contrary to PECL the Principles were restricted in scope to international commercial contracts, and he wondered whether it was really their concern to prohibit slave contracts, prostitution contracts, people smuggling and any other egregious types of conduct. And why then not also address all sorts of violations of civil and political rights or exploitation of child labour or bribery? Where would they end up? He personally had great sympathy for Komarov's suggestion to focus mainly if not exclusively on the mandatory provisions contained in the Principles themselves and leave the other issues to the applicable domestic law.

113. Dessemontet, first of all, pointed out that there was no real conflict between the views expressed by Zimmermann and by Goode insofar as the question was not whether the Principles should have a substantive definition of illegality or whether they should only lay down rules on enforceability but rather why could they not have both? As to the scope of the envisaged provisions on illegality in the Principles he felt that what was at stake was not just the sale of human blood or the protection of disappearing species like whales and so on, but also highly commercial matters, such as the impact of the different national copyright laws on software contracts. In this respect he referred to the American Law Institute's draft Principles on transnational disputes concerning intellectual property rights stating (§ 322)

that "the application of particular rules of foreign law is excluded if such application leads to a result in the forum that is manifestly contrary to its public policy." He concluded by suggesting to take as a starting point for a substantive definition of illegality Art. 15:101 PECL or the ILA definition of "international public policy" read out by Raeschke-Kessler, and to combine Art15:102 (3) PECL with § 178 (3) of the Restatement on Contracts.

114. Raeschke-Kessler recalled a recent decision of the Swiss Federal Court in which – if his recollection was correct – it defined international public policy as the basic principles of fundamental justice common to all civilised nations.

115. Date-Bah confessed that the more he listened to the discussion the more he was intrigued by Uchida's remarks concerning the appropriateness of dealing with illegality at all in the Principles. The Principles would have to compete with the domestic rules of the otherwise applicable law, and if the latter were more restrictive or severe on a particular issue they would prevail in any case. So what was the purpose of the exercise the Group was discussing?

116. Intervening in his capacity as practicing attorney and arbitrator Mattiaccio pointed out that arbitrators dealing with this issue looked more for a structure for the analysis than for a black letter rule, and since the Principles' main task was to provide a practical guide to arbitrators why not postpone, at least for the time being, the discussion on a substantive definition of illegality and immorality and instead start talking about its consequences and the factors to be considered in determining them in each given case.

117. Fauvarque-Cosson first of all expressed her support for Zimmermann's suggestion to distinguish, as in PECL, between two different types of illegality. As to the definition of the first type in her view it was impossible to follow PECL because Art. 15:101 was too European. The Swiss Supreme Court's definition was certainly worth being considered although she felt that the reference to "civilised nations" was to say the least a bit outdated and maybe even politically incorrect. As to the second type of illegality she agreed that in many cases the consequences should not be total nullity. In this respect she mentioned that French law distinguished between "*ordre public de protection*" and "*ordre public de direction*", and whenever the mandatory rule aimed at protecting the weak party only that party that could invoke nullity of the contract. With respect to the important question, raised by among others Uchida and Date-Bah, as to what mandatory provisions of the otherwise applicable domestic laws should be taken into consideration, she felt that it all depended on how the Principles were applied in practice. As long as they were applied merely as contractual terms incorporated by the parties, obviously all the mandatory provisions of the domestic law governing the contract would prevail, whereas if the Principles were applied as the *lex contractus*, only the international mandatory laws should be taken into account.

118. Bonell recalled that this was after all the approach indicated in the comments to Art. 1.4 of the Principles.

119. Goode agreed and drew attention to Art. 1:103 PECL which states in para.1 that "where the law otherwise applicable so allows, the parties may choose to have their contract governed by the Principles with the effect that national mandatory rules are not applicable" and adds in para. 2 that "effect should nevertheless be given to those mandatory rules of national, supranational and international law which according to the relevant rules of private international law are applicable irrespective of the law governing the contract".

120. Garro wanted to go back to the issues raised in Doc. 99, para. 19. First, should there be a distinction between two categories of illegality as in PECL? His answer was yes and he expressed sympathy with the definition of international public policy ("internationally recognised fundamental rights and values") as suggested in bullet point no. 2. Concerning the second category of illegality he agreed that it was essentially a question of which mandatory rules should be taken into consideration and felt that in this respect the comments to Art. 1.4 of the Principles and Art.1:103 (2) PECL would provide a useful starting point.

121. Widmer first of all expressed sympathy for Komarov's suggestion to stick to the mandatory provisions of the Principles themselves rather than to refer to some vague principles and values to be found elsewhere. He too, like Dessemontet did not necessarily see a total conflict between the Zimmermann approach and the Goode approach. After all, even the ambitious substantive definition in Art. 15:101 was not framed in terms of all or nothing but provided that a contract is of no affect *to the extent* that it is contrary to the fundamental principles thereby permitting a flexible approach pretty much the same as the one envisaged in § 178 of the Restatement on Contracts. Why not try to combine the two approaches?

122. With respect to Widmer's (and Komarov's) idea of referring in the context of illegality only to the mandatory provisions of the Principles themselves, Bonell wondered whether there was a risk of narrowing too much the scope of illegality.

123. Widmer clarified that he was not thinking only of the mandatory provisions expressly stated in the Principles but would include also the principles and values underlying the Principles as such which were still to be further defined and could well encompass basic human rights and the like. Komarov agreed on this approach.

124. Goode agreed with Widmer and others who had pointed out that on close examination there was no insuperable contrast between his position and Zimmermann's. Indeed he did not object to a formulation along the lines of Art. 15:101 PECL except that it looked at the contract as such rather than at its enforceability. Indeed, in his view enforceability was the trigger so that he was perfectly prepared to accept as a starting position a general proposition stating that a contract is unenforceable to the extent that its enforcement is contrary to international rules of public policy or something like that – and after a conversation with Zimmermann and Alpa during the coffee break he knew that they too would agree on such an approach.

125. Bonell, though fully appreciating these efforts to find a generally agreeable approach, wondered whether the same idea could be expressed without using the concepts of "enforcement" or "enforceable" since they were well known in common law jurisdictions but not necessarily in civil law systems. What about "no effect, some effect, full effect" to quote Art. 15:102(2) PECL which came closer to e. g. the French or Italian distinction between "absolute" and "relative" nullity?

126. Goode had no strong feelings as far as terminology was concerned: his only concern was that a distinction should be made between cases where the contract is deprived of any effect or is null and void and cases where the sanction is less severe and for instance the innocent party can still enforce the contract.

127. Furmston raised the following question: suppose that Ruritania was a signatory to the Hague-Visby Rules and Ruritania had passed legislation saying that the Hague-Visby

Rules applied to all outward bound sea carriage from Ruritanian ports. If a cargo is loaded at Zenda, a port in Ruritania, and the bill of lading, in a rather unusual format, contains a provision that the carriage is subject to the Principles, would the Hague-Visby Rules apply to this contract?

128. Bonell's first reaction was in the affirmative: this was clearly an example of domestic law that claimed to be internationally mandatory because the respective statute expressly stated "I do claim to be applied whatever the applicable law is", including the Principles.

129. Furmston said that this was exactly his answer too but if there were those who would solve the problem differently they should very clearly state their position right now.

130. Coming back to the basic question concerning the kind of formula that the Principles could use as an equivalent to Art. 15:101 PECL, Fontaine said that so far he had heard two alternative proposals one of which he thought was too broad and the other too narrow. What he believed was too broad was the formula in Art. 15:101 PECL, i.e. "to principles recognised as fundamental in the laws of the member States of the European Union" since, as Alpa said earlier today, the Principles recognise as fundamental also principles such as good faith or sanctity of contracts that had clearly nothing to do with what was being discussed right now. On the other hand Komarov's and others' suggestion to focus on the principles underlying the Principles would in his opinion be too narrow. Such criterion was perfectly fine in the context of interpretation and supplementing the express provisions of the Principles but, like other speakers, he too saw the need of a reference to some basic principles and values at least so far outside the Principles and relating to morality, civil rights and so on. What was needed was a rather flexible in-between formula – why not the formula suggested in Doc. 99 – even though he realised that it would need to be further defined by case law.

131. Dessemontet informed the Group that with the help of Chappius he had obtained a copy of the Swiss decision Raeschke-Kessler was referring to. It was a decision of the Swiss Supreme Court of 8 March 2006 but, as far as he could see, it did not speak at all of values common to all civilised nations. On the contrary, after stating that such a definition of international public policy in such terms would be politically incorrect, it discussed the alternative between a truly international public order and a public order with a distinct Swiss connotation, without however expressing a clear preference for one or the other. This prompted him to come back to Date-Bah's point urging everybody to find a connection with the geo-political environment in which to place in each given case the notion of international public policy. In PECL the connection was with the European Union. The Principles could not of course have that same connection, but he wondered whether they should not have a connection of the kind suggested by Date-Bah. Another important aspect of the Swiss decision was that the case concerned competition law – *rectius*: a case of restrictive trade practices – since two Italian companies had allegedly agreed to present artificially inflated bids for the construction of a highway in Italy and to submit possible disputes to arbitration in Switzerland. The question with which the Swiss Supreme Court was confronted was whether such an arrangement was contrary to public policy in Switzerland. In other words, the case was very much like the Dubai case mentioned by Raeschke-Kessler earlier on: parties try to evade the domestic public policy of a State by submitting their disputes to arbitration in another State. Such a device was viewed with disfavour both by the (Swiss) arbitrators and subsequently by the Swiss Supreme Court, yet according to the Court the question whether the violation of foreign competition law was against Swiss international public policy could not be answered by using as a yardstick the Court called "universal

morality" ("*morale universelle*"). The Supreme Court ultimately rejected the idea of a unitary notion of public policy: it stated that there was one notion of public policy according to which to decide whether to set aside an award, for instance because it did not apply the EU competition law, whereas another notion of public policy was to be applied by the arbitrators themselves when deciding the merits of the case. This second notion of public policy was definitely broader than the first, just as the "manifest disregard of the law" for which a U.S. court might set aside an arbitral award was much narrower than the public policy on which the arbitral tribunal itself might rely in order to declare a contract or its individual terms ineffective.

