



General Assembly

Distr.  
GENERAL

A/CN.9/217  
27 July 1982

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW  
Fifteenth session  
New York, 26 July-6 August 1982

REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER  
ON THE WORK OF ITS THIRD SESSION

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/ At its twelfth session the Commission designated member States of the Working Group. 2/ At its thirteenth session the Commission decided that the Working Group should be composed of all States members of the Commission. 3/
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 programme, inter alia, the harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development. 4/ The Commission at its thirteenth session agreed to accord priority to work related to these contracts and requested the Secretary-General to undertake a study concerning contracts on supply and construction of large industrial works. 5/
3. A study on clauses related to contracts for the supply and construction of large industrial works 6/ was submitted to the second session of the Working Group which was held from 9 to 18 June 1981 in Vienna. At this session issues concerning exoneration, renegotiation, quality, inspection and tests, completion, take-over and acceptance, guarantees, rectification of defects, delays and remedies, damages and limitation of liability, termination of contract and transfer of technology were discussed. 7/

4. At its second session, the Working Group requested the Secretariat to prepare a further study covering topics noted but which had not been analysed in that study 8/ and also to include a number of other topics as the Secretariat deemed appropriate in the light of the discussion at that session. 9/
5. At its fourteenth session, the Commission endorsed the request of the Working Group to complete the study on clauses to be found in contracts for the supply and construction of large industrial works and entrusted to the Secretary-General the drafting of a legal guide that should identify the legal issues involved in such contracts and suggest possible solutions to assist parties, in particular from developing countries, in their negotiations. 10/
6. The Working Group held its third session in New York from 12 to 23 July 1982. All the members of the Working Group were represented except Burundi, Cuba, Cyprus, Hungary, Senegal, Singapore, Spain and the United Republic of Tanzania.
7. The session was attended by observers of the following States: Argentina, Belgium, Bulgaria, Burma, Canada, China, Ecuador, El Salvador, Gabon, Jamaica, Liberia, Mexico, Netherlands, Nicaragua, Poland, Republic of Korea, Sudan, Sweden, Switzerland, Turkey and Venezuela.
8. The session was attended by observers from the following United Nations organs: Economic and Social Commission for Asia and the Pacific, United Nations Conference on Trade and Development, United Nations Industrial Development Organization and United Nations Centre on Transnational Corporations.
9. The session was also attended by observers from the following international governmental and nongovernmental organizations: The Hague Conference on Private International Law, International Chamber of Commerce and International Federation of Consulting Engineers.
10. The Working Group elected the following officers:  
  
Chairman: Mr. Leif SEVON (Finland)  
  
Rapporteur: Mr. Peter Kihara MATHANJUKI (Kenya).
11. The Working Group had before it the study of the Secretary-General on clauses related to contracts for the supply and construction of large industrial works (A/CN.9/WG.V/WP.4 and Add.1-8) which was submitted to the second session of the Working Group (hereinafter referred to as Study I) and Study II on clauses related to contracts for the supply and construction of large industrial works (A/CN.9/WG.V/WP.7 and Add.1-6) which had been prepared by the Secretariat for the present session. The purpose of the discussion on the basis of these studies was to assist the Secretariat in drafting a legal guide which would identify the legal issues involved in contracts for the supply and construction of large industrial works and suggest possible solutions to assist parties, particularly from developing countries, in their negotiations.

12. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Consideration of contracts for the supply and construction of large industrial works
4. Other business
5. Adoption of the report

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

13. The Working Group began its deliberations with a discussion of those topics in Study I which had not been considered at the second session (i.e. drawings and descriptive documents, supply, erection, passing of risks, transfer of property and applicable law).

Drawings and descriptive documents 11/

14. It was observed that these documents were one of many types of documents which may form part of the contract (e.g., tenders, general conditions) and that the legal guide should indicate the importance of clarifying the legal relationship between the various types of documents.

15. There was general agreement that it was impossible to give an exhaustive list of documents of this type to be provided by each party, as the documents which a party should provide would vary with the nature of the contract. As regards documents which the purchaser might provide prior to the formation of the contract, it was noted that some of these (e.g., tender documents, 12/ feasibility studies 13/) were dealt with in other parts of the study. As regards what documents the contractor should provide, it was suggested that this might depend on the requirements of the invitation to tender; the purchaser could protect himself by requiring detailed specifications to be incorporated in the contract. As a general principle, it was suggested that the contractor should be required to furnish all documents necessary for the proper functioning and maintenance of the works which were agreed upon in the contract. It was also pointed out that parties should be advised that an exchange of information and clarification of documents at the stage of negotiation might prevent later disputes.

16. As regards the ownership of these documents, it was noted that the relevant issue was the permitted use of the contents of such documents. Since such

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documents might contain know-how or trade secrets, the use to which such information might be put should be carefully defined.

17. It was noted that parties were free to formulate the legal consequences of failure to provide drawings and documents in a variety of ways, e.g., to stipulate that the works were not to be considered completed until the documents, for instance with respect to operation and maintenance, were provided, or to stipulate for a reduction in the price to be paid to the contractor who had not supplied the drawings.

#### Supply 14/

18. It was noted that the nature of the obligation of the contractor to supply would vary with the type of contract in question. While in some cases the obligation to supply would resemble the obligation of the seller under an ordinary contract of sale, in other cases (e.g., where the supply was ancillary to the erection of the works by the contractor, or where the contractor was a procuring agent for the purchaser) the obligation would be different. The nature of the responsibility of the contractor for defects in the equipment supplied would also depend on the terms of the contract in question.

