IV. NEW INTERNATIONAL ECONOMIC ORDER*

A. Report of the Working Group on the New International Economic Order on the work of its second session held at Vienna, 9-18 June 1981: clauses related to contracts for the supply and construction of large industrial works (A/CN.9/198)**

INTRODUCTION

1. At its eleventh session the United Nations Commission on International Trade Law decided to include in its work programme a topic entitled "The legal implications of the new international economic order" and established a Working Group to deal with this subject.[1]

2. At its twelfth session the Commission designated member States of the Working Group.[2] The Working Group held its first session in New York from 14 to 25 January 1980 and recommended to the Commission for possible inclusion in its work programme, *inter alia*:

> "4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produits en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general."[3]

3. At its thirteenth session the Commission decided that the Working Group should be composed of all States members of the Commission and agreed to accord priority to work related to contracts in the field of industrial development. The Secretariat was requested to carry out preparatory work in respect of contracts on supply and construction of large industrial works and on industrial co-operation.[4]

4. The Working Group held its second session at Vienna, from 9 to 18 June 1981. All the members of the Working Group were represented except Burundi, Colombia, Cuba, Cyprus, Peru, Senegal and Sierra Leone.

5. The session was attended by observers from the following Governments: Argentina, Belgium, Brazil, Bulgaria, Canada, China, Ecuador, Gabon, Malaysia, Netherlands, Pakistan, Republic of Korea, Romania, Suriname, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, Uruguay and Venezuela.

6. The session was attended by observers from the following United Nations Organs: Centre on Transnational Corporations, Economic Commission for Africa, United Nations Industrial Development Organization and the United Nations Institute for Training and Research.

7. The session was also attended by observers from the following international governmental and non-governmental organizations: Commission of the European Communities, European Free Trade Association, Hague Conference on Private International Law, International Association of Democratic Lawyers, International Bar Association and International Chamber of Commerce.

8. The Working Group elected the following officers:

Chairman: ..... Mr. Leif Sevón (Finland)

Rapporteur: ..... Mr. Stephen K. Muchui (Kenya)

9. The Working Group had before it the Study of the Secretary-General entitled "Clauses related to contracts for the supply and construction of large industrial works" (A/CN.9/WG.V/WP.4 and Add. 1 to 8)* and a note on "Clauses related to industrial co-operation" (A/CN.9/WG.V/WP.5).**

10. The Working Group adopted the following agenda:

(*a*) Election of officers

(*b*) Adoption of the agenda

---

* For consideration by the Commission see Report, chapter V (part one, A, above).

** 19 June 1981. Referred to in Report, para. 71 (part one, A, above).

[1] Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 71 (Yearbook . . . 1978, part one, II, A).

[2] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 100 (Yearbook . . . 1979, part one, II, A).

[3] A/CN.9/176, para. 31 (Yearbook . . . 1980, part two, V, A).

[4] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 143 (Yearbook . . . 1980, part one, II, A).

* Reproduced in this volume, part two, IV, B, 1.

** Reproduced in this volume, part two, IV, B, 2.

(*c*) Consideration of contracts for the supply and construction of large industrial works and on industrial co-operation

(*d*) Other business

(*e*) Adoption of the Report.

CONSIDERATION OF CONTRACTUAL PROVISIONS RELATING TO CONTRACTS FOR THE SUPPLY AND CONSTRUCTION OF LARGE INDUSTRIAL WORKS

11. The Working Group began its deliberations with a discussion of paragraphs 39-46 of Part One of the Working Paper (A/CN.9/WG.V/WP.4) which set forth the possible directions that the work could take. There was an exchange of views on the various approaches suggested, i.e. legal guide, model clause, code of conduct, general conditions and convention.

12. There were suggestions in favour of the formulation of a legal guide. It was pointed out that this approach would be more flexible and, moreover, work of such a nature could be accomplished in a relatively short period of time. Such a guide should identify the legal issues involved and suggest possible solutions to assist parties in their negotiations.

13. It was pointed out that such a guide should not exclude model clauses. Should a model clause be included in the guide, various alternatives ought to be given. The model clause should also be practice-oriented.

