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REPORT OF THE WORKING GROUP ON THE NEW INTERNATIONAL ECONOMIC ORDER
ON THE WORK OF ITS FOURTH SESSION
Vienna, 16-20 May 1983

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. At its first session the Working Group 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. The study 6/ was submitted to the second session of the Working Group and examined by it. 7/ At that session, the Working Group requested the Secretariat to prepare a further study covering topics noted but which had not been analyzed 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/

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. 90 and 91.

4. The further study 10/ was submitted to the third session of the Working Group. 11/ At that session the Working Group concluded its consideration of the complete study 12/ and requested the Secretariat, pursuant to a decision of the Commission at its fourteenth session 13/, to commence the drafting of a legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works. 14/ The legal guide is to identify the legal issues involved in such contracts and to suggest possible solutions to assist parties, in particular from developing countries, in their negotiations. 15/

5. The Working Group at its third session requested the Secretariat to submit to the Working Group at its fourth session a few sample draft chapters and an outline of the structure of the legal guide. 16/

6. The Working Group held its fourth session at Vienna from 16 to 20 May 1983. All the members of the Working Group were represented, with the exception of Burundi, Chile, Colombia, Cuba, Cyprus, Ghana, Hungary, Indonesia, Nigeria, Senegal, Sierra Leone, Singapore, Trinidad and Tobago, Uganda, and United Republic of Tanzania.

7. The session was attended by observers of the following States: Argentina, Brazil, Bulgaria, Canada, China, Democratic People's Republic of Korea, Ecuador, Greece, Holy See, Malaysia, Mexico, Netherlands, Norway, Poland, Republic of Korea, Sweden, Switzerland, and Thailand.

8. The session was attended by observers from the following United Nations organs: United Nations Industrial Development Organization, and United Nations Institute for Training and Research.

9. The session was also attended by observers from the following international governmental and non-governmental organizations: Commission of European Communities, Hague Conference on Private International Law, International Federation of Consulting Engineers, International Progress Organization, Organization of American States, and World Bank.

10. The Working Group elected the following officers:

Chairman: Mr. Leif SEVON (Finland)

Rapporteur: Mr. Stephen K. MUCHUI (Kenya)

10/ A/CN.9/WG.V/WP.7 and Add. 1-6.

11/ A/CN.9/217, para 11.

12/ A/CN.9/217, paras. 13-129.

13/ 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.

14/ A/CN.9/217, para. 130.

15/ 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.

16/ A/CN.9/217, para. 132.

11. The Working Group had before it the report of the Secretary-General entitled "Draft Legal Guide on Drawing up Contracts for Construction of Industrial Works: Sample Chapters" (A/CN.9/WG.V/WP.9 and Add. 1-5).

12. The Working Group adopted the following agenda:

1. Election of officers,
2. Adoption of the agenda,
3. Consideration of draft structure and sample draft chapters of the legal guide for drawing up contracts for the construction of industrial works,
4. Other business,
5. Adoption of the report.

STRUCTURE OF THE LEGAL GUIDE

13. The Working Group began its deliberations with a discussion of the draft outline of the Structure of the Guide (A/CN.9/WG.V/WP.9/Add.1). There was general agreement in the Working Group that the draft outline was acceptable on the whole. It was generally recognized that as the work progressed some rearrangement of the chapters might become necessary. The Working Group agreed to give the Secretariat a discretion with respect to the arrangement of chapters taking into account the views expressed by delegations.

14. It was agreed that in the title of the Guide the term "international" should be used to describe the term "contracts". It was suggested that the title of the Guide should be "Legal Guide on Drawing up Contracts for Supply and Construction of Industrial Works", instead of the one suggested in A/CN.9/WG.V/WP.9. There was agreement that the term "large" should not be used in connexion with the term "industrial works".

15. There were several suggestions with regard to the method of presentation which would facilitate the use of the Guide. There was wide support for the proposal to include an index, summaries and check lists as appropriate. It was pointed out that definition of certain terms would be needed in the Guide. There was general agreement that the Guide should include a glossary in accordance with the decision taken at the third session of the Working Group. ^{17/} There was support for the inclusion of model clauses, including alternative model clauses, whenever appropriate. Such clauses would assist parties in drafting.

