A "RESTATEMENT" OF PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: AN ACADEMIC EXERCISE OR A PRACTICAL NEED?

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SUMMARY: I. *The idea of elaborating principles for international contracts in general;* a. *Purpose of the principles;* b. *Scope of the principles;* c. *The binding force of the principles;* d. *The working method.* II. *The present state of work of the project;* a. *Chapter I: General provisions;* b. *Chapter II: Formation;* c. *Chapter III: Interpretation;* d. *Chapter IV: Mistake, fraud, threat and gross disparaty;* e. *Chapter V: Performance;* f. *Chapter VI: Non-performance.* III. *Final considerations.*

In his capacity as a Member of the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) Jorge Barrera Graf has strongly supported the project for the preparation of Principles for international commercial contracts in the form of a sort of restatement ever since the idea of such a project was first launched in 1971, and has repeatedly made most valuable contributions to its realization both in terms of constructive criticism of the various drafts which in the course of these years have been prepared, and of suggesting possible approaches to be followed in the project as a whole. The present Essays offered in his honour provide a welcome opportunity to illustrate in more detail the purposes underlying the project, as well as to give an overall view of the present state of work. This in the hope that those who actively participate in carrying out the project will for a long time to come be in the fortunate position to rely on Professor Barrera Graf's advice and encouragement.

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I. The idea of elaborating principles for international contracts in general

a. *Purpose of the Principles*

Efforts towards the unification, or at least the harmonisation, of different national laws have hitherto rather been concentrated on specific subjects, such as the international sale of goods, negotiable instruments, the various modes of transport, intellectual property, etc. Such an approach has so far undoubtedly produced some considerable results but, as has correctly been pointed out by René David,[1] "the limited nature of unification poses the problem of how to use national rules and techniques which have escaped unification to supplement the uniform law". And since "it is to be feared —as individual legal systems will not be affectted by the uniform law— that the "general principles" of such systems, and the operation of rules remaining outside the uniform law will finish by compromising the value and effectiveness of the latter", the same author insists on the fact that "there must be a system of international law alongside the national systems, and this international system of law must be elaborated by the international community".

The opinion expressed by Professor David is far from being isolated. Similar views have more recently been expressed, among others, also by Helmut Coing, Aleck Chloros, Joseph Esser, Gino Gorla, Ronald Graveson, Rolf Herber, Hein Kötz, Ole Lando and Konrad Zweigert.[2] All these authors have in common that they reject the traditional nationalistic or "conflictual" method according to which state courts, when faced with a problem of interpretation of an existing international convention or uniform law, have to find the solution on the basis of the criteria and principles provided in national laws, more precisely in that national law which on the basis of the conflict of laws rules of the *forum* will actually be competent. In their view a uniform law, even after having been incorporated in the various national legal systems, only formally becomes an integrated part of the latter, whereas from a substantive point of view it does not lose its original character of a special body of law which has been autonomously elaborated at an international level and is intended to be applied in a uniform manner throughout the world. Consequently, in interpreting the uniform laws

[1] "The International Unification of Private Law", in *International Encyclopedia of Comparative Law*, II, 5 (1971), p. 123 *et seq.*

"regard is to be had to its international character and to the need to promote uniformity in its application" [*cf.* Art. 7(1) of the Vienna Sales Convention]; in other words courts should to the largest possible extent avoid national solutions and instead seek to interpret and supplement the uniform law according to equally autonomous and internationally uniform criteria and principles.

So far these criteria and principles have had to be found each time by the courts themselves, on the basis of a functional comparison of the different national legal systems. By attempting to elaborate Principles for international commercial contracts UNIDROIT intends to facilitate the task of courts in this respect.

Yet the purpose of the proposed Principles is not only that of elaborating general principles and rules relating to the law of contract in order to provide the necessary "legal environment" for the interpretation of existing uniform laws governing special types of transactions. They could equally serve as a guideline for national legislators who —as might be the case above all with a number of developing countries— intend to set up o modern contract law adequate to meet the special requirements of trade relations across frontiers.

