II. NEW INTERNATIONAL ECONOMIC ORDER

A. Report of the Working Group on the New International Economic Order on the work of its eighth session

(Vienna, 17–27 March 1986) (A/CN.9/276) [Original: English]

CONTENTS

INTRODUCTION

1. At its eleventh session (1978), 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 (1979), the Commission designated member States of the Working Group.[2] At its thirteenth session (1980), the Commission decided that the Working Group should be composed of all States members of the Commission.[3] The Working Group consists, therefore, of the following States: Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany, Federal Republic of, Guatemala, Hungary, India, Iraq, Italy, Japan, Kenya, Mexico, Nigeria, Peru, Philippines, Senegal, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

2. At its first session (1980), the Working Group recommended to the Commission for possible inclusion in its programme of work, 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 those contracts and requested the Secretary-General to undertake a study concerning contracts on the supply and construction of large industrial works.[5]

3. The study prepared by the secretariat[6] was examined by the Working Group at its second (1981) and third (1982) sessions.[7] At its third session, the Working Group requested the secretariat, pursuant to a decision of the

[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] See footnote 3, above.

[6] A/CN.9/WG.V/WP.4 and Add.1–8, and A/CN.9/WG.V/WP.7 and Add.1–6.

[7] A/CN.9/198 and A/CN.9/217.

Commission at its fourteenth session,[8] to commence the drafting of a legal guide on contractual provisions relating to contracts for the supply and construction of large industrial works.[9] 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.[10]

4. At its fourth session (1983), the Working Group examined a draft outline of the structure of the Legal Guide and some sample draft chapters prepared by the secretariat[11] and requested the secretariat to proceed expeditiously with the preparation of the Guide.[12] At its fifth (1984), sixth (1984) and seventh (1985) sessions,[13] the Working Group discussed a note on the format of the Guide[14] and additional draft chapters.[15]

5. The Working Group held its eighth session at Vienna from 17 to 27 March 1986. All members of the Working Group were represented with the exception of Algeria, Central African Republic, Cyprus, Hungary, Iraq, Peru, Philippines, Sierra Leone, Singapore, Trinidad and Tobago, Uganda and United Republic of Tanzania.

6. The session was attended by observers from the following States: Argentina, Bulgaria, Cameroon, Canada, Colombia, Côte d' Ivoire, Dominican Republic, Ecuador, Finland, Holy See, Indonesia, Kuwait, Netherlands, Panama, Republic of Korea, Saudi Arabia, Switzerland, Thailand and Uruguay.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations specialized agency*
United Nations Industrial Development Organization (UNIDO)

(b) *Intergovernmental organizations*
Asian-African Legal Consultative Committee (AALCC)
Organization of African Unity (OAU)

(c) *International non-governmental organizations*
European International Contractors
International Bar Association
International Chamber of Commerce (ICC)
International Federation of Consulting Engineers
International Law Association
International Progress Organization

8. The Working Group elected the following officers:

Chairman: Mr. Leif SEVON (Finland)[a]

Rapporteur: Mrs. Jelena VILUS (Yugoslavia)

9. The Working Group had before it for examination the "Introduction" to the draft Legal Guide on drawing up international contracts for the construction of industrial works (A/CN.9/WG.V/WP.17/Add.1) and draft chapters on "Pre-investment studies" together with proposed additions to the draft chapters on "Procedure for concluding contract" and "Delay, defects and other failures to perform" (A/CN.9/WG.V/WP.17/Add.2), "General remarks on drafting" (A/CN.9/WG.V/WP.17/Add.3), "Supply of equipment and materials" (A/CN.9/WG.V/WP.17/Add.4), "Supply of spare parts and services after construction" (A/CN.9/WG.V/WP.17/Add.5) and "Settlement of disputes" (A/CN.9/WG.V/WP.17/Add.6), as well as revised draft chapters on "Choice of contracting approach" (A/CN.9/WG.V/WP.17/Add.7), "Transfer of technology" (A/CN.9/WG.V/WP.17/Add.8) and "Termination of contract" (A/CN.9/WG.V/WP.17/Add.9).

10. The Working Group adopted the following agenda:

(a) Election of officers

(b) Adoption of the agenda

(c) Consideration of draft Legal Guide on drawing up international contracts for the construction of industrial works

(d) Other business

(e) Adoption of the report

11. The Working Group proceeded to discuss the documents before it in the order presented below.

INTRODUCTION TO THE GUIDE[16]

12. It was noted that in deciding to publish a Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works the Commission sought to contribute to the advancement of the objectives of the new international economic order. It was generally agreed that a reference to that fact should appear at the beginning of the "Introduction" to the Guide, and that the substance of paragraphs 5 and 6 of the draft "Introduction", insofar as they discussed the context of the new international economic order, should be set forth in paragraph 1. A view was expressed that in connection with the resolutions of the General Assembly on the new international economic order reference should be made to the Charter of Economic Rights and Duties of States. Various additional suggestions were made for improving the drafting of paragraph 1.

13. It was noted that the Guide was intended to identify issues to be taken into consideration by the parties in negotiating and drafting their contract, and, where appropriate, to set forth possible ways in which the parties might, by agreement, deal with those issues. In that connection, it was generally agreed that the "Introduction" should stress that the Guide was not intended to

[a] The Chairman was elected in his personal capacity.

[8] 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.

[9] A/CN.9/217, para. 130.

[10] See footnote 8, above.

[11] A/CN.9/WG.V/WP.9 and Add.1–4.

[12] A/CN.9/234, paras. 51 and 52.

[13] A/CN.9/247, A/CN.9/259 and A/CN.9/262.

[14] A/CN.9/WG.V/WP.9/Add.5.

[15] A/CN/9/WG.V/WP.11 and Add.1–9, A/CN.9/WG.V/WP.13 and Add.1–6 and A/CN.9/WG.V/WP.15 and Add.1–10.

[16] A/CN.9/WG.V/WP.17/Add.1.

have an independent juridical status, to be used, for example, for interpreting contracts that had been entered into before or after the issuance of the Guide.

14. There was general agreement with the suggestion of the secretariat that a three-tiered approach should be adopted in putting forward recommendations or suggestions in the Guide. The highest level, indicated by a statement that the parties "should" take a particular course of action, would be used only when the course of action was logically required or legally mandated. This could be simply a recommendation that the parties should include in their contract a provision dealing with a particular issue, or a recommendation that in the provision the parties should adopt a particular approach or solution to the issue. An intermediate level would be used when it was "advisable", but not logically or legally required, that the parties adopt a particular course of action. A formulation such as "the parties may wish to consider" or "the parties may find it desirable" would be used for the lowest level of recommendation or suggestion. It was generally agreed that this three-tiered approach should be clearly set forth in paragraph 15 of the Introduction to the Guide. A suggestion was made that the reference in the second sentence of paragraph 2 to "solutions recommended" should be clarified in the light of the three-tiered approach. According to another view, however, that reference was satisfactory in its present form.

15. With respect to paragraph 3, it was generally agreed that the relationship of a "works contract" to other types of contracts for the construction of industrial works should be clarified. A view was expressed that the examples given at the end of the last sentence of the paragraph were insufficient, in that they excluded other important obligations sometimes undertaken by a contractor, such as the training of manpower. It was suggested that either the examples should be deleted, or additional ones should be added.

16. A view was expressed that section B of the "Introduction" ("Intended audience") should be combined with section D ("How to use the Guide"). According to a further view, the title "How to use the Guide" was not necessary.

17. It was generally agreed that the material in paragraphs 7 to 9, dealing with the history of the Guide, was not of great importance to the user of the Guide; it should be removed from the "Introduction" and possibly placed in a "Foreword", perhaps in a shortened form.

18. With respect to certain terminology used in the Guide to describe the obligations of the contractor, a view was expressed that the Guide should refer to the construction of works, erection of buildings and installation of machinery. It was generally agreed that whatever terminology was finally settled upon, it should be used consistently throughout the Guide.

19. Various views were expressed with respect to the list of definitions in paragraph 17. According to one view, it was in principle desirable to define as many terms used in the Guide as possible, in order to assist, in particular, readers from developing countries. Disagreement was expressed with respect to the appropriateness of certain of the definitions given in paragraph 17. According to other views, paragraph 17 should be deleted for the following reasons. The meanings of most of the terms defined in that paragraph were given in the chapters of the Guide dealing with the subject-matter of the terms. The reader of the Guide would be assisted in locating those meanings by the detailed table of contents and the alphabetical index, which were to be included in the Guide. Moreover, it was difficult to reduce the meanings of some terms to concise definitions, and the meanings of some terms varied among legal systems. In those cases it was preferable for the reader to be referred to the substantive chapters of the Guide where the terms were discussed.

20. A suggestion was made that terms which were not defined in other chapters of the Guide, such as "contractor", "purchaser" and "works contract", should be defined in paragraph 17 of the "Introduction". According to other suggestions, those terms should be defined in the chapter on "General remarks on drafting", or in the index.

21. After discussion, the Working Group agreed that paragraph 17 should be deleted, and the table of contents and the alphabetical index should be structured so as to enable the reader to locate the meanings of terms used in the Guide in the chapters of the Guide in which the terms were discussed. The index should incorporate an analytical approach. Thus, systematic sub-divisions should be set forth for each term contained in the index (e.g. giving references to places in the Guide where meanings of the terms were given, and references to related terms and concepts). The index should also contain a separate entry, perhaps entitled "meanings of terms", which would list particular terms and indicate where in the Guide their meanings were discussed. Section D of the "Introduction" to the Guide should inform the reader about the index and its use in locating the meanings of terms. As for terms which were not defined elsewhere in the Guide, it was generally agreed that the meanings of the terms "contractor" and "purchaser" should be made clear in the opening paragraphs of the "Introduction" to the Guide by, for example, referring to the nature of the obligations undertaken by those parties. Similarly, the meaning of the term "works contract" should be made clear in paragraph 3.

PRE-INVESTMENT STUDIES[17]

22. It was generally agreed that the title of this chapter should be changed to "Pre-contract studies".

23. It was generally agreed that the first sentence of paragraph 3 should be deleted. It was also agreed that the

[17] A/CN.9/WG.V/WP.17/Add.2.

paragraph should refer to responsibility for the accuracy and sufficiency of information given to the purchaser by a contractor who performed pre-contract studies as well as to information given to the contractor by the purchaser.

24. With respect to paragraph 5, a suggestion was made that the paragraph should be deleted, since the substance of the advice given in that paragraph would already be known to the purchaser. The prevailing view, however, was that the paragraph should be retained, but be re-drafted in order to reflect the intended meaning, i.e. that the purchaser should not necessarily choose the least expensive pre-contract studies, or restrict the scope of the studies to save money, since that course of action could result in inadequate studies and ultimately result in greater cost to him. It was agreed that the word "improper" should be replaced by the word "unwise".

25. A view was expressed that the chapter should stress the value to the purchaser of opportunity studies, and that reference should be made to the fact that there existed international organizations, and in some countries national agencies, which performed those studies.

26. It was generally agreed that the last two sentences of paragraph 7 should be deleted, as they were repetitions of the preceding sentences. With respect to paragraph 10, it was agreed that, in addition to the items to be dealt with by feasibility studies enumerated in that paragraph, the studies should also consider the kinds of manpower which would be needed to construct the works. Moreover, the words "and climatic conditions" should be added to the end of the last sentence of that paragraph.