19. While the contractor's obligation to transport materials would vary with the nature of the contract, there was general agreement that the legal guide should direct the attention of the parties to the issues involved (e.g., fixing of costs, responsibility for storage during transport). It was suggested that a reference by the parties to INCOTERMS might be of assistance, but it was also noted that INCOTERMS did not deal with all modes of transport which might be involved. Furthermore, INCOTERMS were intended for ordinary sales.

20. Under one view, responsibility for the storage of materials on site 15/ should rest with the contractor, as he may best be acquainted with the materials he was supplying. Under another view, however, it was noted that in some cases it might be preferable to place the responsibility on the purchaser, as he might be able to store cheaply, and provide better security. It was noted that, even when the contractor was to be responsible for storage, the purchaser might be placed under a duty to provide storage facilities, and access to such facilities. There was general agreement that the guide should examine the above issues, and also the issue of the allocation of the risk of loss during storage.

#### Erection 16/

21. It was pointed out that the nature and extent of the obligations of the parties with respect to the erection of the works could vary depending upon the type of works to be constructed. In some contracts all obligations in connexion with erection are imposed on the contractor; in others, the purchaser assumes some of these obligations. In still other contracts the obligations of the contractor are limited to supervising erection performed by or on behalf of the purchaser. It was suggested that a division of responsibility with regard to erection could

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produce uncertainties, and the legal guide should recommend that in such cases the obligations of each party should be specified as clearly as possible.

22. It was generally agreed that if the obligation of the contractor is limited to supervising erection, he should not be responsible for the erection of the works, but merely for giving proper instructions. Furthermore, he should not be liable if these instructions are not obeyed.

23. It was noted that if the purchaser undertakes to provide equipment and supplies necessary to erect the plant he should bear the cost of these materials. It was also suggested that the contract should specify the consequences which would accrue from a delay by the purchaser in providing erection materials, or from providing defective materials.

24. With respect to the supervision of erection, it was pointed out that responsibility for such supervision could be imposed wholly on the contractor; alternatively, the purchaser or his engineer could also engage in supervision.

25. It was agreed that the contract should provide for access to the works by the purchaser and his personnel, provided this does not interfere with the progress of the works. According to one view "reasonable" access should be provided; another view suggested that the scope of access should be clearly specified in the contract.

26. It was pointed out that in some contracts the purchaser provides labour for the erection of the works. It was suggested that the contract should specify how much labour is to be provided and how skilled it must be. Also, it was noted that in some areas labour supplied by the purchaser may not possess the skill or training required by the contractor, and that the contractor might have to provide training for this labour. It was suggested that the contract should deal with the issues of the cost and of delay in performance occasioned by such training.

27. It was suggested that the parties to a works contract should agree upon a time schedule for the completion by the parties of the various stages of work, and should specify the consequences of the failure of a party to meet a time limit.

28. The view was expressed that the contract should contain an express promise by each party to co-operate with the other with respect to performance of the contract. Requirements for co-operation in particular respects might also be included.

#### Passing of risk 17/

29. It was suggested that the passing of risk concerns the risk of damage to the materials, equipment or plant for which neither party is liable. It was also agreed that the issue of passing of risk is distinct from the issue of force majeure.

30. There was general agreement that the time and consequences of the passing of risk should be defined in the contract because these may differ according to

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national law of various States, and, in the absence of agreement, may be settled by applicable law in ways contrary to the wishes of a party.

31. It was generally agreed that the degree to which the legal rules governing sales should apply to a works contract depends upon how closely the works contract resembles a sales contract. One view suggested that in a turn-key contract the risk should remain with the contractor until the date of acceptance or completion. Under another view certain risks should pass to the purchaser even before acceptance or completion. However, it was thought advisable for the legal guide to define these events clearly.

32. There was support for the view that the legal guide should deal with the consequences of the passing of risk. It was agreed that after the risk passes to the purchaser, he must pay for the plant unless the damage is due to an act or omission of the contractor.

33. It was generally agreed that it would not be advisable to have multiple passing of risk, as, for example, the passing to the purchaser of risk with respect to equipment delivered to the site, passing the risk back to the contractor upon installation of the equipment in the works, and then returning the risk to the purchaser upon acceptance or completion of the works.

34. It was suggested that it is important for the legal guide to inform the parties, particularly from developing countries, of the consequences of allocating risk. Risk is not always fully covered by insurance; and as more risk is imposed on the contractor, the cost to the purchaser may increase. Moreover, as purchasers undertake more of the work under a contract, they assume more of the risk.

35. There was considerable support for the view that the issue of passing of risk is separate from the issue of passing of ownership. However, another view was that in some cases there might be a link between the two issues.

#### Transfer of property 18/

36. It was generally agreed that the issue of transfer of property was not as important as passing of risk, although there were some factors in connexion with transfer of property of which the parties should be aware. It was agreed that an agreement of the parties concerning the transfer of property might have only a limited effect, since mandatory rules of law might govern this issue, and since the parties could by agreement between them affect neither public obligations nor the rights of third parties, such as creditors. The legal guide should advise parties to explore the applicable law to determine any mandatory rules relevant to the transfer of property.

37. With respect to the question of reservation of title, a distinction was drawn between transfer of the plant itself and transfer of equipment and machinery to be incorporated in the works. Opinions differed concerning the importance of the question of reservation by the contractor of title to the plant after delivery to the purchaser. One view pointed out that the works are often tailored to the

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specific needs of the purchaser, and would have little value to the contractor even if the title were retained by him.

38. A view was expressed that the question of transfer of property might be discussed by the legal guide in the context of other substantive issues, such as acceptance and passing of risk.