16. It was suggested that the Introduction be expanded to include the question of participation of banks and other lending agencies in projects. It was also suggested that some general issues relating to the applicable law might be mentioned in the Introduction while the issues connected with the choice of the applicable law might be dealt with in chapter XXXIX as suggested in the draft outline of the structure.

^{17/} A/CN.9/217, para.59.

17. It was suggested that certain important issues, such as legal aspects of feasibility studies, pre-contractual obligations of the parties, interest to be paid, the language of the contract, selection of persons to be trained, general conditions to be applied, keeping of books and records, and total and partial failure to perform, should not be omitted from the draft structure.

18. It was suggested that the issue of license should be listed as a separate chapter in the outline of the structure of the Guide.

19. There were several suggestions relating to the order in which the chapters were to be presented. It was suggested to place chapter XXXIII (Liquidated damages and penalty clauses) after chapter XXXI (Damages). It was also suggested that chapter XXV (Transfer of property) be placed in another location in the Guide, and that chapter XXXIV (Hardship clauses) be placed immediately after chapter XXXII (Exemptions).

20. There was agreement to delete chapter XLI (Coming into force of contract) and to deal with the subject of this chapter in chapter V (Procedure for concluding contract).

21. In connexion with the discussion of chapter IV (Invitation to tender and negotiation process) in the draft outline of the Structure, the Secretary of the Commission stated that this chapter would not be prepared until all other chapters of the Guide had been drafted. He noted that since contracts for the construction of industrial works were frequently concluded on the basis of public tenders, the drafting of procurement regulations would be a promising project for the Commission to undertake. ^{18/} Work on such a project could usefully proceed concurrently with the preparation of the chapter of the Guide dealing with legal issues involved in tender procedures.

22. In connexion with chapter III (Selection of contractors) the Secretary of the Commission noted that as already suggested at the last session ^{19/} the Working Group might deal in future with legal issues concerning joint ventures and consortia apart from questions of corporate law. The work of the Working Group in the field of industrial contracts, together with its possible work in the areas of procurement regulations and joint ventures, could usefully serve as a basis for the Commission to provide expertise on legal issues in the field of deep-sea mining, if it is called upon to do so by the forum in the United Nations dealing with this subject.

23. In connexion with chapter XXII (Transfer of technology), the Secretary of the Commission noted that the Secretariat had been keeping itself informed of developments in other organizations working in the field of transfer of technology and that this work would be adequately reflected in the preparation of the draft chapters of the Guide by the Secretariat.

^{18/} See A/CN.9/WG.V/WP.7, para. 22.

^{19/} A/CN.9/217, para. 65.

24. It was stressed that in preparing the Guide the Secretariat should bear in mind the objectives of this undertaking in the context of the New International Economic Order. It should be of particular benefit to purchasers from developing countries. However, it was noted that the Guide would also be useful to parties from developed countries in negotiating and drafting industrial works contracts.

25. It was stressed that the Introduction should clearly emphasize the guidelines to be followed and objectives to be attained in the formulation of the Legal Guide. It was further stressed that the Legal Guide should carry out the basic principles laid down by the Sixth Special Session of the General Assembly on the establishment of a New International Economic Order and should be in accordance with the principles of equality, mutual benefit, equity and reasonableness. In addition, it was stressed that the objectives of the Legal Guide should be to support and assist developing countries in establishing and developing their independent national economies and to promote international economic co-operation.

26. Various views were expressed concerning the way in which the Guide should be drafted. One view suggested that the Guide should not be too voluminous. There was wide support for the idea that issues to be settled were complex, and the comprehensiveness of the Guide, rather than its length, should be the primary consideration. There was agreement that it would not be advisable to predetermine the length of the Guide. Preparation of a synopsis was also suggested.

27. It was agreed that the Guide should be drafted so as to be of practical value for various categories of persons involved in negotiating and drafting industrial works contracts, such as administrators and businessmen, as well as for lawyers.