27. It was generally agreed that paragraph 11 should not refer to the allocation of the risks of inadequacies or errors in feasibility studies, and that the paragraph should be re-drafted as follows:

> "Feasibility studies typically assume the existence of certain situations or facts, and therefore incorporate an element of uncertainty. The purchaser should be able to ascertain from the study the assumptions which have been made and the extent of the uncertainty. Sometimes feasibility studies include 'sensitivity studies', which vary some of the assumptions on which the feasibility study is based to determine the effect of those changes in assumptions on the feasibility of the project."

28. It was generally agreed that, in paragraph 12, the purpose of detailed studies should be clarified, i.e. by indicating that once the feasibility of the project had been confirmed, the detailed studies would provide more refined and detailed information needed for the design of the works and to settle other aspects of the particular project. It was also agreed that the secretariat should consider whether the substance of paragraph 12 should be placed before or after the present section F of the chapter.

29. With respect to paragraph 13, it was generally agreed that the tenor of the paragraph should not be to describe current practice; rather, the paragraph should indicate possible approaches to the issues discussed which the parties might wish to consider. It was agreed that the same change should be made with respect to paragraphs 14 and 15. It was agreed, however, that paragraphs 13 and 14 should not make any recommendation that one particular approach should be adopted in preference to another.

30. The question of the selection of consultants to perform feasibility studies was discussed. It was observed that, in order to promote competition, consultants were sometimes chosen by the use of selection procedures, but even in those cases the procedures were usually less formal and extensive than tendering procedures used for the selection of contractors. It was generally agreed that with respect to the performance of pre-contract studies, the purchaser should be advised to consider whether he was able to perform the studies himself. If not, he should consider having them performed by an outside firm in which he had confidence. In choosing such a firm, the purchaser should consider not only the price charged by it (bearing in mind that the least expensive one was not always the best choice), but also such other factors as its reputation and expertise. The purchaser should also be advised that if he could not find a suitable firm, he may obtain assistance in doing so from sources such as lending institutions, international organizations and professional bodies.

31. The Working Group discussed the possible conflict of interest which could arise if the consultant engaged to perform the pre-contract studies might also be later engaged to supply the design for the works or serve as the consulting engineer in connection with the construction of the works (paragraph 14), or if the studies were to be performed by a firm which might later be engaged as the contractor under the works contract (paragraph 15). A view was expressed that the extent of the problem in the two cases was different. The performance of the studies by a firm which might be later engaged as the contractor could present more serious difficulties for the purchaser than the performance of the studies by a consultant who might later be engaged to supply the design of the works or serve as the consulting engineer. Therefore, the two cases should not be linked, and the third sentence of paragraph 15 should be reconsidered in that connection.

32. A view was expressed that it was not necessarily undesirable from the purchaser's point of view for the consultant who performed the pre-contract studies to be engaged to supply the design for the works or to serve as the consulting engineer in connection with the construction of the works. Some lending institutions allowed that to occur, and the practice of those which did not (referred to in the last sentence of paragraph 14) should not be supported in the Guide. Therefore, it was generally agreed that paragraph 14 should advise the purchaser that he might wish to consider engaging the consultant who performed the pre-contract studies to supply the design or act as the consulting engineer under the works contract, but that he should pay attention to the possibility of a conflict of interest in such a case.

33. With respect to engaging the firm which performed the pre-contract studies as the contractor under the works contract, a view was expressed that this was undesirable for the purchaser, although it might be acceptable for the firm merely to supervise the construction of the works by others. It was noted, however, that in some highly specialized areas it was necessary for the pre-contract studies to be performed by the contractor, since there existed no independent consultants with expertise in those areas. It was generally agreed that paragraph 15 should stress the risks to the purchaser of a conflict of interest when the contractor also performed the pre-contract studies, and the strongest level of recommendation should be used against that practice. However, the paragraph should also note that in some cases there might be no alternative to the studies being performed by the contractor.

DELAY, DEFECTS AND OTHER FAILURES TO PERFORM (continued)[18]

34. The Working Group took note of the statement by the secretariat that, although this material had been designated as an addition to chapter XVIII, "Delay, defects and other failures to perform", it might be appropriately included in some other chapter, in view of a previous decision of the Working Group to restrict chapter XVIII to a discussion of remedies. The Working Group requested the secretariat to determine the most appropriate location for the material.

35. A view was expressed that this material should commence with a discussion of the background to the issue addressed (i.e. responsibility for information needed by the contractor for the construction of the works); the possible approaches for dealing with the issue should then be discussed separately. It was also suggested that the parties should be advised to take into account mandatory rules of applicable law imposing liability for insufficient or erroneous information.

36. A suggestion was made that a reference to information concerning climatic and soil conditions should be added to the first sentence of paragraph 1. With respect to paragraph 2, a view was expressed that the phrase in the fourth sentence, "and to the extent that the contractor is able to rely on that information", implied that the contractor should always be able to rely on information provided to him by the purchaser. It was therefore suggested that the phrase be deleted. It was further suggested that the last sentence of paragraph 2 should be reformulated so as to recommend that each party be responsible for the accuracy of information given by him to the other party.

37. In connection with the first approach to the allocation of responsibility for the sufficiency and accuracy of information, discussed in paragraph 3, a view was expressed that the paragraph should indicate the kinds of information for which each party might be made responsible in the contract. It was suggested that data relating to boring should be added to the examples given in the last sentence of the paragraph. According to a further suggestion, it should be pointed out that site conditions were sometimes an element of the design of the works.

38. A view was expressed that the variation of the first approach, described in paragraph 4, was similar to the second approach, described in paragraph 5, and that the two should be consolidated. It was also suggested that the reference to the cost ceiling in the second sentence of paragraph 4 should be elaborated, and that a reference should be given to the chapter in the Guide where the cost ceiling was discussed. With respect to the last sentence of paragraph 4, it was suggested that the obligation of the contractor to discover errors in information should depend upon his own level of experience. Furthermore, it was suggested that the sentence should clarify who was to bear the risk of errors discovered after the contract had been entered into.

39. In connection with paragraph 5, a view was expressed that the costs resulting from the existence of information or situations which were not discoverable or foreseeable should be shared on an equal basis between the two parties, instead of being totally assumed by the purchaser.

PROCEDURE FOR CONCLUDING CONTRACT (continued)[19]

40. The Working Group noted that the subject matter covered by this section of the chapter was extensive and complex. It was therefore not possible to treat it comprehensively and in detail in the context of and within the present scope of the Guide. In the light of those considerations, the Working Group considered whether the subject-matter should be discussed in the Guide, and, if so, how it should be treated.

41. The prevailing view was that because of the complexity of the issues connected with the contracting arrangements discussed in the material, a discussion of them would be of particular benefit to purchasers in developing countries, who might need information and advice concerning those arrangements.

42. A view was expressed that the contracting arrangements referred to in the chapter should not be discussed in detail. Rather, the Guide should merely refer to the fact that the purchaser might consider entering into one of the contracting arrangements referred to. The Guide should also refer the reader to sources of further information on those arrangements, including relevant work done by other international organizations. According to another view, the present discussion should be expanded in order to assist purchasers in developing countries. After discussion, the Working Group generally agreed that the scope of the discussion should be as set forth in paragraphs 46 and 60, below.

[18]Ibid.

[19]Ibid.

43. It was observed that the arrangements in section A (contracting by the purchaser with a group of firms which would perform the obligations of the contractor) were of a fundamentally different character from those discussed in section B (formation by the purchaser and the contractor of a joint venture for the operation of the works and marketing of its output, and perhaps also for the construction of the works). It was agreed that the discussion of the two types of arrangements should be separated; the discussion of the subject-matter of section A should be retained in the chapter entitled "Procedure for concluding contract", and the possibility of adopting the kind of arrangement discussed in section B, as an alternative to a works contract, should be mentioned instead in the chapter entitled "Choice of contracting approach".

44. It was observed that the term "joint venture" was used in sections A and B with different meanings, which could result in confusion for the reader. It was suggested that terminology should be chosen to describe the arrangements dealt with in sections A and B so as to avoid that confusion. It was also observed that the terminology used in practice to describe those arrangements was not settled or uniform. The view was expressed that it would be desirable if the Guide contributed to uniformity with respect to terminology. It was generally agreed that the Guide should advise the parties that in using particular terminology in their contract they should consider what legal consequences might flow from the terminology chosen.

45. Views were expressed that the Guide should advise purchasers contemplating entering into arrangements described in sections A and B to obtain expert legal advice in that regard. In addition, it was observed that in many legal systems various aspects of those arrangements were governed by legal rules, some of which might be mandatory. It was suggested that the Guide should advise the parties to take such legal rules into consideration.

Contracting with group of firms

46. It was generally agreed that the Guide should point out various issues which the purchaser should consider when entering into a contract with a group of firms. The discussion should not, however, engage in a detailed analysis of those issues, or recommend particular approaches to dealing with them. The Guide should direct the reader to sources of detailed information and advice on the subject. It was also generally agreed that the Guide should advise the purchaser that when he contracted with a group of firms which was not organized as an independent legal entity, every member of the group should become a party to the contract.

47. Various suggestions were made with respect to issues which the Guide should point out with respect to contracting by the purchaser with a group of firms. Those included, for example, the problem of obtaining jurisdiction over several separate firms, often from different countries, in connection with dispute settlement proceedings (in that regard a suggestion was made that one solution might be for the group to form an independent legal entity in the country of the site); the nature of the liability of the members of the group to the purchaser in respect of the performance of the obligations of the contractor (e.g. joint and several liability of all members of the group for the performance of those obligations, or liability of each member only for the performance of particular obligations); guarantees to be given in respect of the performance by the members of the group (in that regard a suggestion was made that each member of the group might guarantee the performance by all members); financial arrangements between the group and the purchaser; taxation questions; and ancillary agreements which would have to be entered into by the purchaser.

48. A view was expressed that contracting by the purchaser with a group of firms which was to perform the obligations of the contractor should be differentiated from the situation where the purchaser entered into separate contracts with two or more contractors (referred to elsewhere in the Guide as the "separate contracts approach"). Such a clarification should be made in particular in paragraph 3. Moreover, the "silent" contract referred to in paragraph 3 should be more clearly differentiated from subcontracting by the contractor. A view was expressed that the contract should require the consent of the purchaser to any arrangement by the contractor with other contractors in respect of the construction of the works, especially in cases where the contractor was chosen because of his purported capability of doing all the work.

49. A suggestion was made that the discussion should only deal with the case where the purchaser entered into a contract with a group of firms which was not organized as an independent legal entity. Where the group was organized as an independent legal entity, that entity alone would be the contractor under the contract, and the problems faced by a purchaser entering into a contract with several firms which were to perform the obligations of the contractor would not arise. According to another view, the discussion should differentiate an "integrated" arrangement (where the members of the group set up a separate entity to construct the works) from a "non-integrated" one (where the various obligations in respect of the construction of the works were allocated among the members of the group).

50. It was pointed out that the possible problems for the purchaser arising from his contracting with an independent legal entity with minimum capitalization organized by a group of firms, referred to in paragraph 5, were not limited to the case of the organization of the independent entity by a group of firms, but arose in any case where the contractor was organized with minimum capitalization. A view was expressed that the reference in paragraph 5 to performance guarantees should make it clear that the guarantees should not be obtained from the independent entity itself; rather, they might be obtained from the individual members of the entity, or from a third person.