14. It was pointed out that the guide was to be carefully considered in the context of the New International Economic Order (NIEO). The Working Group was in general agreement that its work should be within the context of the basic principles of NIEO and in particular should be directed to meeting the needs and aspirations of the developing countries.

15. According to a view the work of the Working Group on this subject, in view of its mandate, should focus on the aspect of development especially of developing countries in order to distinguish its work from the work of other Working Groups of UNCITRAL.

16. Some views were expressed that the work should be concentrated only on semi-turn-key and not turn-key contracts as the latter involved civil engineering works, which were of a specialized nature. Another view was that not only the two types of contract but also other variants of the two should be taken into consideration in the formulation of the guide as this would involve a discussion of all issues pertaining to a works contract. It was observed that in the discussion of any issue, the different types of contract would have to be taken into consideration.

17. A point was raised as to whether the Group was duplicating the work currently undertaken by the United Nations Industrial Development Organization (UNIDO) in respect of model contracts for the construction of fertilizer plants. It was pointed out that the work envisaged by the UNCITRAL Working Group was to be of a wider scope and was to take into consideration all types of industries.

18. Further, it was pointed out that other organs within the United Nations were also engaged in some aspects of industrial contracts. In this context it was observed that the question of co-ordination was of utmost importance. As UNCITRAL is a core legal body in the field of international trade law the preparation of a legal guide would be of assistance to other organs in considering certain legal issues involved in industrial contracts. In this way unification and harmonization may be attained in this area.

19. The work envisaged by the UNCITRAL Working Group was to be of a more comprehensive legal nature. There was general consensus that it would be useful as a first practical step to undertake the formulation of a detailed legal guide covering turn-key and semi-turn-key contracts as well as their variants. Problems posed by various clauses would be examined in the context of such contracts. Also, the advantages and disadvantages of various alternative solutions to such problems, if any, would be indicated.

20. The Working Group then turned to a discussion and preliminary exchange of views on particular topics based on the documentation provided by the Secretariat. The purpose of this discussion, as summarized in the following sections,[5] was to provide indications to the Secretariat for drafting a guide and not to draft specific recommendations on the final contents of the guide.

EXONERATION[6]

21. The opinion of the Working Group was divided in respect of the definition of exoneration. One view favoured a general definition based on "exemptions" as defined in article 79 of the United Nations Convention on Contracts for the International Sale of Goods (Sales Convention). It was pointed out that the Sales Convention applied to sale of goods only, while the legal guide was to deal with contracts for large industrial works. Another view favoured an exhaustive list. There was yet another suggestion to have a combination of a general definition followed by an illustrative list of exonerating circumstances.

---

[5] Summaries of debates on specific legal issues are set out below in the order of discussion. This order was decided after taking into account the availability of the basic documents, and the complexity of the subjects and their relationship with one another.

[6] A/CN.9/WG.V/WP.4/Add.5: paras. 1-48 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 98-113 (reproduced in this volume, part two, IV, B, 1).

22. There was wide agreement that exonerating circumstances stipulated in a contract should be few and of an exhaustive nature. It was thought undesirable to admit other exonerating circumstances on the basis of applicable law. It was, however, observed that the rules of applicable law might be of a mandatory character. It was suggested that the question of " economic" difficulties should be dealt with in a "hardship" clause, and not in an exoneration clause, subject to the definition of the terms.

23. The Working Group was of the opinion that the failure to notify the other party of an exonerating event should not entail loss of the right to rely on the event. However, if notice of the impediment was not given to the other party, the non-performing party should be liable for damages resulting from the failure to give such notice.

24. The opinion of the Working Group was divided on the question of the consequences of exoneration. The view was expressed that the special nature of contracts for the supply and construction of large industrial works should be taken into consideration. Thus instead of terminating the contract there should be only a suspension of the contract if the impediment was not permanent.