Applicable law 19/

39. It was generally agreed that the legal guide should clarify the importance and the scope of the choice of applicable law by the parties. It should mention the factors which the parties should take into account in choosing the applicable law. It was suggested that the legal guide should deal with the problem of applicable law in close connexion with the problem of settlement of disputes.

40. Some views were expressed that the guide should recommend a model clause on choice of law, without mentioning the law to be chosen. However, it was noted that under many legal systems the law of the place of construction is the applicable law. One view suggested that the law of the place of the construction of the works should be recommended to the parties. Another view suggested that the law of the forum be recommended coupled with the inclusion of an exclusive jurisdiction clause in the absence of an arbitration clause, as otherwise expertise on the foreign law to be applied would be needed and proceedings would be longer and more expensive. It was suggested that preference should be given to a law known to both parties. One view suggested that the legal guide should mention the possibility of resorting to general legal and equitable principles in the event the parties are unable to agree on national law. Under another view the parties should be cautioned against such a choice.

41. It was suggested that the applicable law should be chosen by the parties before drafting the contract as the applicable law should be taken into account in this connexion.

42. It was pointed out that under the conflict rules of some countries the freedom of the parties to choose the applicable law is limited. It was suggested that the parties should take into consideration the conflict rules of the country where the court or arbitration proceedings are to take place.

43. It was pointed out that the ability of the parties to choose the applicable law is limited to the law governing the rights and duties between the parties and some administrative municipal laws apply regardless of the choice of the parties.

44. The mandatory requirements of administrative laws (e.g., in the fields of environment protection, safety regulations) being in force in the country of the erection of the works may affect the performance of the contract. The opinion of the Working Group was divided on the issue whether the purchaser should be obliged to inform the contractor of such requirements. The view was expressed that the purchaser should not have such an obligation since such rules are published. Another view was that some of these requirements are not available to foreign

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enterprises and therefore the purchaser should inform the contractor of them. It was suggested that the legal guide recommend collaboration between the parties and should only draw attention of the parties to these problems and indicate possible solutions.

45. It was agreed that the legal guide should deal with the effects of changes of law on the contractor's obligations.

Feasibility studies 20/

46. There was general agreement that the contractor cannot be responsible for feasibility studies and should not be obligated to check the correctness of feasibility studies or information which he received from the purchaser. Feasibility studies are not usually in the possession of the contractor and do not form part of the contract. In the legal guide there should be only a short reference to these problems.

47. It was pointed out that the contractor should not be obliged to make studies and obtain information concerning the feasibility of the works. Evident errors in tender conditions in respect of technical issues should be notified by the contractor to the purchaser. There was agreement that the guide should recommend that the issue of responsibility for a change of physical conditions after preparation of the feasibility studies which affects implementation of the contract should be settled by the parties.

Formation of contract 21/

48. It was pointed out that it was advisable to distinguish between the conclusion of the contract and its entry into force. This distinction is important in particular if the contract is subject to a condition (e.g., an approval by authorities).

49. It was observed that the legal guide should recommend that the parties follow the example of article 29 of the United Nations Convention on Contracts for the International Sale of Goods in drafting provisions concerning the form of modification of the contract.

Variation 22/

50. With respect to variation of the contract, one view was suggested that the contract might be changed only by mutual agreement of the parties. Unilateral change would cause problems as to the ability of the contractor to meet the purchaser's requirements and would have consequences for the price and time of performance.

51. According to another view the purchaser should be entitled to vary the scope of the contract unilaterally if the contractor is able to fulfil the new obligation.

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52. It was noted that a distinction should be made between variation of the contract and rectification of errors in drawings and descriptive documents. The contractor should be responsible for such errors provided that they are not due to incorrect information furnished by the purchaser.

53. It was stressed that the legal guide should recommend a solution to the question of variation which could enable the work to go on without any interruption.

54. It was suggested that the contractor should be entitled to vary the scope of the work undertaken by him if it is in the interest of the purchaser (e.g., improvement of the quality of the works). According to another view the purchaser should have the right to consider what is in his interest and mutual agreement should be required in such cases.

#### Interpretation of contract 23/

55. There was general agreement that the power of the parties to determine rules for interpreting the contract could be limited if mandatory rules of the applicable law would to some extent regulate such interpretation. It was agreed that the parties should be encouraged to identify documents which formed the contract. In particular, parties should determine which documents prepared, and proposals made, by the contractor at the pre-contractual stage were to be part of the contract, and should take steps to achieve this. Since the negotiations leading to the conclusion of works contracts might clarify the terms of the contract, it was also agreed that it would be desirable that some documents not forming part of the contract (e.g., correspondence containing negotiations) could be used to clarify the terms.

56. There was general agreement that parties should be advised to eliminate inconsistencies between the various documents which formed the contract. Under one view, it would be advisable to recommend a rule as to which documents were to prevail in case of inconsistency. Under another view, the formulation of a rule was inadvisable, as the rule might not lead to appropriate results in some cases. It was agreed, however, that written contract provisions should prevail over general conditions incorporated by reference.

57. There was wide support for the view that, when general conditions were made part of a contract, pre-printed headings and marginal notes in the general conditions were not normally intended to be part of the contract and could not be used to interpret it. When, however, such headings and marginal notes were intended to be part of the contract (e.g., added to the contract and initialled by the parties) they could be so used.

58. There was general agreement that parties should be advised clearly to define, whenever possible, important terms used in the contract. It was also noted that the legal guide should call the attention of parties to the fact that, under some national laws, the use of certain terms may not be appropriate.