In addition, the Principles, being elaborated by an independent international Organisation in collaboration with other academic institutes and specialized agencies, could be considered as a kind of *ratio scripta* of an emerging supranational legal order —a modern *lex mercatoria*— which governs international transactions either because the parties themselves have referred to it as the applicable law or because of their recognition by arbitration practice. It is true that according to the traditional view the freedom of choice of the parties in themselves designating the law governing the contract is limited to existing national legal systems and that arbitrators too are, in the absence of any designation by the parties, in general bound to decide the dispute according to the (national) law determined by the relevant conflict of laws rules. However in practice not only do the parties quite frequently state that any dispute arising out of their contract shall be settled in conformity with "the terms of the contract and the usages of international trade" or the general principles universally recognized by civilized nations", but also the arbitrators, irrespective of whether or not authorized to act as "amiables compositeurs", instead of applying the law of a single State,

[2] For exact references see Kötz, H., "Gemeineuropäisches Zivilrecht", in *Festschrift f. K. Zweigert*, Tübingen, 1981, p. 481 *et seq.*; and Lando, O., "European Contract Law", in *Am. J. Comp. Law*, vol. 31 (1983), p. 653 *et seq.*

base their decisions on rules which are commonly accepted as being suitable for international contracts.[3] Recently this more flexible approach was even recognized, at least to a certain extent, by an international instrument such as the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985: indeed, Art. 28 of this Model Law states that "the arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute [...]. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules *which it considers applicable* [...]" (italics added).[4] Until now the tendency to avoid a strict "localization" of all international commercial contracts whithin the framework of a single national legal system, and instead to have recourse, where appropriate, to principles and rules of a supra-national or transnational character, has been criticised, *inter alia*, because of the extreme vagueness of such a solution. There is no doubt that by expressly referring to the proposed Principles as the alternative source for the regulation of a given international contract, the parties and/or the arbitrators could considerably reduce such uncertainty.

b. *Scope of the Principles*

The scope of the proposed Principles should be limited to international contracts only. There are two reasons which support this basic approach. First of all, it is when a given transaction presents factual links with more than one State that conflicts between the respective national laws may arise, and this not only in the absence of any international legislation but also where the applicable uniform laws are obscure as to their precise meaning or present true gaps. Secondly, given the considerable differences which nowadays exist between the various countries

[3] *Cf.* Lando O., "The Lex Mercatoria in International Commercial Arbitration", in 34 *ICLQ* (1985), p. 752 *et seq.*; Derains, Y., "L'ordre publique et le droit applicable au fond du litige dans l'arbitrage international", in *Revue de l'Arbitrage*, 1986, p. 375 *et seq.* For some examples of decisions of national courts upholding such an approach by the arbitrators, see French Cour de Cassation, 9 December 1981, in *Clunet*, 1982, p. 931, followed by a comment by A. Oppetit; Supreme Court of Austria, 18 November 1982, in *Iprax*, 1984, p. 96, and Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. R'as al-Khaimah National Oil Co., (1987 3 *W.L.R.* 1023.

[4] For the discussion which led to the adoption of this provision, see Bonell, M.J., "Una nuova disciplina modello sull'arbitrato commerciale internazionale", in *Diritto del commercio internazionale*, 1987, p. 3 *et seq.* (13 *et seq.*).

as to their economic and political structures, it would be entirely unrealistic to attempt to lay down on a world-wide basis uniform principles and rules applicable also to purely domestic transactions: after all, what is intended is not to unify the existing national laws of contract, but rather to elaborate principles and solutions which, apart from being uniform, seems to be best adapted to the special requirements of international commercial contracts.

There still remains of course the difficulty of how exactly to define the scope of the proposed Principles. So far the problem has been discussed only within the Steering Committee set up in 1973 with the task of establishing the basis criteria to be followed in the elaboration of the Principles.[5] It was found that, as far as the definition of the international or non-international character of a contract was concerned, it was too difficult a task to tackle at the very outset of the work and should accordingly be left aside for the time being. One possible solution which was suggested would be to include in the Principles a general definition of what is meant for the purpose of their aplication by an "international contract", and to suplement, if necessary, such a definition by special provisions referring to particular kinds of transactions.[6] As to the distinction between civil and commercial contracts it was considered to have become so blurred as not to justify being made in the proposed Principles.[7] There is indeed a growing tendency, both within the various national systems and on an international level, to overcome the traditional distinctions between legal relationships of a "civil" and "commercial" character and rather to differentiate between principles and rules that apply in general and special rules governing consumer transactions. Correspondingly, the scope of the proposed Principles will not be limited to commercial contracts in the traditional sense: only consumer transactions, to be defined on the basis of special criteria,[8] fall outside their intended sphere of application.

[5] The Steering Committee was composed of Professors René David, Tudor Popescu and Clive Schmitthoff, representing respectively the civil law systems, the systems of the socialist countries and the common law systems. On the occasion of a meeting held in 1974 the Committee discussed a number of questions relating to both the substance and the working method of the project, laying down the basis for the further development of the project.

[6] *Cf. Report of the Secretariat of Unidroit on the 1st meeting of the Steering Committee on the progressive codification of international trade law*, held in Rome on 8 and 9 February 1974 —UNIDROIT 1974, Study L— Doc. 7, p. 4.

