

## B. General conditions of sale and standard contracts

*Report of the Secretary-General: the feasibility of developing general conditions of sale embracing a wide scope of commodities (A/CN.9/78) \**

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\* 16 March 1973.

## I. INTRODUCTION

1. The Commission at its third session requested the Secretary-General:

"To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, *inter alia*, the conclusions in [a progress report to be submitted at the fourth session], referred to in paragraph 1 above, and the analysis of the General Conditions of the Economic Commission for Europe, to be submitted by the representative of Japan."<sup>1</sup>

2. Pursuant to this request, the Secretary-General submitted to the Commission at its fourth session a report

comprising the first phase of the study on the feasibility of developing general conditions embracing a wider scope of commodities.<sup>2</sup> This phase of the study was directed towards the identification and analysis of the issues that were dealt with in the general conditions the text of which appears in document A/CN.9/R.6.

3. In the light of this report the Commission requested the Secretary-General "to continue the study on the feasibility of developing general conditions embracing a wider scope of commodities, and to submit the study, if possible, to the Commission at its fifth session".<sup>3</sup>

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)*, para. 102 (b); UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>2</sup> A/CN.9/54; UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 106; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

4. In response to this decision, the Secretary-General submitted to the Commission at its fifth session a progress report on the second phase of the feasibility study.<sup>4</sup> On the basis of this report the Commission requested the Secretary-General:

"to submit to the Commission at its sixth session his final study on the feasibility of developing general conditions embracing a wider scope of commodities and, to the extent feasible, to commence the preparation of guidelines on this subject and of a draft set of such general conditions."<sup>5</sup>

5. The present report completes the feasibility study referred to above. The Secretary-General has also completed the preparation of a first draft of a set of "general" general conditions. It was considered, however, that for reasons set forth in paragraph 198 below, such a draft should only be submitted to the Commission after consultations with trade associations and other organizations concerned in different regions of the world, and revision of the draft to take account of such consultation.

## II. METHOD OF ANALYSIS AND STRUCTURE OF THE STUDY

6. It will be recalled that the principal object of the first phase of the feasibility study, as submitted to the Commission at its fourth session, was to identify the issues that are usually contained in existing general conditions which are applicable to a wide scope of commodities. It will also be recalled that as a result of that study, the Secretary-General reached the following tentative conclusions:

(a) Although not all of the issues identified in the study are contained in every set of general conditions or relate to all kinds of commodities, this circumstance alone would not necessarily prevent the inclusion of such issues in a scheme of "general" general conditions; where a provision is appropriate only for a particular commodity or type of commodity, a restricted applicability of the provision could be provided for in the text of the general conditions.

(b) It was not necessary to draw up separate general conditions forms in order to cover different delivery terms such as f.o.b. or c.i.f.; the interpretation of all these alternative terms might be included in one set of general conditions, and the parties would agree as to which term should apply to their contract, instead of agreeing on the form which should govern their contract.

(c) The feasibility of drawing up a set of "general" general conditions did not depend on a decision at this stage as to which issues should be covered in such a scheme, but rather on whether it was possible to develop

a formulation on basic issues that could be included in general conditions of unrestricted applicability.

7. In order to test the validity of those tentative conclusions, the present study analyses a number of general conditions relating to different types of commodities. The purpose of this analysis is twofold:

(a) To compare the issues which are dealt with in "general" general conditions with those dealt with in general conditions of restricted scope, and

(b) To compare the provisions embodied in both types of general conditions with a view to providing adequate source-material for drawing up uniform provisions on the various issues involved, that would be applicable to all commodities or to a wide range of commodities.

8. For this purpose, part III of the present report analyses the provisions of ECE general conditions relating to cereals (general conditions Nos. 1A to 8B), and from that analysis, draws conclusions for use in the consideration of the feasibility and desirability of drawing up "general" general conditions.

9. Part IV of the study carries the analysis further by comparing the above formulations with general conditions relating to other agricultural products, processed agricultural foods, timber, rubber, minerals and different kinds of manufactured and engineering goods. These general conditions are listed in annex II. Part V of the present study sets forth the final conclusions and sets forth certain recommendations with respect to future work on the subject of general conditions of sale and standard contracts.

## III. ANALYSIS OF THE ECE GENERAL CONDITIONS RELATING TO CEREALS

### A. General observations

10. The United Nations Economic Commission for Europe (ECE) has drawn up 16 different forms for the sale of cereals. Eight of these relate to sales on c.i.f. (maritime) basis, two to sales on f.o.b. (maritime) basis, two to sales by rail; the remaining four relate to sales by inland waterways (two on c.i.f. basis and two on f.o.b. basis). All of these general conditions are listed in annex I to this report.

11. It is noted that ECE general conditions relating to cereals deal, in one way or another and in a more detailed manner, with the same issues which were identified in the preliminary study<sup>6</sup> with two exceptions: for the passing of property and the formation of the contract. It should be noted, however, that these ECE formulations do not need to provide for the formation of the contract because they have been drawn up as standard contract forms and not as general conditions.

<sup>4</sup> A/CN.9/69.

<sup>5</sup> Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 43; UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

<sup>6</sup> A/CN.9/54, section D; UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

12. The provisions in the various ECE general conditions relating to cereals are similar, except for certain differences most of which are necessitated by the specific characteristics of the mode of transport or the chosen trade terms, e.g. c.i.f. or f.o.b., reciprocal or non-reciprocal, etc. These differences are set out in paragraphs 13 to 22 below.

#### B. *Reciprocal and non-reciprocal contracts*

13. These general conditions distinguish between reciprocal and non-reciprocal contracts so that where the quality of the goods delivered does not correspond to the agreed quality:

(a) Under a reciprocal contract, the buyer is entitled to an allowance if the quality is lower than the one agreed upon, and has to pay the seller an allowance if the quality is higher;

(b) Under a non-reciprocal contract, the buyer is entitled to an allowance if the quality is lower than the one agreed upon, but is under no obligation to pay the seller such an allowance if the quality is higher.

14. All reciprocal contracts, therefore, contain additional provisions to the effect that the buyer shall pay the seller a certain allowance if the actual quality of the goods delivered is better than the quality agreed upon in the contract.

#### C. *Condition final at shipment and rye terms (conditions guaranteed at discharge): shipping weight final, and full out-turn*

15. The above terms indicate whether the condition of the goods is guaranteed, and the final weight determined, at the port of shipment or on discharge. The relevant provisions relating to these terms differ accordingly.

16. It should be noted that while in the case of maritime transport on c.i.f. basis specific forms are drawn for each of the above two possibilities, no separate forms exist in the case of transport by inland waterways or by rail. In the latter cases a blank space is provided to be filled out by the parties in order to indicate the place (of shipment or of discharge) where the weight and the condition of the goods should be determined.

#### D. *Mode of transport: maritime, inland waterways and rail*

17. The ECE general conditions under consideration deal only with three modes of transport, viz. maritime, inland waterways and rail; they do not deal with other modes of transport, such as road or air.

18. As indicated in paragraph 10 above, there are separate contracts only for c.i.f. and f.o.b. terms in case of maritime and inland waterways transport. Consequently, no contract forms exist for other trade terms used in international trade contracts, providing for maritime or inland waterways transport, such as c.&f., ex quay, ex ship, and f.a.s.

19. No separate forms are drawn up for different trade terms used in cases of transport by rail. Thus, the

same forms are applicable to sales concluded on the bases of such trade terms as "free on rail", "carriage paid to", "carriage paid to the named point of a frontier of the exporting country", and "delivered at".

20. There are several differences in the provisions contained in the various forms relating to maritime, inland waterways and rail transport which result directly from the difference in the mode of transport. These include the following:

(a) In maritime contract forms, there are provisions relating to the shipment of the goods, such as those indicating the type of vessel to be used, possibility of deviations, and the minimum load that could be shipped in one vessel. No such provision can be found in forms for inland waterways contracts, nor of course, for rail contracts.

(b) In maritime contracts, if the parties agree to determine the weight of the goods by joint verification and the buyer fails to appear on that occasion, the bill of lading weight would be deemed final. In inland waterways contracts, if *either of the parties* is absent on such occasion, the weighing will be carried out either by sworn weighers or in accordance with the custom of the port of shipment. In the case of railway transport, if *either of the parties* is absent, the weight established by the railway shall be deemed final.