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59. In this connexion it was noted that the preparation of the legal guide would require a clarification of certain terms or notions commonly occurring in contract practice, and possibly require the formulation of new terms acceptable to the various legal systems and in contract practice in order to avoid unnecessary misunderstandings which otherwise might accrue. It was agreed that such clarification and formulation would be of great assistance to parties in drafting contracts, and might in the long term lead to a unification in contract practice. There was therefore general agreement that the legal guide should include a glossary which would define as many as possible of these common legal and technical terms because these definitions would not only be essential to understand the guide but could be incorporated by reference by the parties into their contracts.

60. The Working Group considered the definition of certain terms commonly used in works contracts. With regard to the term "writing", it was noted that the applicable law might require the contract to be in writing and contain a definition of that term which required the writing to be authenticated. Furthermore the contract itself might require certain communications to be made in writing. It was agreed that the attention of the parties should be drawn to difficulties which might arise from the use of certain forms of communication, such as telex. It was also agreed that problems created by modern electronic forms of communication should be examined. With regard to the term "purchaser", a view was expressed that the Secretariat might evaluate the possible use of "employer", "owner" and "client". 24/

61. The Working Group considered the frequent use of more than one language in drafting a contract and its annexures. There was general agreement that the use of more than one language was often inevitable, because the parties to the contract were not equally familiar with the same language. Under one view, in such cases it was advisable to provide that, in case of inconsistency, one language version was to prevail. Under another view, the various language versions should be accorded equal authenticity, as in the case of some international conventions. A suggestion was made that thought should be given to selecting the language of the country whose law would govern the contract, or whose courts would adjudicate on disputes, as such a selection would facilitate dispute settlement.

Assignment or transfer of contract 25/

62. There was general agreement that the legal guide should clarify the distinction between assignment and subcontracting. There was also general agreement that it was inadvisable that a contract should permit a party, without the consent of the other party, to assign the contract to a third party, substituting for himself the third party as a party to the contract.

63. As regards the assignment of contractual duties by either party, there was general agreement that, following the provisions of most legal systems, the contract should not permit a party to assign his duties without the consent of the other party. There was considerable support for the view that the position should be the same in regard to the assignment of contractual rights, as a unilateral assignment could lead to difficulties (e.g., the non-assigning party might be

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prevented by the law or policy of his country from dealing with the assignee). It was suggested, however, that permitting unilateral assignment in a limited class of case might be useful (e.g., where a contractor was permitted to assign his right to the proceeds to the bank financing the contractor).

Sub-contracting 26/

64. There was general agreement that the legal guide should address the question of the extent to which a contractor should be permitted to use sub-contractors for discharging his obligations under the contract. It was noted that there may be mandatory laws regulating this question. It was also noted that there was a variety of ways in which sub-contracting could be regulated (e.g., choice of sub-contractors to be approved by the purchaser, sub-contractors to be proposed by the purchaser). Which way was most appropriate would depend on the circumstances of each contract, and perhaps even on the stage which the project had reached at the time sub-contractors were to be used.

65. It was noted that the legal guide should deal with the subject of joint ventures or consortia of contractors, dealing with such aspects as communication between the purchaser and the joint venture and the question of joint and several liability of contractors. This question might be governed by applicable law. It was also suggested that the future programme of work of the Working Group might deal with the question of consortia and joint ventures on a larger base. It was also noted that the purchaser should be informed of the composition of the consortia.

66. There was general agreement that the legal guide should not discuss in detail the relationship between the contractor and sub-contractor. One view suggested that the legal guide should recommend that if the main contract contains provisions concerning settlement of disputes and applicable law, the parties should consider whether the same provisions should be included in a sub-contract. Another view was that this might be unwise in some cases where the nationality of the sub-contractors might differ from that of the purchaser.

67. According to one view, if the contractor without reasonable cause fails to pay a sub-contractor, the purchaser should be able to pay the sub-contractor directly. The contract should contain a specific provision defining the circumstances when this could be done, since without such a provision payment of the sub-contractor by the purchaser would be entirely at the purchaser's risk. According to one view the risk borne by the sub-contractor should be proportionate to his share of the work.

68. It was generally agreed that the subject of contracts entered into by the purchaser with third parties is separate from the issue of sub-contracting. The legal guide should therefore discuss this subject separately from sub-contracting.

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Co-ordination and liaison agents 27/

69. There was general agreement that co-ordination of the day-to-day operations under the contract is important for the expeditious completion of the work at low cost. The legal guide should encourage parties to establish means and procedures for co-ordination and co-operation between the parties. One view suggested that the authority of liaison agents appointed by each party should be delineated in the contract. Another view suggested that the legal guide clarify the differing terminology used in practice to refer to these agents.

Engineer 28/

70. It was generally agreed that the legal guide should recommend that parties clearly define in the contract the role of the engineer if any. Under one view, the engineer should be regarded as a representative of the purchaser alone.

71. According to one view, where the engineer represented the purchaser, the legal guide should recommend that the engineer represent the purchaser only in respect of technical matters arising from the contract. Another view suggested that the role of the engineer should be broader (e.g., determining the amount to be paid for extra work).

72. It was noted that the relationship between the purchaser and the engineer is outside the scope of the contract between the contractor and the purchaser.

73. It was suggested that the legal guide recommend that the parties provide a mechanism to settle provisionally problems in connexion with the work so as to enable the work to continue. In this regard, a view was expressed that such a role could be played by an engineer.