132. According to Goode the same result would have been achieved also in England though more as a matter of procedure. In other words, whenever - as they say - "if illegality is apparent" on the face of an award, it would be a ground for setting the award aside. Likewise, if the illegality was apparent to the arbitrator on the face of what was put in, then the arbitrator should not enforce the contract. On the contrary, if the illegality was not apparent on the basis of the evidence and one party failed to plead it or produce evidence, then that party would not be allowed later on to go to the court to have the award set aside. In other words, illegality had to be pleaded if it was not apparent on the face of it.

133. Furmston asked Dessemontet what the Swiss Court's reaction would have been if the arbitrator had struck down the agreement as being corrupt (which by the way seemed to him to be the case). Would it have intervened or similarly taken the view that it was up to the arbitrator?

134. Dessemontet recalled a famous case of 1993 concerning the violation of an Algerian law against bribery. The arbitrator had declared the agreement null and void, but the Swiss Federal Court held that the Algerian statutory provision in question was too closely connected to the Algerian State to be applied by an arbitrator sitting in Switzerland and therefore set the award aside and sent the case to a second arbitral tribunal which decided that the contract was valid. With respect to the case mentioned in his earlier intervention he insisted that in rejecting a request to have the award set aside on the ground that the contract in dispute had violated EU competition law the Swiss Court had relied on a narrow notion of Swiss public policy while at the same time acknowledging that the arbitrator, when deciding the merits of the case, could adopt a broader notion of Swiss public policy and might therefore declare the contract null and void on the ground of the same violation of EU competition law.

135. Lando, first of all, expressed his strongest appreciation for Fauvarque-Cosson's intervention. Secondly, he felt that the formula suggested in Doc. 99, para. 19 for immoral contracts ("contrary to internationally recognised fundamental rights and values") was an excellent point of departure.

136. Gabriel expressed his support for the positions of Widmer, Komarov, Lando and Fontaine and found that the discussion had made considerable progress insofar as there seemed to emerge a general consensus that a court should be entitled to invalidate wholly or in part a contract in three categories of cases: first, violation of the mandatory provisions contained in the Principles; second, violation of the general principles underlying the Principles; finally, violation of "internationally recognised fundamental rights and values".

137. Bonell, after thanking Gabriel for his so constructive statement, wanted to know whether in the framework indicated by Gabriel the mandatory provisions of State A – to come back to Furmston's example – that claimed to apply to all cases of carriage starting

from State A's ports whatever the otherwise applicable law should be disregarded for not falling within any of the three categories.

138. Gabriel, while agreeing that this would be the result according to the suggested rules on illegality of the Principles, pointed out that in practice courts would in the hypothetical case simply disregard the Principles and apply the mandatory provisions of State A on the basis of the relevant conflict-of-laws rules. There was always the risk that whatever the Principles stated some outside mandatory provisions of national, supranational or international origin prevailed, but nevertheless the Principles should lay down criteria for determining when a contract is to be considered invalid on the ground of illegality – in an ideal world.

139. Also according to Goode the formula "internationally recognised fundamental rights and values" was a good starting point but he wondered whether at least in the comments it should be explained that in practice it was important to consider the geo-political environment in which the contract has been concluded. Thus, with respect to a contracts within the European Union such fundamental rights and values would certainly encompass basic principles of Community Law, while the same could obviously not be expected with respect to non European contracts.

140. Bonell asked Goode and Date-Bah what the solution would be with respect to a contract between a European and a non European party, e.g. between a company from Ghana and a company from the UK.

141. According to Date-Bah if in such a case there were conflicting principles and values at stake one would have to find a sort of in-between solution by adapting both the Ghanaian and the English positions.

142. Zimmermann thought that due consideration should also be given to the item mentioned in the last bullet point in para. 19 of Doc. 99, i.e. that of partial invalidity, and suggested that on this point the approach to be taken should be very much the same as that of Art. 15:103, i.e. that it should be stated that, absent strong reasons for a different solution, in case of partial invalidity the remaining part of the contract should be upheld.

143. Bonell asked whether the Group thought that there were other points left for discussion.

144. Finn, though finding the discussion so far very interesting, expressed some concerns or doubts of a more general nature. Notions such as "internationally recognised principles and values" had been invoked and in this context reference had been made to human rights and similar politically highly sensitive standards – but, important as they may be also in the context of the Principles, should the Principles go further and explicitly address matters that are definitely much more important in the context of international commercial contracts, such as e.g. collusive tendering or corruption? The Group might of course come to the conclusion that it was not possible/advisable to deal with such issues explicitly, but he thought that at least an attempt should be made.

145. Bonell recalled what Furmston had already pointed out, i.e. that one should not forget that in addition to the black letter rule(s) on illegality in general there would be comments and illustrations, and he wondered whether Finn's concern could be taken care of – at least in part – by sufficiently elaborated comments and illustrations.

146. Widmer definitely preferred to deal with the very important questions raised by Finn in the comments only.

147. Crépeau, recalling that also on the occasion of the preparation of the new Civil Code of Québec it was discussed whether the notions of *ordre public* and *bonnes moeurs* should be further defined and that ultimately it was decided to embody the notion of immorality in the general concept of public order, thought that the Principles should take the same approach and found the formula suggested in Doc. 99 very attractive. He further agreed with Zimmermann and others that a distinction should be made – to use civilian terms – between total and partial nullity, depending on whether the whole contract was affected by the illegality or only individual terms thereof, as well as between absolute and relative nullity, depending on whether the illegality concerned general interests or only involved the protection of the interests of one of the parties. As to the effects of illegality, he favoured a flexible approach granting considerable discretion to the courts and in this respect again referred to the Civil Code of Québec stating in Art. 1699(2) that "the court may, exceptionally, refuse restitution where it would have the effect of according an undue advantage to one party, whether the debtor or the creditor, unless it deems it sufficient, in that case, to modify the scope or mode of the restitution instead." In other words, the rule should be restitution but in view of the particular circumstances of the case the courts might deny this remedy.

148. Bonell thanked Crépeau for his very illuminating comments based on the Quebec experience, but wondered whether he would agree with Finn that in the context of international commercial contracts one might perhaps be more explicit, if not in the black letter rules at least in the comments.

149. Gabriel, though sharing the doubts that had been expressed as to the advisability of having in the context of the Principles too detailed rules and definitions concerning illegality, agreed with Finn that at least the comments should make it clear that the Principles are not concerned with the world in general but specifically with international commercial contracts. This should be adequately taken care of by the comments.

150. Zimmermann had great sympathy for the views expressed by Finn and was not sure whether it would be sufficient to mention the most relevant cases of illegality only in the comments. A possible alternative was to have in the black letter rules a broad definition followed by a non exhaustive list of specific cases of contracts that would be considered contrary to "generally recognised fundamental principles and values". He suggested postponing the decision on this point until the Rapporteur has submitted his or her position paper and preliminary draft chapter.

151. According to Bonell this was a very wise suggestion and he was sure that the Rapporteur would take it into account.

152. Bonell asked Furmston whether he would be prepared to act as Rapporteur on the topic of illegality. Furmston agreed and Bonell, speaking also on behalf of the whole Group, expressed to Furmston his greatest appreciation for having accepted such a difficult task. He was confident that as on previous occasions Furmston would perform his task in an exemplary manner.

153. Furmston, in view of the considerable differences of opinions that had emerged during the discussion, thought that it might be premature to prepare already at this stage a preliminary draft. He preferred to submit to the Group at its next session a position paper

where he would give a list of examples of arguably illegal international commercial contracts, soliciting with respect to each of them comments by the Members and Observers of the Group.