[7] See *Idem*, p. 3.

[8] *Cf. e.g.* Art. 2 lett, a of the Vienna Sales Convention.

c. *The binding force of the Principles*

The (original) French version of the resolution, by which in 1971 the Governing Council decided to include the project in question in the Work Programme of the Institute, spoke of "l'essai d'unification portant sur la partie générale des contrats, en vue d'une *Codification progressive du droit des obligations 'ex contractu'*)".[9] The project was thereupon in its first stage entitled "Codification progressive du droit du commerce international" and "Progressive codification of international trade law" in French and English respectively.

Admittedly the phraseology chosen at the time was not too fortunate. The term "codification" in particular was misleading, as it might give the impression that what was envisaged was the elaboration of a "Code" of the kind known to many civil law countries, *i.e.* a legislative body of principles and rules constituting the primary source for the regulation of international trade relationships. Yet this was not the case. First of all because it would undoubtedly seem anachronistic and for several reasons inopportune to repropose in our days the nineteenth-century idea of setting up in a single piece of legislation a logically perfect and complete system of general principles and rules, capable of providing a definite solution for all cases which might arise in practice: this all the more so, as the object is the law of international trade relationships, an area which by its very nature is subject to continous changes and new development, and which therefore requires a sufficiently flexible legal regime.[10] Secondly, while it is true that as to the binding force of the proposed Principles in theory three possibilities are open —namely that the Principles become the object of an international convention by which States undertake an obligation to bring it into force within their national systems of law; that they are approved in the form of a model law which each national legislator would be free to adopt in whole or in part; that they assume a purely private character which, simply because of the authority of the institution(s) which elaborated them, would be used by state courts when faced

[9] *Cf.* UNIDROIT 1971, C.D. 50th Session, p. 93.

[10] See in this respect the pertinent observations of Barmann J., "Ist internationales Handelsrecht kodifizierbar?" in *Festschrift f. F.A. Mann*, München 1977, p. 560 *et seq.*; for an attempt at redefining the concept of codification in the light of the needs and expectations of modern society, see, however, Tallon D., "Codification and Consolidation of the Law at the Present Time", in 14 *Israel L.R.* (1979), p. 9 *et seq.*; Schmidt K., *Die Zukunft der Kodifikationsidee*, Heidelberg 1985, p. 47 *et seq.*; Kötz H., "Taking Civil Codes Less Seriously", *Modern Law Review*, 50 (1987), p. 1 *et seq.*

with a question of interpretation of international conventions or by arbitrators when called upon to decide on disputes concerning international trade relationships— in practice, and bearing in mind the reluctance which States generally show in adopting conventions and model laws even if of a more limited scope, it is not difficult to foresee that neither the first nor the second solution will be of relevance in the immediate future. This being so, subsequent to a renewed discussion on this point also within the Governing Council of UNIDROIT, it was decided to change the title of the project from "progressive codification of international trade law" to "elaboration of principles for international commercial contracts". This in order to make it clear that what, at least for the time being, was intended was not the elaboration of provisions of a binding nature, but of principles and rules of a purely private character which would be applied in practice because of their persuasive value.

d. *The working method*

In view of the fact that the proposed Principles are intended to provide a sort of model regulation for international commercial contracts, the Steering Committee recommended from the very beginning that in their preparation regard should be had primarily to current trade practice as reflected in international conventions or in instruments of a purely private character, such as general conditions or standard forms of contract, rather than to principles traditionally adopted by the various national laws. Among the national laws particular attention should be given to legislation, such as the Czechoslovak International Trade Code, the German Democratic Republic Law on International Economic Contracts and the United States Uniform Commercial Code, which are specifically dedicated to international trade relations and/or were drawn up in the light of the special needs of international or inter-state trade. But also the most recent attempts at codifying, wheter on a legislative basis or not, the law of contracts in general, such as the American Restatement (Second) of the Law of Contracts, the relevant part of the new Dutch Civil Code, or the new Algerian Civil Code, as well as the work carried out in this respect by the English Law Commission, the Civil Code Revision Office of Québec and similar institutions should be the subject of special consideration.[11]

[11] *Cf. Report of the Secretariat of Unidroit..., cit., supra,* p. 2 *et seq.*

In order to facilitate the necessary preparatory studies the Secretariat assembled, although for technical reasons only in a limited number of copies, a collection of materials, which contained some 40 international conventions and uniform laws, as well as general conditions and standard forms of contract relating to international contracts in general and to the various kinds of contract of sale, including contracts for the supply and construction of large industrial plants and machinery. In addition, in order to facilitate the analysis of the content of each of the collected legislative and contractual instruments and to permit, as far as possible, an immediate comparison between the provisions contained therein relating to the different aspects of the general problems of performance and non-performance of the type of contracts concerned, the Secretariat also drew up synoptic tables of these provisions.[12]