Parties' liabilities in respect of third parties 29/

74. There was some support for the view that the contractor should be fully liable for the acts and omissions of his sub-contractors. There was general agreement that the legal guide should recommend that the contract deal with the question of damage caused to third parties by the acts or omissions of contractors or sub-contractors. It was suggested that the legal guide should recommend that the contract require the contractor to indemnify the purchaser against claims by such third parties. Another view suggested that the legal guide should note that the parties could safeguard themselves against such damage through co-insurance of the contractor and the purchaser.

75. It was noted that the liability of the purchaser and contractor to third parties would be governed by the applicable law. It was suggested that this be brought to the parties' attention since the law relating to this issue may vary from country to country.

76. One view suggested that it was advisable for the contract to allocate responsibility for the safety of persons coming onto the worksite. Another view suggested that this was not necessary because it would be governed by applicable law.

77. It was generally agreed that the legal guide should not deal with the subject of agency because the issue is more related to the stage of procurement; the guide should limit itself to the responsibility of the parties in respect of their performance of the contract.

#### Training and acquisition of skills 30/

78. It was suggested that the expression "technical assistance" was inappropriate and that the legal guide should establish the terminology with regard to training and other services provided by the contractor in respect of the operation and management of the works.

79. According to one view the contract should deal with questions such as the nature of training, duration of training, the qualifications of trainers and trainees, lodging of trainees, the place of training and the cost of training. Another view suggested that the contract should contain only a general provision with regard to training, and that details regarding these services be dealt with in a separate agreement to be concluded at the same time as the main contract.

80. There was some support for the view that the training should take place in the country of the purchaser.

81. With respect to management services, it was suggested that only services after take-over could be considered management services.

#### Maintenance and spare parts 31/

82. There was general agreement that the issues concerning maintenance and spare parts are important for the purchaser, in particular in the developing countries. There was support for the suggestion to distinguish between repairs covered by a warranty binding on the contractor and other repairs which the contractor undertakes without being in breach of any of his obligations.

83. It was noted that the main issue to be addressed by the legal guide was that of maintenance not covered by the warranty period. Under one view, it would be advisable to settle this issue in the contract, while under another view it would be preferable to settle this issue in a separate contract. It was pointed out that the period of maintenance should not be too short, and sanctions should be agreed upon for cases where the contractor failed to perform his obligations.

84. It was pointed out that it might be desirable to distinguish various types of spare parts in the contract, and that the contractor might be asked to guarantee the availability of certain critical items important for the operation of the works.

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85. It was felt that tie-in clauses limiting the purchaser to buying spare parts from the contractor might in some circumstances be disadvantageous to the purchaser, and that the purchaser should be free in choosing a supplier. Furthermore, such clauses may be contrary to mandatory provisions of the applicable law on restrictive practices. Under one view, a restriction on choosing a supplier of spare parts other than the contractor might be justified during the warranty period.

86. There was support for the suggestion that the contractor should be obligated to supply the spare parts during a reasonable period of time, and after its expiration the purchaser should be able to produce the spare parts. The contractor should advise the purchaser where to obtain the spare parts not produced by the contractor and the spare parts should be supplied at market prices and within a short delivery period. However, the contractor should not be obliged to procure spare parts manufactured by third parties after the expiration of the warranty period.

87. It was suggested that the attention of the parties should be drawn to the interest of purchasers in developing their own capabilities to maintain and repair the works and produce spare parts.

Price 32/

88. There was general agreement that there is a lack of uniformity in terminology used in connexion with different kinds of prices (e.g., lump-sum price, cost-reimbursable price, fixed price, firm price or unit price). It was suggested that an attempt should be made to unify this terminology, and to define the terms used in the legal guide.

89. It was pointed out that the problems connected with inflation should be separated in the legal guide from the issues concerning currency fluctuations.

90. The opinion of the Working Group was divided on the issue whether, and to what extent, the legal guide should deal with criteria used in pricing. One view was that these problems were important, and the elaboration of such criteria, without recommending any solutions, would be of assistance to procurement officers in developing countries, while another view preferred to limit the legal guide only to the legal aspects of pricing because the determination of price was more closely connected to economic factors. It was also noted that the applicable law may also have relevance to the fixing of price.

91. It was suggested that the legal guide should analyse what methods of pricing are advisable in various types of contracts. It was pointed out that the purchaser might be interested in knowing in advance what financial commitments would arise from the contract, and that cost-reimbursable contracts would not give such advance knowledge. Another view was that there should not be a recommendation for a general approach to this problem, as all circumstances should be taken into consideration in determining the appropriate method of pricing.

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92. There was general agreement that it would be advisable to specify the equipment and services covered by the agreed price to achieve certainty and eliminate potential disputes.

93. It was pointed out that the purchaser might be interested in agreeing that a part of the price should be paid in the currency of his country, in particular for costs incurred therein, and that the legal guide should deal with problems connected with such payments.

#### Revision of price 33/

94. It was agreed that the legal guide should deal separately with revision of price claimed by either party and with adjustment of price. The suggestion was made to deal separately with the problems of changes in price consequent to changes in the extent and scope of work, and consequent to the furnishing of additional supplies and services. It was pointed out that it would be advisable not to deal in the legal guide with the revision of price in its own chapter, but in the chapters dealing with the various circumstances in which revision of price occurred.

95. In cases of changes in the extent or scope of the work, the parties should consider the financial consequences of such changes and agree upon a new price. The suggestion was made to pay attention in the legal guide to the problems of the procedure for revision of the price, as it would be advisable to stipulate in the contract clear consequences when circumstances occurred in which the price should be revised.