(c) Plurality of debtors and of creditors

154. Fontaine stressed the practical importance of the topic. There were many situations where there was a contract with several obligors and/or several obligees: for instance, several contractors submitting a joint offer, working together, borrowing together on the one hand, and co-insurance, bank consortiums granting a loan together, etc. on the other hand. He thought that, like PECL, also the Principles should deal with this topic. A first question to be addressed concerned terminology: should the Principles, like PECL, in this context use the terms "debtors" and "creditors" or should they, as he preferred, stick to the terms "obligors" and "obligees" used so far? With respect to plurality of obligors, the first question raised in para. 25 of Doc. 99, i.e. how many types of plural obligations should be distinguished, was very important. PECL distinguished between solidary, separate and communal obligations, the Restatement on Contracts between "joint", "several" and "joint and several", yet the respective notions did not completely correspond. In his view, leaving aside terminology, when several obligors undertake the same obligation under the same contract the basic distinction to be made was between the case where each single obligor is bound only for part of the performance and the case where each single obligor is bound for the whole performance. The first question was: what should be the rule and what should be the exception? Secondly: how to determine whether in a given case the exception applies? Relevant criteria could be the express provisions of the Principles themselves or of the otherwise applicable law, the agreement between the parties, usages, the indivisibility of performance, etc. Finally: what did solidarity actually mean? What exactly were the rights of the obligee vis-à-vis the single obligors? What defences could the single obligors requested to render the whole performance raise against the obligee? What were the rights of an obligor who has paid more than its share vis-à-vis the other obligors? How to apportion the payment made among the other obligors? What were the consequences of an insolvency or voluntary winding up of one of the obligors? Turning to plurality of obligees, he thought that the questions were substantially the same: what should the rule be and what should the exception be? In the case of solidarity between the single obligees what were the rights of each of them vis-à-vis the obligor? What defences could the obligor raise against the single obligees? How to apportion the performance received by one obligee among the others? Despite the similarity of the problems, one should however with respect to each of them carefully consider whether the solution adopted in the context of plurality of obligors would be appropriate also in the context of plurality of obligees.

155. Zimmermann, also in the light of the discussions that had taken place some years ago on the same topic within the Commission on European Contract Law, had four remarks to add to Fontaine's excellent introduction. First, contrary to the majority of the other members of the Commission he was not so convinced that plurality of creditors was simply the mirror image of plurality of debtors not requiring therefore too much special attention. On the contrary, recent research work on the subject by, among others, one of his younger colleagues at the Max Planck Institute in Hamburg, had shown that the two situations presented very little if any analogies and should therefore be approached separately and certainly deserved the same attention. Secondly, terminology. He suggested sticking also in the Principles to the notions of "solidary" and "separate" obligations and not using the terms of art "joint", "several" and "joint and several" because in the Lando Commission not even the three English lawyers could agree on their precise meanings. Thirdly, he agreed with Fontaine not to deal with the third type of plural obligations, i.e. "communal" obligations.

They were of no great practical importance and virtually unknown in most legal systems. Finally, a very strong plea to accept the terminology “debtor” and “creditor”, obviously not only for this chapter but throughout the Principles.

156. With respect to Zimmermann’s last point Bonell recalled the lengthy discussions the Group had had in the past on this terminological question and pointed out that it had ultimately been decided that this was one of the (few) instances where in the English version of the Principles the terms suggested by the common law lawyers of the Group should be adopted without preventing of course the use in the French, German, Italian, etc., versions of the civilian terms of art “*debiteur/créancier*”, “*Gläubiger/Schuldner*“, “*creditore/debitore*“ etc.

157. Gabriel wholeheartedly supported Bonell’s remarks on this point. Furthermore he agreed with Zimmermann as to the inappropriateness, at least in the context of an international instrument such as the Principles, of the term “joint and several liability”. Even in the United States this notion had originally been used only in tort law, and it was Robert Braucher who first introduced it also in the Restatement on Contracts.

158. Finn too was strongly against reopening the discussion on the terminology “obligor/obligee”. At the same time he agreed with Zimmermann’s suggestion not to deal with so-called “communal” obligations.

159. Date-Bah, while supporting Gabriel’s and Finn’s preference for “obligor/obligee”, confessed that he had considerable difficulties also with the term “solidary” obligation. Was this an English word?

160. Lando on the contrary expressed his preference for the terms “creditor/debtor”: they might not correspond to the orthodox English terminology but since the English of the Principles should be an international English he suggested using the terms “creditor/debtor” which were much better known to most people around the world. After all, how could it be that in the Commission on European Contract Law the English members were prepared to accept that terminology? As to Zimmermann’s remark concerning the peculiarity of plurality of creditors, he too found that due consideration should be given to the most recent studies in the field and that the minimalist approach of PECL in this respect should not necessarily be a model for the Principles.

161. Goode confessed to be relatively relaxed on “debtor/creditor”, while he had great difficulties with the terms “solidary” and “communal” which for him did not convey any meaning. On the contrary there was nothing wrong with the terms “joint and several” and “joint”. The formula “joint and several” conveyed the idea that there was a liability of all the debtors together and at the same time a separate liability of each of them, while the formula “joint” clearly referred to a situation where there was just one obligation and the obligee could demand performance only from all of them together.

162. Fauvarque-Cosson supported Lando’s remarks concerning “debtor/creditor”.

163. Dessemontet stressed the need to use terms known and generally used in international contract practice and was therefore strongly in favour of “joint and several”: admittedly the exact meaning of this formula was far from clear but it would be the task of the Principles to provide an answer to this question.

164. Crépeau recalled that in the new Civil Code of Québec the corresponding English term of the French term "*obligations solidaires*" that for all civilian lawyers has a very precise meaning, was no longer "joint and several" but "solidary", so why not use the same term also in the Principles?

165. Furmston strongly objected since nobody at least in England would ever understand what "solidary" actually meant. He was not suggesting to adopt necessarily the term "joint and several" but definitely wanted an English term that conveyed at least some meaning to native English speakers.

166. Finn asked whether the term "shared" obligations would be acceptable to the civilian lawyers.

167. According to Fontaine what was important was that the English version of the Principles use a term understandable to native English speaking people: the French or Italian versions would in any case use the term "*solidaires*", "*solidali*" etc.

168. Komarov thought that the discussion should focus first on the types of plural obligations to be dealt with and only later on terminology. In this respect it was however necessary to bear in mind that the Principles represent a legal system of their own so that they may well use new terms provided that they are clearly defined.

169. Date-Bah was in favor of only two types of plural obligations excluding what in PECL are called "communal" obligations.

170. Goode insisted that instead of "solidary" the term "joint and several" should be used. As to "communal" obligations, they were clearly not an invention of the Lando Commission but were well known in a number of domestic laws and used in commercial practice where in addition to joint and several obligations (e.g. a loan backed by a suretyship) and separate obligations (e.g. a syndicated loan where each financial institution involved undertakes to contribute only a slice of the total loan and the debtor will have to repay to it only that slice) it might well be that an indivisible obligation could be enforced only against all of the obligors (e.g. the obligation of a football team to play a match against another team or that of an orchestra to give a concert). One might call this type of plural obligations "communal" or "joint" but it should definitely be dealt with in the Principles.

171. Al Mulla drew attention to the difference between joint and several obligations arising from a single contract and joint and several liability as a consequence of a particular status, for instance that of a partner in a partnership.

172. Furmston supported Goode's remarks concerning "joint" obligations and recalled that they were dealt with also in the Restatement on Contracts (§ 289 (3)).

173. Dessemontet too felt that in practice one could not do without "joint" or "communal" obligations. He made the example of a settlement agreement according to which two claimants who had filed their claim jointly undertake to withdraw it before any court or arbitral tribunal before which it was pending. Their obligation was clearly indivisible since for procedural reasons their withdrawal could only be made jointly.

174. Hartkamp thought it not useful to adopt a concept without providing a rule. PECL introduced the concept of "communal" obligations but failed to give a rule on them.

175. Bonell recalled that also Zimmermann had expressed similar reservations, but in view of the fact that the Group seemed to be rather divided on the issue he solicited further comments.

176. Date-Bah expressed support for Dessemontet's plea in favour of the term "joint and several" which was well known in practice.

177. Widmer disagreed with Hartkamp concerning the absence of any rule on "communal" obligations in PECL: in his view the definition itself resulted in a rule, i.e. that the creditor may require the performance only from all debtors.

178. According to Finn with respect to joint liability or obligations a distinction should be made between performance and enforcement. A party jointly liable could completely discharge the obligation vis-à-vis the obligee, while as far as enforcement was concerned, the obligee would have to sue all of the joint parties as necessary parties to the litigation. Yet if this was correct then he saw no need to deal with joint obligations in the Principles.

179. Bonell recalled that Finn's approach was precisely what is stated in the Restatement on Contracts (§ 289 *et seq*.), but both approaches differed from that of PECL where the emphasis is on performance not on enforcement.

180. Gabriel agreed.

181. Zimmermann, precisely because lawyers from different jurisdictions had different understandings of the envisaged third type of plural obligations – "communal" obligations as understood in PECL were not the same as "joint" obligations in the common law systems – was against dealing with them in the Principles, all the more so since, as already pointed out, he had not been able to find any significant case law on this matter.

182. Goode on the contrary thought that this was not a sufficient reason to decide already at this early stage to deal only with the two main types of plural obligations. Joint obligations were relevant not only in the context of performance, but also under other aspects, e.g. the release of the parties: indeed in cases of a joint obligation a release given to one party releases them all, while in cases of a joint and several obligation the release of one party did not prevent the obligee from preserving its rights against the other.

183. In view of the considerable difficulties in understanding each other by using abstract terms, Crépeau proposed to proceed by way of concrete situations. If A was the creditor and B, C, D and E were the debtors one should first try to figure out the various possibilities and only then ask how they should be called.

184. Fontaine agreed that this would be a useful exercise which the Rapporteur could prepare for the next session of the Group.

185. Hartkamp proposed that in order to facilitate consultation among the members of the Group even before the next session the list of participants attached to the Report should also indicate each member's e-mail address.