Since the purpose of the proposed Principles is not to unify the existing laws but rather to enucleate principles and rules which are common to the existing national legal systems and, where such a "common core" cannot be established, to select the solutions which seem best adapted to the special requirements of international commercial contracts, it goes without saying that in their preparation not every legal system can have an equal influence on every issue considered. Where appropriate, even solutions which have not yet been adopted in the law of any State could be envisaged. Nevertheless it is difficult to say to what extent the Principles will be innovative rather than reflect existing law. The answer might be very similar to what has been said in response to the same question in respect of the American Restatement (Second) of the Law of Contracts, namely that

> Sometimes innovation does not take the form of a new substantive rule but rather of a new perspective on the problem, reflected in the substitution of a new terminology or analysis for a traditional one [...]. Even where substantive rules are concerned, it is no easy task to assess the extent of innovation [...] often a paucity of cases or a confusion in the courts' analyses makes it impossible starkly to contrast innovation with tradition.[13]

Given the purposes of the proposed Principles it seemed preferable to entrust with the task of formulating the preliminary draft provisions and their explanatory notes a group of independent experts rather than

[12] *Cf.* UNIDROIT 1980, Study L - Doc. 19.

[13] *Cf.* Farnsworth, "Ingredients in the Redaction of the Restatement (Second) of Contracts", in *Columbia Law Review,* vol. 81 (1981), pp. 5-6.

a committee of governmental representatives. In determining the membership of this group two different factors had to be taken into account: on the one hand the desirability of ensuring an adequate representation from all the main political and legal systems of the world, and on the other hand, given the limited resources of UNIDROIT, the necessity of restricting the choice to those experts and/or research institutions which were prepared to participate actively in the work on the project on a voluntary basis.[14]

II. The present state of work of the project

In May 1987 the Secretariat of UNIDROIT issued a consolidated text of the Principles so far discussed by the Working Group.[15] The text is divided into six chapters, the first of which is devoted to the definition of the scope of the Principles and to other provisions of a general character, whereas the others deal with the formation, interpretation, validity, performance and non-performance of contracts respectively. The chapters are based on preliminary drafts which were prepared, together with explanatory notes, by different members of the Working Group at different times. The Secretariat document contains only the actual text of the different draft provisions; the explanatory notes will be harmonised at a later stage, after the final reading of the text within the Working Group.

[14] The Working Group, which was set up in 1980 by the President of UNIDROIT *was originally* composed of Professors Ulrich Drobnig, Director at the Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; Marcel Fontaine, Director of the Centre de droit des obligations, Louvain-La-Neuve; Ole Lando, Director of the Institute of European Market Law, Copenhagen; Dietrich Maskow, Deputy Director of the Institut für ausländisches Recht und Rechtsvergleichung; Potsdam-Babelsberg and Jerzy Rajski, Director of the Institute of Comparative Civil Law, University of Warsaw. Subsequently the Group, which by its very nature is open-ended, was joined by Professors C. Massimo Bianca, University of Rome I; Paul-A. Crépeau, Director of the Centre de recherche en droit privé et comparé du Québec; E. Allan Farnsworth, Columbia University, New York; Michael P. Furmston, University of Bristol; Mr. Arthur Hartkamp, Advocate-General of the Supreme Court of the Netherlands; Professor Denis Tallon, Director of the Institut de droit comparé de Paris; Mr. Tony Wade, Deputy Director of the Asser Institute, The Hague; and Mr. Wang Zhenpu, Deputy Director of the Department of Treaties and Law, Ministry of Foreign Economic Relations and Trade, Beijing.

The writer of the present paper, who has the honour to coordinate the work of the Group, is assisted by Ms. Lena Peters of the UNIDROIT Secretariat.