51. It was suggested that the fourth sentence of paragraph 5 should clarify that a claim against an independent

legal entity for failure to perform its contractual obligations could be governed by law other than that of the place where the entity was established, e.g. the law of the place where the works was being constructed.

52. A view was expressed that the discussion placed excessive emphasis on the desirability that members of a group which undertook the obligations of a contractor be jointly and severally liable to the purchaser for a failure by a member to perform. According to that view, there existed other methods of protecting the purchaser (e.g. guarantees). In connection with paragraph 6, it was observed that members of a group might in some cases be unwilling to accept joint and several liability.

53. With respect to paragraph 7, a view was expressed that the authority of a member of a group to serve as spokesman for the group should be differentiated from his authority to act for the group. It was suggested that the paragraph should point out that the designation by members of a group of one member to serve as the spokesman of the group and to act for it could be beneficial not only for the purchaser, but also for the group.

Joint ventures between contractor and purchaser

54. It was suggested that the importance of joint ventures between the contractor and the purchaser as a form of transfer of technology should be emphasized. However, it was agreed that the Guide could not deal comprehensively with such arrangements. While some parts of the Guide could be relevant to those arrangements, most of the Guide would not be.

55. It was suggested that the Guide should concentrate only upon joint ventures whose purposes included operating the works and marketing of its output, since only joint ventures formed for those purposes were of practical importance. Joint ventures were usually not formed only for the purpose of constructing the works. A view was expressed that the essence of joint ventures formed by the parties was equity participation by the parties in the joint ventures, and that therefore they should be referred to in the Guide as "equity contracts". It was suggested that the Guide should refer to the various possible ways in which a joint venture could be organized, without, however, recommending any particular approach.

56. A view was expressed that section B attempted to deal in summary form with some very complex issues, and could be misleading, and that the Guide should therefore do no more than indicate possible arrangements.

57. With respect to paragraph 9, a view was expressed that the Guide should point out that the formation by the contractor and the purchaser of a joint venture could create difficulties for the purchaser as a result of having to share some managerial control with the contractor. Pursuant to that view it was suggested that a clause be incorporated in the contract creating the joint venture providing for a revision of the arrangement if such difficulties arose. According to another view, the sharing by the purchaser of some managerial control with the contractor was not necessarily disadvantageous for the purchaser.

58. Concerning paragraph 11, it was suggested that the second sentence should avoid the implication that the works contract was entered into after the formation of the joint venture by the contractor and the purchaser to operate the works and market its output, since that sequence of events did not reflect usual practice. A view was expressed that the third sentence of paragraph 11 should be reformulated in order to clarify the situations in which a group of entities without independent legal personality might enter into a works contract. A suggestion was made that the last two sentences of paragraph 11 should be deleted.

59. With respect to the terminology used in section B, a suggestion was made that the terms "corporate" or "contractual" joint ventures should be used in preference to entities with or without independent legal personality.

60. After discussion of the treatment in the Guide of the formation by the purchaser and the contractor of a joint venture, it was generally agreed that the Guide should inform the purchaser that he might wish to consider the possibility of forming a joint venture characterized by a relatively high level of integration, or one with a looser arrangement. The Guide should point out possible types of arrangements within that range, without, however, discussing them in detail or recommending any particular type. The Guide should direct the reader to sources of detailed information and advice on the subject.

GENERAL REMARKS ON DRAFTING[20]

61. The view was expressed that the chapter as presently drafted was too detailed, and contained some advice of an elementary nature which might be deleted. The prevailing view, however, was that an extended treatment of the problems which might arise in drafting was useful, in particular if, as was sometimes the case, drafting of works contracts was undertaken by persons who were not lawyers. A detailed treatment would also have the advantage of bringing to the attention of the parties issues which they might overlook. It was noted that particular attention should be given in the chapter to drafting problems which were of special importance in relation to works contracts (e.g. inconsistencies between contract documents).

62. The view was expressed that the Guide should mention the possibility of each party establishing for himself a procedure containing steps to be taken during the negotiation and drafting of works contracts. Such a procedure, based on suggestions contained in the chapter, would reduce the possibility of omissions or mistakes in drafting. It was also noted that the Guide should mention the desirability of the purchaser obtaining legal or technical advice to assist him in drafting the contract when he

[20] A/CN.9/WG.V/WP.17/Add.3.

did not himself possess the necessary expertise. It was noted that legal advice might be needed not merely on liability for taxation (as mentioned in paragraph 4) but on other issues as well.

63. Different views were expressed concerning the advantages to the purchaser of preparing a first draft of the contract. It was agreed that the Guide should not make a recommendation to this effect, but only mention the possible advantages and disadvantages of his doing so. It was noted that, if tendering procedures were adopted by the purchaser, he would be obliged to prepare a first draft of the contract so that tenders might be submitted on the basis of that draft.

64. It was suggested that paragraphs 3 and 4, dealing with the need to take account of applicable laws when drafting the contract, might be reconsidered and simplified. It was noted that paragraph 3 suggested that, after agreement had been reached between the parties on the main technical and commercial issues relating to the proposed contract, it would be useful for the parties to agree upon the law applicable to the contract and to review the documents reflecting their agreement in the light of the chosen law. The view was expressed that the Guide should also note the possibility of the parties agreeing upon the law applicable to the contract at the commencement of their negotiations, thus enabling them to keep in mind the requirements of that law in the future negotiations. Such initial agreement on the law applicable to the contract would eliminate the need to review at a later stage the terms of documents which had already been agreed upon.

65. It was noted that, in addition to the reasons stated in paragraph 3 for taking into account the law applicable to the contract when drafting the contract, it was important to take that law into account because it might provide for terms to be implied in the contract when an issue was not regulated by express terms. It was also noted that, besides the mandatory legal rules of an administrative, fiscal or other public nature in the country of each party, such rules in other countries (e.g. in the country of a supplier of technology) might also need to be taken into account in drafting the contract.

66. The view was expressed that paragraph 5 should be modified to refer to the potential usefulness of standard forms of contract or general conditions as aids to drafting. Standard forms or general conditions might provide examples of issues to be addressed, and might also help in determining how such issues might be resolved.

67. Different views were expressed as to whether it was advisable to draw up the contract in only one language, or in the languages of the two parties where those languages differed. It was agreed that the Guide should not make a recommendation on that issue, but should mention both approaches and state the respective advantages and disadvantages of each approach. In accordance with that decision, the fifth sentence in paragraph 2, which implied that only one language was to be used, should be deleted. Several other observations were made with regard to the language in which the contract might be drafted. It was noted that the third sentence of paragraph 6 should be clarified so as to avoid an inference that the contract must be drafted in a third language and not in the language of either of the parties. If the language of one of the parties was generally used in international commerce, it might be advisable to draft the contract in that language. It was suggested that, if the contract were to be drafted in a language or languages which were not languages of the country of the applicable law, an agreed translation of the contract might be made into the language of that country. It was noted that where a contract was drafted in two languages, and a contract provision in one language version was unclear, the contract might provide that the other language version might be examined to remedy the lack of clarity.

68. The view was expressed that the reference in paragraph 7 to a contract document coming first in logical sequence among all of the contract documents and controlling the other documents pre-supposed a complex works contract consisting of many documents. It was suggested that the Guide should also envisage and deal with the organization of documents in a simpler works contract. It was also suggested that in paragraph 7 the parties should be advised to set forth in the contract not only the date on which it was signed, but also the date on which it was to enter into force. It was proposed that paragraph 8 should be less categorical about the need for a party to require proof from the other party of his capacity to enter into a works contract, or about the need to require proof that an official of a corporation which was to be a party to a contract had the authority to bind the corporation. In some cases the previous trade relations between the parties would already have furnished sufficient proof of those matters. It was noted that the documents which might form a works contract were somewhat differently described in paragraph 9 and the first sentence of paragraph 12, and that the descriptions should be harmonized.

69. It was observed that the law applicable to the contract might provide rules of interpretation to resolve an inconsistency between contract documents or within the same document. Paragraph 10 should bring the possible existence of such rules, which might even be of a mandatory character, to the attention of the parties. It was also observed that, while this paragraph noted the possibility of inconsistency within the same document, it did not suggest a solution for resolving the inconsistency.

70. It was observed that paragraph 11 set forth two approaches which might be adopted with respect to the relationship between the contract documents, on the one hand, and the oral exchanges, correspondence and draft documents which emanated during the negotiations, on the other. It was suggested that it would be sufficient to describe the two approaches, without indicating that one approach might lead to a fairer result. It was also noted that oral exchanges, correspondence and draft documents might emanate subsequent to entry into force of the

contract. It was observed that the parties should be advised to clarify the relationship between the contract documents, on the one hand, and these oral exchanges, correspondence and draft documents, on the other. Where a draft document was intended to form part of the contract, the parties should clearly so provide.

71. A suggestion was made that paragraph 12 should discourage the inclusion of introductory recitals in a works contract, since the extent to which recitals might influence the interpretation of a contract was uncertain. The view was expressed that, in addition to indicating that separate contracts might include a description of the interrelationship of the time-schedules for performance under related contracts, paragraph 14 should also indicate the desirability of including descriptions of the interrelationship of aspects of infra-structural work to be executed under the separate contracts.

72. In regard to the time when notifications were to be effective, it was suggested that paragraph 16 might mention the possibility of a notification being effective after the lapse of a specified period of time following the dispatch of the notification. The Guide should mention the advantages of selecting a means of giving notification under which proof of dispatch or receipt of a notification could be obtained. It was noted that the example given in paragraph 17 of an exception to a general rule that a notification was effective upon dispatch was sufficient, and that it was unnecessary to justify the exception on the basis of fairness.

73. It was observed that, with regard to notifications which were not of a routine character, paragraph 18 only noted the possibility of such notifications being given by the purchaser to the head office of the contractor. The paragraph should also refer to the possibility of non-routine notifications being given by the contractor to the head office of the purchaser.

74. Some proposals were made for modifying paragraph 19 dealing with the legal consequences of a failure to notify. It was observed that the description contained in the paragraph was too simple. The consequences of a failure to notify could not be set forth in a generalized manner, but would depend upon the purpose for which the notice was given. A suggestion was made that this difficulty might be resolved in part by adding cross-references to other chapters where the effects of a failure to notify were dealt with. There was wide agreement that the paragraph should be revised and expanded.

75. While there was general agreement that a works contract needed to contain definitions of certain key concepts, there was disagreement as to whether the Guide should provide examples of definitions. Under one view, such definitions should not be provided. The definitions might be used by parties in contracts where they were inappropriate. It was also difficult to formulate definitions which would be acceptable in all business circles, since different drafting techniques and traditions prevailed in different regions. Under another view, a few examples of definitions would help users of the Guide to draft definitions appropriate to their own contract. A suggestion was made that, instead of presenting its own definitions, the Guide might reproduce a few selected definitions taken from some well-known model contracts. The prevailing view, however, was that the Guide should not include provisions contained in standard contracts drafted by other bodies, since those definitions might conflict with the terminology used in the Guide. Furthermore, the definitions contained in those standard contracts might be subsequently revised.

76. After deliberation, it was agreed that paragraph 22 should be modified to include a statement that the parties might find it useful to define certain key concepts which were frequently used in the contract. The concepts which the parties might find it advisable to define might be mentioned, without, however, providing definitions for those concepts. In addition, the paragraph could set forth a few selected definitions which might command wide acceptance. It was suggested, for example, that definitions of "the contract", "writing", "dispatch" and "receipt" might be included. The paragraph could also indicate that descriptions of other concepts were contained in the various chapters of the Guide, and that those descriptions could be located by the use of the index to the Guide.