186. Before the closure of the discussion on this topic Zimmermann reiterated his doubts about the feasibility of dealing with plurality of debtors and plurality of creditors in one and the same context: the two topics were not mirror images of each other and each of them deserved special attention. He was prepared to submit to the Rapporteur on this

chapter a short memorandum in order better to explain his concerns in this matter. It was so agreed.

187. Hartkamp recalled that the new Dutch Civil Code had taken in Arts. 6:6 *et seq*. an approach along the lines suggested by Zimmermann. The concept of solidarity has been restricted to plurality of obligors, while with respect to plurality of obligees a different concept was adopted, i.e. that of co-creditorship as a form of co-property. Yet this approach did not prove to be very successful in practice. With respect to the issue of how many types of "co-debtorship" the Principles should deal with, he was rather reluctant to go into too great detail and/or make too many distinctions and rather favoured a practice-oriented approach, i.e. to concentrate on the commercially most important type – which he thought was what PECL called "solidary" obligations – and to add a sentence stating that of course parties might in a given case contractually agree on a different type of "co-debtorship".

188. Crépeau expressed great sympathy for Hartkamp's suggestion.

189. So did Finn.

190. Goode pointed out that so far no consideration had been given to the impact of plurality of debtors or creditors on assignment. The Principles did deal with assignment of rights, but nothing was said with respect to the case where there was a plurality of creditors. For instance, what would be the effect of an assignment by only one of them as opposed to an assignment by all of them? There were basically two possibilities: if the obligation was owed to the creditors jointly it could not be assigned only by one of them; or there was, as in the Dutch Code, a sort of co-creditorship where each creditor owned a share of the right, in which case that share could obviously be assigned without the consent of the other co-creditors. He was open to any solution but just thought that the question should be given at least some consideration by the Rapporteur.

191. In closing the discussion on this topic Bonell asked Fontaine whether he would be prepared to act as Rapporteur on plurality of obligors and plurality of obligees. Fontaine agreed. Bonell stressed that the Group could hardly have found a more competent Rapporteur on this extremely complex topic and was confident that Fontaine would perform his task in his usual exemplary manner.

(d) Conditions

192. Fauvarque-Cosson first of all stressed the need for rules on "conditions" in the Principles. She then raised three questions that in her opinion were of paramount importance in this field. The first question concerned terminology. How should "conditions" - or better a "condition" - be defined and distinguished from what in civil law systems is called a "term"? Both terms referred to a future event but while the occurrence of a "term" was certain, that of a "condition" was uncertain. Furthermore, should the Principles deal with both – in civilian terminology – "suspensive" and "resolutive" conditions, which in substance corresponded to "conditions precedent" and "conditions subsequent" in common law terminology? And what about so-called "extinctive" conditions? The second question concerned the effects of the occurrence of a condition. Should they be retroactive or prospective – *ex tunc* or *ex nunc* in Latin? In many legal systems as well as in PECL the effects were not retroactive, while in others such as in France or in Italy they were retroactive. She felt that if the Principles were to adopt the first solution then they should also deal with so-called "extinctive conditions", i.e. resolutive conditions stipulated with respect to long-term contracts and the occurrence of

which would not affect the performances already rendered. The third and final question concerned the relationship between the rules on conditions and those already contained in the Principles on good faith in general and on inconsistent behaviour in particular. Did the latter suffice or was there a need to add more specific provisions as to how the parties must behave pending the condition and the consequences of a party's bad faith, such as preventing the occurrence of the condition if its non-occurrence was in that party's interest.

193. Crépeau thought that the topic of "conditions" should be dealt with together with that of "terms" because the two were clearly interrelated. As an example of a provision of the Principles dealing with terms he cited Art. 5.1.8.

194. Widmer expressed sympathy for Crépeau's suggestion.

195. Finn asked what the exact meaning of the term "terms" in this context was.

196. Fauvarque-Cosson insisted that in her opinion the basic difference between a condition and a term was that both were future events but only the first was uncertain.

197. Finn still had considerable doubts as to the advisability of dealing with "terms".

198. Concerning Art 5.1.8 Bonell dared to disagree with Crépeau, while in his view it was Arts. 6.1.1 et seq. as well as Art. 1.12 that already addressed most of the issues normally dealt with in our civil codes under the heading of "terms".

199. Crépeau basically agreed but insisted that he would prefer, for instance, the approach adopted by Fontaine in his draft prepared for OHADA where he had dealt with "terms" in a separate section.

200. Dessemontet too found that what was dealt with in Arts. 1508-1517 of the Civil Code of Québec under the heading "term" should be addressed specifically also by the Principles. As an example he quoted Art. 1514 stating that: "A debtor loses the benefit of the term if he becomes insolvent, is declared bankrupt, or, by his own act and without the consent of the creditor, reduces the security he has given to him. He also loses the benefit of the term if he fails to meet the conditions in consideration of which it was granted to him" or Art. 1510 according to which: "If an event that was considered certain does not occur, the obligation is exigible from the day on which the event normally should have occurred."

201. Fontaine agreed with Bonell that many questions normally dealt with in civil codes under the heading "terms" had already been addressed in Arts. 6.1.1 *et seq*. of the Principles. He therefore was not very much in favour of a separate chapter on "terms" in addition to that on "conditions", but did not exclude that one might consider adding somewhere provisions similar to Arts. 1510 and 1514 of the Civil Code of Québec.

202. Furmston insisted on the risk of using the term "terms" in this context since common law lawyers would inevitably understand it as referring to the terms of the contract.

203. Bonell, while agreeing that for the reasons indicated by Finn and Furmston the term "terms" should not be used in this context, thought that what was important to discuss was – at least so he understood Crépeau's intervention - whether there were issues dealt with in civil codes under this heading that needed to be addressed also by the Principles.

204. Widmer agreed and also referred to Fauvarque-Cosson according to whom sometimes it was rather difficult to distinguish between terms and conditions.

205. Bonell was not sure what Fauvarque-Cosson actually meant but drew attention to bullet point no. 5 in para. 29 of Doc. 99 where he had indicated some border-line cases and said he would like to hear comments on the issue.

206. Hartkamp, recalling that the new Dutch Civil Code no longer contained any of the detailed provisions on "terms" as the ones in the Civil Code of Québec, thought that there was no need for the Principles to deal with them either.

207. Fauvarque-Cosson agreed.

208. Fontaine too agreed in general, but insisted on the advisability of adding a provision – maybe in chapter 6 which already contained two other provisions on "terms", i.e. Arts. 6.1.1 and 6.1.5 – dealing with the cases where the obligor loses the benefit of the term. As a possible model he referred to Art. 6.6 of the OHADA draft Uniform Contract Act which had been inspired by Art. 1514 of the Civil Code of Québec.

209. Crépeau pointed out that the mere fact that a given terminology was known only in certain legal systems and not in others did not mean that the underlying problems were not equally known on both sides. He therefore strongly urged the Rapporteur on this chapter to give adequate consideration in the position paper he or she would prepare for the next session to the different meanings that the terms "condition" and "term" had in the various legal systems so that the Group could appreciate what the problems of real life behind these terms were.

210. Bonell was confident that the Rapporteur would follow this important suggestion. In this context he recalled that even within the common law systems there were differences in terminology: thus, what in English law are commonly called "conditions subsequent", in the terminology of the Restatement on Contracts are referred to as "events that terminate a duty".

211. Al Mulla pointed out that the notion of "terms" was quite important under the Sharia, since in the case of sales contracts with payment in cash the ownership of the goods passes immediately and the seller is not allowed to ask for a security, while this is possible if the sales contract provides that delivery is to take place within a certain term.

212. Goode, while entirely agreeing with those who had opposed dealing with "terms", went even further by questioning the very need to deal with "conditions". By stating, as for instance Art. 16:101 PECL did, that "A contractual obligation may be made conditional upon the occurrence of an uncertain future event, so that the obligation takes effect only if the event occurs or comes to an end if the event occurs", was this not just stating the obvious? In other words, would the provisions on contract interpretation contained in the Principles not be sufficient to cope with the issue?

213. Date-Bah agreed with Goode.

214. Widmer disagreed pointing out that - still taking the example of PECL – Art. 16:101 served only to introduce the subsequent two provisions that dealt with issues that were clearly not self-evident, such as interference with conditions and the effects of conditions.

215. Hartkamp entirely agreed with Widmer, especially with respect to the provision on interference which he thought was very important at least for those legal systems not necessarily familiar with the general principle of good faith.

216. Also according to Raeschke-Kessler Art. 16:102 addressed a very important issue as shown by the great number of arbitration cases in which it was the key issue.

217. Garro too was in favour of dealing with conditions in the Principles: the main purpose of the Principles was to provide suppletive or default rules for those cases in which the parties have not expressly provided otherwise, and there were many problems with conditional contracts which parties usually neglect. Furthermore, he insisted on the importance of better defining the terminology used, maybe not only among civil lawyers and common law lawyers, but even among the latter as shown by the special terminology used in the Restatement on Contracts.

218. Finn agreed with Widmer and Raeschke-Kessler on the importance of a provision like the one contained in Art. 16:102 PECL and this not only for practical, but also for pedagogical, reasons: he recalled that current Australian law was pretty much in accordance with the rule set out in that article, but felt that courts in his country would appreciate it if they were told that what they were doing right now was just a specification of the general principle of good faith and as such in conformity with internationally accepted standards.