25. It was observed that a distinction should be made between a partial and total failure of performance. A factor also to be taken into consideration should be the stage at which the impediment occurred. In the guide, different solutions should be indicated. The view was expressed that the consequences of exoneration should be limited to the exclusion of damages and problems concerning termination of the contract should be dealt with in the chapter on termination. There was general agreement that the termination of a contract should be the last solution.

Renegotiation[7]

26. The Working Group was of the opinion that the question of renegotiation should be discussed in the guide in cases where an exonerating event temporarily suspended the obligations of the parties if this was felt useful. The purpose of renegotiation would be to adapt the contract to changed circumstances.

27. Some views were expressed as to the methodology of renegotiation. It was suggested that the guide should list various possibilities to assist the parties in their renegotiation, pointing to the advantages and disadvantages of each approach. There was also a suggestion that provision should be made as to the consequences if one of the parties refused to participate in the renegotiation. Conciliation and arbitration were mentioned as possible procedures that parties could resort to in order to assist them in their renegotiation.

28. The Working Group noted that another area in which renegotiation of a contract could be provided for to adapt the contract to changed circumstances was in hardship situations. The Working Group proceeded first to consider whether the insertion of a hardship clause in a works contract should be encouraged. Opinion was divided on this question.

29. In favour of inclusion it was argued that a works contract was one of complexity and of long duration. Changed circumstances may arise to affect the contractual equilibrium of the parties and cause hardship if the contract were to be continued under its original terms. It was also felt that a hardship clause could assist not only the contractor but also the purchaser to alleviate the hardship.

30. According to another view a hardship clause was to be approached with great caution. It was observed that at the present moment the concept of "hardship" was still unclear and ill-defined. There might be the danger that it would be used by a contractor in a developed country to escape his obligations under a contract to the disadvantage of a purchaser in a developing country. For this reason there was also opposition against any inclusion of a hardship clause. It was pointed out that any business would involve a risk element and to allow a party to signal for renegotiation in a "hardship" situation would not be conducive to the certainty of a contract.

31. Despite some doubts expressed on the usefulness of a hardship clause, there was general consensus that the legal guide should deal with such a clause, but pointing to its advantages and disadvantages.

32. It was generally agreed that a hardship clause should be distinguished from a price revision clause which raised special problems. It was noted that the subject of price revision was to be considered in a separate chapter.

33. The Working Group was of the view that an attempt should be made in the guide to lay down clearly the criteria for the recognition of a hardship situation that would bring about renegotiation of the contract. The guide should also spell out the position of the contract during renegotiation and consider the various consequences relating to the performance of the contract, bearing in mind the sort of situations that had given rise to the renegotiation.

Quality[8]

34. The Working Group was of the opinion that the question of quality was very important and that detailed

[7] A/CN.9/WG.V/WP.4/Add.5: paras. 49-79 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 114-123 (reproduced in this volume, part two, IV, B, 1).

[8] A/CN.9/WG.V/WP.4/Add.2: paras. 38-74 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 50-55 (reproduced in this volume, part two, IV, B, 1).

provision should be made in the contract itself. In dealing with this question, a distinction between turn-key and other types of contracts should be taken into consideration.

35. Different views were expressed as to whether the contractor should be obliged, if necessary, to conform to a higher standard requirement according to the law of the country in which the plant was to be erected. A view was expressed that the contents of the contract ought to be decisive. Another view was expressed that the contractor should conform to a higher standard if required by the law of the country where the plant was to be erected, the purchaser bearing the extra cost, if any. It was suggested that the purchaser should advise the contractor of such standards in any case.

Inspection and tests[9]

36. It was observed that the purpose of inspection and tests was to ensure that the plant would meet the quality and conform to specifications expected under a works contract. Defects discovered, on inspection, during production would reduce the costs of remedying the defects and avoid delays. Tests conducted after completion would demonstrate whether the performance of the plant was in accordance with the terms of the contract. It was pointed out that the interests of both the contractor and the purchaser would be served from such an exercise.

37. After deliberation, the Working Group recommended that the following matters be considered in the guide:

Costs of inspection and tests.

Right of the purchaser to reject defective materials.

Provision of the necessary facilities by the contractor for the purpose of carrying out inspection and tests.