[15] UNIDROIT 1987, Study L - Doc. 40.

a. *Chapter I: General Provisions*

This chapter at present contains only two articles, namely Article 3 which lays down the duty to observe in the formation, interpretation and performance of a contract the principles of good faith and fair dealing in international trade, and Article 4 which is intended to contain definitions of some of the key concepts used throughout the Principles (*e.g.* "writing", "reaches", "usage" etc.). Article 1 will deal with the purposes and scope of the Principles, and Article 2 will determine the extent to which they may be derogated from by the parties to each single contract, but the text of both these provisions has still to be drafted.

b. *Chapter II: Formation*

The preliminary draft of this chapter was prepared by the Secretariat of UNIDROIT and, after having discussed a first time in 1979 within a study group composed of experts who had previously replied to a questionnaire sent out by the Secretariat, was revised by the Working Group in 1983.[16]

The 18 articles of which the chapter is presently composed correspond in part almost literally to the provisions to be found in Part II of the 1980 Vienna Sales Convention (cf. Arts. 2-11) and are in part new. Of the new provisions particulary important are Art. 1 (dealing with the problem of confidential information obtained in the course of negotiation), Art. 12 (dealing with the case where a contract has already been concluded orally and one party sends to the other a "letter of confirmation" the purpose of which is simply to confirm what has already been agreed upon, but which may sometimes contain additional or modifying terms), Arts. 15-17 (dealing with the effectiveness of general conditions or standard forms of contracts to which one or both parties may have made reference) and Arts. 13 and 14 (dealing with the case where the parties, when concluding their contract, leave one or more of its terms open, but nevertheless intend to enter into a binding agreement and in fact refer for the determination of the outstanding terms to an agreement to be made by them at a later stage or to a third person).

[16] *Cf.* UNIDROIT Study L - Docs. 9, 11, 15, 25, and P.C. - Misc. 4.

c. *Chapter III: Interpretation*

Also the provisions of this chapter were drafted by the Secretariat before being discussed first by the above-mentioned study group and finally by the Working Group.[17] The chapter deals with three kinds of problems: the determination of the meaning of express statements made by and other conduct of the parties according to common canons of interpretation [*cf.* Arts. 1, 2, 5(1) and (2), 6]; the relevance to be given to the various practices and usages commonly observed within a specific trade sector or professional category, when clarifying the meaning of certain clauses or in completing the terms of the agreement [*cf.* Arts. 3 and 4]; finally, the interpretation of contracts concluded on the basis of general conditions and standard forms of contract unilaterally worked out by single firms or by trade associations to which only one of the parties belongs [*cf.* Art. 5(3)].

d. *Chapter IV: Mistake, Fraud, Threat and Gross Disparaty*

The chapter was originally entitled 'Substantive Validity of Contracts" and was divided into two separate sections, the one dealing with mistake, fraud, threat and gross disparity, the other with public permissions and prohibition requirements.

The first section, prepared by Professors Drobnig and Lando, was substantially based on the 1972 UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods (*see*, in particular, Art.s 1-6, 8, 9, 11, 13-17, dealing with the three typical cases of defect in consent, *i.e.* mistake, fraud and threat respectively). In addition, a number of new provisions have been included in the draft, covering problems which the 1972 draft did not consider at all. The most important ones are those contained in Art. 7 (avoidance of the contract, if there exists a gross disparity between the obligations of the parties which is injustifiable having regard to the circumstances of the case) and Art. 12 (right of a party, who by the avoidance of the contract for gross disparaty would be exposed to an unfair detriment, to request the competent court or arbitrator to adapt the contract in order to bring it into line with reasonable commercial standards of fair dealing).

The draft section, which was also discussed by the study group, was approved in substance by the Working Group.[18]

[17] *Cf.* UNIDROIT Study L - Doc.s 12, 13, 14, 15, 25, and P.C. Misc. 4.
[18] *Cf.* UNIDROIT, Study L - Doc.s 17, 20, 22, 26 and P.C. - Misc. 2, 3 and 4.

Section 2, on public prohibitions and permission requirements, was prepared by Professor Maskow in collaboration with Dr. M. Andrae of the Potsdam Institute,[19] and, in the version originally adopted by the Working Group,[20] consisted of two parts: the one consisting of a single article establishing the conditions under which effect is to be given to mandatory provisions of a public law character affecting the validity of an international commercial contract, even where they have been enacted by a State the law of which is neither the law otherwise governing the contract nor the law of the *forum;* the other consisting of 5 articles dealing with the rights and obligations of the parties in cases where the effectiveness or the performance of the contract is subject to a public permission requirement.

The section, however, when brought to the attention of the governing council of the Institute, gave rise to much controversy.[21]

Againts its maintenance arguments of a methodological as well as of a substantive nature were put forward. As to the method it was argued that, since the provision is basically a conflict of laws rule, it would be inappropriate to include it in the proposed Principles which are essentially concerned with substantive rules of law. As to the substance of the draft it was pointed out that it was hardly in the interest of international trade to increase the number of cases where the validity of a given contract may be affected because of restrictions or other unilateral interventions by national authorities. The proposed Principles should rather be based on the opposite principle of the *favor validitatis, i.e.* they should as far as possible favour the validity of a contract between the parties and restrict the relevance of public prohibitions and permission requirements to those cases where they constitute an impediment to the performance of the contractual obligations.

