

B. Note by the Secretary-General on the progress made by the Secretariat in respect of its investigatory study on contract practices in international trade (A/CN.9/160)*

1. The United Nations Commission on International Trade Law, at its eleventh session, adopted its new programme of work and decided that priority should be given, among other things, to the consideration of international contract practices, with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses, and clauses protecting parties against currency fluctuations.¹

2. It was suggested that an investigatory study be made by the Secretariat on contract practices in international trade, which should initially focus on typical clauses used in international contracts, and on the use of unfair clauses in trade between developed and developing countries.²

3. By a note verbale dated 14 July 1978, the Secretary-General invited Governments to supply him with copies, or relevant extracts therefrom, of international contracts to which the Government or one of its public entities was party and which might be of assistance in the preparation of the study. In this connexion, the Secretary-General noted that the success of the investigatory study would depend in large measure on whether it reflected contemporary commercial practices.

4. At the time of writing of this note, copies of contracts, or relevant extracts therefrom, had been received from the Governments of Argentina, Australia, Austria, Canada, Czechoslovakia, the German Democratic Republic, Guyana, Hungary, Poland, the Sudan and Turkey.

5. By a letter dated 27 July 1978, the Secretary of the Commission addressed himself to various international organizations, and national and international institutions and business associations for copies of general conditions and clauses used in international trade and prepared or employed by those organizations, institutions or associations.

6. At the time of writing of this note, the Secretariat, in response to that letter, had received copies of:

- 45 Agreements concluded between Governments, or between Governments and business firms or international organizations;
- 120 International contracts for the sale of various commodities;
- 100 Forms or order confirmations for the sale of different commodities;
- 80 General delivery conditions for the sale of different commodities, loan agreements, charter-parties, etc.;

* 11 May 1979.

¹ UNCITRAL, report on the eleventh session (A/33/17), paras. 67 (c) (i) b, and 69 (Yearbook . . . 1978, part one, II, A).

² *Ibid.*, para. 47.

150 Contract clauses relating to "hardship", *force majeure*, penalty clauses and liquidated damages clauses, clauses protecting parties against currency fluctuations, price revision clauses, and guarantee clauses.

7. This material has been obtained from sources in Argentina, Austria, Australia, Belgium, Canada, Czechoslovakia, the Federal Republic of Germany, the German Democratic Republic, the United Kingdom of Great Britain and Northern Ireland, Guyana, Chile, Hungary, China, Morocco, Mexico, Norway, Poland, Sweden, Turkey, Thailand and the United States of America. It is expected that further material will be obtained in the near future.

8. So far, the Secretariat has examined these materials mainly from the angle of liquidated damages and penalty clauses and clauses protecting parties against currency fluctuations. Reports on these matters (A/CN.9/161* and 164)** are submitted to the Commission at the present session. A report on contract practices relating to clauses on excuse for non-performance (relief, *force majeure* and frustration) is in an advanced state of preparation but could not be completed in time for the present session.

9. Some respondents have indicated to the Secretariat the hesitations they experience regarding the feasibility of preparing appropriate model clauses for international trade contracts that would be universally acceptable. In the view of these respondents such "universal" clauses would probably not reflect consistent commercial practice and their interpretation would probably vary according to the law applicable to the contract of which a clause forms part and according to the content in which a clause is placed.

10. In the view of the Secretariat, a study of contemporary international contract practices could determine whether generally acceptable clauses can indeed be identified or whether, as the Law Society in the United Kingdom suggested, guidelines should be prepared and issued on the matters which might be covered in different types of contracts and on how certain terms and phrases should be interpreted.

11. Beyond these immediate aims, the material already collected constitutes, it is suggested, valuable background material for the Commission's work in general. It would therefore be of interest that analytical compilations of the material be prepared according to subject matters. The Commission may wish to request the Secretariat to prepare such compilations, in addition to continuing work on the specific clauses identified at the eleventh session.

* Reproduced in this volume, part two, I, C.

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