96. The question was raised whether the purchaser should pay all costs connected with changes in administrative laws affecting the scope of the works. It was pointed out that, in particular in the field of environment protection, the design of the works should set a standard which might be required by future legislation of the developing countries. It was also suggested that the legal guide should draw the attention of the parties to the problem of a revision of price required by technological innovations to the design of the works.

97. As regards currency fluctuations, it was pointed out that the legal guide should refer to these problems and may examine existing techniques aimed at protecting the parties. The legal guide should deal with problems in relation to index clauses.

#### Payment conditions 34/

98. There was general agreement that the legal guide should address legal issues connected with payment conditions. It was noted that the payment conditions appropriate to a contract would depend on the circumstances of that contract.

99. The view was expressed that the legal guide should direct the attention of the parties to the possible need to provide remedies for anticipatory breach of the contract. It was noted, however, that the remedies to be recommended may not be

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those appropriate to an ordinary sales contract. It was also noted that the guide should consider problems which arise when legal restrictions on payment are imposed on the partner subsequent to the conclusion of the contract.

100. As regards the time of payment, it was noted that it would be impossible to advise on the actual sums to be paid at different stages of the work, as the amount of these sums would depend on the circumstances of each contract. However, the legal guide could discuss factors relevant to determining the amounts. Thus the sums should bear a relation to the cash needs of the contractor to proceed with his work at the different stages, and to the need of the purchaser to retain moneys as security for due performance. Furthermore, the right to payment should be made to depend on due performance.

101. As regards payment documents, it was observed that the purchaser or his engineer sometimes delayed in certifying payments, or refused to certify payments without adequate reasons. It was noted that the contract could provide for this situation in various ways, e.g., by providing that the certification is deemed to be given after the lapse of a specified period, or that such matters should be referred to arbitration. In this connexion it was pointed out that it would be desirable for the parties to define the circumstances when certification could be refused.

102. As regards methods of securing payment to the contractor, it was noted that a letter of credit was not the only method used, and that other methods (e.g., cash deposits) should also be discussed.

#### Performance guarantees 35/

103. There was general agreement that the term "guarantee" might cover a variety of concepts and that the term had different meanings under different legal systems. The legal guide should therefore attempt to clarify the term. It was suggested that the guide should provide model forms of guarantee exemplifying the different types of guarantees used in practice. It was also agreed that, in addition to dealing with guarantees for the completion of work by the contractor, the guide should also deal with guarantees for advance payment and for the contractor's obligations during the warranty period after completion.

104. There was general agreement that performance guarantees were often necessary, as the solvency or stability of the contractor might be in doubt. The terms of such guarantees should be agreed upon at the conclusion of the contract. It was also noted, however, that in view of the high cost of obtaining such guarantees, possible techniques for minimizing their use or reducing their cost should also be explored, e.g., by using revolving letters of credit. There was wide agreement that a progressive reduction in the amount of the guarantee as work progressed was beneficial as it would lessen the costs of the guarantee. A performance guarantee, however, should not be reduced to an amount so low as not to provide adequate security to the purchaser.

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105. As regards the nature of the guarantor's obligation, the attention of the parties should be directed to the merits and demerits of each form of guarantee and of conditions which might be inserted in the guarantee. Thus a first demand guarantee gave the purchaser considerable security, but might be abused. An accessory guarantee, on the other hand, might result in delay before the purchaser receives payment. It was noted that where a guarantor's obligation was not to pay money but to continue the performance of work, the manner in which the performance was to be carried out should be specified.

106. It was suggested that the period to be covered by the guarantee should be clearly indicated both in the contract and the guarantee. The guarantee should also deal with the effect on the guarantee of variations to the contract.

Insurance 36/

107. It was suggested that the legal guide should draw the attention of the parties to the various types of insurance available to cover risks arising from the contract. One view suggested that the legal guide should advise the purchaser that he will ultimately have to bear the costs of insurance by the contractor and suggest that he might wish to consider whether he can obtain insurance himself at lower cost. It was also noted that in some cases the purchaser may require insurance to be purchased in his own country.

108. One view noted that it was common for contractors to carry general liability insurance, including third-party coverage, covering the liabilities arising in the course of its business. It was suggested that the legal guide should recommend that the purchaser consider whether it is necessary to require further third-party liability insurance in connexion with the specific contract, which might result in double insurance.

109. One view suggested that the legal guide should consider various measures which a party may take if the other party fails to meet an obligation to provide insurance. According to one view, the legal guide should deal with the possibility of insurance to cover the liability of the contractor for his faulty performance of the contract and issues arising from such insurance.

110. With respect to the time period to be covered by insurance, one view suggested that this would vary with the nature of the risk covered. According to this view, liability insurance should cover the period from the start of erection to take-over of the works by the purchaser.

Customs duties and taxes 37/

111. One view suggested that questions concerning customs duties and taxes should be carefully considered by parties before entering into the contract because these duties are imposed by the applicable mandatory national law and the responsibility of each party in this regard usually cannot be changed by a contract. According to another view, it was nevertheless advisable to provide in the contract for the allocation of the ultimate burden concerning customs duties and taxes.

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Bankruptcy 38/

112. There was general agreement that the legal guide need not deal with bankruptcy in a separate chapter, but rather should consider bankruptcy in connexion with other substantive aspects of the contract (e.g., termination, exoneration, modification and assignment) which may be affected by bankruptcy. In this connexion, it was suggested that the legal guide should also refer to insolvency, liquidation and similar arrangements in addition to bankruptcy.

113. One view suggested that the legal guide should recommend that the parties consider whether the bankruptcy of a sub-contractor should exonerate the contractor. If not, the parties should consider whether the contractor should be given a period of time within which to substitute a new sub-contractor.