In favour of the maintenance of the draft section it was stressed, first of all, that it was not intended to introduce additional grounds for the invalidity of international trade contracts, but was simply aimed at unifying the criteria which were already commonly used for the determination of the effects of foreign mandatory provisions of a public law character on the validity of contracts between private persons. As to the suggestion to deal with this kind of provisions only in connection with the problem of impossibility of performance, it was argued that there were public law prohibitions and permission requirements which

[19] *Cf.* UNIDROIT, Study L - Doc.s 18, 21, 22, 27 and P.C. - Misc. 2, 3, 4, 5.
[20] *Cf.* UNIDROIT, Study L - Doc. 32.
[21] *Cf.* UNIDROIT 1983, C.D. 62nd session, p. 8 *et seq.;* UNIDROIT 1984, C.D. 63rd session, p. 22 *et seq.*

in fact do relate to the performance of a contractual obligation, and those which on the contrary relate to the validity or effectiveness of the contract itself: while the former would certainly be dealt with in the framework of the chapter on non-performance, the proper place for consideration of the latter was the Chapter on validity. Finally, as to the objection that the proposed Principles should not deal at all with private international law aspects, it was pointed out that the provision under consideration could hardly be seen as a conflict of laws rule *strictu sensu*, but rather as a "scope rule", *i.e.* a rule aiming at determining the exact extent to which existing public prohibition or permission requirements may affect the validity of a given contract.

Notwithstanding these arguments the Governing Council eventually decided to delete the first part of the section and to request the Working Group to see to what extent it was more appropiate to place the remaining provisions of the section in the chapter on performance.[22]

e. *Chapter V: Performance*

The chapter consists of two sections, the first dealing with performance of contracts in general and the second with hardship.

The first section is based on preliminary drafts prepared by Professors Fontaine and Rajski, and approved in substance by the Working Group.[23] It is composed of 22 articles dealing with the most important aspects relating to the performance of contracts, such as the distinction between obligations involving a duty of care in the performance of an activity, and obligations involving a duty to achieve a specific result, and the different degree of diligence required by the debtor for each case (Arts. 2-4), the cooperation between the parties (Art. 5) partial performance (Art. 6), time and place of performance (Arts. 7-9 and 11), price determination (Art. 10) modes of payment of monetary obligations (Arts. 12-13), currency of payment (Arts. 14-15) and appropriation of payments (Arts. 17-19). The last three articles of the section are taken from the former section 2 of chapter IV and deal with the case where the contract as such, or the performance of any of its obligations, is subject to a public permission re-

[22] *Cf.* UNIDROIT 1985, C.D. 64 - Doc. 14, p. 30 *et seq.*
[23] *Cf.* UNIDROIT, Study L - Doc.s 28, 29, 33, 34 and 39, and P.C. - Misc. 5, 6, 8 and 11.

quirement. While deliberately leaving the question of which of the permission requirements existing in each single case may become relevant, *i.e.* only the permission requirements of the *lex contractus,* or also of other States with which the contract has significant connections, to the conflicts of law rules of the *forum,* the draft determines which party is under the obligation to apply for permission (Art. 20) and imposes upon the applicant party certain additional duties, such as the duty to apply without undue delay and with due diligence, to pay any expenses connected with the application and to inform the other party of the granting or refusal of the permission as the case may be (Art. 21).

The second section of the chapter on performance, dealing with hardship, is based on a preliminary draft prepared by Professor Maskow.[24] It begins with an affirmation of the duty of a party to fulfil his obligations even if they become more onerous (Art. 23), in order to make it clear that notwithstanding the subsequent provisions on hardship the principle *pacta sunt servanda* remains the main rule and that of *rebus sic stantibus* has to be considered the exception. Any situation of hardship, as defined in Art. 25, entitles the disadvantaged party to request the other party to renegotiate the terms of the contract in order to adapt them to the changed circumstances (Art. 24). As to the consequences of a failure of the renegotiations, these are laid down in Art. 26 and consist of the right of the disadvantaged party to terminate the contract, subject to an intervention by the court at the request of either party who may ask it to confirm the termination or alternatively to maintain the contract in its original terms, or to adapt it (Art. 26).

f. *Chapter VI: Non-Performance*

The chapter is divided into five sections, the first of which is devoted to general provisions, whereas the others deal with specific performance, termination, damages and exemption clauses and restitution.