28. While model clauses would be appropriate to be recommended for use in contracts in various situations it was pointed out that illustrative clauses might assist in the discussion of certain issues dealt with in some chapters. It was noted, however, that an industrial works contract must be adapted to specific situations and that illustrative clauses to be contained in the Guide might not necessarily be appropriate for all contracts. The clauses should therefore be included merely to illustrate legal issues discussed in the Guide. It was suggested that the Guide should nevertheless include illustrative clauses whenever appropriate.

29. It was stressed that the Guide should as far as possible indicate the advantages and disadvantages of alternative approaches to the solution of issues dealt with in the Guide, with special reference to the interests of the purchaser.

CHOICE OF CONTRACT TYPES

30. The Working Group discussed the draft sample chapter on Choice of contract Types (A/CN.9/WG.V/WP.9/Add.2).

31. According to one view it was difficult in practice to distinguish among some types of works contracts discussed in this sample draft chapter, in particular, between the semi-turnkey contract and the partial turnkey contract. Another view suggested that the types of contracts discussed in the sample draft chapter were not defined in any legal system; according to this view it was preferable to distinguish among different negotiation approaches, rather than types of contracts. Accordingly, it was advisable firstly to distinguish between an approach involving separate contracts and an approach involving a single (turnkey) contract. Thereafter, possible variations in contractual arrangements involving a turnkey contract could be examined. In this connexion one should refer to the possibility of a joint venture. In examining the different arrangements, attention should be paid to the functions of each type of arrangement.

32. According to another view, however, it was useful for the Guide to employ working definitions of various types of contracts in order to facilitate the presentation of issues which arose in connexion with each type.

33. There was general agreement that the issue of transfer of technology was very important for purchasers from developing countries, and even for those from developed countries. Transfer of technology was important in order to enable purchasers to operate the works when they were completed, and to build similar works on their own. The Guide should assist purchasers in negotiating contracts appropriate to their needs in technology.

34. Views were exchanged with respect to the footnotes used in the draft sample chapter. One view suggested that footnotes should be eliminated or reduced in number; in particular, the footnotes referring to documents issued by other bodies should be eliminated. Another view was that the footnotes were sometimes useful (e.g. to indicate cross references), and did not detract from the Guide.

35. The view was expressed that the Guide should be drafted from a functional and practical viewpoint, that is, it should focus on various interests, objectives and concerns of the purchaser (e.g. transfer of technology, scheduling and project management considerations, and the risks involved), and assist parties, and especially the purchaser, in the negotiation of a contract which accomodates these factors in the choice of a contractual arrangement appropriate to meet the needs of the purchaser.

36. The Working Group requested the Secretariat to redraft this chapter in light of the views expressed.

EXEMPTIONS

37. The Working Group discussed the draft sample chapter on Exemptions (A/CN.9/WG.V/WP.9/Add.3). There was general agreement that the chapter was on the whole acceptable.

38. The Working Group stressed the importance of drawing the attention of parties to rules of applicable law, particularly mandatory provisions which might restrict the freedom of the parties in the drafting of an exemption clause. It was suggested that some examples of mandatory rules of applicable law should be included in the chapter. However, it was pointed out that this might not be advisable as such rules might be changed after the publication of the Guide, and readers might not be aware of such changes.

39. It was agreed that the Guide should recommend a narrow scope of exemptions. It was noted that it would be useful to have illustrative or model clauses showing the various methods of drafting an exemption clause. Under one view, the exhaustive approach should not be recommended as it was too restrictive. According to another view, the exhaustive approach might have advantages in some cases and make clear that there was in reality more possibility for the contractor to apply exemption clauses. The view was expressed that the exempting impediment must be unforeseeable, unavoidable, and irremediable.

40. It was observed that the advantages and disadvantages of the various approaches to exemption clauses should be set out.

41. It was pointed out that a cross-reference should be made to the chapter on Insurance, as the extent of insurance cover taken out by a party would influence the extent of risks, as reflected in an exemption clause, which that party was prepared to undertake.

42. The view was expressed that an exemption clause should exempt a party not only from damages but also from liability under a liquidated damages or penalty clause, and from liability to perform the obligation which is prevented by the exemption. However, under another view an exempting impediment should only exempt a party from liability to pay damages.

43. There was a suggestion that in addition to the legal effects mentioned in Part E of the chapter, parties should be advised that an obligation to renegotiate the contract might be appropriate in certain circumstances.