219. Uchida also supported the idea of having a provision along the lines of Art. 16:102 PECL dealing with good faith and conditions, but wondered whether with respect to the effects of unfair interference one should not distinguish between conditions with high probability of occurrence and conditions with low probability of occurrence. In the latter case he thought one might perhaps adopt a less radical solution, e.g. by granting only partial compensation for the losses caused by the party acting unfairly.

220. Fauvarque-Cosson agreed. She too had difficulties in understanding Art. 16:102 (1) PECL according to which in case of undue interference “the condition is deemed to be fulfilled”. Did this mean that the contract was then considered to be effective so that there would be available the remedy of specific performance? Or did it mean that only the right to damages was granted? She thought that the Principles should go further than simply stating that in case of undue interference “the condition is deemed to be fulfilled” and give more precise indications as to the consequences of undue interference. Furthermore, what about the case where one party promises to make best efforts to get an authorisation for the export of goods, but the authorisation is refused because that party failed to make best efforts to obtain it?

221. Hartkamp had intended to address this issue later on when discussing the question raised in Doc. 99 in the last bullet point of para. 29, but since Fauvarque-Cosson had hinted at it he would make his comment now. He too thought that the rule in Art. 16:102 was very important but it should be made clear that it applied only to contractually stipulated conditions and not to conditions imposed by law, e.g. the granting of public permissions. The latter kind of conditions should not be dealt with at all in the chapter on conditions; after all the most practical aspects of public permission requirements were already covered by Art. 6.1.14 and following.

222. Goode thought that any solution along the lines of Art. 16:102 (1) PECL would have to be very carefully considered. It certainly did not represent English law. There was a

case in England of a FOB sales contract requiring the buyer to give the seller notice of appropriation so that the seller could make arrangements for loading the goods on board of the vessel. The buyer failed to give notice of appropriation and the seller did not deliver the goods but nevertheless tried to recover the price. The court rightly rejected its claim and only granted damages for breach of contract. Indeed, one could hardly argue that the notice of appropriation by the buyer was a condition for the delivery of the goods by the seller so that if the buyer failed to give such notice the condition would be deemed to be fulfilled under Art. 16:102 (1) with the consequence that the seller was entitled to the payment of the price even if the goods had not been delivered. The only remedy the seller had in such a case was clearly damages for breach of contract by the buyer.

223. Bonell agreed with Goode and drew attention to bullet point no. 5 in para. 29 of Doc. 99 referring to a similar case and pointed out that it did not concern a condition in a strict sense.

224. Furmston found Goode's example very interesting. In his view in this case it was really a matter of order of performance – who had to do what and in what order – which nowadays English lawyers discuss in terms of conditions in the sense that they consider the seller's duty to load the goods conditional on the buyer's giving notice of appropriation. Yet this was further indication as to the importance of exactly defining the notion of "conditions" in the present context which clearly had nothing to do with order of performance.

225. Gabriel also supported the inclusion of a provision such as Art. 16:102. It was absolutely in accordance with U.S. law but he thought it would be important to have it expressly stated for educational purposes.

226. Hartkamp agreed on the great variety of meanings attached to the term "conditions", and this was the case not only within common law systems but also within civil law systems where historically also breach of contract or the *clausula rebus sic stantibus* or hardship were considered as conditions. Hence the necessity of a precise definition of the notion of "conditions" in the context of the Principles.

227. Lando confessed that, while he had originally been rather hesitant to include special provisions on conditions, in the light of the discussions he now had come to the conclusion that such provisions were needed in order to avoid misunderstandings and confusion with other situations.

228. Al Mulla recalled that there were even further examples of conditions, such as formal requirements of the contract imposed by the law or by the parties themselves, which ought to be distinguished from the "conditions" under discussion in the present context.

229. In closing the discussion on this point Bonell stressed the necessity of a clear definition of the notion of "conditions" if possible in the black letter rules themselves and of a succinct but exhaustive reference in the comments to the great variety of different meanings that same notion might have in the various legal systems. He then solicited further comments on the issue raised in the last two bullet points of para. 29, already addressed by Hartkamp, i.e. whether the envisaged chapter on conditions should also deal with conditions implied by courts or imposed by law.

230. Date-Bah feared that the notion of "conditions implied by courts" might be yet another source of confusion since in common law "implied conditions" as opposed to "implied warranties" were something completely different.

231. Goode agreed with Hartkamp's remarks concerning conditions imposed by law: after all, their legal consequences would presumably be specified by the law imposing them.

232. Lando agreed.

233. Dessemontet, while fully agreeing with the previous speakers with respect to conditions implied by courts or by law, wanted to raise the issue of so-called potestative conditions. He thought that they should be expressly mentioned in the comments explaining that the occurrence of conditions might depend entirely or at least partially on the will of one party.

234. Bonell recalled that the Italian Civil Code contained an express provision (Art. 1355) stating that where the occurrence of the condition is entirely dependent on the will of the obligor, the obligation in question is null and void.

235. Fauvarque-Cosson confirmed that the notion of *condition potestative* was known in French law too but had been deliberately left out of the recent *avant-projet* of reform of the French law of obligations for reasons of simplicity.

236. Hartkamp entirely agreed with Fauvarque-Cosson. The whole concept of potestative condition was relevant only with respect to unilateral obligations insofar as there was no obligation until the moment the obligor said "I want to give it to you". On the contrary, in the context of a contract the potestative condition was entirely normal because every option provided by it was a potestative condition. Therefore there was absolutely no need to deal with this issue in the chapter under discussion.

237. Bonell noted that Hartkamp's conclusions on this point were generally shared which basically left only one important question for discussion, i.e. the retroactive effect or the prospective effect of the occurrence of conditions.

238. Hartkamp, after pointing out that the question of retroactive effect was of most practical importance in the case of a resolutive condition, recalled that there was a trend in modern contract law towards abolishing the concept of retroactivity. The Principles themselves had taken this approach, for instance with respect to termination of contract for breach and set-off, and probably the same would be the case also with respect to termination of long-term contracts for good cause. He therefore thought that also with respect to conditions the concept of retroactivity should be abandoned: after all the practical consequences of the occurrence of a resolutive conditions could be settled in a satisfactory manner even without retroactivity, for instance by appropriate rules on restitution.

239. Widmer agreed in principle with Hartkamp but thought that the Principles should expressly state that parties might provide otherwise.

240. Also Dessemontet agreed in general with Hartkamp. However he thought there were cases where even in the absence of an express agreement between the parties a more flexible approach was needed. He gave the example of a contract stating that its validity was subject to the resolutive condition that it was not contrary to such and such mandatory requirements imposed by the applicable law. If subsequently it turned out that the contract, though in conformity with the law of country A which was the law governing the contract, was contrary to the law of country B which for other reasons had to be taken into account, the appropriate solution might well be restitution rather then just an effect *ex nunc*. He

therefore suggested adopting the solution recommended by Hartkamp but adding "unless circumstances indicate otherwise".

241. Bonell recalled that a similar proviso was mentioned also in a number of other provisions of the Principles.

242. Furmston found it all difficult to understand. He made the following case: A makes a contract with B for the sale of his car for £10,000 subject to the condition that the contract would come to an end if England won the world cup. A delivers B the car and B pays A £10000. What happens if England wins the world cup?

243. For Hartkamp the answer was clear: the contract comes to an end and B would have to return the car to A and A would have to return the price to B.

244. Furmston agreed but found that this was precisely retroactivity.

245. Hartkamp disagreed with Furmston's conclusion on the ground that in the meantime the contract had existed so that notwithstanding the occurrence of the resolutive condition only restitutionary remedies would be available.

246. According to Goode the granting of a restitutionary remedy had nothing to do with retroactivity or non-retroactivity.

247. Hartkamp agreed that this was the case as far as the two parties were concerned. Indeed retroactivity normally affected only third party rights.

248. According to Bonell retroactivity or non-retroactivity might affect even the rights of the parties, for instance in the example given by Furmston with respect to the benefits the buyer might have had in using the car in the interim or the deterioration of the car as a consequence of having been used.

249. Goode, admitting that there was no condition involved, gave the example of a leasing contract terminated by the lessor for a breach by the lessee. Why should the lessor have to give back the rentals he has received? He insisted that restitution had nothing to do with retroactivity or non-retroactivity: it all depended on the circumstances of the case. For that reason he suggested that the Rapporteur, whatever formulation he/she might come up with, test it against as wide a variety of fact situations as possible. He was sure that in some cases Hartkamp's solution would be right and in other cases it would not work.

250. Bonell closed the discussion on this point taking note that there was general consensus that the non-retroactive effect of the occurrence of conditions should be the rule but there should be room for exceptions depending on the circumstances of the case.

251. Fauvarque-Cosson still had a couple of questions. The first concerned unilateral promises: should the envisaged rules on conditions apply by analogy also to unilateral promises? In PECL the situation was clear since Art. 1:107 stated that they applied by analogy also to unilateral promises. What about the Principles? The second question concerned conditions with no time-limits specified. For instance, A sells B its business and the contract is subject to the condition that B obtains a loan but makes no mention of a time limit for obtaining the loan. Should the Principles address the issue?