SUPPLY OF EQUIPMENT AND MATERIALS[21]

77. A view was expressed that the quality of equipment and materials, and the inspection of equipment during manufacture, were important issues. Therefore, they should be mentioned in the present chapter, and reference should be given to the other chapters of the Guide where those issues were discussed.

78. A suggestion was made that the concepts of supply, take-over and receipt as used in the chapter should be clarified. Additional suggestions were made with respect to the terminology used in the chapter. The secretariat was requested to reconsider the use of the terms "plant" and "equipment". It was suggested that instead of the term "take-over", it might be advisable to use the expression "take into possession". According to a further suggestion, the term "specification", rather than "quality", should be used in connection with the description of the equipment and materials to be supplied.

79. With respect to the suggestion in the chapter that the parties might include in the contract a particular trade term in order to establish which party was to pay the costs of shipping equipment and materials, and refer to INCOTERMS to define that term, it was suggested that the chapter should also warn the parties that INCOTERMS regulated other matters in addition to who bears the shipping costs (e.g. passing of risk). In incorporating INCOTERMS, therefore, the parties should be sure they wished to settle all such issues in the manner settled by INCOTERMS. A further suggestion was made

[21] A/CN.9/WG.V/WP.17/Add.4.

that the parties might wish to consider settling in their contract various issues referred to in the present chapter simply by referring to INCOTERMS, rather by elaborating the settlement of those issues in contractual provisions. Therefore, it might be advisable to discuss the applicability of INCOTERMS in the "General remarks" section of the chapter.

80. It was suggested to stress in paragraph 3 that the supply of equipment and materials might not necessarily result in the passing of risk or the transfer of ownership in respect of the equipment and materials. It was agreed to delete the last sentence of paragraph 4 and to deal with the issue covered by that sentence either in the chapter on "Passing of risk" or in the chapter on "Delay, defects and other failures to perform", giving a reference to those chapters in the present chapter.

81. A view was expressed that the Guide should note that some equipment and materials might be obtained in the country of the site, rather than from abroad, and advise the parties also to consider solutions to issues discussed in the chapter which were suitable for the former cases. It was further suggested that the concept of bailment which existed in some legal systems should be referred to in connection with the storage of equipment and materials. It was suggested that paragraphs 3, 22 and 25 might need to be harmonized.

82. With respect to paragraph 5, a suggestion was made to delete the expression "as a general matter" in the first sentence and to replace the word "risk" in the fourth sentence by another suitable expression. A view was expressed that the Guide should strongly recommend that the parties adequately describe in the contract the equipment and materials to be incorporated in the works. It was suggested that paragraph 6 should not imply that the contractor should in all cases be obligated to supply all equipment and materials needed for his construction, even if they were not specified in the contract.

83. A view was expressed that the contractor should not be able to avoid liability for defects in equipment and materials by obtaining them from third persons. It was suggested that this point be discussed in the chapters on "Subcontractors" or "Delay, defects and other failures to perform".

84. With respect to the question of whether the contract should permit the contractor to supply equipment and materials earlier than the date stipulated in the contract, a view was expressed that the contract should not imply that whether or not the purchaser had funds to pay for the equipment and materials was always relevant to that question. It was suggested to clarify in what situations it might not be possible to stipulate in the contract a date for the supply of equipment and materials.

85. A view was expressed that it was desirable to delete the second part of the first sentence and the fourth sentence in paragraph 9. According to another view they should be retained.

86. A view was expressed that the contractor under a turnkey lump sum contract should not in all cases be obligated to bear the costs connected with the transport of equipment and materials, and the second sentence in paragraph 10 should be re-drafted to reflect that point. According to another view, the contractor in a turnkey lump sum contract should always be obligated to pay those costs. It was noted that costs connected with transport might include insurance costs, and a reference to the chapter on "Insurance" would therefore be advisable. In connection with paragraph 12, it was suggested to delete the expression in the first sentence "in all cases", since in some exceptional cases the purchaser might be responsible for packing the equipment and materials and protecting them during transport.

87. A view was expressed that in the heading of subsection B.4, the term "restriction" should be replaced by another term which would take into account the contents of paragraph 17. It was suggested that the last two sentences in paragraph 16 be redrafted to include the possibility that the contractor might in some cases be responsible for payment of import customs duties. It was noted that the issues concerning customs duties might need to be expressly settled in the contract if INCOTERMS were not incorporated in the contract.

88. It was suggested to expand paragraph 17 in order to explain the different kinds of restrictions which might apply with respect to the supply of equipment and materials. In that connection, a view was expressed that the Guide should mention import and export prohibitions, and import and export licence requirements. In addition, it would be advisable to distinguish between prohibitions and licence requirements existing at the time of conclusion of the contract, and those arising after that time. If the former restrictions could affect the availability of items essential to the completion of the contract, the parties might wish to consider deferring entry into force of the contract until after the relevant permits had been obtained. The contract should establish which party was to procure licences, and that party should give to the other party timely notice of steps which had been taken and of the results achieved. It was suggested to include in the last sentence in paragraph 17 a reference to the chapter on "Termination of contract", and to redraft that sentence.

89. A suggestion was made to clarify in the last sentence of paragraph 18 the situations in which the purchaser or another contractor might incorporate into the works the equipment supplied by one contractor. It was further suggested to delete the term "loss" in the last sentence of paragraph 19. In addition, it was suggested to limit the effects mentioned in that sentence to a specified period of time.

90. A view was expressed that the issue of liability for defects in equipment and materials should be discussed in the chapter on "Delay, defects and other failures to perform". A suggestion was made that the contractor should in some cases entitle the purchaser to establish a time-schedule for the repair of defects by the contractor.

91. A view was expressed that the third sentence of paragraph 20 should be redrafted, and there should be no obligation to take over defective equipment and materials by the purchaser.

92. It was suggested that the contractor should be liable for damages not only in the case of defects in equipment and materials, but also in case of delay in supplying equipment and materials. It was also suggested to include a cross reference to the chapter in which the contractor's obligation to demonstrate that the equipment complied with the specifications was discussed.

93. A view was expressed that even if the purchaser was to bear the risk of loss of and damage to equipment and materials stored by him, in certain situations he should not be obligated to hand them over to the contractor in the same condition in which he received them for storage (e.g. in cases of damage due to natural causes or damage caused by the contractor). A view was expressed that, if necessary, the purchaser would carry out the conservation of equipment which was being stored by him.

94. Suggestions were made to delete the two last sentences in paragraph 30, and to harmonize the terminology used in paragraphs 20 and 29.

SUPPLIES OF SPARE PARTS AND SERVICES AFTER CONSTRUCTION[22]

95. There was wide agreement that section A of the chapter ("General remarks") should include a paragraph describing possible connections between the subjects dealt with in the chapter and the policy of developing countries with regard to industrialization. It was suggested that the Guide should stress the importance to developing countries that the purchaser himself, or other enterprises from his country, achieve as early as possible the capability to manufacture spare parts and to maintain, repair and operate the works, so that the dependency of the purchaser on the contractor would be reduced. The achievement of this capability would often depend on adequate training being given to the personnel of the purchaser, and the paragraph should stress the importance of contractual arrangements providing for training. The importance of training should also be stressed at appropriate points within the chapter.

96. It was noted that a distinction might be drawn between the supply of spare parts and repair of the works by the contractor, on the one hand, and maintenance and operation by him, on the other. As regards the supply of spare parts and repair, it was probable that purchasers from many developing countries would need assistance from the contractor for the operational lifetime of the works. As regards maintenance and operation, however, it was probable that, within a certain period of time after the commencement of operation of the works, the purchaser's personnel would be able to perform those functions. That distinction would be relevant to the duration of the obligations to be imposed on the contractor and should be taken into account in sections H and I of the chapter ("Commencement and duration of obligations of parties" and "Termination").

97. It was observed that legal regulations, which might be mandatory, regulating the obligations of the parties in regard to the subject-matters dealt with in the chapter, in particular maintenance and operation, existed in some countries. The parties should be advised to take those regulations into account when drafting the contract.

98. It was noted that the time when the post-construction obligations dealt with in the chapter became relevant and were to be imposed on the contractor was not accurately described in paragraph 1. Those obligations did not become relevant immediately after the works were ready to operate, but subsequently, after the works had been taken over by the purchaser. A cross-reference to chapter XIV, "Completion, take-over and acceptance" was desirable.

99. It was observed that the subjects dealt with in the present chapter were often interlinked (e.g. spare parts might be needed for repair, and maintenance might include the repair of certain elements). The subjects themselves should be carefully described, and the linkages noted.

Contractual arrangements

100. The view was expressed that parties would often find it difficult at the time of the conclusion of the contract to determine the nature and extent of the rights and obligations to be created between them in regard to the subjects dealt with in the chapter (e.g. the quantity of spare parts to be delivered, the personnel to be supplied by the contractor to assist in operating the works). The chapter, possibly in paragraph 4, should set forth a procedure to be followed where the parties had decided that certain contractual terms were to be agreed in the future, but were unable to reach agreement at a later stage. It was also noted that paragraph 5 should stress that the conclusion of contracts for the supply of spare parts and post-construction services separate from the works contract was a common method of dealing with that difficulty, in particular in regard to the provision of maintenance needed after the expiry of the guarantee period.

Spare parts

101. There was wide agreement that the continued availability of spare parts for the operational lifetime of the works was of great importance to purchasers. Such availability was of particular importance in developing countries where works were often expected to have a longer lifespan than in developed countries.

102. It was noted that the amount of the spare parts needed might vary at different stages: i.e at the stage of completion of construction, during the guarantee period, and during the subsequent lifetime of the works.

[22] A/CN.9/WG.V/WP.17/Add.5.

103. The view was expressed that the contractor could not at the time of the conclusion of the contract predict with certainty the kinds or quantity of spare parts that might be needed at different stages, and that the first sentence of paragraph 6 should be amended to reflect that fact. It followed that where the contractor had given an estimate of the quantities needed, but the estimate turned out to be incorrect (paragraph 12), it might be unreasonable to obligate the contractor to supply additional spare parts at the prices at which they were originally supplied. The vital interest of the purchaser which needed to be protected was the continued availability of the spare parts, more than the price at which he could obtain them.

104. It was noted that, apart from the distinction between standard and non-standard spare parts noted in paragraph 7, a distinction could be drawn between parts which were routinely subject to wear and tear and therefore had to be periodically replaced, and parts which only had to be replaced for exceptional causes (e.g. breakage due to accidents or faulty use of equipment). While fairly accurate estimates could be made of the quantities of spare parts needed in the first category, it was difficult to make an estimate of needs in regard to parts in the second category. It was also noted that while paragraph 7 stated that non-standard spare parts were obtainable only from the contractor, paragraphs 10 and 11 indicated that they might be obtainable from other sources as well; those paragraphs should therefore be harmonized.

105. It was proposed that paragraph 8 should be amended to state that non-standard spare parts "may normally" be obtainable more cheaply from sources other than the contractor, since the uncertainty of market forces made it impossible to be certain about the cheapest source of supply. In paragraph 9, it was proposed that the purchaser should be advised to obtain by the time the construction was completed an "adequate", rather than a "large", stock of spare parts. A large stock of certain very durable parts (e.g. generators) might be unnecessary. It would also be inadvisable to obtain a large stock of spare parts with a short shelf life.