(c) The number of days within which the seller is required to inform the buyer of the date of shipment is, in a maritime contract, two working days to 10 calendar days, depending on the point of shipment and/or point of discharge; in inland waterways contracts the period is two or five working days, depending on whether the distance between the ports of shipment and discharge exceeds 200 kilometres; in rail contracts the period is one working day or as agreed between the parties.

21. On the other hand, there are differences in the provisions that do not seem to be directly or necessarily connected with the particular mode of transport. The following may be mentioned:

(a) In a maritime contract, the seller is entitled to a tolerance on shipment amounting to 10 per cent in the case of cargoes, and 5 per cent in the case of parcels. In an inland waterways contract, the maximum amount of tolerance is 5 per cent and in a rail contract, 2 per cent.

(b) In c.i.f. maritime contracts, there are provisions on the ownership and disposition of the bags in which the goods are delivered. No such provisions exist in either contracts relating to rail or inland waterways (c.i.f. and f.o.b.) or in f.o.b. maritime contracts.

(c) In a c.i.f. maritime contract, if the buyer exercises his right of rejection of the goods, then he is not entitled to require replacement of the goods or to claim any other remedy normally accorded a non-defaulting party. In case of c.i.f. inland waterways and rail contracts, there is no such limitation, the question of additional remedies being left to arbitration if the parties fail to agree thereon.

(d) While maritime and inland waterways contracts define the expressions "immediate shipment" as six working days and "prompt shipment" as 21 running days, rail contracts define "immediate dispatch" as four days and

"prompt dispatch" as eight days. These time-limits run, in the case of maritime and inland waterways contracts, from the date of the contract, and in the case of rail contracts, from the receipt by the seller of the instructions for dispatch sent by the buyer.

(e) Rail contracts, in addition to the terms mentioned in (d) above, also define the expressions "at disposal dispatch", "specified period dispatch", "dispatch spread over several months", and "dispatch spread over a single month"; these expressions are not found in the other two types of contracts.

#### E. *c.i.f., f.o.b., and other standard trade terms*

22. The main differences between *c.i.f.*, *f.o.b.* and rail standard trade terms, as used in the ECE General Conditions for Cereals, are as follows:

(a) In *c.i.f.* and rail contracts, the *seller* is entitled to a tolerance on shipment, while in *f.o.b.* contracts, it is the *buyer* who can claim such tolerance.

(b) *c.i.f.* contracts contain provisions as to shipment, e.g., type of vessel, deviation clauses, etc. *f.o.b.* contracts do not contain such clauses; instead they include provisions as to the buyer's obligations to provide the vessel or space therein.

(c) *c.i.f.* contracts contain provisions concerning the documents the seller must present to the buyer—both as to the type of documents and the time of presentation. Similar provisions are found in rail contracts; the difference relates only to the type of documents to be presented. *f.o.b.* contracts do not specify the documents to be presented.

(d) *c.i.f.* contracts also contain detailed provisions on the type of insurance the *seller* must take out, while in *f.o.b.* contracts it is the *buyer* who has to take out the insurance. In rail contracts, a blank space is provided for the agreement of the parties on this issue.

(e) In *c.i.f.* contract forms there is a provision that the *discharge* of the goods will be at buyer's expense. No such provision exists in *f.o.b.* and rail contracts. *f.o.b.* contracts, however, contain a blank space for agreement of the parties on the terms of *loading*.

(f) In *c.i.f.* and rail contracts, there is a provision enabling the *seller* to extend the time allowed for shipment while in *f.o.b.* contracts it is the *buyer* who enjoys such a right.

(g) As is mentioned in paragraph 21 (c) above, where the *buyer* avails himself of his right to reject the goods, under *c.i.f.* contracts he is not entitled to any further remedies, while in rail contracts any additional remedy is subject to agreement or arbitration. In *f.o.b.* contracts no such limitations exist.

#### F. *General observations on ECE general conditions*

23. In the light of the above analysis of ECE general conditions relating to cereals, the following general observations can be made:

(a) These general conditions are not comprehensive enough to cover all trade terms that are used in the international sales of cereals, nor do they provide for all modes

of transport (see paras. 17 and 18). This means that if the parties wish to use a trade term other than *f.o.b.* of *c.i.f.*, or if they wish the goods to be carried by a mode of transport other than maritime, inland waterways or rail, then the ECE general conditions cannot be used for that purpose. It seems, therefore, that General Conditions covering all modes of transport and all or a wide variety of trade terms would be of more use to the business community.

(b) The differences between the provisions of the various general conditions under consideration do not seem to justify the use of separate contract forms for each trade term, condition or mode of transport. It also seems that the multiplicity of those forms could conveniently be reduced by accommodating the competing provisions relating to the various trade terms, conditions or mode of transport within one set of general conditions. The fact that this method was largely used in respect of trade terms and conditions used in the forms relating to rail transport seems to indicate that such a scheme is feasible. If this method is used, the parties will have to indicate which term, condition or mode of transport they wish to employ instead of choosing the appropriate form from among the 16 different forms that are now provided by ECE. The danger of uncertainty that might be created by the failure of the parties to indicate which term, condition or mode of transport is to be used can be avoided by a provision in the unified form addressed to this contingency.

(c) The fact that certain provisions which are not necessarily or directly related to the mode of transport or the chosen trade term appear only in certain forms and not in others seems to be fortuitous; for instance, the provisions mentioned in paragraphs 21 (a) and 21 (b), and the commencement of the time-limit mentioned in paragraph 21 (d). If so, it might be advisable to have the same provisions included in all forms except where the provision is applicable only in respect of a certain form covering a specific mode of transport, trade term or condition.

(d) The fact that the separate general conditions have been drawn up for different modes of transport and/or different trade terms does not seem to justify a difference in the remedies of the *buyer* in case of rejection (see para. 21 (c) above). The uniformity of provisions on the rights and obligations of the parties, wherever possible, would greatly enhance their awareness of such rights and obligations, and thereby help in avoiding misunderstanding and dispute.

#### IV. ANALYSIS OF PROVISIONS CONTAINED IN DIFFERENT GENERAL CONDITIONS FORMS

24. As was explained in paragraph 9 above, this part of the present report analyses the provisions, relating to various issues, which are contained in a number of general conditions. Annex II below lists the general conditions analysed in this report. It will be noted that they fall into five main categories:

##### A. "General" general conditions

- B. General conditions relating to all or to a group of agricultural products
- C. General conditions relating to a group of non-agricultural commodities
- D. General conditions relating to a specific agricultural product
- E. General conditions relating to specific non-agricultural commodities

25. The annex provides identifying symbols for each formulation. For example, the nine "general" general conditions (category A, above) are identified as A.1, A.2, etc.; the 18 general conditions relating to all, or to a group of agricultural products (category B, above) are identified as B.1, B.2, etc. In this report, these various general conditions will usually be referred to by the identifying symbols rather than by their titles.

26. The issues that are discussed in this part of this report are not necessarily contained in all the general conditions listed in annex II. Most of them, however, are contained in many of the formulations under consideration. The remaining issues are dealt with because they seem to be important even though they appear in a few formulations only.

27. It should be noted that the provisions that are analysed in this part of the report relate more or less to the same issues as those that were identified in the previous study, contained in document A/CN.9/54.\* However, some of the issues identified in that document are dealt with in the present study under another title or have been divided and dealt with under two or more titles.

28. It should also be noted that the references to formulations given below are merely illustrative and not exhaustive.

29. This analysis, however, does not deal with specific provisions that are applicable only to a particular commodity, such as provisions relating to the allowable moisture content or the required germinating capacity of certain agricultural products.

#### A. Formation of contract

30. Questions relating to the formation of contract are dealt with in several general conditions (e.g., A.3, B.16, B.20, C.1, C.3, C.5, D.1, E.1, E.2). Standard contracts (as contrasted with general conditions) usually do not contain such provisions—for example, the contract forms prepared by the Economic Commission for Europe for the sale of cereals (B.16, B.17, B.18, B.19).