252. With respect to the first question Bonell noted that, while unilateral promises were not formally covered by the Principles, he would not exclude that some of the provisions of the Principles might apply by analogy.

253. Furmston was surprised by Bonell's statement since he took it for granted that unilateral promises were contractually binding.

254. Hartkamp pointed out that while in some legal systems a unilateral promise was considered a contract where only one party assumed an obligation, in others it would be considered a unilateral declaration of intent by one party to the other party that might or might not be binding. The latter approach was for instance that of PECL, but he thought that because of these considerable conceptual difficulties it was a wise decision not to deal expressly with the issue in the Principles.

255. Furmston, while observing that he did not remember any discussion on this issue by the Group in the past, asked whether there was any doubt that for instance the promise by a bank to pay a certain amount against the presentation of certain documents amounted to a contract.

256. Goode thought that it all depended on the context. If Furmston was thinking of a documentary credit situation, then the bank's promise was certainly binding independently of whether or not it was considered a contract as in English law or a unilateral undertaking as in other legal systems including that of the United States. On the other hand, if Bank A says to Customer C "we are willing to lend you money provided we have a guarantee from a third party" and Guarantor G says to A "if you advance the money to C I will guarantee repayment", there was no obligation on the part of A while G's obligation was subject to the condition that A made the advancement of money to C.

257. Finn wondered whether in view of the differences of opinion on the issue of unilateral promises it would be a good idea to mention in the Comments to Art. 1.6 that unilateral promises are within the scope of the Principles so that one might refer to the principles underlying the Principles to settle any question relating to them.

258. According to Al Mulla a distinction should be made between a contract that binds only one party and a promise to enter into a contract with somebody else. The latter case could arise in the course of negotiations and it would then be a question of interpretation whether the promise would be binding or not.

259. Turning to Fauvarque-Cosson's second question Bonell thought that in the case she had indicated one could imply that the condition had to occur within "a reasonable time": if this was agreeable he wondered whether such a solution would already follow the general provision contained in the Principles without the need of a specific provision in the chapter on conditions.

260. Lando agreed and referred in particular to the general principle of good faith (Art. 1.7) and the provision on time of performance (Art. 6.1.1).

261. Dessemontet pointed out that in practice in cases of conditions with no indication of a time limit the problem was not only one of fixing a time limit within which they ought to occur, but also one of determining the moment of commencement of the running of such time limit. He suggested that both problems be mentioned in the comments and with respect to the second problem a reference to Art. 10.2 might be appropriate.

262. Hartkamp agreed and suggested mention be made in this context also of Art. 6.1.16 which, with respect to the granting or non granting of public permissions, refers to "a reasonable time from the conclusion of the contract".

263. It was so agreed.

264. In closing the discussion on the topic of conditions Bonell asked Fauvarque-Cosson whether she would be prepared to act as the Rapporteur. Fauvarque-Cosson agreed. Bonell, speaking also on behalf of the entire Group, thanked Fauvarque-Cosson for accepting this difficult task. Though being a newcomer in the Group, she would certainly provide an excellent basis for further discussion on the topic of conditions.

(e) Termination of long-term contracts for cause

265. Bonell, recalling that the topic had been originally proposed by Dessemontet and had received wide support within the Governing Council which had included it in the list of the five priority items to be dealt with by the Working Group, asked Dessemontet briefly to introduce it.

266. Dessemontet recalled that the Institute for Business Law of the University of Lausanne had under his direction conducted two basic research projects in the area of long-term contracts resulting in two publications – the first in 1987 on bilateral contracts such as dealership agreements, licensing agreements, etc. and the second in 2006 on multipartite agreements such as partnerships in general, partnerships for construction projects, etc. The studies have amply shown that one of the most important problems concerning long-term contracts was precisely termination for cause. In his opinion the questions to be addressed were basically three. First, since the remedy in question was clearly an exception to the principle of *pacta sunt servanda*, when should it be granted? His answer was: only in very exceptional cases to be defined as precisely as possible. Second, even if only in such exceptional circumstances, was it justified to grant a party the right to terminate the contract with immediate effect? His answer was: yes because the exceptional circumstances that justify such an extraordinary remedy by their very nature impose an immediate putting an end to the contract. For instance, if the licensor of highly sensitive technology learns that the licensee has been taken over by one of the licensor's competitors, it should be entitled not only to terminate the licensing agreement for cause but also to terminate it with immediate effect. Third, when, in case of termination of the contract for cause by one party, should the other party be entitled to some monetary compensation? His answer was: whenever the extraordinary circumstances invoked by the first party as a good cause for termination lay within that same party's sphere of risk.

267. Bonell thanked Dessemeontet for this very useful introduction.

268. Fontaine thought that the topic was of great practical importance and should definitely be dealt with in the Principles. He recommended however to avoid using the term "cause" in this context: "cause" had a very distinct connotation in a number of legal systems and in order to avoid any confusion it would be much better to use other equivalent expressions such as "serious grounds" or "serious reasons".

269. Bonell thanked Fontaine for this reminder and thought that perhaps even the term “termination” was misleading and should therefore be replaced by a different, more neutral expression.

270. Gabriel, though admitting that the proposed topic was an extremely important area in contemporary contracting, expressed some doubts as to the feasibility of dealing with it in the Principles. Since the subject matter was by its very nature based on extremely complex factual patterns and equities, he was afraid that it would be impossible to elaborate sufficiently clear-cut rules covering the great variety of fact situations to be covered.

271. Goode asked for clarification of what was meant by long-term contracts in the present context. Contracts might be long-term because their duration was fixed for say 10 or 15 or 20 years, or because they were intended to give raise to an on-going relationship of indefinite duration. Since for the latter kind of contracts the Principles already provided for the possibility of termination on reasonable notice, was it intended to lay down different rules for the former kind of long-term contracts?

272. Dessemontet explained that the kind of long-term contracts he had in mind were those contracts, such as distributorship agreements, licensing agreements, franchises, etc., performances of which were repeated over a period of time, while the mere fact that the performance of one of the parties extended over a certain period of time, e.g. in construction contracts, was irrelevant. Perhaps the notion of “relational contracts” was more appropriate in the present context.

273. Goode agreed.

274. Finn first of all wondered whether it was advisable to deal with relational contracts in the Principles not in a systematic manner but addressing only a very specific and exceptional aspect of this kind of contracts, i.e. termination for good reason. He furthermore thought that the problems indicated by Dessemontet were in practice often regulated by express terms of the contract or could in most cases also be disposed of by mere interpretation of the contract according to the general principle of good faith. Finally, he wanted to know what was the relationship between termination for good reason in general and termination for convenience as typically known in government contracts.

275. Bonell found Finn’s intervention extremely stimulating, but wondered whether recourse to general principles such as good faith already laid down in the Principles would really provide a satisfactory solution in all cases envisaged by Dessemontet. As an example he cited the recent ICC arbitration in the Arthur Andersen case: the various Andersen Member Firms operating around the world had entered into an umbrella agreement for an indefinite period which imposed on them, in addition to specific obligations, a general duty to cooperate in the interest of the group; there were express provisions on termination for breach as well as on termination on reasonable notice; the contract also contained a reference to “general principles of equity” as a gap-filler; yet when the dispute arose between the Andersen consulting firms and the Andersen auditing firms the arbitral tribunal, after finding that the fiduciary relationship on which the umbrella agreement was based was irreparably destroyed, had considerable difficulty in justifying on the basis of the sole terms of the contract the remedy it thought most appropriate under the circumstances of the case, i.e. the termination of the agreement with immediate effects and with only some form of compensation.

276. Widmer reiterated his support for this topic already declared in the Governing Council. He found Gabriel's intervention very interesting and thought that the equity elements Gabriel had referred to had their counterpart in the general principle of good faith in the civil law systems. In other words, there might be situations where it would be beyond any reasonable expectation of the parties that their relationship continue, but the Principles should expressly address such cases.

277. Chappuis too was in favour of dealing with the topic in the Principles and recalled the recent work of the *Groupe de travail contrats internationaux* on termination clauses and on clauses dealing with post-contractual obligations or the effects of termination currently used in international contract practice. The analysis of the great number of clauses examined by the Group amply showed that the parties normally considered it necessary to address specifically the possibility of terminating the contract for good cause without advance notice. Also the ICC model contracts on agency, distributorship and franchising contain specific provisions not only on termination for breach but also on termination with immediate effects for exceptional circumstances such as bankruptcy or change of control.

278. Bonell recalled that the topic had been recently specifically addressed also by the German legislator who on the occasion of the reform of the law of obligations included a new provision in the Civil Code (§ 314: "*Kündignung von Dauerschuldverhältnissen aus wichtigem Grund*") which was pretty much along the lines suggested by Dessemontet.

279. Crépeau pointed out that in his opinion to admit, even though only in exceptional circumstances, termination without advance notice and compensatory indemnification would be contrary to good faith which was a basic principle of the Principles.

280. Schiavoni agreed and added that in his opinion no court in any civil law system would ever grant the remedy of termination of the contract without advance notice.