The first section has as yet not been drafted. It will however contain, in addition to a general definition of non-performance (Art. 1), provisions dealing with the cumulation of remedies (Art. 2), the circumstances which exempt a party from liability for non-performance (Art. 3), and the right of a party to withhold performance and to ask for

[24] *Cf.* UNIDROIT, Study L - Doc.s 24 and 37, and P.C. - Misc. 5, 9 and 11.

adequate assurance of performance in cases of an expected non-performance of the other party (Art. 4).

Section 2 ("Specific Performance") is based on a preliminary draft prepared by Professor Drobnig,[25] and adopted in substance by the Workin Group. It first of all lays down the conditions for the right of the obligor to demand performance where the obligee has not performed at all, distinguishing between monetary obligations (Art. 5) and non-monetary obligations (Art. 6). The remaining articles deal with the reparation of defective performance (Art. 7), judicial penalty (Art. 8) and unenforceable claims for specific performance (Art. 9).

Section 3. ("Termination") is based on a preliminary draft prepared by Professor Lando,[26] which has also already been adopted in substance by the Working Group. It determins when a party has the right to terminate the contract, *i.e.* in cases of fundamental non-performance (Art. 10), or when the dafaulting party fails to perform within an additional period of time granted by the aggrieved party (Art. 11), or in cases of so-called anticipatory non-performance (Art. 13). It moreover lays down the conditions for the actual exercice of this right, providing that the aggrieved party must as a rule give notice of termination to the other party within a reasonable time after he has, or ought to have, become aware of the non-performance (Art. 12), and indicating the cases where termination is excluded because of the impossibility of the aggrieved party to make restitution of the goods already received (Art. 14).

As to Section 4 ("Damages and Exeption Clauses"), it is based on a preliminary draft prepared by Proffesor Tallon and adopted in substance by the Working Group.[27] It is composed of some 18 articles dealing *inter alia* with the definition of the right to damages in general (Art. 15), the notice of default ("mise en demeure") (Art. 16), the nature of the loss for which compensation may be requested and the extent to which damages may be recovered (Arts. 18-20, 25), proof of loss (Arts. 21-22), contributory negligence and the duty to mitigate damages (Arts. 23-24), the right to interest on overdue amounts (Art. 26) and damages evaluated in foreign currency (Art. 29). The last two articles tackle the particularly delicate problems of the extent to which parties may contractually exclude or limit their liability for non-

[25] *Cf.* UNIDROIT, Study L - Doc. 35, part one, and P. C. - Misc. 9.
[26] *Cf.* UNIDROIT, Study L - Doc. 35, part two, and P.C. - Misc. 9.
[27] *Cf.* UNIDROIT, Study L - Doc. 31 and 36. and P.C. - Misc. 10.

performance of any of their obligations (Art. 31), and of the validity of clauses providing for penalties and liquidated damages (Art. 32).

Section 5 ("Restitution") deals with the effects of termination with respect to both the obligations of the parties which still have to be performed, and the performance already rendered. The three articles of the section were originally contained in Professor Lando's preliminary draft on termination: following a decisión of the Working Group to devote a special section to restitution, they appear now in this section, the precise content of which, however, has still to be determined by the Working Group.

III. Final considerations

When the idea of embarking upon the preparation of Principles for international commercial contracts was first launched back in the seventies, doubts were expressed even within the competent bodies of UNIDROIT as to the general feasibility of such a project, which by its very nature is long-term and of great complexity. Moreover, in view of the fact that it is most unlikely that the proposed Principles will ever take the form of an internationally binding instrument, it was questioned whether UNIDROIT in particular was the appropriate institution for the preparation of such Principles. Since then it has become more and more evident that perplexities of this nature are unjustified.

As to the time factor, thanks also to the substantial contributions made by the single members of the Working Group and their associated institutions, the project has already reached a considerably more advanced stage than could originally have been expected. Moreover, following the decision of the UNIDROIT Governing Council in 1985 to increase the frequency of the meetings of the Working Group, which until then had met only once a year, it is quite possible that the final reading of the entire draft will be completed within the next two or three years, so that soon thereafter the proposed Principles, together with the explanatory notes, may be issued in their final form.