Detailed specification of the kinds of inspection and tests that are to be carried out.

Indication regarding parts of plant that are not to be inspected or tested.

Desirability of "joint" inspection and tests.

Provision for third party intervention, e.g. appointment of an engineer to assist the parties in the event of disagreement as to whether or not the plant was defective.

38. Diametrically opposite views were expressed as to whether the nature of a contract, e.g. turn-key or semi-turn-key, would affect the rights and obligations of the parties regarding inspection and tests.

39. It was observed that the guide should deal with performance tests, as these tests were not provided for sufficiently in existing contracts for the supply and construction of large industrial works.

40. There was a suggestion that the guide should contain illustrative forms with respect to certificates of inspection and tests and that UNCITRAL should attempt to unify and simplify such certificates.

41. Divergent views were expressed as to what remedies would be available to the purchaser if the materials or the plant were found to be defective during the course of inspection and tests. According to one view, the legal effects of non-conformity should not apply at this stage. However, the purchaser should be able to require the contractor to repair the defects or replace with new materials and/or plant. According to another view, the purchaser should be entitled to reject the materials and/or plant even at the stage of production.

42. There was general consensus that the purchaser should not lose his right to have the defects repaired even if he did not indicate any defects or if he did not undertake the inspection and tests during construction.

Completion[10]

43. There was general agreement that the notion of "completion" was not quite clear and it was desirable to clarify it in the guide. It was stressed that this term did not necessarily mean that the contract was completed. The view was expressed that "completion" was to be interpreted as the mechanical completion of the work or the physical completion relating to the erection of works. There was consensus that it was advisable to define "completion" in a works contract, particularly in connexion with the programme relating to construction of works.

44. General support was expressed for an explanation or definition of the main terms used in the guide in order to assist the understanding of such terms. In this connexion a distinction between individual stages of the construction of the plant would be desirable.

Take-over and acceptance[11]

45. The Working Group noted that the concepts of "take-over" and "acceptance" were not interpreted in the same way. The view was expressed that these terms

[9] A/CN.9/WG.V/WP.4/Add.3: paras. 1-90 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 56-67 (reproduced in this volume, part two, IV, B, 1).

[10] A/CN.9/WG.V/WP.4/Add.3: paras. 91-104 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 68-74 (reproduced in this volume, part two, IV, B, 1).

[11] A/CN.9/WG.V/WP.4/Add.3: paras. 105-133 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 75-80 (reproduced in this volume, part two, IV, B, 1).

should not be distinguished as they determined the time of the passing of risk and commencement of a guaranty period. On the other hand, it was observed that such a distinction might be useful. It was pointed out that "take-over" should mean the taking possession of the work and "acceptance", the approval of the work.

46. There was general agreement that definitions of the above terms should be determined in the contract itself and their legal consequences should be made clear. Taking into consideration the need to simplify and clarify individual stages of construction, it was noted that it would be advisable to recommend a distinction between "take-over" and "acceptance" in the guide in case of a need for such a distinction in order to determine clearly the legal position of the parties.

47. It was suggested that the question of hidden defects of the plant might be raised even after the acceptance of the work, but not apparent defects.

48. It was requested that problems concerning presumed acceptance as well as partial and provisional acceptance should be dealt with in the guide.

Guaranties[12]

49. There was general agreement that guaranty was one of the most important issues to be dealt with in the guide. It was stressed that at this juncture the Working Group would deal only with guaranties concerning plants, and would defer consideration of bank and other guaranties, including performance bonds.

50. The opinion of the Working Group was divided on the question whether it was advisable to distinguish between mechanical guaranty and performance guaranty or whether it would be preferable to have a single guaranty only, covering both materials, design and workmanship, and proper performance of the works.

51. Different views were expressed in respect of the length of a guaranty period. It was observed that a guaranty period for a considerable length of time was needed for the developing countries. It was suggested that it would be desirable to have a guaranty period for one third of the life expectancy of a plant. It was pointed out that the life of a plant, its usage, maintenance and changes in technology and skill of personnel were factors to be taken into consideration. It was observed that the length of the guaranty period might influence the price of the plant.