31. The main issues relating to formation of contracts that are dealt with in the formulations under consideration are: binding effect of the offer, time of acceptance, effect of negotiations prior to the conclusion of the contract, form of the contract, and finally, validity of actions by brokers and agents.

32. With regard to the binding effect (i.e., irrevocability) of the offer, there are certain differences in the adopted solutions. According to A.3, all offers are deemed to be binding on the offerer unless otherwise expressly specified in the offer; formulation B.6, on the contrary, provides that offers are always understood "without engagement"; B.20 chooses a middle course by declaring that offers sent by telegram or telex are firm while those sent in writing are not binding.

33. Under some formulations an offer is considered accepted at the time when the written acceptance is sent by the offeree (C.1, C.2, C.4) and under others at the time when the acceptance is received by the offerer (A.3, E.1, E.2).

34. B.16, B.17, B.18, B.19, E.1, E.2 and E.5 provide that after formation of the contract all previous negotiations, oral or in writing, that are contrary to the contract shall cease to have effect. According to A.3, all such negotiations, whether or not they are contrary to the contract, shall become null and void.

35. Some formulations require the contract to be in writing (A.3, C.3). Others recognize oral transactions but call for written confirmation. According to B.16 and B.20, only written confirmations are valid, while under C.8 failure to confirm the contract in writing does not affect the validity thereof.

36. A few formulations also provide for the validity of the actions of brokers or agents. Under some of these formulations the contract may be concluded and signed by a duly authorized representative or agent (E.1, E.2), under others such contracts can only be considered as valid if confirmed by the principal himself (B.6, C.3, C.5). D.1 requires the broker to disclose in all cases, the names of the buyer and the seller to the other party; D.2, on the other hand, provides that this should be done only in certain specified cases.

#### B. Licences

37. The following issues are dealt with under the heading of licences: which party should obtain the export or import licence, and the effects of delay, refusal or withdrawal of a licence by governmental authority.

38. Many formulations (e.g., B.16, B.18, B.19, B.20, D.3, E.3, E.6) require each party to obtain a licence required in his country. Other formulations (e.g., A.1 in respect of contracts on c.i.f., c.&f., ex ship, and f.c.p. to basis, A.2 and B.17) provide only that export licences shall be obtained by the seller, and import licences by the buyer. Still other formulations (A.1 in respect of contracts on f.o.r., f.a.s. and ex quay basis, A.2, A.9, B.1 in respect of contracts on duty paid basis, and D.8) depending on the trade term used, provide that the seller has to provide the import licence and the buyer, the export licence.

39. Under most general conditions, delay, refusal or withdrawal of a required licence by governmental authority permits either party to cancel the contract (B.6, B.20, E.3, E.6) or to regard the contract as null and void (A.9, C.1). However, formulations E.1 and E.2 distinguish be-

\* UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

tween the effects of refusal, delay and withdrawal. In case of delay, the contract is considered null and void; refusal and withdrawal after the ship is chartered or the goods are dispatched is regarded as a ground for relief, while withdrawal before chartering of the ship or dispatch of the goods gives rise to a right of rescission of the contract.

40. A radically different solution is adopted by all ECE general conditions for the sale of cereals (e.g., B.16, B.17, B.18, B.19). These general conditions regard as default any failure to obtain the required licence for any reason whatsoever, except for a general prohibition of imports or exports which is imposed after the conclusion of the contract.

### C. *Taxes, duties and fees*

41. All general conditions which have not been drawn for sale on a specific trade term (e.g., A.3, A.8, B.4, B.5, D.4, D.6, E.1, E.2, E.4, E.5) as well as those which are based on the trade terms f.o.b., c.&f., or c.i.f. (A.1, B.2, B.3, B.8, B.16, B.17, B.18, D.3, D.5, D.7), provide that all taxes, duties and fees levied in seller's country or in country of origin are to be paid by the seller, and those levied in the buyer's country or country of destination are to be paid by the buyer.

42. Under general conditions drawn up for sale on a specific trade term other than f.o.b., c.&f., or c.i.f., the question which party is responsible for payment of taxes, duties and fees depends on the conditions of the trade term. Thus in general conditions based on f.o.r. and ex works (A.1) or frontier basis (A.2), the buyer has to pay the taxes, duties and fees levied in the country of dispatch or shipment. In general conditions on "delivered..." basis (A.2 and B.1), the seller also has to pay the taxes, duties and fees levied in the country of destination. In the case of sale on ex wagon (B.1) or ex ship basis (A.1), the provision in respect of f.o.b., c.&f. and c.i.f. mentioned in the previous paragraph seems to apply.

43. The general conditions that deal with fluctuations in the rate of duties, taxes and fees, stipulate (with one exception) that such fluctuations should be at buyer's account (A.8, D.1, D.4, D.5); D.8 provides that the buyer is not affected by fluctuations in taxes, duties and fees originally payable by the seller.

### D. *Quantity: tolerance; determination of quantity delivered*

44. Most general conditions that are drawn up for the sale of goods in bulk allow the seller or the buyer, depending on who provides the means of transport, to deliver or to require delivery of goods, as the case may be, more or less than the agreed quantity up to a certain percentage. According to the majority of these general conditions (e.g. A.5, B.2, B.4, B.5, B.8, B.10, B.11, D.9, D.10) the amount of this tolerance is up to 5 per cent. According to other general conditions, the amount of tolerance varies from 2 to 15 per cent (e.g., B.14, B.15, B.19, D.4, E.3, E.5, E.6). In certain formulations the percentage of the tolerance allowed depends on whether the quantity is stated to be "about", "circa" or "approximate"

(B.1, C.7, C.9, D.20), or to be shipped as a "full cargo" (e.g., B.9).

45. Where tolerance is applicable, under some formulations (B.6, B.7, B.13, B.14, B.15, B.16, B.17), the excess or deficiency in the quantity delivered is to be settled at contract price; under other formulations, partly at contract price and partly at market price (B.11, B.18, B.19).

46. Many general conditions include provisions that deal with the determination of the quantity of the goods actually delivered. These general conditions differ as to whether this quantity should be determined at the time of shipment or at the time of discharge. Thus, formulations A.3, B.1, B.2, B.16, B.17, C.9, provide that the quantity should be determined at the time of shipment, while formulations B.4, B.5, B.12, D.6, D.7, D.9, D.10, require that the quantity should be determined at discharge. However, some general conditions, for instance B.18, B.19 and D.3, expressly leave the question open for agreement of the parties.

47. Several general conditions provide that the quantity should be determined by a specified public authority or independent agency, for instance, B.2, B.4, B.10, D.9, D.10 and C.9. Several formulations provide that the seller or the buyer, as the case may be, has the right to attend or supervise the determination of the quantity which takes place in the country of the other party (B.4, B.5, B.8, D.3, D.7, D.9, D.10 and C.9).

48. Other formulations provide that the quantity indicated in the bill of lading or railway bill shall be deemed to be the actual quantity delivered (A.3, B.1, B.8, B.16, B.17, B.19 and D.3). Some general conditions also provide for the possibility that the parties or their representatives jointly establish the quantity delivered (B.1, B.16, B.17, B.18 and B.19).

49. A few general conditions contain provisions as to the determination of tare weight and that a certain percentage should be deducted as tare from the weight of the quantity delivered (B.1, B.2, B.3, D.3 and C.7).

### E. *Quality of the goods and verification thereof*

50. Most general conditions relating to agricultural goods provide that the goods delivered should be of fair average quality (A.3, B.1, B.7, B.11, B.14, B.15, B.16, B.17, B.18, B.19, D.1, D.6, D.9, D.10). Other general conditions require that the goods should be in sound marketable condition (B.4, B.20, D.2). In respect of non-agricultural goods, some formulations provide that the goods should conform "to the standards in use in the exporting country in respect of quality, assortment, size or marking" (E.1) or that this should correspond to goods usually delivered by the seller (E.3) or "the usual average quality existing in the seller's country for the delivery of the given type of goods and corresponding to [its] purpose" (A.3).

51. Several general conditions provide that in case of sale by sample, the goods must correspond exactly to the sample, while in case of sale by type sample, the correspondence need only be approximate (B.20, C.7, C.8, C.9, D.3).