106. It was observed that where certain spare parts had been manufactured for the contractor by suppliers (paragraph 10) it might nevertheless be preferable from the point of view of the purchaser to enter into a contract with the contractor obligating him to supply spare parts, rather than to arrange with him to procure them as an agent. Under the former arrangement, the contractor could be held personally liable if the spare parts were defective.

107. Several observations were made with regard to paragraph 11, dealing with the possible manufacture by the purchaser of non-standard spare parts. It was observed that while some developing countries which were technologically advanced might have this capability, a great many developing countries would always have to rely on outside sources of supply. It was noted that while paragraph 11 referred to the relevant technological capability as being that of the purchaser himself, the more relevant consideration was the capability in the country of the purchaser. It was also noted that paragraph 11 should refer to the possibility that if the purchaser used spare parts manufactured by him, performance or other guarantees given by the contractor might cease to be operative, depending on the terms of the contract. It was further suggested that the last sentence of the paragraph dealing with possible difficulties of the contractor in supplying to the purchaser drawings and specifications of spare parts manufactured by a supplier because the supplier had industrial property rights in regard to the items should be deleted or amplified. If amplified, the sentence might note the possibility of the purchaser obtaining a licence from the supplier, and also note that the difficulty would not arise if the industrial property rights of the supplier were not enforceable in the country of the purchaser.

108. Views were exchanged on the situation where the contractor was obligated to supply spare parts manufactured by him over a long period of time, and within that period of time the contractor changed his production facilities, with the result that the manufacture of the spare parts had to be discontinued, or the cost of manufacture was greatly increased. It was agreed that the Guide should stress that the continued availability to the purchaser of spare parts for the operational lifetime of the works was a key issue. With that in mind, the Guide could note that different solutions might be considered. A continuing obligation of supply for the lifetime of the works might be imposed on the contractor, which might be regarded as the primary solution. As a second possibility, continuing obligations might be imposed on suppliers from whom the contractor obtained the spare parts. As a further possibility, drawings or specifications might be supplied to the purchaser, or licences granted to him, in order to enable him to manufacture the spare parts or have them manufactured by a third party. It was observed, however, that the last possibility might not be appropriate in those developing countries where neither the purchaser nor other enterprises in his country had the capability to manufacture the spare parts.

109. The view was expressed that the scheme suggested in paragraph 14 for two different guarantee periods in respect of the quality of the spare parts supplied was not often encountered in practice, and that a simpler scheme, involving a single period, might be suggested. Under another view, however, the scheme suggested was appropriate, in particular because it took into account the fact that certain spare parts had a short shelf life. In that connection it was suggested that spare parts were usually described not by reference to their "quality", but by reference to technical standards.

110. It was noted that the contract should provide that the instruction manuals to be supplied by the contractor (paragraph 16) should be drafted in a manner (e.g. format, language) which would make them readily understandable to the personnel of the purchaser. In addition to manuals, "as built" drawings should be supplied,

explaining how the various pieces of equipment were interconnected, and the facilities available for repair or maintenance work at the place where the equipment was located.

Maintenance

111. The view was expressed that the appropriate stage at which a contractor might be obligated to supply a maintenance programme was some time prior to the completion of the works, and not (as suggested in paragraph 11) at the time of the conclusion of the contract. The paragraph should also indicate that the maintenance manuals to be provided by the contractor should be readily understandable by the personnel of the purchaser. Reference might also be made to model forms of agreement for maintenance.

112. It was noted that, while the sixth sentence of paragraph 18 suggested that the purchaser might find it preferable to enter into independent maintenance contracts with suppliers, it would be difficult for the purchaser to identify and contact suppliers at times when maintenance was needed if at those times their identity was unknown. It was suggested that the contractor should be obligated to disclose the identity of suppliers at the time that the contract was entered into, so as to give the purchaser the option of concluding maintenance contracts with suppliers at a time when he wished to do so.

113. Several observations were made to the effect that the term "workmanlike manner" referred to in paragraph 19 as a method of defining the standards to be observed during maintenance might not have a clear meaning in certain regions. Alternative terms which might be used (e.g. "professional manner") were suggested. It was also observed that the approach to maintenance discussed in the last two sentences of the paragraph, under which the contractor was obligated to ensure that the works operated in accordance with the contract for a specified percentage of its normal operating time, needed clarification.

114. It was observed that the first sentence of paragraph 21 was too sweeping, and therefore needed to be restructured.

115. It was observed that paragraph 22 should suggest that payment was to be made, not merely after the submission of an invoice by the contractor, but after the submission of an invoice accompanied by maintenance reports.

Repairs

116. With regard to the possible difficulty faced by the purchaser in using persons other than the contractor to effect repairs because that might violate secrecy obligations binding on the purchaser (paragraph 23), the view was expressed that the contract might permit the use of certain enterprises whose assurances with regard to the maintenance of secrecy the contractor was prepared to accept. Where the purchaser himself had the capability to effect certain repairs (paragraph 24), he might nevertheless not have the capability to start up the works after the repairs had been effected. Paragraph 23 might suggest the inclusion of a contract provision providing for assistance by the contractor in the start-up.

117. It was suggested that paragraph 25 might indicate that, pending the effecting of repairs, the purchaser could continue to use the works or the equipment to the extent possible. It was also noted that the contract might specify the period of time after notification when repairs must be commenced by the contractor.

118. With regard to paragraph 26, it was observed that an agreement to effect repairs should always be reduced to writing, whether or not the repairs were extensive. It was also observed that the suggestion in the paragraph that a technical expert might be employed to settle the time-schedule for effecting repairs when the parties failed to agree on the time-schedule might not always be appropriate. The failure of agreement might not depend on a technical issue, but might be caused by such reasons as the contractor not having qualified personnel immediately available, or the contractor deploying his personnel on other work.

119. Different views were expressed about whether it was appropriate to suggest (paragraph 27) that the purchaser might have to pay a fee to cover the contractor's costs in having personnel in readiness for an inspection. It was agreed that the paragraph should only state that the parties should reach agreement on which party was to bear the costs involved.

120. With regard to the report to be submitted by the contractor describing the repairs carried out by him (paragraph 29), it was suggested that the report should also describe the materials used during repair. It was also noted that a description of repair work which might be needed in the future raised separate issues from a description of the repair itself, and might more appropriately be treated in a document separate from the report of the repairs. It was further noted that if a new piece of equipment was installed in the course of a repair, a quality guarantee might be required by the purchaser in respect of that piece of equipment.

121. It should be stressed that, where an item had to be transported to the contractor's country for the purposes of repair (paragraph 30), the parties should co-operate in regard to the various incidents of transportation (e.g. customs clearance), both during the transportation of the item to the contractor's country and its return after repair to the purchaser's country.

Operation

122. It was noted that the term "division of control" used in the fourth sentence of paragraph 32 was unclear, and should be re-considered. The paragraph might suggest that where directions on technical questions were

given by the purchaser's personnel to personnel of the contractor engaged to assist in operation, the latter contractor might be given some form of right of appeal against those directions. It was suggested that where the purchaser required the contractor to replace one of his employees even in the absence of a proved complaint against that employee, the Guide should not suggest that the expenses of replacement (e.g. travel and recruitment costs) were to be borne by the purchaser; the Guide might only suggest that parties should agree on this issue. It was noted that the suggestion in the fifth sentence of paragraph 33 that an incentive fee might be paid to the contractor depending on the productivity and profitability of the works should be either deleted or expanded to indicate that such a fee might also be paid to the contractor if it was paid to local employees of the purchaser.

Facilitation by purchaser of services to be provided by contractor

123. It was suggested that the language of the second sentence of paragraph 34 should be amended to clarify that both the contractor and the purchaser were bound to comply with safety regulations applicable to the works. It was also suggested that the paragraph should only mention the possibility of the purchaser supplying locally available equipment and materials, or facilities such as accommodation and transport for the contractor's personnel, without indicating any need for the purchaser to do so.

Commencement and duration of obligations of parties, and termination

124. The view was expressed that the statement in the penultimate sentence of paragraph 35 that repair obligations might commence from the date of expiry of the quality guarantee assumed by the contractor in respect of the works needed modification. Even during the period of the quality guarantee defects might occur needing repair which were not covered by the guarantee. It was suggested that the obligation of maintenance extending over the normal maintenance period should be provided for in a separate agreement.

125. It was suggested that it might be inadvisable to suggest (paragraph 36) that the time when the contractor's obligations as to the supply of spare parts, maintenance, repair and operation were to end might be determined by reference to the point of time when the purchaser had developed the capacity to supply the spare parts and services himself; that point of time might be uncertain. With regard to delimiting the duration of the contractor's obligations in that regard, it was noted that two approaches might be mentioned and distinguished in the paragraph. Under one approach, the obligations might be created for a relatively short period. If the purchaser wished the obligations to continue after the expiry of that period the parties might negotiate for their extension for a further period. Under another approach, the contractor's obligations might be created for a relatively long period, with the purchaser having the right to terminate those obligations by giving a specified period of notice. The suggestions in paragraph 39 as to termination of obligations of the parties should be harmonized with those approaches. It was suggested that the term "specified failures of performance" (paragraph 39, last sentence) needed to be clarified, possibly by giving examples of failures of performance which might be specified in the contract. A suggestion was made to include in the last sentence of paragraph 39 unsatisfactory work as a ground for termination of the contract.

Remedies other than termination

126. It was observed that this section should be amended to make clear that it suggested the creation of a special system of remedies for failures to perform the post-construction obligations dealt with in the chapter. Appropriate remedies might be selected out of those described in other chapters dealing with the failure to perform construction obligations. It should be clarified that the section did not suggest the automatic application to post-construction obligations of remedies for failures to perform construction obligations.

Summary

127. It was generally agreed that the summary should be shortened. It should also be written in a style which could be readily comprehensible to non-lawyers.

Drafting suggestions

128. Several suggestions were made for improving the drafting of this chapter.

SETTLEMENT OF DISPUTES[23]

129. It was noted that States or state-owned enterprises might be parties to works contracts, and the view was expressed that it would not be in accordance with the principle of state sovereignty for the courts of another State to exercise jurisdiction to settle disputes involving such parties. According to that view, the Guide should suggest negotiation, conciliation and arbitration as means of settling those disputes. According to another view, the issue of state sovereignty should not be mentioned in the Guide. It was agreed that the Guide should, however, indicate that the fact that one party to the contract was a State could influence the choice of a means of settling disputes arising from the contract.

130. A view was expressed that the principal means of settling disputes arising from works contracts should be judicial proceedings, and that the chapter as presently drafted over-emphasized the settlement of disputes by arbitral proceedings and by the use of experts. According to another view, however, arbitral proceedings were the most practical means of settling disputes arising from works contracts. It was generally agreed that the section of the chapter entitled "General remarks" should list the

[23] A/CN.9/WG.V/WP.17/Add.6.

various possible means of settling disputes, and the interrelation among those means, as well as kinds of disputes which might appropriately be settled by each means. In that connection it was noted that fact finding by experts might be mentioned.