44. It was suggested that the title of the chapter should be amended to read "Exempting impediments" rather than "Exemptions", as this title would reflect more clearly the content of the chapter.

45. There were suggestions on the contents and drafting of particular paragraphs of the chapter, which were noted by the Secretariat, and were to be taken into account in finalizing the draft chapter.

HARDSHIP CLAUSES

46. The Working Group discussed the draft chapter on Hardship clauses (A/CN.9/WG.V/WP.9/Add.4).

47. The Working Group considered whether the Guide should contain a chapter on Hardship clauses. According to one view, such a chapter should not be included, because such clauses usually benefited the contractor rather than the purchaser, who is normally from a developing country, creating inequality between the parties. Moreover, the notion of hardship is not established universally and is unknown in some legal systems. According to another view, the Guide should contain a chapter on hardship clauses in order to make the parties aware of the problems which such clauses create. After deliberation the Working Group agreed that a chapter on hardship clauses should be included, but the chapter should recommend that the definition of hardship circumstances be drafted narrowly. An exhaustive list of circumstances which should be considered as cases of hardship should be mentioned. While the Guide should indicate both the advantages and disadvantages of hardship clauses, it should strongly warn the parties about their dangers and substantial disadvantages, in particular for the purchaser. There was considerable support for the idea that the chapter should indicate that its inclusion in the Guide is not to be taken as an endorsement by the Commission of the desirability of hardship clauses.

48. It was suggested that the distinction between hardship clauses and exemption clauses should be further clarified, and that some illustrations should be given to demonstrate the two notions.

49. It was suggested that the chapter on Hardship clauses should be combined with the chapter on Price revision, as the two types of clauses were of a similar nature. Under another view, such a relocation was inappropriate because of the wider ambit of hardship clauses, that is, to re-establish the balance of contractual obligations envisaged by the parties. It was suggested that currency clauses should be mentioned in this chapter. Reservations were expressed concerning the appropriateness of the word "hardship" to describe the subject matter of the chapter.

50. There were suggestions concerning the contents and drafting of particular paragraphs of the chapter, which were noted by the Secretariat to be taken into account in finalizing the draft chapter.

OTHER BUSINESS AND FUTURE WORK

51. The Working Group noted that the Secretariat had now acquired the expertise needed to carry out its new task in a complex area of work. The Working Group expressed its appreciation for the high quality of the work of the Secretariat on the sample chapters submitted, which formed a useful basis for the discussions.

52. Concern was expressed that the work should not be delayed. There was general agreement in the Working Group that the Guide should be completed

expeditiously. In this connexion, the Secretary of the Commission made a statement in which he observed that, as forecast at an earlier stage in the deliberations of the Working Group, half of the available Secretariat resources were already devoted to this project. Because of the experience gained in preparing the draft chapters currently before the Working Group, and because of the comments made by the Working Group at this session, the Secretariat could to some extent accelerate its work. However, because of the complexity of the work and the need to maintain a high standard, it would be realistic to predict that two to three years would be needed under present conditions for the completion of the project.

53. The Secretary of the Commission also noted that by January of 1984 the Secretariat expected to produce sufficient draft chapters to justify the holding of a two week session of the Working Group. It would therefore be possible to hold the fifth session of the Working Group in New York at the end of January next year. If this were done, the sixth session could be held towards the end of 1984 in Vienna. Such a course would also expedite the work. After deliberation, the Working Group decided that the date and length of the next session of the Working Group should be fixed by the Commission, as decisions to be taken by the Commission as to the agenda for its sixteenth session were relevant to these matters.

54. At the close of the session, the Working Group expressed its appreciation to its Chairman, Mr. Leif Sevón, for the able manner in which he had conducted the proceedings in this extremely complex field. This had enabled the Working Group to proceed with its work in an efficient and productive manner. It was noted that Finland would cease to be a member of the Commission as from the commencement of the sixteenth session of the Commission, and would accordingly also cease to be a member of the Working Group. The view was expressed that it would be highly desirable if means could be found for Mr. Sevón, despite this fact, to continue to associate himself with the work of the Working Group.