52. Some general conditions require that the seller should provide the buyer with evidence of the quality of the goods by way of a declaration or other appropriate certificate (A.1, A.3, B.20). According to A.8, the seller has to submit the certificate upon the buyer's request. Under formulations C.2 and C.4, the verification of quality shall be done at the seller's works in the presence of the buyer.

53. Many general conditions provide for the verification of the quality of the goods by the buyer or his representative at the time and place of shipment (e.g., B.8, B.17, B.18, B.19 and D.8). Other formulations require that such verification should be done at destination (A.6, B.11, B.12, B.20, B.21, D.3, D.19). Under some of these general conditions, the place of verification is also determinable by agreement of the parties (B.16, B.17, B.18, B.19, E.2).

54. Several general conditions provide that where the method of inspection is agreed upon by the parties or the inspection is carried out by a certain official agency, the findings shall be final and may not be contested by the parties (e.g., A.4, A.9, B.16, B.17, B.18, B.19, E.1).

55. Most general conditions relating to agricultural products contain provisions which require verification of the quality by way of samples. The method of taking the samples as well as their examination are governed by detailed provisions which, in many respects, differ from one another (D.7, B.9, B.10, B.20, B.21, B.11, B.8, D.3). Similar provisions are contained in C.9, which deals with the sale of vegetable and animal oils, fats, etc.

#### F. Packing

56. Several formulations leave the question of the mode of packing to the parties to determine in the manner they agree upon (B.2, B.3, B.8, B.16, B.17, B.18, B.19). Some general conditions, however, determine the mode of packing by reference to what is customary in the circumstances (A.1, A.2, A.3, C.8). Formulation A.3 requires that packing should assure safety of the goods during transportation and under usual handling. A few formulations relating to agricultural commodities provide that the goods should be delivered in bags of a certain description (B.5, B.6, B.20).

57. A number of general conditions also contain a provision to the effect that the packing material is the property of the buyer, the cost of packing having already been included in the price (e.g., B.16, C.1, C.2, C.4, C.5).

#### G. Place and time of delivery

58. A few general conditions provide that delivery is effected either by handing the goods over to the buyer or by informing him that the goods have been placed at his disposal (C.3, C.5). Other general conditions make the place of delivery dependent on who pays for the carriage of the goods; where it is the duty of the seller to pay, he has to deliver the goods at the place of destination; on the other hand, where the carriage is paid for by the buyer, the seller has to deliver the goods at the place of shipment (B.1, C.7).

59. A number of formulations provide that in case the contract does not designate the place of delivery, that place will be the place of business of the seller (B.6, C.1, C.2, C.4, C.5, C.8). According to E.3, however, the seller has to deliver the goods free alongside the vessel.

60. Many formulations contain provisions defining the meaning of certain expressions generally used in international trade to indicate the time-limit within which the goods are to be shipped. These definitions, however, differ from one another. Thus, for instance,

(a) "Immediate delivery" means delivery within:

3 running days from the conclusion of the contract (B.9, B.10);

6 working days from the day following the date of the conclusion of the contract (B.16, B.17);

4 working days from receipt of shipping instructions from buyer (B.19);

7 days in case of transport by rail and 10 days in case of transport by steamer (B.20);

15 days from the day following the date of the sale (D.3);

(b) "Prompt delivery" means delivery within:

8 working days (B.19) after receipt of shipping instructions;

10 days in case of delivery by rail, and 14 to 30 days in case of delivery by sea, depending on the distance, "on receipt of shipping instructions from the buyer, or after learning of the granting of any necessary licences, or after the opening of an agreed credit" (B.20);

10 days from the date of the conclusion of the contract, but 3 days in case of local sales, e.g., sale at a commodity exchange (B.1);

21 running days from the day following the date of the conclusion of the contract (B.16, B.18).

61. Several general conditions contain provisions that deal with one aspect or another of the time of delivery. Thus, D.3 provides that where no time for delivery is fixed in the contract, delivery is understood to be "prompt", that is, within 30 days from the date of sale, while under E.4, the buyer has to give instructions for "prompt" delivery within 10 weeks from the date of the contract. Under C.2 and C.4, on the other hand, the time is to be determined by agreement by the parties after six months from the date of the contract.

62. Where the contract provides for a delivery period, that period commences to run from the later of: (a) the date of the formation of the contract or (b) the date of the receipt by seller of the advance payment agreed in the contract (C.1), or the date on which the seller receives notice of issuance of the import licence (C.2, C.4). C.4 also provides that if the execution of the contract depends on plans, specifications or information to be supplied by the buyer, the commencement of the period may be delayed until the receipt of such documents.

63. Formulations B.9, B.10, D.9 and D.10 contain provisions in the calculation of periods expressed in months or half months.



64. Many general conditions stipulate that the party who has to provide the means of transport may, by notifying the other party, extend the delivery time. Most of these formulations allow an extension of up to 8 days (B.5, B.6, B.12, B.13, B.14, B.15, B.16, B.18, D.7) while others allow 3 days (B.9), 15 days (B.4), or one month (B.8, C.1). General conditions B.5, B.6, B.12, B.14 and D.7 allow extension of the delivery time only if the contract period for shipment is not more than 31 days.

65. A great number of the general conditions mentioned in the above paragraph provide that if it is the seller who extends the period, he has to pay a penalty, the amount of which depends on the length of the extension (B.5, B.6, B.12, B.13, B.14, B.15, B.16, B.18, D.7).

66. Under A.3, the seller may postpone delivery of the goods in cases where the buyer does not provide him in time with the data necessary for the production of the goods or if he later changes these data.

67. Several general conditions deal with the question whether delivery can be effected in instalments. A.9 allows delivery in instalments in all cases. According to B.1, delivery may be made in instalments where the contract is on "ex quay" or "delivered..." basis, or where the seller has to provide for the carriage of the goods. C.7 allows delivery in instalments in the latter two cases, while C.9 allows such delivery where the contract is on c.&f. or c.i.f. basis. B.16 allows delivery in instalments only where the contracted quantity is more than 50 tons (of cereals). On the other hand, some general conditions do not permit delivery in instalments except with the consent of the buyer (e.g., A.3). Under B.1 and C.7, however, the seller has to deliver the goods in parts where the buyer requests him to do so.

68. Several general conditions stipulate that where the goods are delivered in more than one shipment, each shipment shall be deemed to be a separate contract (A.9, B.16, B.18, B.19, D.7, D.9, D.10). According to B.16, B.18, B.19, D.9 and D.10, each separate shipment will have to comply with the provisions governing the whole contract.

#### H. Trade terms

69. Several general conditions of sale are based on one or more specific trade terms, such as c.&f., c.i.f., f.o.b., etc. At the same time there are a number of general conditions the use of which is not confined to contracts based on any specific trade term. However, some formulations falling within the second category do contain definitions for various trade terms that the parties might use in their contract.

70. Among the formulations that are under consideration in this report, two sets deal exclusively with the interpretation of certain trade terms. Formulation A.1 (Incoterms 1953, prepared by the International Chamber of Commerce (ICC)) deal with the interpretation of the following trade terms: ex works, f.o.r., f.a.s., f.o.b., c.&f., c.i.f., freight or carriage paid to, ex ship and ex quay. The other set is A.2 (also prepared by the International Chamber of Commerce) which deals with the

interpretation of two trade terms: "Delivered at frontier" and "Delivered... duty paid".

71. Unlike the above formulations prepared by ICC for the interpretation of trade terms, general conditions C.7 includes the interpretation of a number of trade terms in a different manner. This form sets out the issues relating to a sales transaction (e.g., quality, delivery, lack of conformity, remedies) and lays down alternative solutions to each issue according to several trade terms which the parties may use in their contract, e.g., f.a.s., f.o.b., c.&f., c.i.f., ex quay, ex warehouse, subject to approval, free on buyer's scale.

72. A similar method is used in other general conditions forms but in a more restricted manner. Thus, formulations C.1, C.2 and C.4, prepared by the United Nations Economic Commission for Europe, adopt this method only with respect to the passing of risk. With respect to other issues, this form does not provide for the interpretation of trade terms.