52. There was wide support for the view that the length of the guaranty period was to be settled by the parties in the contract and that the guide should draw attention of the parties to the legal aspects that might determine their legal position.

53. It was suggested that in preparing the guide, general conditions applied to contracts for the supply of large industrial works by member States of the Council for Mutual Economic Assistance, among others, should also be taken into consideration.

54. It was pointed out that the guide should deal with the legal consequences of the breach of guaranty by the contractor. Furthermore, it was important to consider whether the expiration of the guaranty period would exempt the contractor completely from any further obligations.

55. It was observed that questions of assurance of supply of spare parts and adequate training of personnel for the operation of the plant were also important. It was noted in this connexion that the second part of the study of the Secretariat, to be submitted to the next session of the Working Group, would cover these subjects.

Rectification of defects[13]

56. It was noted that the term "defects" was not clear and that it should be clarified in the guide. In considering this term, it was suggested that consideration should be given to other notions such as "faults", "non-conformity" and "omissions". A clear distinction should also be made between different types of defects, whether they be major or minor, as this would affect the legal consequences.

57. Divergent views were expressed as to whether a distinction should be made between rectification of defects during production and after taking-over.

58. In favour of the distinction it was argued that as the plant was in the hands of the contractor during production the purchaser should not have the right to reject as the contractor could still repair the defects and supply a plant in conformity with the terms of the contract. However, if the defects were discovered at take-over, the purchaser would have the right to reject. After taking-over and acceptance the purchaser would only have the right of rectification.

59. In favour of the view that no distinction should be made between the stages of production and take-over, the argument was proffered that the legal consequences should be the same, i.e. the contractor should be responsible in handing over a plant in accordance with the contract. Otherwise, the contractor would be liable for damages and the purchaser would have the right to reject the plant or have it rectified.

[12] A/CN.9/WG.V/WP.4/Add.6: paras. 1-72 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 124-133 (reproduced in this volume, part two, IV, B, 1).

[13] A/CN.9/WG.V/WP.4/Add.2: paras. 73-118 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 134-140 (reproduced in this volume, part two, IV, B, 1).

60. The question was also raised as to which party should be given the choice of the means of rectification. One view favoured giving the right to the contractor to decide on the measures to be taken, while another view favoured giving the choice to the purchaser.

61. On the question of notification, there was general consensus that notification was required when defects were discovered after take-over. Some views were expressed that failure to notify should not disentitle the purchaser from claiming any remedies but should only affect the question of damages. Notification should be given within a reasonable time after discovery of the defects.

62. However, there was a difference of opinion as to whether notification was necessary before take-over. It was observed that in practice the purchaser would in any event notify the contractor of the defects during production. If the purchaser were to follow the various stages of production and did not discover the defects during this period he was still entitled to have the plant in accordance with the contract. No question of notification would arise.

63. The point was raised that the legal guide should provide guidance as regards the time when the defects should be rectified as well as a possibility of utilizing a third independent party in assessing the extent of a defect.

64. It was also suggested that, besides examining various stages where defects might arise, an over-all analysis of the effects of defects should be described.

Delays and remedies[14]

65. It was observed that the guide should stress the importance of providing in the contract for the stipulation of the programme and time-schedule for construction of works. Also the consequences of non-compliance with the programme and time-schedule should be spelt out. It was noted that the type of contract might influence the concept of delay, in particular the question whether delay should be considered at particular stages in the construction of the works or on completion only.

66. The Working Group pointed out different views on the legal consequences of failure to make payment in time. Some views were expressed that the contractor should be entitled to suspend the performance or even terminate the contract if it was clear that the delay would continue or payment would not be made (e.g. in case of bankruptcy). On the other hand, the view was expressed that the payment of interest should be the only consequence of delay in payment. It was observed in this connexion than an interest clause might be contrary to the applicable law. Another view favoured the same system of remedies for both parties.