281. Bonell thought there might be a misunderstanding and wondered whether one should avoid speaking in the present context of "termination" and instead use neutral terms such as "dissolution" or "cancellation" so as to make it clear that the remedy under discussion had nothing to do with the ordinary remedy of termination for non-performance. Nor in his view should "dissolution" or "cancellation" for good cause be confused with the right Art. 5.1.8 of the Principles grants parties to a contract for an indefinite period to end the contract for whatever reason by giving notice a reasonable time in advance. The remedy at present under consideration rather resembled the one recently introduced in the German Civil Code with respect to long-term contracts in general (§ 314) or the ones traditionally known with respect to specific types of relational contracts such as partnerships: as an example he cited Art. 2272 of the Italian Civil Code according to which a partnership is dissolved or cancelled ("*sciolta*") not only for the reasons expressly indicated in the contract or where the partnership's objectives have been completely fulfilled, but also where, due to supervening circumstances, including irresolvable conflicts between the partners, the originally intended purposes of the partnership can no longer be achieved.

282. Hartkamp confessed that so far he had not yet made up his mind with respect to the topic under consideration. At first sight he saw the risk of a kind of overlapping between the remedy proposed by Dessemontet and hardship – *rectius*: the parties' right to ask the court to terminate or modify the contract for supervening hardship.

283. Fontaine, while sharing to some extent Hartkamp's concern, recalled that in international contract practice the so-called hardship clauses normally had a much wider

scope than the provisions on hardship contained in the Principles, i.e. they were not restricted to a fundamental change in the original contractual equilibrium but also included the kind of circumstances at present under discussion, i.e. where for whatever supervening reasons it was no longer possible to achieve the original objectives of the contract so that the only way out was the immediate dissolution or cancellation of the contract. If the scope of the provisions on hardship contained in the Principles was equally broad, in his view there would be no need for an additional remedy of the kind proposed by Dessemontet. Yet since the notion of hardship as adopted by the Principles was restricted to *eccessiva onerosità* or *imprévision* or disbalance, there might well be room for such a remedy whose scope however should be very precisely defined so as to avoid overlapping with the section on hardship.

284. Bonell recalled that in the German Civil Code the provisions on hardship (§ 313: "*Störung der Geschäftsgrundlage*") immediately preceded the already mentioned provision on dissolution for just cause and the two provisions differed both as to their scope and the remedy they provided: hardship was defined as a situation where due to supervening circumstances a party could no longer reasonably be expected to perform the contract in its original terms, while the "just cause" situation was defined as one where a party could no longer reasonably be expected to be bound by the contract; consistent with these premises, the remedy provided for hardship was basically contract adaptation, while the remedy in the other situation was dissolution or cancellation of the contract.

285. Uchida shared the concern expressed by Crépeau. In his view the circumstances that should give rise to the remedy of termination for good cause without notice had already been adequately taken care of by the duty of re-negotiation in accordance with Art. 6.2.3 of the Principles.

286. Lando on the contrary strongly supported the idea of adding the special remedy of termination – *rectius*: ending – of long-term contracts for cause without notice in advance. There were cases – and the Andersen case mentioned by Bonell was a good example – where due to supervening circumstances the fiduciary relationship on which relational contracts by their very nature are based was irremediably destroyed and where the only appropriate remedy was the ending of the contract with immediate effects. He found § 314 of the German Civil Code a very useful point of reference for the solution to be adopted in the Principles, with the only reservation of better clarifying the relationship between the ending of the contract for good cause and termination for breach.

287. Furmston first of all agreed that relational contracts posed special problems that might require special rules and was therefore in principle in favour of dealing with the topic under consideration. However, he had some reservations concerning the approach so far suggested. In his opinion with respect to indefinite long-term contracts Art. 5.1.8 already provided a satisfactory remedy also in the cases at present discussed, so that the problem ultimately concerned only long-term contracts with a fixed duration. Though admitting that there might be extraordinary circumstances where it would be fair to allow termination also of fixed long-term contracts, he felt that those circumstances had to be very narrowly defined; furthermore, termination without giving notice a reasonable time in advance should not be permitted.

288. Gabriel, though finding the discussion extremely interesting, still had considerable difficulty in understanding why the remedies already provided in the Principles – in particular in Arts. 5.1.8 and 6.2.2-6.2.3 – would not suffice to settle in a satisfactory manner also the kind of situations under discussion.

289. Also Schiavoni reiterated the objections he had already raised earlier on: in his view one could even argue that an arbitral award putting an end to a contract at the request of one of the parties without there being a breach by the other party(ies) nor its/their consent would be considered at least in Europe contrary to public policy and therefore could not be enforced in any jurisdiction. And anyhow: if one of the parties was allowed to terminate the contract with immediate effects, what safeguards were provided for the other party(ies) in order to avoid abuses?

290. Finn recalled that in common law systems there actually existed something similar to what was under consideration here: it was known as "just and equitable ground of winding up companies" and concerned the case where the purpose of a company had disappeared because for one reason or another the parties were simply deadlocked and could no longer cooperate while cooperation was a central part of their relationship. Yet it required a court order which could be considered as a sort of safeguard because the court would order the winding up of the company only where it was convinced that under the circumstances it was just and equitable to do so. In his view, if the Principles were going to provide a remedy of the kind suggested by Dessemontet and others, it should be made clear that it would be granted only where the following requirements were met: first, there was a significant change in the assumptions upon which the contract was based; second, neither party has assumed the risk of that change; third, the party requesting termination has to justify it if it was called into question by the other party(ies), i.e. to prove that it was just and equitable in the circumstances to dissolve the contract with immediate effects.

291. Bonell thought that Schiavoni's and Finn's remarks concerning the necessity of some safeguards against possible abuses of the remedy of termination or dissolution of the contract for good cause were very useful. He thought that the Principles could also in this respect require a court intervention as they already did in Art. 6.2.3 with respect to termination or adaptation of the contract for hardship.

292. Zhang expressed some doubts as to the precise nature and the scope of the envisaged remedy of termination for good cause. What exactly were the differences between this kind of termination and termination for breach, for hardship, by mutual agreement between the parties, for the occurrence of resolutive conditions, etc.? And why should termination without notice in advance be granted in this case? Finally, while he could accept such a remedy with respect to some kinds of contracts, he was rather reluctant to admit it in general, with respect to all kinds of long-term contracts however defined.

293. Mattiaccio warned against the risk of excessive generalization. In the United States the single States of the Union took quite different views as to which party to what kind of long-term contracts deserved stronger protection than others: in the State of New York maybe the automotive dealers, in the State of Wisconsin the agricultural equipment dealers and so forth. If these strong local lobby groups exceptionally were entering into contracts with a foreign manufacturer subjected – why not – to the Principles, a provision in the Principles allowing the foreign partner to terminate the contract for good cause with immediate effects would be considered against the respective State's public policy with the consequence that the Principles would be practically banned.

294. Lando quoted § 314 (1) of the German Civil Code according to which "Either party may terminate a contract for the performance of a recurring obligation on notice with immediate effect if there is just cause for doing so. There is a just cause if, having regard to all the circumstances of the specific case and balancing the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship

until the agreed termination date or until the end of a notice period." He insisted in indicating this provision as a model for the Principles.

295. Garro found the discussion extremely interesting but confessed he still had some doubts. What was being proposed here was yet another departure from the general principle *pacta sunt servanda*. He recalled that in the United States one of the provisions of the Principles that met with most criticism was the one on hardship and it was easy to foresee what the reaction would be if in addition to hardship the Principles were to go even further by allowing termination of a contract for unspecified "extraordinary" circumstances and this without advance notice and also where the contract had a fixed duration. Such a provision would certainly be considered as inadmissibly undermining certainty and reliability in business relationships and could therefore seriously prejudice the acceptance of the Principles in practice. On the other hand he admitted that actual life was always different from theory and he was very impressed in hearing Chappuis' examples of contract clauses taken from actual practice as well as the new provision included in the German Civil Code. Even common law lawyers were likely to reach a just, fair result in those extraordinary situations where even with respect to a fixed long-term contract the court was convinced that the situation could not go on. In his opinion the first thing to do was better to define the kinds of contracts they were talking about, and in this respect he thought the most relevant factor was not so much the duration but the fiduciary element involved. Secondly, the issue of notice should be addressed clarifying of course that the party invoking the supervening exceptional circumstances that rendered the contract no longer possible has to give notice thereof to the other party(ies) but that such notice does not have to be given in good time in advance. Thirdly, as Finn already had pointed out, it should be made clear that the supervening circumstances did not fall within the sphere of risk of the party invoking them. Finally, the available remedies should be discussed. He thought that in addition to putting an end to the contract – in this respect he agreed with Bonell that instead of "termination" a different term should be used so as to avoid any confusion with termination for breach – alternative solutions should be envisaged such as renegotiation and adaptation, always on the understanding that it would be up to the court to make the final decision in the light of the circumstances of the case. Obviously there was a clear parallelism with the provisions on hardship and it was absolutely necessary to avoid overlapping.

296. Concerning Garro's last point, Bonell wondered whether the circumstances allowing termination for just cause and hardship could really be confused. He understood that the former were situations where the contract had come to a point of no return, i.e. the fiduciary relationship between the parties was irremediably compromised so that there was no other way out than to declare formally the end of the contract.

297. Date-Bah, though agreeing with Bonell that the two situations were substantially different, still thought that in the one at present under discussion the remedy available should be not only termination but also re-negotiation and adjustment.