73. Some general conditions, which are not drawn up for contracts based on one or more specific trade terms, incorporate by reference the interpretations given in formulation A.1 (Incoterms 1953), for example, A.9, B.20 and C.2 (the last only with respect to passing of risk).

74. Other formulations define certain trade terms in varying degrees of detail, and in a manner which, in several respects, differs from the interpretations given in Incoterms. Many of these formulations also define a number of trade terms that are not dealt with in the ICC interpretations, referred to in paragraph 70 above.

75. The most comprehensive of these definitions are those found in A.3 (CMEA general conditions). In respect of each trade term dealt with therein, this formulation includes not only provisions relating to payment of expenses of transportation and the passing of risk but also the time when the property in the goods passes and the exact moment when delivery is considered to be effected. These general conditions also define the parties' obligations in respect of carriage of goods by air and by post, neither of which situations is covered by the ICC interpretations or any other formulation under consideration.

76. Some general conditions forms that are not specifically drawn up on the basis of any trade term seem to indicate that they can be used only with respect to one or more specific trade terms. For instance, B.5 (drawn up by the Grain and Feed Trade Association) seems to be applicable only to contracts on c.i.f. basis, while A.8 seems to be applicable to contracts on f.o.b., c.&f. or c.i.f. basis.

#### I. Insurance

77. Almost all general conditions drawn up for contracts on c.i.f. basis or which are applicable to such contracts include detailed provisions on insurance which the seller has to take out. In respect of contracts on f.o.b. or c.&f. basis, many formulations require the buyer to take out insurance on the goods before their loading, for



example, A.5, B.7, B.17, B.22, D.3. Formulations relating to contracts on other trade terms do not contain provisions as to insurance.

78. As to which kinds of risks the insurance policy should cover, the general conditions under consideration contain different rules. In respect of ordinary or usual risks, some formulations require that the insurance policy should be on W.A. terms (Institute Cargo Clauses), for instance, A.8, B.5, B.6, B.18, B.20, C.9, D.3, D.10. Other general conditions require f.p.a. (free from particular average) insurance, for example, A.9, B.14, B.15, B.16, D.5.

79. With respect to special risks such as war, riot, or strikes, the rules also differ from one another. Most formulations require the seller in cases of c.i.f. contracts to include coverage against war risks and, according to some, also against strikes, mines, riots, and civil commotions (e.g., B.5, B.6, B.11). However, under A.9 the seller may, at his option, ensure the goods against war risks, and under B.18 the seller has to take out such insurance if requested by the buyer. On the other hand, formulation B.3 requires that the parties should agree as to insurance against certain special risks, including theft, pilferage, leakage and breakage.

80. The rules also differ as to who should pay for the cost of insurance against special risks. According to formulations B.5, B.6, B.13, B.14, B.16, C.9, D.3, D.7, etc., the seller pays the premium up to one half of 1 per cent of the value of the goods, and the buyer pays the remainder, if any. According to B.9, however, the seller pays up to one quarter of 1 per cent, and according to D.5, up to 10 per cent. Under formulations B.7, B.20, D.5 and D.10, it is the seller who pays the full premium of such insurance, while under formulations A.1, B.2, B.4, E.3 and others, such premium is for buyer's account.

81. Furthermore, the rules also differ as to the amount of insurance to be taken out. Formulations E.4 and E.5 require that the insurance should cover the amount of the invoice only. Formulations B.5, B.6, B.13, B.14, B.15 and D.7 require covering the amount of the invoice plus 2 per cent; B.4, B.9, C.8, C.9, and D.5 require the invoice amount plus 5 per cent; A.9, B.20 and D.3 require the invoice amount plus 10 per cent.

#### J. Documentation

82. Most general conditions contain provisions concerning the documents that relate to the performance of the contract of sale. These documents may be classified in four basic categories: (a) documents that are required for the exportation or importation of the goods, other than licences and other governmental authorizations, which were dealt with in paragraphs 37-40 above; (b) documents that are needed by the buyer for taking over the goods; (c) documents relating to erection, repair or maintenance of engineering goods; and (d) documents relating to payment.

83. With respect to documents under (a) above, formulation A.1 (Incoterms) provides, in respect of each trade term, that it is the buyer who should obtain all

documents (except for the certificate of origin and the consular invoice) which he may need for the transit, the importation and, where delivery is in the seller's country, the exportation of the goods; the seller is required to render every assistance to the buyer in obtaining those documents. On the other hand, the seller has to provide the buyer, at the latter's request and expense, with the certificate of origin and the consular invoice. Formulations B.18, D.9 and D.10 contain a similar rule providing that all certificates that are required and obtainable in the country of shipment and/or origin should be provided by seller at buyer's expense.

84. Regarding documents under paragraph 82 (b) above, general conditions A.1 specify, in respect of several trade terms, the documents which the seller has to provide in order to enable the buyer to take delivery of the goods. For contracts on f.o.r. basis, these documents are "the usual transport documents" which the seller has to provide; for contracts on c.&f. and c.i.f. basis, the documents consist of a clean Bill of Lading, the invoice of the goods and, in case of c.i.f. contracts, the insurance policy, for contracts on "ex ship" or "ex quay" basis, the documents also include the delivery order and "any other documents which may be necessary to enable the buyer to take delivery of the goods".

85. Several general conditions relating to plant and machinery include a provision for the delivery to the buyer of certain technical documents (see para. 82 (c) above). Thus, formulations C.2 and C.4 require the seller to supply drawings and other technical data for the erection, commissioning, operation and management of the delivered goods. According to A.3, the technical documents furnished by the seller must be in accordance with the practice existing in the corresponding branch of industry in the seller country. Formulation C.3 requires the supply of drawings with respect to erection of, and laying of the foundations for, the machinery, while C.1 provides that the seller has to provide the buyer with instruction leaflets relating to the use and maintenance of the goods.

86. Several general conditions which provide for the supply of technical documents also stipulate that such documents remain the exclusive property of the seller and may not, without his consent, be utilized by the buyer for any purpose other than the one for which they were handed over, and that the buyer may not transmit or communicate these documents to a third party (A.3, C.2, C.3, C.4 and C.5).

#### K. Transportation of the goods

87. Several general conditions contain provisions relating to the obligation of the seller in respect of transportation of the goods where, under the contract, he is bound to arrange for such transportation.

88. Formulation D.3 contains a provision similar to that of article 54 of ULIS, stipulating that the seller has to conclude, with due diligence and on the customary terms and conditions, the contract for the carriage of the goods by usual route to the agreed port of destination. Some general conditions provide for the type of vessel

the seller may use for the transportation of the goods. For instance, B.5, B.6 and D.7 require that the ship should be "a first-class steamer and/or power engined ship classed not lower than 100 A.1 or British Corporation B.S. or top classification in American, French, Italian, Norwegian, West German or other equal ranking Registers". Under B.9, the ship must be "a good seaworthy ship, suitable for the transport of [grain] and for which insurance can be covered at the normal premium".

89. Most general conditions provide that the goods can be shipped direct or indirect, with or without trans-shipment (B.4, B.11, B.16, C.9, D.3, D.4, D.7, D.9 and D.10). A.9, however, does not mention the possibility of indirect shipment but allows trans-shipment. A.6, on the other hand, expressly excludes trans-shipment and required direct shipment to the port of destination.

#### *L. Shipping data; instructions; notices; date of shipment*

90. Several general conditions require the buyer, where he is obliged to provide for the transport of the goods, to notify the seller of the shipping data. Thus, formulation A.1, in respect of contracts on f.a.s. basis, provides that the buyer shall give the seller due notice of the name of the vessel, the loading berth, and the delivery date to the vessel. According to B.2, the buyer has to notify the seller of the name, capacity and expected date of the arrival of the vessel 30 days before shipment. Formulation A.5 provides that the buyer should, at the beginning of the month preceding the "shipping month" notify the seller of the name and nationality of the ship, the loading port, the scheduled date of arrival, the quantity for loading and the name of the consignee. Formulations E.1 and E.2, on the other hand, require notification of the name of the ship and her tonnage only.