114. It was suggested that the legal guide should recommend that the parties consider incorporating in the contract measures to avoid an interruption of work in the event of the bankruptcy of the contractor.

115. It was suggested that the legal guide should recommend that the parties take into account relevant rules of mandatory law in connexion with bankruptcy. In this regard, the parties should be warned that with respect to certain matters (e.g., reservation of title) applicable law might contain mandatory rules.

116. It was generally agreed that the legal guide should deal with the relationship between bankruptcy of a party and the termination of the contract by the other party. It was suggested that the legal guide should advise the parties to consider whether the bankruptcy of a party should automatically result in termination, and also whether termination should depend upon the stage of the contract at which the bankruptcy occurs (e.g., immediately after conclusion of the contract or during the warranty period).

Notification 39/

117. It was generally agreed that questions of notification should be dealt with when relevant in connexion with other substantive matters concerning the contract. The legal guide might include a check-list to alert the parties to aspects of the contract for which formal notification might be required.

118. According to one view the legal guide should recommend that the parties consider including in the contract means for dealing with discrepancies between multiple modes of a particular notification (e.g., letter and telex).

119. It was suggested that the legal guide should advise the parties to avoid inconsistencies in notification requirements in the contract, and to bear in mind provisions of applicable law concerning notification and the extent to which parties may modify these provisions by agreement.

120. It was generally agreed that the parties should be advised to consider whether notification should be deemed effective upon dispatch or upon receipt. One view

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suggested that the legal guide should take note of the requirement in some legal systems that the notice takes effect when the recipient takes cognizance of the contents of the notification.

Settlement of disputes 40/

121. There was general agreement on negotiation as the first step in the settlement of disputes. The opinion of the Working Group was, however, divided whether the amicable settlement of disputes should be provided for in the contract. It was pointed out that it would not be advisable to stipulate in the contract a time-limit for initiation of legal proceedings as the parties should have a reasonable time for their negotiations.

122. One view suggested that conciliation proceedings would not be advisable as it might postpone the settlement of disputes in legal proceedings. According to another view conciliation should be recommended in the legal guide as it might make possible the settlement of disputes by an agreement of the parties. According to one view joint conciliation might be conducted by conciliators of equal numbers appointed at the request of the disputing parties by the arbitration institutions of their respective countries. It was agreed only to draw the attention of the parties in the legal guide to the possibility of using conciliation and to recommend the application of the UNCITRAL Conciliation Rules for the solution of issues connected with conciliation proceedings. It was also pointed out that conciliation might be used even in cases where a conciliation clause was not included in the contract.

123. The settlement of technical questions by technical experts was discussed. Under one view, these experts might speed up the solution of technical problems without any interruption of the construction of the works. Another view was that it is difficult to distinguish technical and legal problems and that, in some cases, independent or qualified technical experts might not be available. If technical experts are used it would be advisable to provide that their opinion should not be binding.

124. It was agreed that the legal guide should mention only the main problems connected with agreeing upon exclusive jurisdiction clauses and should draw the attention of the parties to the possibility that public policy issues might be involved. It was noted that in formulating exclusive jurisdiction clauses the problem of the recognition and enforceability of court decisions should be taken into account. One view suggested that the choice of the courts of the purchaser's country might be more convenient. Problems connected with the immunity of States were also mentioned in this connexion.

125. Under one view arbitration proceedings offer advantages over judicial proceedings as they are better adapted to the specific features of international trade and arbitral awards can be recognized and enforced abroad often more easily than court decisions. The suggestion was made to recommend the application of the UNCITRAL Arbitration Rules, but also to mention the possibility of using other arbitration rules.

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126. The view was expressed that the arbitration proceedings should take place in the purchaser's country. It was suggested to draw the attention of the parties to the existence of arbitration centres in the developing countries. Another view stressed the importance of the choice of qualified arbitrators.

127. It was noted that the enforceability of the arbitral award should be taken into account in choosing the place of arbitration. A suggestion was made to indicate in the legal guide that administered arbitration had certain advantages.

128. It was pointed out that the legal guide should recommend to the parties to provide for the possibility of third parties (e.g., subcontractors) participating in arbitration proceedings with a view to securing the settlement of interrelated disputes in a single proceeding.

129. There was an exchange of views on the function of the engineer in connexion with the settlement of disputes. Some views were expressed that an engineer nominated only by one party could not be considered a neutral person with the power to make final decisions affecting both parties. Another view was that in practice an engineer nominated by only one party had the confidence of both parties and was useful in speeding up the decision-making process in respect of technical questions.

#### FUTURE WORK

130. There was general agreement that the Secretariat should now commence the drafting of the legal guide. The aim of the work was to produce a guide which was properly researched, readable and well-balanced.

131. The Working Group briefly considered the possible structure of the legal guide 41/ and decided to examine this topic at its next session. In this connexion it was suggested that the subject of scheduling should also be considered for inclusion in the legal guide. Under one view the guide should not quote clauses from existing forms and models.

132. The Secretary of the Commission suggested that the next session of the Working Group might be of one week's duration and should be devoted to deciding on the structure of the guide and the approach to be adopted in its drafting. For this purpose, a few sample draft chapters and an outline of the structure of the guide would be submitted to the Working Group. Early decisions on structure and approach would prevent the waste of time and resources.