131. A suggestion was made that the Guide should clearly point out that the supplementation and adaptation of a contract by a court, arbitral tribunal or expert, or the substitution of their consent for that of a party wrongfully refusing his consent, were not known in some legal systems, in order to avoid misleading readers who might not be familiar with those procedures. With respect to the refusal of a consent by a party, it was suggested that that situation could be dealt with by permitting a party to refuse consent only upon reasonable grounds. The question of whether the refusal of consent was reasonable would then be a question for resolution in dispute settlement proceedings, and the substitution of consent would not be involved. It was generally agreed that the Guide should stress that in drafting contractual clauses on the settlement of disputes the parties should carefully consider the law which would govern the various types of proceedings, and also consider in particular the scope of authority of a court, arbitral tribunal or expert, as the case may be.

132. It was suggested that the secretariat should reconsider the terminology used in the draft chapter. A question was raised as to whether the term "referee" instead of "expert" should be used in section F.

133. It was suggested that the Guide should differentiate between the resolution of routine problems or misunderstandings on the site, and the settlement of disputes. According to that view, the contract should provide that disputes to be settled by dispute settlement proceedings were to be formally notified by one party to another.

134. It was suggested that the first sentence of paragraph 1 should be reformulated so as to avoid the suggestion that disputes arising from works contracts always needed treatment different from the treatment of disputes arising from other types of contracts.

135. It was generally agreed that the last sentence in paragraph 4 should be deleted, since a court, arbitral tribunal or expert should not be able to order the construction to proceed notwithstanding the termination or suspension of the contract.

136. It was suggested that the Guide should mention the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965, and indicate the scope of that Convention. According to another suggestion, in addition to the UNCITRAL Arbitration and Conciliation Rules, the Guide should refer to rules prepared by other international bodies. The prevailing view, however, was that the policy of the Working Group to refer explicitly only to texts prepared under the auspices of United Nations organs should not be departed from. It was suggested that the references to the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules in paragraphs 17 and 11, respectively, should be removed to footnotes. Another view was that the reference should be kept in those paragraphs.

137. There was general agreement that the summary should be shortened. Various suggestions were made for improving the drafting of the chapter.

Negotiation and conciliation

138. It was generally agreed that the importance of negotiation as a means of settling disputes should be stressed in the Guide. It was suggested that the Guide should mention that the settlement of disputes by negotiation could avoid the disruption of the business relationship between the parties; moreover, dispute settlement by negotiation would avoid problems connected with enforcement of arbitral awards or judicial decisions. A suggestion was made that the phrase "broadly acceptable" in paragraph 5 should be replaced by a more appropriate one.

139. There was little support for suggesting in the Guide that the parties should be obligated to attempt to reach a settlement by negotiation before referring their dispute for settlement by other means. In that connection, a view was expressed that paragraph 6 should be deleted. According to another view, however, the concept behind paragraph 6 should be retained, but the parties should be warned of the problems which could arise if a long period of negotiation had to precede reference to settlement by other means.

140. It was suggested that paragraph 7 be redrafted so as to clarify that the settlement agreed to by the parties should be reduced to writing. Another suggestion was that paragraph 7 be deleted.

141. A suggestion was made to distinguish between the settlement of disputes by negotiation and conciliation, on the one hand, from settlement by arbitral and judicial proceedings, on the other. A view was expressed that the settlement of disputes by negotiation and by conciliation should be discussed in the same section, since those forms were interlinked. The prevailing view, however, was that they should be discussed in separate sections, since they reflected different methods of settling disputes. A view was expressed that the Guide should point out that negotiation or conciliation might be used in parallel with other means of settling disputes.

142. It was generally agreed that the Guide should mention a practice which existed whereby, before the construction commenced, the parties established a body which was to meet periodically on the site and suggest to the parties how disputes which arose in the course of the construction might be settled. The parties were free to accept or reject those suggestions, and to initiate legal proceedings at any time.

Arbitration

143. Different views were expressed with respect to the advantages and disadvantages of arbitration as a means of settling disputes. It was suggested that, in addition to the advantages of arbitration mentioned in the draft chapter, the Guide should point out the following advantages: that arbitral proceedings might avoid the disruption of business relations between the parties which could result from judicial proceedings; that with arbitration neither party was forced to accept the jurisdiction of a court in the country of the other party; and that the parties could choose the language to be used in arbitral proceedings, and could possibly avoid the need to translate relevant documents. It was suggested that the Guide should mention as a disadvantage of arbitral proceedings that a party might have recourse to a court to set aside an arbitral award, which would result in prolonged dispute settlement proceedings.

144. Due to the different views expressed concerning the advantages and disadvantages of arbitration, it was generally agreed that the Guide should include only a brief listing of factors which the parties might wish to take into consideration in determining which means of dispute settlement to choose. It was suggested to include in the Guide a short characterization of arbitration as a method of dispute settlement.

145. With respect to the second sentence of paragraph 14, it was suggested to limit the point made in that sentence to cases where the arbitration agreement was recognized as valid by the court. A view was expressed that in the third sentence of that paragraph the word "usually" should be deleted, and that the sentence should indicate only that the courts "might" have the authority mentioned in that sentence.

146. It was suggested that paragraph 17 should be shortened. It was further suggested that the Guide should use the terms ad-hoc arbitration and institutional arbitration in paragraph 16, since those terms were commonly used in the practice. A view was expressed that paragraph 20 should discuss the procedure to be followed if the parties failed to appoint arbitrators. The paragraph should also refer to the possible relevance of the nationality of arbitrators in their selection. In the second sentence of paragraph 19 it was suggested that the term "works contract" be replaced by the term "arbitration agreements", as the latter was more appropriate.

147. A view was expressed that even greater emphasis should be placed on the importance of the place of arbitration. It was suggested that the discussion on the so-called mixed arbitration clause (paragraph 25) be deleted. The prevailing view, however, was that that type of clause was used in practice, and should be dealt with. It was noted that paragraph 25 covered two situations, i.e. where the parties agreed to two places of arbitration (the country of each party) and where they agreed upon two arbitration institutions, one located in the country of each party. While the disadvantages indicated in the latter part of the paragraph related to both those situations, the present text might be interpreted as indicating that the disadvantages related only to the latter situation. The text should therefore be clarified. It was also suggested to indicate that an advantage of that clause was to enable the parties to compromise if the parties could not agree upon a single arbitration institution. The suggestion was also made to clarify that arbitration proceedings might be conducted at a different place from the location of the seat of the arbitration institution chosen by the parties. Under one view the last sentence in paragraph 23 might be deleted. Under another view that sentence was useful and should be retained. It was suggested that the parties might wish to specify in the contract that the arbitral award was to be issued at a place chosen by the parties, since issuance of the arbitral award at that place might facilitate its enforcement. It was suggested that the parties might be advised in the contract to choose the place where the site was situated as the place of arbitration, since very often relevant evidence would be available at the site.

148. It was suggested that the second sentence of paragraph 25 should be clarified, or deleted as superfluous. It was noted that under the legislation of some countries parties from those countries were only permitted to agree on a place of arbitration located in their countries, to agree upon arbitrators who were nationals of their countries, and to agree to the use of the official language of their countries in arbitral proceedings. The suggestion was made that paragraph 26 should explain the meaning of arbitrators being authorized to decide *ex aequo et bono*.

149. Under one view the first sentence of paragraph 27 should be deleted. The paragraph might indicate that any limitation in the arbitration clause in respect of the issues which might be settled in arbitration proceedings might lead to difficulties. Under another view the sentence should be retained. However, different views were expressed in respect of the issues which might be excluded from the arbitration. Under one view the list indicated in the paragraph 27 should be expanded (e.g. by the addition of a reference to liability for damages). Under another view some of the issues in the list should be deleted.

Judicial proceedings

150. Differing views were expressed in respect of the section on judicial proceedings. Under one view that section should be expanded. It was suggested that the section might mention that under some legislation summary judicial proceedings might be initiated and that some issues could not be excluded from the competence of a court. Under another view, that section should be shortened. It was agreed to include in the section on "General remarks" a paragraph explaining that disputes would be settled in judicial proceedings if the parties did not agree upon an arbitration agreement. It was also agreed that a comparison should be made of the enforceability of a judicial decision and of an arbitral award, and the concept of enforceability stressed in choosing between judicial and arbitral proceedings.

151. It was suggested that paragraph 30 should mention that judicial proceedings might not always be an acceptable method for the settlement of disputes if a State or state-owned enterprise was a party to a works contract, and that the parties should consider whether such an issue existed and how to deal with it. Another suggestion was to indicate only that in those cases there might be in various countries different approaches to the settlement of disputes, including settlement in judicial proceedings.

152. It was agreed that the advantages and disadvantages of using an exclusive jurisdiction clause in the contract should be indicated. In addition to the disadvantages mentioned in the section, some other disadvantages (e.g. costs connected with judicial proceedings conducted abroad) might also be mentioned. It was noted that an exclusive jurisdiction clause might create great hardship to a party if the judicial decisions were not enforceable abroad, and the jurisdiction of other courts were excluded. However, a view was expressed that an exclusive jurisdiction clause might be useful since the courts which would have competence to decide disputes between the parties would be known from the time the contract was concluded.

153. It was suggested that only the first two sentences in paragraph 31 should be retained, and that paragraph 32 should be deleted as superfluous. It was noted that, in drafting the exclusive jurisdiction clause, the parties should take into consideration whether the selected court would be able to exercise the competence conferred by the parties. It was noted that the choice of the courts of a State other than the State of a party was not practical, and paragraph 31 should not include a reference to such a choice. Under one view paragraphs 33 and 34 did not convey significant information and might be deleted. Under another view those paragraphs were useful since they contained a warning against the possible consequences of an exclusive jurisdiction clause agreed upon by the parties without proper consideration. It was also noted that the applicable law might restrict the choice of a court by the parties.

Experts

154. It was noted that the settlement of disputes by experts was not regulated under any legal system. A view was expressed that the section on settlement of disputes by an expert should be deleted. The prevailing view, however, was that the use of experts in settling disputes was very important in practice, and, due to the absence of legal regulation, if the parties decided to engage an expert for settling their disputes they should be guided on how the issues which arose might be settled in the contract. If an expert was engaged, it would be advisable to determine in the contract what disputes he could settle, the extent of his authority, and the effects of his decision. It was stressed, however, that the parties should be cautious in engaging experts for the settlement of disputes, due to the absence of legal safeguards applicable to this method of settling disputes. It was agreed that the parties should be advised to limit the authority of experts to the settlement of disputes of a technical nature which required rapid decisions. A view was expressed that the authority might be limited to the finding and verification of facts. It was noted that the decision of an expert would not have the binding effect of an arbitral award. The view was expressed that the respective functions of the expert and the consulting engineer should be clearly determined in the Guide.

155. It was pointed out that the potential authority of an expert to adapt or supplement the contract might be limited by the law applicable to the contract. It was agreed to place the section on the settlement of disputes by experts before the sections on settlement of disputes in arbitral and judicial proceedings. There was general agreement that the discussion in the chapter of the settlement of disputes by experts should be confined to general issues connected with the engagement of experts in the settlement of disputes and to delete paragraphs 40 to 46. Some of the issues discussed in those paragraphs might be mentioned, if needed, in connection with general issues.