As to the argument that a project of the kind under consideration is better carried out by independent institutions such as academic institutes, private foundations, etc., than by an intergovernmental organisation such as UNIDROIT, it is true that in the past UNIDROIT has exclusively been engaged in initiatives aiming at the unification of law at a legislative level. However, in recent times it has become more and more questionable to what extent this traditional approach may be considered to be the only valid one for the future. Indeed, the attitude

of States vis-à-vis the process of unification has changed considerably. Not only has the object of unification itself become less attractive, but national legislators are in general more and more obsorbed by other functions which are considered to be more urgent or of greater political importance. As a result, an increasing number of conventions, although already adopted at international level, are not ratified and thus risk remaining a dead letter, while States are more and more reluctant to embark on initiatives for the elaboration of new uniform laws. In these circumstances all international organizations dealing with the unification of law have to reconsider the working methods so far followed. In the case of UNIDROIT the difficulties are particularly evident, since after the creation of UNCITRAL in 1968 there has been a growing tendency, also among the member States of UNIDROIT, to consider UNCITRAL, at least in the field of international trade law, the most appropriate forum for the elaboration of draft conventions and to confer on UNIDROIT at the most the task of carrying out the preparatory studies. This being so, it is increasingly realised that, although such a task still has its merits, the Institute should in addition pursue separate activities so as to reinforce its unique position in relation to other international organisations, and that the elaboration of the proposed Principles could be seen as one of these initiatives.[28]

The validity of the basic idea underlying the UNIDROIT project for the preparation of Principles for international commercial contracts is further demonstrated by the fact that similar projects have recently been launched also by other institutions.

Thus, in 1980 a Commission on European Contract Law was set up with the task of drafting "Principles of European Contract Law".[29] The Commission, composed of specialists in the field of comparative law from all member States of the European Communities, receives subsidies from the Commission of the European Communities as well

[28] This view has repeatedly been expressed, not the least at the two recent international symposia held in Rome under the auspices of UNIDROIT in 1976 and 1987 respectively. With respect to the 1976 symposium, see *New Directions in International Trade Law: Acts and Proceedings of the 2nd International Congress on Private Law*, 2 vols., Oceana, Dobbs Ferry 1977, and in particular the report and interventions by G. Eörsi (p. 155 *et seq.*, 170), W. Hauschild (p. 595 *et seq.*, 598), P. Lalive (p. 750 *et seq.*, 756), T. Popescu (p. 21 *et seq.*, 45), and J. Rajski (p. 478). As to the symposium held in 1987, see, in particular, the reports and interventions of F. Enderlein, E.A. Farnsworth, and J. Honnold, in *Uniform Law in Practice, Acts and proceedings of the 3rd International Congress on Private Law* (in course of publication).

[29] *Cf.* Lando O., *European Contract Law, cit.*; Kötz H., "Gemein europäisches Zivilrecht", *cit. supra*.

as from foundations of some of the Member States, but acts as an independent group of experts, in the sense that none of its members are appointed by governmental institutions. The Principles, which will take the form of a simple recommendation, are intended to serve as a guideline for the institutions of the European Communities, as well as for the national legislators and courts of each individual Member State. The Commission has already virtually completed the work on two chapters of the Principles, dealing respectively with performance and non-performance, and is expected soon to begin the preparation of other chapter relating to formation, interpretation and validity of contracts.

Recently a project was also launched within the Council for Mutual Economic Assistance (CMEA) for the elaboration of general principles of contract law. The set of rules to be prepared by the Academies of Science of each of the Member States is intended to become the general framework for the various General Conditions which presently govern special kinds of contracts between the economic organisations of CMEA Member States in the sense that they should provide a uniform solution whenever in the application of the latter a question of interpretation or of the filling of a true gap arises. The project is still at a preparatory stage, but there are good chances that in the near future the first preliminary drafts will be submitted to the competent bodies within the CMEA.[30]

At first sight it may appear that the work of the Commission on European Contract Law and that conducted within the CMEA overlap to a large extent with the project undertaken by UNIDROIT. A closer examination, however, shows that this is not the case. All three initiatives purport to bring about a systematic harmonisation of the law of contract. Yet while the UNIDROIT project aims at the elaboration of uniform rules to be offered to all nations and to be applied equally by market economy and state economy countries, by industrialised and developing countries, the scope of the proposed "Principles of European Contract Law" is restricted to the Member States of the European Communities, just as the scope of the instrument being

[30] The purpose and the basic characteristics of the project were discussed in detail at an international conference held in Potsdam-Babelsberg from 25 to 27 June 1985: see, for the Acts and Proceedings, Akademie für Staats- und Rechtswissenschaft der DDR, Institut für ausländisches Recht und Rechtsvergleichung (ed.), *Grundzüge einer wissenschaftlichen Konzeption des allgemeinen Teils der rechtlichen Regelung internationaler Wirtschaftsverträge zwischen den Organisationen der Mitgliedsländer des RGW*, Potsdam-Babelsberg 1986.

elaborated within the CMEA is limited to the Member of that Council. The latter will therefore only reflect the economic and social conditions prevailing in Western Europe and in the CMEA Member States respectively, no account having to be taken of the special needs and expectations of other nations or regions with different political, social and economic backgrounds.