133. There was general agreement with this suggestion. It was observed, however, that the Governments of developing countries were unlikely to send delegates only to attend a session of one week's duration, and it was recognized that it was extremely important that developing countries should be adequately represented at the session. It was accordingly agreed that the Commission should be requested to decide that the next session of the Working Group should be held at Vienna in the week immediately preceding the commencement of the Commission's sixteenth session. It was recognized, however, that the decision of the Commission on the scheduling of the session of the Working Group might be affected by the Commission's decision as to the length of the sixteenth session.

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Notes

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.

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.

3/ 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.

4/ A/CN.9/176, para. 31.

5/ 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.

6/ A/CN.9/WG.V/WP.4 and Add.1-8.

7/ A/CN.9/198, paras. 11-88.

8/ A/CN.9/WG.V/WP.4, para. 36.

9/ A/CN.9/198, paras. 89-91.

10/ Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 84.

11/ A/CN.9/WG.V/WP.4/Add.1, paras. 1-43; A/CN.9/WG.V/WP.4/Add.8, paras. 4-8.

12/ A/CN.9/WG.V/WP.7/Add.1, paras. 17-22.

13/ Ibid., paras. 1-12.

14/ A/CN.9/WG.V/WP.4/Add.1, paras. 44-65; A/CN.9/WG.V/WP.4/Add.8, paras. 9-17.

15/ The Working Group considered the section entitled "Storage on site" in Study II (A/CN.9/WG.V/WP.7/Add.3, XII) in conjunction with this section.

16/ A/CN.9/WG.V/WP.4/Add.1, paras. 66-113; A/CN.9/WG.V/WP.4/Add.8, paras. 18-24.

17/ A/CN.9/WG.V/WP.4/Add.1, paras. 114-129; A/CN.9/WG.V/WP.4/Add.8, paras. 25-34.

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18/ A/CN.9/WG.V/WP.4/Add.1, paras. 130-140; A/CN.9/WG.V/WP.4/Add.8, paras. 35-37.

19/ A/CN.9/WG.V/WP.4/Add.7, paras. 87-110; A/CN.9/WG.V/WP.4/Add.8, paras. 158-162.

20/ A/CN.9/WG.V/WP.7/Add.1, paras. 1-12; A/CN.9/WG.V/WP.7/Add.6, paras. 1-7.

21/ A/CN.9/WG.V/WP.7/Add.1, paras. 13-22; A/CN.9/WG.V/WP.7/Add.6, paras. 8-9.

22/ A/CN.9/WG.V/WP.7/Add.1, paras. 23-43; A/CN.9/WG.V/WP.7/Add.6, paras. 10-12.

23/ A/CN.9/WG.V/WP.7/Add.1, paras. 44-103; A/CN.9/WG.V/WP.7/Add.6, paras. 13-16

24/ The Working Group decided to consider the definitions of the terms "subcontractor" and "engineer" in connexion with the sections in Study II entitled "Sub-contracting" and "Engineer" (A/CN.9/WG.V/WP.7/Add.2: VI and VIII).

25/ A/CN.9/WG.V/WP.7/Add.2, paras. 1-7; A/CN.9/WG.V/WP.7/Add.6, paras. 17-19.

26/ A/CN.9/WG.V/WP.7/Add.2, paras. 8-41; A/CN.9/WG.V/WP.7/Add.6, paras. 20-27.

27/ A/CN.9/WG.V/WP.7/Add.2, paras. 42-49; A/CN.9/WG.V/WP.7/Add.6, paras. 28-30.

28/ A/CN.9/WG.V/WP.7/Add.2, paras. 50-66; A/CN.9/WG.V/WP.7/Add.6, paras. 31-33. See also paras. 120-132, "settlement of disputes".

29/ A/CN.9/WG.V/WP.7/Add.2, paras. 67-79; A/CN.9/WG.V/WP.7/Add.6, paras. 34-37.

30/ A/CN.9/WG.V/WP.7/Add.3, paras. 1-21; A/CN.9/WG.V/WP.7/Add.6, paras. 38-42.

31/ A/CN.9/WG.V/WP.7/Add.3, paras. 22-49; A/CN.9/WG.V/WP.7/Add.6, paras. 43-47

32/ A/CN.9/WG.V/WP.7/Add.4, paras. 1-24; A/CN.9/WG.V/WP.7/Add.6, paras. 51-54.

33/ A/CN.9/WG.V/WP.7/Add.4, paras. 25-62; A/CN.9/WG.V/WP.7/Add.6, paras. 55-56.

34/ A/CN.9/WG.V/WP.7/Add.4, paras. 63-92; A/CN.9/WG.V/WP.7/Add.6, paras. 57-62.

35/ A/CN.9/WG.V/WP.7/Add.4, paras. 93-116; A/CN.9/WG.V/WP.7/Add.6, paras. 63-69.

36/ A/CN.9/WG.V/WP.7/Add.5, paras. 1-31; A/CN.9/WG.V/WP.8/Add.6, paras. 70-76.

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37/ A/CN.9/WG.V/WP.7/Add.5, paras. 32-44; A/CN.9/WG.V/WP.7/Add.6, paras. 77-78.

38/ A/CN.9/WG.V/WP.7/Add.5, paras. 45-54; A/CN.9/WG.V/WP.7/Add.6, paras. 79-80.

39/ A/CN.9/WG.V/WP.7/Add.5, paras. 55-95; A/CN.9/WG.V/WP.7/Add.6, paras. 81-85.

40/ A/CN.9/WG.V/WP.7/Add.5, paras. 96-149; A/CN.9/WG.V/WP.7/Add.6, paras. 86-93.

41/ A proposal for a possible structure was submitted by the German Democratic Republic: [A/CN.9/WG.V/III] CRP.3.

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