91. Several general conditions contain provisions as to the shipping instructions which the buyer has to give to the seller. For instance, formulation A.1 provides that in case of contracts on f.o.r. basis the buyer must give the seller "the necessary instructions for dispatch", while under A.2, in case of contracts on "delivered . . ." basis, the buyer has to inform the seller of the address of the final destination of the goods in the country of importation. Formulation B.6 also requires the buyer to give the seller the necessary information for the execution of the contract. Under E.6 the buyer has to give "full loading orders", and under A.3, in respect of goods which are to be carried by rail, he has to give "tariff declaration", "the point where the goods cross the border in the seller's country, the consignee, as well as the station of destination".

92. The general conditions in question differ as to the time-limit within which the shipping instructions must be given. Thus, such instructions have to be sent:

Under formulation A.1, in respect of contracts on f.o.r. basis, "in time";

Under B.6, "in good time";

Under B.9, "before loading has been completed";

Under D.8, in time "to reach the seller, not less than two clear working days prior to the day in which [the goods are] required to be sent to the wharf"; and

Under E.6, in time to be "in the agent's hands not later than 12 days before the time of shipment stipulated in the contract"; and

Under A.3, in case of carriage by sea, 55 days before the delivery date.

93. Other general conditions set different time-limits within which the shipping instructions must be sent by the buyer according to the term used for indicating the time within which the seller must deliver the goods.<sup>7</sup> Thus:

For "immediate delivery" the shipping instructions must be given at the time of closing the contract (D.3), within 24 hours (B.19), and within 3 working days (B.20);

For "prompt delivery", at the time of closing the contract (D.3), and within 8 working days (B.19, B.20);

For delivery within a given period, 3 working days before the date indicated in the contract (B.19, B.20);

For delivery within a specified time-limit, the 15th of the month prior to the month of shipment (D.3), and on the first working day of the period (B.19, B.20).

94. Most general conditions under consideration require the seller to inform the buyer of the time of the shipment of the goods. However, the time-limit within which such information must be given to the buyer differs from one set of general conditions to the other.

95. While some general conditions simply provide that such information should be given "without delay" or use some similar term (A.1, B.17, C.9, D.9 and D.10), others require that the information should be sent in good time to enable the buyer to take the necessary steps for customs clearance and acceptance of the goods (E.1 and E.2). The majority of the general conditions, however, set definite periods of time within which such information must be furnished (A.4, A.5, B.1, B.2, B.9, B.11, B.13, B.14, B.15, B.16, B.18, D.3, E.1, E.2, etc.). These periods range from 7 days before commencement of loading (A.3, where freight space is to be furnished by the seller) to 28 days from the date of the bill of lading (D.4) and to 10 days from "the sailing date" of the steamer (D.5). Some general conditions leave the determination of the time to the agreement of the parties (B.5, B.6, B.12, C.9).

96. Many general conditions forms determine which date should be considered the date of shipment. Most of the general conditions that involve carriage by sea provide that the date of the bill of lading should, in the absence of evidence to the contrary, be deemed to be the date of shipment (A.8, B.5, B.6, B.9, B.11, B.13, B.14, B.15, B.16, C.9, D.3, D.7, D.9, D.10, E.1, E.2, etc.). Formulation B.4 provides that where the bill of lading does not state that the goods were actually loaded, the date of the customs clearance mentioned in the certificate of origin shall be deemed to be the date of shipment.

97. Formulation A.1 provides that, in respect of f.a.s. and f.o.b. contracts, the seller must provide the customary clean document in proof of delivery of the goods.

<sup>7</sup> For the interpretation of some of these terms, see paragraph 60 above.

98. A special rule in respect of plant and machinery is provided for in formulation A.3. Under this formulation, if the times of delivery of component parts of plant or machinery are not fixed in the contract, then the date of effectuating delivery of the plant or machinery shall be the date of delivery of the last part of the plant or machine without which the given unit cannot be put into operation.

99. In respect of transport by rail, formulation B.19 provides that the date of dispatch shall be the date on which the goods were handed over to the railway, while according to E.1 and E.2, the date of the way bill is deemed to be the date of dispatch.

#### M. Guarantee

100. A number of general conditions relating to machinery and other engineering goods contain provisions concerning guarantees in respect of the goods.

101. The guarantee extends to faulty design, material or workmanship (C.1, C.2, C.3, C.4 and C.5). Under formulation A.3 the guarantee also extends to those characteristics of the goods which are defined in the contract.

102. Some of the general conditions also specify the period of the guarantee. Thus, under C.5, for the sale of gear wheels the period of the guarantee is six months, while under C.1, for the sale of durable consumer goods and other engineering stock articles, the period extends to 12 months from the date on which the risk passes, or six months from the date of the sale of the goods to the first end user, whichever expires first.

103. Formulation A.3 establishes different periods for the guarantee depending on the basic types of goods involved. According to this formulation, the period of the guarantee is:

(a) For articles of precision, 9 months from date of delivery;

(b) For small machinery and apparatus, and for small and medium installations, 12 months from date of putting into operation, but not more than 15 months from date of delivery;

(c) For big machinery and large-scale installations, the same as under (b) above, except that the period shall not be more than 24 months from the date of delivery.

104. Formulations A.3, C.2, C.4 and C.5 provide that the guarantee period shall be extended by any period during which the goods could not be used because of a defect therein.

105. The provisions concerning the guarantee in respect of replaced or repaired goods or parts thereof differ. According to C.2, C.4 and C.5, these goods will be subject to a new guarantee of the same length of time as that relating to the original goods. On the other hand, C.3 provides that no guarantee is made in respect of replacements for defective goods. Under A.3, "a new guarantee period for replacements may be established in the contract, with account taken of international practice".

106. All general conditions which include a provision relating to the guarantee in respect of the goods provide that it is the seller who, at his option, determines whether the defect in the goods should be eliminated by replacement or by repair and whether the repair should be done at the place where the defective goods are situated or at his place of business. However, while formulations C.1, C.2, C.3, C.4, and C.5 provide that the return of the defective goods to the seller for repair or replacement should be at buyer's expense, general conditions A.3 stipulate that all expenses connected with such return should be borne by seller.

#### N. Passing of risk

107. According to formulations A.3 and C.3, risk passes at the moment when delivery is effected. Formulations B.1, C.7, D.8, E.1 and E.2 provide that risk passes when the buyer is bound to take delivery.

108. Several general conditions determine, with respect to certain trade terms, the time when the risk passes in the same manner as in Incoterms. For instance, formulations A.3, B.16, B.17, B.18, C.1, E.1 and E.2 also provide that in respect of trade terms f.o.b., c.i.f., and c.&f., the risk passes when the goods actually pass the ship's rail at the port of shipment. However, according to formulations A.8, D.9 and D.10, the risk passes only at the time when the goods are delivered on board the ship, and under formulation E.3, when the "goods are loaded into lighters for shipment after the receipt of notice from the vessel of her expected arrival". Under formulation D.3, the risk passes when the seller brings the goods to the port of shipment.

109. An exception to the Incoterms rule mentioned in the above paragraph is contained in formulations B.16 and B.18 which provide that where the contract is concluded after the time when the goods actually passed the ship's rail at the port of shipment, the risk shall pass from the seller to the buyer on the conclusion of the contract.

110. Similarly, the Incoterms rule relating to passing of risk in case of contracts on ex works basis is adopted in formulations C.1, F.1 and E.2. The latter two formulations also contain the Incoterms rules relating to contracts on f.a.s. or ex quay basis.

111. Several general conditions also determine the time when the risk passes in respect of contracts based on trade terms that are not covered by Incoterms. For instance, C.1, E.1, and E.2 provide that, in sales free on lorry or barge, the risk shall pass when the carrier, as in the case of sale "free on wagon", takes over the loaded vehicle or craft. Under A.3, in sales free on buyer's lorry the risk passes at the moment of receipt of the goods from the seller's means of transport unto the buyer's means of transport.

112. Certain formulations provide for passing of the risk in case of sales based on trade terms that are not covered by Incoterms: for instance, "free at frontier" (E.1 and E.2), "delivered at frontier" (C.1), "delivered at frontier of exporting country" (B.19 and C.1), "delivered

to frontier of country of transit" and "delivered to frontier of country of importation" (B.19), "delivered at" (B.19), "free delivered (agreed frontier post of importing country or agreed point in the interior of importing country)" (C.1, E.1 and E.2), and "f.o.r. border of the seller's country" (A.3).