Disputes concerning failure of agreement or consent

156. It was agreed to delete the section on disputes concerning failure of agreement or consent. It was suggested to include in the section entitled "General remarks" a paragraph which would recommend to the parties to consider to what extent, if at all, an arbitration clause should apply to cases of a failure of the parties to reach agreement, or a failure of a party to grant a consent if the agreement or consent was required by the contract. In addition, the way in which disputes concerning failure to agree on the adaptation of contractual terms to a new situation should be settled might be discussed in the chapters dealing with cases where such an agreement was required (e.g. in chapter XXII, "Hardship clauses" or chapter XXIII, "Variation clauses"). The way in which disputes concerning a failure to give a consent should be settled might be discussed in the chapters dealing with cases where such a consent was required (e.g. in chapter XI, "Subcontracting"). Cross-references to those chapters might be included in the section entitled "General remarks".

Multi-party settlement of disputes

157. It was agreed to delete the section on multi-party settlement of disputes. It was suggested that in the section entitled "General remarks" the attention of the parties should be drawn to issues which might arise in connection with the settlement of disputes when several parties participated in the construction of the works, and that some practical approaches to the resolution of the issues (e.g. the appointment of the same arbitrators to settle all disputes) be suggested.

Illustrative provisions

158. It was agreed to delete all the illustrative provisions at present set forth in the draft chapter, with the exception of paragraphs 1 and 7 of the illustrative arbitration clause set forth in footnote 7.

CHOICE OF CONTRACTING APPROACH[24]

159. There was wide agreement to organize the chapter into three sections, entitled "General remarks", "Single contract approach" and "Several contracts approach". It was generally agreed that all sub-headings in the chapter should be deleted, and that within the two latter sections the various contracting approaches dealt with in the chapter should be placed and discussed in the order of the comprehensiveness of the obligations undertaken by the contractor. Moreover, it was generally agreed not to use the terms "semi-turnkey contract" and "comprehensive contract" in the Guide, except when references were made to other texts or documents in which those terms were used.

160. A suggestion was made to remove paragraphs 11 and 12 from section C ("Engagement of more than one entity") to section B ("Engagement of single contractor"). According to another suggestion, however, those paragraphs properly belonged to section C.

161. A suggestion was made to expand upon the discussion of factors relevant to the choice of a contracting approach (paragraph 2), and to identify situations in which a particular contracting approach might be preferable.

162. It was suggested that the enumeration of the performances needed for the completion of the works should be deleted from the first sentence of paragraph 1, since the performances were set forth in paragraph 4. It was observed that the second sentence of paragraph 2 might be redrafted to eliminate a possible misinterpretation that in all cases other than the one mentioned in the sentence the purchaser should engage several contractors. A view was expressed that the single contract approach might be used by the purchaser even in cases where mandatory rules in his country required that local enterprises be engaged for certain aspects of the construction, since those enterprises might be engaged as subcontractors by the single contractor.

163. A view was expressed that the term "all performances" in the first sentence of paragraph 4 should be replaced by another term, such as "major tasks". Another view was that the former term should be retained, since the performance by the contractor was the relevant factor. It was suggested to redraft paragraph 4 so as to clarify that the obligation of the turnkey contractor was to render all performances needed for completion of the works, and not merely to co-ordinate the construction. It was also suggested to include training among the performances to be effected by the turnkey contractor. According to a further suggestion, paragraph 4 should advise that the turnkey contractor should complete the construction on a specified date and that the works should be capable of operating during a test period. It was suggested to add the words "in principle" before the word "liable" in the last sentence of paragraph 4.

164. It was suggested to substitute in the third sentence of paragraph 5 the word "supply" for the word "manufacture", and the word "specification" for the word "design". A question was raised as to whether tendering could be conducted on the basis of different designs (paragraph 5, last sentence).

165. In respect of paragraph 6, a suggestion was made to substitute in the second sentence the expression "at the same time" for the expression "on the other hand", and in the first sentence to substitute for the word "design" another expression to make clear that the design was not determined by unilateral decision of the contractor.

166. A view was expressed that, in connection with the characterization of the product-in-hand contract approach in paragraph 7, the contractor should not be obligated to ensure that his training was successful, but that he should only be obligated to use his best efforts to achieve that objective. According to another view, however, the characteristic feature of that contracting approach was the contractor's responsibility to achieve a specified result through training. It was suggested to substitute in the penultimate sentence of paragraph 7 the expression "assumes greater responsibility" for the expression "responsibility would be greater".

167. A suggestion was made to reflect in paragraph 8 that the capability of the purchaser in the field of the construction of the works was relevant to the choice of a contracting approach. In connection with the penultimate sentence of that paragraph, it was suggested to clarify that the total cost under the several contracts approach would be lower than under other approaches because under the several contracts approach the purchaser himself would perform some of the functions which would be performed by the contractor under other approaches. In that connection, it was suggested to indicate at the beginning of section C that in considering whether to adopt the several contracts approach the purchaser should consider whether he was capable of performing the co-ordination and other functions in relation to the construction which he would normally have to undertake under that approach. A view was expressed that under the several contracts approach, when the purchaser provided the design, the contractor might be obligated under the contract to notify the purchaser of evident defects in the design.

168. A view was expressed that paragraph 15 should be reformulated so as to provide a detailed clarification of the consequences of a failure of a contractor to perform with respect to the liability of the purchaser to other contractors. It was suggested that the purchaser might protect himself to some degree against those consequences by stipulating in each separate works contract that he would be liable to the contractor only for liquidated damages or penalties in the case where delay by other contractors prevented the contractor from commencing his performance. It was suggested to substitute in paragraph 16 the term "installation of equipment" for the term "erection of equipment".

[24] A/CN.9/WG.V/WP.17/Add.7.

169. In respect of paragraph 17 it was noted that the purchaser might wish to engage a construction manager in addition to a consulting engineer. It was also noted that the purchaser might engage a consulting engineer even under a single contract approach.

170. It was noted that the situation described in paragraph 18 was exceptional, and that a single contract approach would be preferable to that situation as a means of reducing the risks of co-ordination. It was suggested that a cross-reference to chapter X, "Consulting engineer", might be advisable with respect to the responsibility of the consulting engineer.

171. It was generally agreed that paragraph 20 should be deleted. Several suggestions were made for improving the drafting of the chapter.

TRANSFER OF TECHNOLOGY[25]

172. There was general agreement that the overall balance achieved by the draft chapter was satisfactory. It was proposed that section A ("General remarks") should refer to certain cases of transfer of technology which were at present not reflected in the section and which might occur when a works contract was concluded. Thus, the technology required to construct a portion of the works might be transferred to a purchaser by the contractor if it was agreed that the purchaser was to construct that portion. Technology might also be transferred to the purchaser with regard to the processing of the products of the works, in particular when those products were to be internationally marketed.

173. With regard to the description of the legal rules applicable to the grant of a patent, it was noted that a person who invented a product or process might apply for the grant of a patent not only to a government (paragraph 3, fifth sentence), but also to a governmental institution, such as a patent office. Furthermore, an inventor might apply not only in his own country, but also in other countries for the grant of a patent.

174. It was agreed that the description of national legal regulations, and the relevance of those regulations to the drafting of contract provisions, (paragraph 7) should be amplified. Reference should be made to legal regulations which might exist in the purchaser's country which might encourage the transfer of certain kinds of technology (e.g. technology which might increase productivity) or discourage the transfer of other kinds of technology (e.g. where similar indigenous technology was already available). Reference should also be made to the technology policy of a country which might be implemented by governmental agencies, and which might determine what provisions on transfer of technology might be included in a contract. It was also noted that the Guide should emphasize the importance of regulating the transfer of technology through contract provisions when no legal regulations governing the transfer of technology existed in the purchaser's country.

175. A suggestion was made that the technology should be not only up to date, but also appropriate to local needs, and there should be no restrictions on exports by the transferor.

176. In regard to the description of the technology (subsection B.1), it was suggested that the contractor might be required to provide the description of the technology in the contract, since he had special knowledge of the technology. The Guide should also advise the purchaser to determine the level of the technology he required. In some cases, he might wish to obtain the most up-to-date technology, while in others he might prefer to obtain a technology which, while not being the most up to date, was the most appropriate for him. It was suggested that the Guide should note that the level of technology required could influence the price to be paid.

177. Views were exchanged on subsection B.2 ("Conditions restricting purchaser in use of technology"). Under one view, the present treatment of those conditions in the section was appropriate and should be retained. Under another view, the section emphasized too strongly the disadvantages which purchasers may suffer through those conditions, since in practice conditions which produced undue disadvantages for purchasers were not often imposed. It was agreed that, while the description of possible advantages and disadvantages to each party of such conditions should be retained, paragraphs 10 to 13 should be expanded by the addition of examples suggesting how the competing interests of the purchaser and contractor might be reconciled in a balanced manner. In regard to paragraph 11, it was proposed that the paragraph might suggest that, while the contractor should under the contract be given the right to control whether modifications to the technology might be effected by the purchaser, the contract should also provide that the contractor's consent to a request by the purchaser to make modifications should not be unreasonably withheld. In regard to paragraph 12, it was proposed that the paragraph might suggest that each party might be required to inform the other of improvements which he made to the technology, or that the contractor should be required against payment of an agreed remuneration to inform the purchaser of improvements that the contractor had made. Yet another possibility was that provision might be made for joint research and development of the technology. In regard to paragraph 13, it was proposed that the paragraph might note that, while export restrictions might be imposed on the purchaser in respect of certain markets, other export markets might be reserved for the purchaser.

178. It was proposed that the opening phrase, "For these reasons", should be deleted from the fourth sentence of paragraph 9, since the statement made in that sentence did not result from reasons stated in preceding sentences. It was also proposed that a further footnote be appended at an appropriate place to that paragraph

[25] A/CN.9/WG.V/WP.17/Add.8.

referring to the UNCTAD Draft Model Law on Restrictive Business Practices.

179. It was proposed that the guarantee to be given by a turnkey contractor suggested in the second sentence of paragraph 14 should be operative only if the works were operated by the purchaser in accordance with operation manuals and training provided by the contractor. The view was expressed that the substance of paragraph 15 was better presented in its original drafting (i.e. in paragraph 12 of A/CN.9/WG.V/WP.15/Add.3) than in the present drafting. The present drafting should therefore be reconsidered, retaining, however, changes to the original drafting proposed by the Working Group at its seventh session (i.e. in A/CN.9/262).

180. In regard to paragraph 16, the view was expressed that the second sentence of that paragraph, in addition to mentioning the cases presently set forth therein where infringement of industrial property rights of a third party might occur, should also mention that such infringement might occur through the construction of the works itself. In regard to the third sentence of paragraph 17, it was proposed that the supplier of technology should be obligated to assist the transferee of the technology when legal proceedings were brought against the latter only to the extent that the legal proceedings resulted from the supply of the technology by the supplier. In regard to the suggestion contained in the last sentence of paragraph 17 that royalty payments were to cease in the event of successful legal proceedings being brought against the purchaser by a third party, it was proposed that the payments should cease only if the contractor was liable to the purchaser for the infringement of the rights of the third party.

181. With regard to section C ("Issue special to know-how provisions: confidentiality"), the view was expressed that, while that section treated the issue of confidentiality as being special to know-how provisions, this was not always the case; confidentiality might also relate to certain information conveyed when industrial property rights were licensed. Under another view, however, information which was protected by industrial property legislation was not kept confidential, but merely protected from unauthorized use by the legislation. It was observed that the section contemplated only the imposition of obligations of confidentiality on the purchaser. However, in some situations (e.g. when improvements to the technology made by him were communicated by the purchaser to the contractor) it might be appropriate to obligate the contractor to maintain confidentiality. The section should be expanded to include a mention of those cases.