67. Furthermore it was observed that the question of anticipatory breach should also adequately be covered in the guide.

Damages and limitation of liability[15]

68. In regard to liability for personal injuries and damage to property not being the subject-matter of the contract it was stressed that the contract for the supply and construction of large industrial works could not disentitle a third person (not being a party to such a contract) from claiming damages. It was observed that the only questions which might be dealt with in the guide were distribution of risks in respect of such damages and also insurance against such risks. However, it was also noted that the question of insurance was for each party to decide, and, even if this question was dealt with in the guide, the treatment should be confined to those risks which might arise from the contractual relationship. It was further noted that the Secretariat had intended to deal with insurance under a separate chapter in its future study.

69. The view was expressed that the guide should point out the relationship between the guaranty conditions and the liability of the contractor since at least in some cases the former could result in a limitation or exclusion of the latter under applicable law.

70. It was observed that there would be a general obligation to mitigate damages.

71. One view favoured only foreseeable damage. Another view was expressed that unforeseeable damage should not be excluded. There was yet another view that the relevant time for unforeseeability should not be the time of the conclusion of the contract but rather that of the breach of contract.

72. The view was expressed that the guide should stress that the validity of clauses on the limitation of contractual liability might be limited by mandatory rules of the applicable law.

73. As the notion of "damages" differed in some legal systems, the guide should make it clear what was to be understood by "direct" and "indirect" damages. In this connexion, it was observed that different types of damages, i.e. loss of profit, damage to property and personal injury should be distinguished.

74. Different views were expressed in regard to the appropriateness of the concept of gross misconduct in

[14] A/CN.9/WG.V/WP.4/Add.4: paras.1-22 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 81-85 (reproduced in this volume, part two, IV, B, 1).

[15] A/CN.9/WG.V/WP.4/Add.4: paras. 23-52 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 86-97 (reproduced in this volume, part two, IV, B, 1).

the ECE General Conditions which related also to loss of profits. One view was that this concept was too harsh for the purchaser. Another view considered the wording of the ECE clause as sufficient for the protection of the purchaser.

75. The Working Group was informed by the Secretary of the Commission of the work of the UNCITRAL Working Group on International Contract Practices in respect of the progress made by it on a project on liquidated damages and penalty clauses. The report of the deliberations would be submitted to the fourteenth session of UNCITRAL. The Working Group agreed that the guide should duly reflect the ultimate solution by the Commission of this matter.

Termination[16]

76. There was general consensus that the termination of a contract should be the last recourse to which the parties should be entitled and only where other remedies proved inadequate. The Working Group agreed that termination of a contract should be limited only to fundamental breach. The parties should spell out very clearly in their contract the circumstances where termination could be resorted to.

77. The opinion of the Working Group was divided on the desirability of distinguishing between cases where the failure to perform was due to exonerating events and cases where either of the parties was responsible for the failure. The view was expressed that the conditions for termination of a contract should be more strict in cases where the contract was not fulfilled due to impediments for which the party was not responsible. According to another view it would not be advisable to distinguish between exonerating events and breach of contract as the termination of contract should be limited only to cases where other solutions were not possible or feasible. Such a distinction should, however, be important in respect of other legal consequences, in particular that of damages.

78. One view was expressed that the guide should also deal with the concept of partial termination making clear the legal consequences.

79. It was suggested that the term "avoidance" (in the Sales Convention) be used instead of "termination".

80. The view was expressed that the guide should also deal with possible approaches by which the purchaser could force the contractor to complete the work where the remedy of damages or termination was not adequate. Under another view there was no possibility of forcing the contractor to continue the work. However, it would be in the interest of the contractor to complete the work otherwise his reputation might be at stake.

81. There was substantial support for the view that a notice be required for termination. However, the view was expressed that there should not be a requirement of notice in certain exceptional circumstances, e.g. abandonment of contract. In this connexion it was noted that some legal systems required an express agreement in the contract for its termination.