### O. *Payment*

113. Most general conditions contain provisions relating to payment. These include provisions concerning the amount, method, and time of payment.

114. The amount of payment the buyer has to make consists not only of the price but of the freight, insurance, cost of packing etc., depending on the term of delivery employed and other terms of the contract and/or of the applicable general conditions.

115. In respect of goods the price of which is payable according to their weight, some general conditions provide that the price should be calculated on the basis of the net weight (B.8, B.11). However, according to B.16, where the goods are shipped in bags, the price is calculated on the basis of the gross weight. According to C.1, C.2 and C.4, the prices shown in price lists and catalogues are deemed to apply to unpacked goods, while prices quoted in tenders and in the contract include the cost of packing.

116. Several formulations provide that if the quantity delivered is less than that stated in the bill of lading, the difference shall be paid for by the seller, and if the quantity is more, by the buyer, at contract price (B.13, B.14, B.15). According to B.9, any difference between the contract quantity and the delivered quantity should be settled at the price "ruling on the day of shipment" and according to B.10, at the market price on the day of delivery. Under E.1 and E.2, however, if the difference between the contract quantity and the delivered quantity does not exceed 10 per cent, this difference will be settled at contract price.

117. A number of general conditions contain provisions on the effect of increase or reduction in the rates of transport occurring subsequent to the making of the contract. According to B.21, such changes are at the account of the party who bears the cost of the transport. Under D.6, however, any rise or fall in the rate of freight is at seller's account. Formulations B.13, B.14 and B.15 refer only to reduction of freight rates, which will be to buyer's benefit.

118. The general conditions under consideration adopt basically three different approaches with respect to the method of payment. The first is to leave the question open for agreement by the parties. The second is to include detailed provisions relating to one or more methods of payment which the parties may agree on. The third approach is to provide for a certain method of payment; most of these latter provisions require that payment should be made in cash, against documents or by a letter of credit.

119. Formulations C.1, C.2 and C.4 leave the question of the method of payment to the agreement of the parties.

Formulations B.20 and D.4, however, though basically following this approach, limit the parties' freedom of choice to specific methods of payment listed therein.

120. The formulations which adopt the second approach, described in paragraph 118 above, usually contain provisions relating to payment against documents or by letter of credit, should the parties agree on one of those methods of payment (A.8, B.6, C.7, D.3).

121. Formulations B.1, B.4 and D.8, adopting the third approach, provide that the payment should be made in cash, while formulations B.4, B.5, B.6, B.9, B.13, B.14, B.15, D.3 and D.7 require that payment be effected against documents. Some of the latter formulations specify the documents that need to be presented for payment, for instance, formulation B.4.

122. Of the formulations that provide for payment by letter of credit, formulation A.6 requires that the letter should be "irrevocable", and formulation D.5 that it should be "confirmed and irrevocable". However, under A.9 it has to be "confirmed, irrevocable and without recourse", and under A.5 "irrevocable, assignable and divisible". According to formulation A.4, the letter of credit must be "irrevocable, confirmed, transferable, assignable and divisible", and, finally, under B.2 and B.3, it should be "confirmed, divisible, irrevocable and unrestricted".

123. The validity of the letter of credit must exceed the ultimate date of shipment by at least 15 days under general conditions A.9 and D.3; under A.8, by 30 days. Any unreasonable delay on the part of the buyer in opening the letter of credit entitles the seller to prolong the period of shipment to the same extent.

124. Several general conditions include a provision to the effect that if the seller fails to present any document that is required for payment, payment should nevertheless be made against an appropriate bank guarantee (B.4, B.5, B.6, B.13, B.14, B.15, D.3, D.7).

125. Some general conditions contain provisions as to when payment should be made. Thus, under formulation B.20, payment must be made immediately on the date agreed; under B.9 payment must be made by the day following the presentation of the documents. B.4 provides that payment should be made, under all circumstances, within 90 days from the date of the bill of lading. In case of sale on ex works basis, formulation C.1 requires that payment should be made within 30 days after seller's notification that the goods have been placed at buyer's disposal. However, formulation C.5, dealing with the sale of gear wheels and gear boxes, provides that payment should be made as follows:

- (a) One third at the time of placing the order;
- (b) One third during performance of the contract, but not later than the time when the goods are placed at the disposal of the buyer; and
- (c) One third within 30 days after the goods have been placed at the buyer's disposal.

126. Formulation A.8 includes the provision that, irrespective of the method of payment agreed between

the parties, the buyer shall remain responsible for the payment of the full value of all goods shipped in accordance with the contract. Formulation B.6 provides that if the parties are not in agreement with respect to a part of the goods to be delivered, or if delivery of the whole of the goods has not been made, the buyer must in any case pay for the quantity received or the quantity regarding which the parties are in agreement.

127. A few general conditions provide that in case of late payment, the buyer has to pay interest on the amount in arrears. Under A.3, the rate of interest is 4 per cent; under C.8 it is 2 per cent above the discount rate in the Federal Republic of Germany. According to C.3 and C.5, the interest rate follows the rates of the Bank of France.

#### *P. Notification of claims*

128. Many general conditions fix the time within which the buyer has to submit his claims relating to the quantity and/or quality of the goods. Under A.8, this period has to be agreed upon by the parties at the time contracting; under B.1 the period is three working days from the date on which the goods have been tendered, under D.6 it is 21 days from the final date of discharge, and under A.9 it is 30 days from the arrival of the goods at the destination. Other formulations set different dates depending on whether this claim relates to quantity or quality.

129. With respect to quantity, the following periods are established in the different general conditions: two working days from the measuring of the goods (C.7); six working days following the arrival of the goods at destination (B.6); 14 business days from the final date of landing and/or warehousing at the final port of destination (D.3); three months from the date of delivery (A.3).

130. On the other hand, the following periods are established for claims relating to quality:

Immediately after discharge (C.9); or immediately after taking over the goods in case of sale on ex quay or ex warehouse basis, provided that this requirement is brought to the notice of the buyer; otherwise, the claim has to be submitted immediately after arrival (B.1);

Three working days in respect of on-the-spot sale (C.7), or from the receipt of the goods if the defect is patent and from discovery if the defect is latent (B.20);

Five working days after arrival of the goods (C.8), or after the goods have become available for inspection (D.10);

Seven calendar days after the goods become available for inspection (D.9); or after receipt of the goods if the defect is patent or eight weeks and three months depending on the type of the goods, if the defect is latent (E.4 and E.5);

Seven business days from the date of delivery of samples to the buyer (D.3);

Twelve days from arrival of the goods at destination if the defect is patent, and 45 days if the defect is latent (germinative quality) (B.6);

Six months from the date of delivery, or, in relation to goods for which a guarantee is given, not later than 30 days from the expiration of the guarantee period (A.3).

131. Some general conditions include specific provisions as to the form and content of a claim by the buyer. Thus, formulations A.3, B.6, E.1 and E.2 provide that the claim must be in writing. E.1 and E.2 require that the claim contain all the necessary particulars concerning the quantity of goods in respect of which the claim is made, as well as the reasons for making it. On the other hand, formulation A.3 lists in detail the particulars that must be set forth in the claim by the buyer, including his choice of remedy. Should any of the required data be omitted from the claim, the seller is required to notify the buyer without delay of the absence of such data. Failure by the seller to do so would preclude him from subsequently arguing that the claim was incomplete.

132. Formulation B.6 provides that a claim in respect of quality of the goods shall not be valid unless it is subsequently supported by certificates of analysis issued by official stations concerning samples drawn by sworn samplers or qualified officials from goods still under the seller's seal.

133. Several general conditions provide that if the buyer fails to notify the seller or to forward full particulars of his claim within the specified period, he shall be deemed to have waived the claim (e.g., A.9, B.1, E.3, E.6).

134. A number of general conditions also contain provisions as to the time and method of investigating a claim made by the buyer. Thus, formulation A.3 provides that the seller must investigate and answer the buyer's claim within the time specified in the contract, and if no time is stipulated in the contract, within not more than 90 days in respect of complete plants and installations, and 60 days in all other cases. If the seller fails to answer the buyer's claim within the specified time or within any additional period agreed between the parties, and the buyer resorts to arbitration, the seller has to bear all costs of arbitration irrespective of the outcome of the case.