298. Crépeau confessed that after reading the whole of § 314 of the German Civil Code he was much more convinced of the advisability of having a similar provision also in the Principles. While looking forward to discussing the position paper to be prepared by the Rapporteur on the subject he recommended taking the German approach as a model and agreed with the emphasis put in Doc. 99, para. 30 on "relational" or "symbiotic" contracts rather than on long-term contracts *tout court*.

299. Gabriel on the contrary, though appreciating the language of § 314 of the German Civil Code, had considerable reservations about the idea of having a similar provision in the

Principles. He found the very notion of "just cause" as a ground for immediate termination far too vague and feared that it would at least in his country give rise to an inflation of frivolous law suits. He was almost certain that if the Principles contained such a provision hardly any major law firm would recommend their clients to use them – a result that should definitely be avoided.

300. Fauvarque-Casson, like Crépeau, was very impressed by the precedent of § 314 of the German Civil Code but urged great caution in defining the scope of the new provision.

301. Also in Fontaine's experience the Principles' provisions on hardship were, if not the only ones, certainly the ones that had been most heavily criticised by practitioners on the ground that they caused considerable uncertainty. He therefore urged greatest caution in dealing with the topic and was in any case against termination with immediate effects.

302. Hartkamp asked Gabriel better to explain what his exact concerns were with respect to a provision such as § 314 of the German Civil Code: the notion of "just cause"? The right of one party to terminate the contract? Or termination with immediate effect?

303. Gabriel insisted that it was the notion of "just cause": it was open-ended and in his view absolutely too vague.

304. Lando cited the precedent of the "unconscionability" provision in the Uniform Commercial Code which was likewise very broad but had so far, as far as he understood, not given rise to excessive litigation in the United States.

305. Gabriel replied recalling the fierce opposition by certain industry lobbying groups to both the unconscionability and the good faith provisions on the occasion of the recent revision of Articles 1 and 2 of the Uniform Commercial Code.

306. In closing the discussion on this topic Bonell thanked all those who had intervened for their most valuable contributions. There clearly was a general interest in the topic under consideration and everybody had expressed the hope that the Rapporteur would prepare for the Group's next session a position paper and perhaps even a first preliminary draft that would certainly be of great help in their further discussion on this topic. It had been suggested to focus in particular on the scope of the suggested remedy, i.e. the kind of contracts concerned on the understanding that the notion of "long-term" contracts with no further qualification was too vague. Furthermore, what exactly was meant by "termination" in this context? Termination by mere declaration of one party and always without advance notice? Or should a court intervention be necessary? And what exactly were the circumstances justifying the granting of such an exceptional remedy? Finally, was termination the only remedy or should also alternative solutions be envisaged such as re-negotiation and adaptation? It was generally felt that § 314 of the German Civil Code was a very useful term of reference, and that regard should be had not only to the general provision contained in para. 1 but also to the other three paragraphs which addressed, among others, the case where the "just cause" invoked by one party was a breach of the contract by the other party, or the relationship between termination for just cause and damages.

307. Bonell asked Dessemontet whether he would be prepared to act as Rapporteur on this very difficult topic. Dessemontet agreed and Bonell thanked him for his cooperation which was all the more to be appreciated as he had volunteered in his capacity of Observer.

Bonell was absolutely confident that Dessemontet would perform his task in his usual brilliant and intellectually stimulating manner.

III. FUTURE WORK

308. Bonell announced that the next session would take place again in Rome and suggested as the date 4 to 8 June 2007. The session would be devoted to an in depth examination of the position papers and preliminary drafts concerning the five new topics. He invited the Rapporteurs to submit their papers as soon as possible and in any case in time to permit their circulation among all Members and Observers well in advance of the next session.

309. It was so agreed.

310. In closing the session Bonell wholeheartedly thanked all the Members and Observers of the Group for their constructive cooperation and outstanding contribution to the discussion. He felt that the session had been very successful – yet another exciting experience in the ongoing, fascinating project of the Principles – 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)

1st session, Rome, 29 May – 1 June 2006

LIST OF PARTICIPANTS

MEMBERS

Mr Guido ALPA	Professor of Law University of Rome I "La Sapienza" Rome, Italy alpa@alpa-galletto.it
Mr M. Joachim BONELL (Chairman)	Professor of Law University of Rome I "La Sapienza" Consultant UNIDROIT Rome, Italy mj.bonell@unidroit.org
Mr Paul-André CRÉPEAU	Professor of Law McGill University Montreal, Canada paul.crepeau@mcgill.ca
Mr Samuel Kofi DATE-BAH	Justice of the Supreme Court of Ghana Accra, Ghana kofi_date_bah@hotmail.com
Ms Bénédicte FAUVARQUE-COSSON	Professor of Law Université Panthéon-Assas Paris II Paris, France b.fauvarquecosson@wanadoo.fr
Mr Paul FINN	Judge of the Federal Court of Australia Common Law Courts Adelaide, Australia paul.finn@fedcourt.gov.au
Mr Marcel FONTAINE	Professor of Law Catholic University of Louvain Law School Louvain-la-Neuve, Belgium marcfontaine@skynet.be
Mr Michael Philip FURMSTON	Professor of Law Faculty of Law, University of Bristol Bristol, United Kingdom michaelfurmston@hotmail.com

Mr Henry D. GABRIEL	DeVan Daggett Professor of Law Loyola University New Orleans School of Law New Orleans, United States of America Member of the UNIDROIT Governing Council gabriel@loyno.edu
Sir Roy GOODE	Professor of Law University of Oxford Oxford,United Kingdom Honorary Member of the UNIDROIT Governing Council roy.goode@sjc.ox.ac.uk
Mr Arthur S. HARTKAMP	Professor of Law Radboud Universiteit Nijmegen Faculteit der Rechtsgeleerdheid Nijmegen,The Netherlands Former Procureur-Général at the Supreme Court of the Netherlands Member of the UNIDROIT Governing Council a.hartkamp@jur.ru.nl
Mr Alexander KOMAROV	Professor of Law Head of Private Law Department Russian Academy of Foreign Trade Moscow, Russian Federation Member of the UNIDROIT Governing Council aleksandr_komarov@vavt.ru
Mr Ole LANDO	Professor of Law Holte, Denmark Chairman of the Commission on European Contract Law ol.jur@cbs.dk
Mr Takashi UCHIDA	Professor of Law Faculty of Law, University of Tokyo Tokyo, Japan uchida@j.u-tokyo.ac.jp
Mr João Baptista VILLELA	Professor of Law Universidade Federal de Minas Gerais Belo Horizonte, Brazil villelaw@gold.com.br
Mr Pierre WIDMER	Professor of Law Former Director of the Swiss Institute of Comparative Law Lausanne, Switzerland Member of the UNIDROIT Governing Council pierrewi@bluewin.ch
Mr ZHANG Yuqing	Professor of Law Beijing Zhang Yuqing Law Firm Beijing, People's Republic of China Member of the UNIDROIT Governing Counci yqzhanglaw@yahoo.com.cn
Mr Reinhard ZIMMERMANN	Professor of Law Director, Max-Plank-Institut für ausländisches und internationales Privatrecht Hamburg, Germany r.zimmermann@mpipriv-hh.mpg.de

OBSERVERS

Mr Ibrahim AL MULLA	Director Emirates International Law Center Dubai, United Arab Emirates Emirates International Law Center advocate@emirates.net.ae
Ms Christine CHAPPUIS	Professor of Law Faculty of Law University of Geneva Geneva, Switzerland *Group de Travail Contrats Internationaux* Christine.Chappuis@droit.unige.ch
Mr François DESSEMONTET	Professor of Law Faculty of Law, University of Lausanne Lausanne, Switzerland Swiss Arbitration Association Francois.Dessemontet@unil.ch
Mr Alejandro M. GARRO	Professor of Law Columbia Law School New York, United States of America New York City Bar garro@law.columbia.edu
Mr Emmanuel JOLIVET	General Counsel ICC International Court of Arbitration Paris, France ICC International Court of Arbitration ejt@iccwbo.org
Mr Richard MATTIACCIO	Attorney, Pavia & Harcourt LLP New York, NY, United States of America American Arbitration Association rmattiaccio@pavialaw.com
Mr Hilmar RAESCHKE–KESSLER	Rechtsanwalt beim Bundesgerichtshof Ettlingen bei Karlsruhe, Germany German Arbitration Institution hrk@raeschke-kessler.de
Mr Giorgio SCHIAVONI	Vice President Chamber of National and International Arbitration of Milan, Italy Chamber of National and International Arbitration of Milan G.SCHIAVONI@iol.it
Mr Jeremy SHARPE	Attorney White and Case LLP Washington, D.C., United States of America Institute for Transnational Arbitration of the Center for American and International Law jsharpe@whitecase.com

Mr Matthew SILLETT	Deputy Registrar London Court of International Arbitration London, United Kingdom London Court of International Arbitration ms@lcia.org
Mr Renaud SORIEUL	Principal Officer Head, Legislative Branch International Trade Law Division, Office of Legal Affairs United Nations Commission on International Trade Law (UNCITRAL) Vienna International Center Vienna, Austria United Nations Commission on International Trade Law (UNCITRAL) renaud.sorieul@uncitral.org

UNIDROIT

Mr Herbert KRONKE	Professor of Law Secretary-General
Ms Alessandra ZANOBETTI	Professor of Law Deputy Secretary-General
Ms Paula Howarth	Senior Officer Secretary to the Working Group