Transfer of technology[17]

82. There was general agreement to include the appropriate legal aspects of the transfer of technology in the guide. The fact that transfer of technology was also dealt with by other international organizations, particularly UNCTAD, UNIDO and WIPO, did not preclude UNCITRAL from taking up this subject. It was felt that UNCITRAL might make a contribution by resolving legal issues pertaining to the subject. Reference was made to the determination of applicable law and settlement of disputes.

83. There was also agreement that the transfer of know-how was essential in order to assist the purchaser in the operation of the plant, its maintenance and also its repair. It was pointed out that in the long run the transfer of know-how was essential to lay the basis for the industrial and technological development of developing countries. Mention was made of the need to include in the guide indications covering the possibility of the contractor employing engineers and managers of the purchasing party in all stages of work to ensure adequate transfer of technology. There were other questions involved, e.g. the training of personnel, which should be covered in the second part of the study.

84. Different views were expressed in regard to the problem of granting licences by third parties. The guide should make it clear under what conditions the contractor himself would have to provide for the technology.

85. As to the common restriction of the purchaser to sell the products of the plant in third countries the view was expressed that restrictive practices be abolished. Under another view it was argued that there might be a justification for certain restrictions.

86. Doubts were expressed as to the necessity of confidentiality in respect of all related information as found in many contracts.

87. In regard to the retransfer of technology from the purchaser to the contractor there was one view opposing such an obligation whereas another view spoke

[16] A/CN.9/WG.V/WP.4/Add.7: paras. 1-86 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 141-157 (reproduced in this volume, part two, IV, B, 1).

[17] A/CN.9/WG.V/WP.4/Add.2: paras. 1-37 (reproduced in this volume, part two, IV, B, 1). A/CN.9/WG.V/WP.4/Add.8: paras. 38-49 (reproduced in this volume, part two, IV, B, 1).

in favour of payment for such retransfer and in favour of applying the same principle for the transfer of improvements of the technology from the contractor to the purchaser.

88. It was agreed that UNCITRAL should not duplicate the work in regard to the proposed code of conduct on transfer of technology. However, it was generally felt that it would be desirable for the legal guide to refer to relevant issues under consideration by UNCTAD so that the parties would be made aware of them.

Future work

89. There was general consensus that the remaining topics listed in the study by the Secretary-General in A/CN.9/WG.V/WP.4, para. 36 should be completed by the Secretariat and examined by the Working Group.

90. It was pointed out that other topics such as maintenance, spare parts, customer's service, technical assistance, variations, financial arrangements, time limits, feasibility studies, modes and effects of notices, supply of raw materials and industrial input, tenders, liability of a consulting engineer, joint and several liability of several contractors and bankruptcy might also be included.

91. The Working Group requested the Secretariat to complete the remaining preparatory work for its next session. It was suggested that sufficient time should be made available to the Secretariat to prepare the remaining aspects of this subject in order to make the documents available well in advance to the participating countries for their study. However, the Group agreed that the Secretariat should be given a discretion regarding the organization of work including the selection of the additional topics suggested.

92. The Working Group also entrusted the Secretariat with the drafting of the legal guide.

93. As regards clauses related to industrial co-operation, the Working Group considered the note by the Secretariat on the subject (A/CN.9/WG.V/WP.5)* and agreed that work on it be deferred. The Working Group agreed to concentrate its work on contracts for the supply and construction of large industrial works at the present moment. However, it requested the Secretariat to submit, at a future session, a preliminary study on specific features of industrial co-operation contracts after the preparation of the legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works.

94. Some views were expressed on when the next session should be held. One suggestion was to hold the next session early in 1982. Another view was that the next session of the Working Group might be arranged just before the next session of the Commission as was done this time so that again many members may be represented. The Working Group expressed its wish to the Commission to take into account the urgency of the project in determining the date of the next session of the Working Group.

* Reproduced in this volume, part two, IV, B, 2.

B. Working papers submitted to the Working Group on the New International Economic Order at its second session (Vienna, 9-18 June 1981)

1. Study of the Secretary-General: clauses related to contracts for the supply and construction of large industrial works (A/CN.9/WG.V/WP.4 and Add.1-8)*

CONTENTS

* Referred to in Report, para. 71 (part one, A, above).