182. It was suggested that the Guide should note that even when a legal system contained obligations as to the observance of good faith during negotiations (paragraph 18, last sentence), it might nevertheless be advisable for the contractor to conclude an agreement as to confidentiality. It was also suggested that the term "public domain" (paragraph 19, third sentence) was not sufficiently precise to be used to delimit the point of time at which obligations of confidentiality ended.

183. With regard to section D ("Communication of technical information and skills"), it was noted that documentation supplied at the time equipment was supplied might be relevant to the communication of technical information and skills. It was proposed that cross-references should be given to other chapters which referred to the need to supply documentation communicating technical information and skills. It was suggested that the words "and required under the contract to be delivered prior to the completion" be inserted in the second sentence of paragraph 22 between the words "works" and "has", as that would clarify the meaning. Divided views were expressed on the advisability of amending the last sentence of paragraph 22 to suggest that, where loss was caused to the purchaser through errors or omissions in the documentation, a liability to pay liquidated damages might be imposed on the contractor as an alternative to the liability of the contractor to pay damages referred to in that sentence.

184. In view of its importance, it was decided that the training of personnel (subsection D.2) should be dealt with in an independent section. It was proposed that paragraph 24 should indicate that the purchaser should be obligated not to remove trainees during the period of training without good reason.

TERMINATION OF CONTRACT[26]

185. A view was expressed that the contract need not contain provisions entitling a party to terminate the contract in certain cases (e.g. in the case of the bankruptcy of the other party, or in the case of abandonment of construction by the contractor), since the contract would be terminable under the applicable law. According to that view, the rules on termination under applicable law were adequate; consequently, the last sentence of paragraph 3 should be deleted. According to another view, however, even if termination were permitted under the applicable law, it would still be advisable for the contract to contain provisions dealing with termination, since the scope of or conditions to the right of termination under that law might be ill-suited to a works contract, or might lead to results different from those which the parties might wish to achieve. With respect to the last sentence of paragraph 3, it was suggested that the paragraph should elaborate upon the ways in which legal rules on termination under the applicable law might be ill-suited to works contracts.

186. A view was expressed that it was too categorical to suggest (paragraph 6) that the contract should be terminated only in respect of the construction which had not yet been performed because the purchaser could not return to the contractor the portion of the works which had already been constructed. It was noted that, in some cases, the purchaser might be able to dismantle and

[26] A/CN.9/WG.V/WP.17/Add.9.

return construction which had been effected by the contractor. In addition, if the contractor had not yet begun construction on site, but had supplied certain equipment or materials, the purchaser might be able to return to the contractor what had been supplied. The entire contract might be terminable by the purchaser in cases such as those. It was therefore generally agreed that paragraph 6 should be reformulated so as to be more flexible with respect to the extent to which the contract should be terminable. It was also agreed that the paragraph should be kept in a separate section, as it presently appeared in the draft chapter, rather than including it in the section on "General remarks".

187. A suggestion was made to replace the words "to be obligated" in the last sentence of paragraph 2 with "he may be required".

188. It was generally agreed that the word "unilateral" should be removed from the headings of subsections 1 and 2 of section C.

189. A suggestion was made to shorten the discussion in paragraphs 8 through 14. The prevailing view, however, was that the discussion should not be shortened.

190. With regard to the suggestion set forth in the draft chapter that before terminating the contract for certain grounds a party be required to give notice of the existence of those grounds to the other party, and then to give notice of termination if the grounds had not been remedied within a specified period of time, a view was expressed that the requirement of two notices was unnecessary. It was observed, however, that the requirement was in furtherance of the policy that termination should be resorted to only as a last resort, since it gave the party against whom the right of termination was being invoked an opportunity to remedy the grounds before the termination was effected. It was generally agreed to retain the two-notice system. It was also agreed to add at the end of the last sentence of paragraph 2 a reference to the requirement that the contractor remedy the grounds for termination within a specified period of time.

191. With respect to abandonment of the construction by the contractor, a view was expressed that the term "abandonment" was unclear, and involved the intent of the contractor. It could, therefore, give rise to questions in particular cases as to whether the contractor had abandoned the construction. According to a further view, a remedy of the purchaser in the case of abandonment of construction by the contractor might be to compel performance by the contractor. It was generally agreed that the Guide should clarify cases in which abandonment might be considered to occur (e.g. if the contractor notified the purchaser that he would not continue with the construction of all or part of the works, or if the contractor vacated the site before the completion of construction). It was also agreed that the Guide should recommend that, before terminating the contract, the purchaser should be required to deliver to the contractor a notice requiring him to continue with the construction, and that the purchaser should be entitled to terminate if the contractor did not do so within a specified period of time. With respect to the illustrative provision in footnote 1, it was agreed that the provision concerning abandonment should be deleted, as the discussion in the text should give adequate guidance to the drafting of a provision on abandonment.

192. A suggestion was made to reconsider the words "may entitle" in paragraph 9.

193. It was generally agreed that the second sentence of paragraph 11 should be reformulated so as to clarify the idea that the contract might provide for the payment by a contractor in delay of liquidated damages up to a specified limit; when that limit had been reached, the contract should be terminable by the purchaser.

194. It was generally agreed that paragraph 14 should clarify that the purchaser might agree to subcontracting by the contractor which was otherwise in violation of contractual restrictions on subcontracting, in which case there should be no ground for termination of the contract by the purchaser.

195. With respect to termination by a party on the ground of bankruptcy of the other party, a view was expressed that a distinction should be drawn between the institution of involuntary bankruptcy proceedings against the party, and the adjudication of bankruptcy. The mere institution of bankruptcy proceedings should not constitute ground for termination of the contract by the other party, since the alleged bankrupt might successfully defend against an adjudication of bankruptcy. In the case of voluntary bankruptcy proceedings instituted by the party himself, an adjudication of bankruptcy would normally be issued within a short period of time, and the other party would not be prejudiced by waiting until the adjudication before terminating the contract. According to another view, however, the institution of voluntary or involuntary bankruptcy proceedings by or against a party could affect the performance of the contract by the party and should constitute a ground entitling the other party to terminate the contract. It was generally agreed that the Guide should stress the necessity that the contractual provisions in respect of bankruptcy be in accord with the applicable national laws on bankruptcy.

196. It was generally agreed that the term "performance guarantee" in paragraph 18 should be reconsidered, and that a reference to the chapter entitled "Security for performance" should be included in paragraph 18.

197. With respect to termination by the purchaser for convenience, it was noted that under many legal systems it was possible for either party to terminate a contract, so long as he fully compensated the other party for his losses resulting from the termination. A view was expressed that the second sentence of paragraph 19 should be deleted, since the right of termination for convenience should not be restricted to governments or government entities. According to that view, the exercise of the right would be

very expensive for a party, which inhibited the exercise of the right. On the other hand, it was observed that for policy reasons a Government or government entity might seek the right to terminate for convenience, and that the contract might restrict the amount of compensation to be paid to the other party upon termination for convenience. It was generally agreed that the second sentence of paragraph 19 should be changed to read "A purchaser, e.g. a Government or government entity, may wish to be entitled by the contract to terminate the contract for convenience". It was also agreed that paragraph 38 should refer to the possibility of restricting the amount of compensation payable upon the exercise of that right to, for example, a specified percentage of the contract price in respect of the terminated portion of the contract.

198. A suggestion was made to refer to termination for convenience in the section of the chapter entitled "General remarks". According to an additional suggestion, the third sentence of paragraph 19 should be deleted.

199. It was generally agreed that the language contained within brackets in paragraph 21 should be deleted. Also, the word "purchaser" as it first appeared in the last sentence of that paragraph should be changed to "contractor".

200. With respect to paragraph 28, it was generally agreed that the Guide should advise the parties that if they agreed that the contractor should be obligated to take the measures referred to in the paragraph, the contract should contain an express provision to that effect.

201. A suggestion was made in connection with paragraph 29 that the right of the purchaser or of a new contractor to use the contractor's equipment and materials should be subject to the rights of third persons (e.g. lessors) in those items. According to another view, however, such a condition should not be included in the contract, since in agreeing to a provision entitling the purchaser or a new contractor to use those items, the contractor should satisfy himself that such use would not infringe the rights of third persons, and the contractor should bear the risk of such infringement.

202. It was generally agreed that the contractor should have the obligations referred to in paragraph 33 only if the contract was terminated for reasons other than ones attributable to the purchaser. A view was expressed that the contractor should not be obligated to create drawings and documents which had not yet been created. It was generally agreed that, rather than referring to an obligation of the contractor to "create" those items, the fifth sentence of paragraph 33 should refer to an obligation to "obtain" them, since the contractor might obtain them from other sources.

203. A suggestion was made to delete the reference in paragraph 36 to the costs of repatriating the contractor's personnel. It was generally agreed, however, that the reference should be retained.

204. A view was expressed that paragraphs 36 and 38 should also refer to the loss of profit by the contractor as a result of termination of the contract. It was generally agreed, however, that it was sufficient for the paragraphs to refer to the chapter of the Guide dealing with damages.

205. Various other changes were suggested for paragraph 38. It was generally agreed, however, that the paragraph should remain unchanged, with the exception of the inclusion of a reference to a possibility of restricting the amount of compensation payable by a purchaser terminating for convenience (see paragraph 199, above).

TERMINOLOGY AND FUTURE WORK

Terminology

206. The Working Group considered the question whether the term "purchaser", or a different term, should be used in the Guide to indicate the party for whom the works was to be constructed.[27] After deliberation, the Working Group decided that for the English version of the Guide the term "purchaser" was preferable to other terms such as "owner", "employer" and "client", and should be used. It was agreed that the term "purchaser" was appropriate both for the case where the party for whom the works was to be constructed was a private enterprise, and for the case where the party was a government or governmental entity.

207. As regards the French version, the prevailing view was that the term *"acquéreur"* should be used as the equivalent of "purchaser". However, the French version of the Guide should explain at its commencement that the term *"acquéreur"* was used as an equivalent of the term *"maître d'ouvrage"*, which was used in some legal systems.

208. It was noted during the deliberations that some passages of the Guide in language versions other than English did not correspond to the original English version, or were deficient in other respects. The secretariat was requested to make greater efforts to eliminate such deficiencies. In that connection, it was agreed that it would be helpful if members of the Working Group who might note deficiencies at any future time transmitted a record of those deficiencies to the secretariat.

Future work

209. A statement was made by the Secretary of the Commission on the future course of the work as envisaged by the secretariat. It was proposed that the secretariat would revise the "Introduction" and all draft chapters of the Guide, and submit them to a further session of the Working Group. The Working Group could then determine whether the secretariat had fulfilled its mandate.

[27] A/CN.9/WG.V/WP.17, para. 4.

210. The Working Group agreed with that course of action. It was generally felt that during the next session the Working Group would restrict itself to determining whether decisions taken by it during its previous sessions had been reflected in the revised draft chapters before it.

The Working Group also discussed the possible duration and date of its ninth session. After deliberation, it was decided to recommend to the Commission that the session be held for a period of three weeks, during March-April 1987.

B. Working paper submitted to the Working Group on the New International Economic order at its eighth session – Draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works: report of the Secretary-General (A/CN.9/WG.V/WP.17 and Add. 1 to 9)

[Original: English]

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