#### *Q. Remedies for default with respect to delivery*

135. The remedies for default in respect of delivery that are available to the non-defaulting party differ widely from one formulation to the other. Some of these general conditions provide for separate remedies for delay in delivery and for non-delivery. Others have a uniform system of remedies applicable to all types of default. Furthermore, several general conditions provide that before invoking any remedy, the non-defaulting party has to grant an additional period for performance. Other formulations provide that in case of delay, the seller has to pay a certain penalty, the amount of which depends on the length of the delay, and the buyer cannot invoke any other remedy until he exhausts the maximum of that penalty.

136. Most of the general conditions that provide for an additional period for performance apply the same rule to defaults by either buyer or seller (B.1, B.20, C.7, C.8). Formulation C.1, however, requires the granting of an

additional period only in case of default by the seller. A slightly different approach is adopted by formulation A.3, according to which the buyer cannot invoke other remedies for non-delivery unless a certain period of time has elapsed.

137. Some general conditions indicate the length of the additional period. Under B. 20 the additional period is normally 7 days; under B.1, that period cannot be shorter than 3 working days; under C.8, it cannot be shorter than 3 working days in case of immediate delivery, and 6 days in all other cases. According to C.1, in the absence of agreement between the parties, the period is one month.

138. Formulations A.3 and B.20 establish an exception to the *Nachfrist* rule mentioned in paragraph 135 above, in cases where the defaulting party notifies the other party in writing that he will not fulfil the contractual obligation or where the contract has been concluded "with definite delivery time" (contracts for a time, i.e. where time is of the essence), under B.20, however, the latter qualification should be expressly mentioned in the contract.

139. As indicated in paragraph 135 above, several general conditions provide for the payment of a penalty or a reduction in price in case of late delivery. Thus, formulations A.8, C.2 and C.4 provide that the price shall be reduced by a certain percentage agreed upon by the parties at the time of contracting.

140. Under formulation A.3 a penalty has to be paid by the seller in the amount of 0.05 per cent for each day of delay during the first 30 days, 0.08 per cent for each day during the next 30 days and 0.12 per cent for each day beyond 60 days; the total amount of the penalty should in no case exceed 8 per cent of the value of the delayed goods. Under formulation A.6, however, the amount of the penalty is 1 per cent of the value of the undelivered goods if the delay does not exceed two weeks; this penalty increases by 1 per cent for every two weeks of delay thereafter, provided, however, that the total penalty should not exceed 5 per cent.

141. Paragraphs 142 to 150 below give some examples of the remedies that are available to the non-defaulting party, subject, of course, to the granting of a *Nachfrist* or the exhaustion of the maximum penalty, where such requirements are applicable.

142. Under formulations C.2 and C.4, the buyer may by notice in writing require the seller to deliver the goods within a reasonable additional time which he may fix in the notice. If the seller fails to deliver the goods within that period, the buyer is entitled, by notice in writing and without requiring the consent of any court, to terminate the contract in respect of the undelivered goods; in addition, he may claim damages.

143. According to C.1, the buyer is entitled to terminate the contract by notice in writing, both in respect of all goods undelivered and in respect of goods which though delivered cannot be properly used without the undelivered goods. Furthermore, the buyer is entitled, to the exclusion of any other remedy for delay in delivery,

to recover any payment which he has made in respect of the above goods as well as any expenses properly incurred in performing the contract.

144. Under C.9, the non-defaulting party may, by immediate notice to the seller, "and without prejudice to his right for fulfilment":

(a) Cancel the contract or the unfulfilled part thereof, and renounce any further claim, or

(b) Sell or buy, with ordinary prudence, the goods or documents for the account of the defaulting party and claim the difference in price, if any, or

(c) Have independent brokers fix the market value of the goods on the day when the default became known or on the expiry of any extension. The difference in price resulting therefrom should be immediately paid by the defaulter;

(d) In addition to (b) and (c), claim damages in special circumstances.

145. According to formulations E.1 and E.2, the buyer may choose between maintaining the contract, subject to the seller's liability for any justifiable additional expense resulting from the delay, and by notice terminating the contract without the consent of any court. In the latter case, the buyer may also claim damages.

146. Under A.3, the buyer may, after the expiry of the period mentioned in paragraph 137 above, refuse performance of the contract in respect of the undelivered part of the goods as well as in respect of those delivered parts which cannot be used without the undelivered part. In such a case, the seller has to refund all payments made by the buyer with interest of 4 per cent per annum.

147. Under A.8, the buyer may either cancel the contract in respect of the non-delivered goods and claim any excess over the contract price of the market price prevailing in the country of shipment for goods of the same description at shipment time or accept the goods with an allowance to be mutually agreed upon.

148. According to A.6, in case of delay for more than 10 weeks, the buyer may cancel the contract in respect of the undelivered part of the goods.

149. Under E.3 and E.6, and in case of non-delivery, the seller has to pay as liquidated damages a sum equal to 10 per cent of the c.i.f. value of the non-delivered goods; under D.5, the liquidated damages equal 1 per cent of the contract or market price on the date of default, whichever is the higher.

150. According to B.20 and C.8, the contract or any part thereof which remains unfulfilled is considered as cancelled unless one of the parties has issued a reminder within 30 days according to B.20, and within three months according to C.8, from the last delivery date. B.20 further provides that in such a case neither party is entitled to damages.

151. Formulations B.16, B.18 and B.19 provide that failure by the seller to dispatch one lot within the contractual time-limit shall not give the buyer the right to refuse the other lots; the seller also remains responsible

for delivering such other lots within the contractual time-limits.

152. Several general conditions provide for seller's remedies where the buyer fails to take delivery or is late in taking delivery.

153. Thus under A.2 in cases of contracts on "delivered..." or "delivered at frontier" basis, if the buyer fails to take delivery of the goods as soon as they have been duly put at his disposal, he has to bear all the risks of the goods and pay any additional expenses incurred because of such failure. According to C.7, if the buyer is late in taking delivery, the seller may, after the expiry of an additional period which he should grant, either sell the goods by public auction or have them sold through an authorized broker at buyer's account. Under C.1, the seller has to arrange for the storage of the goods at the risk and cost of the buyer; he may also recover any expenses properly incurred in performing the contract. Formulations C.2 and C.4, in addition to requiring the seller to store the goods at the risk and cost of the buyer, provide that he should insure the goods at buyer's cost. Furthermore, under the latter formulations, if the buyer fails to accept delivery within a reasonable time set in a notice in writing by the seller, the latter may, by a further notice in writing, and without the consent of any court, terminate the contract in respect of the undelivered part of the goods and recover from the buyer any loss suffered by reason of the buyer's failure to take delivery of the goods.

#### R. Remedies for lack of conformity of the goods

154. Most general conditions relating to agricultural products and other goods sold in bulk contain a provision which makes a certain allowance (reduction in price) the primary remedy for lack of conformity of the goods. According to B.11, the amount of the allowance is to be fixed by mutual agreement or by arbitration, and according to D.5, by arbitration only; under formulations B.13, B.14 and B.15 "due allowance shall be made for the time of year in which the shipment took place". Many formulations fix the amount of the allowance to be made depending on the extent of the deficiency in quality, e.g. B.9, B.10, B.12, B.16, B.17, B.18, D.4.

155. Under formulation D.5, in certain cases a penalty is payable by the seller in addition to the allowance to be made. The amount of the penalty equals 50 per cent of the allowance. Formulation A.3 also provides for the payment of a penalty in cases where the buyer requests the seller to eliminate the defect in the goods. This penalty is to cover the period from the date when the claim is made to the date when the defect is eliminated either by repair or replacement, and it is to be calculated at the same rate as in cases of delay in delivery (see para. 140 above).

156. Some general conditions make the remedy of the buyer dependent on the extent of the deficiency in the quality of the goods. Thus, under B.16, B.17 and B.18, in cases where the allowance would exceed 10 per cent of the contract price, the buyer may reject the goods and claim damages. Under C.7, where the difference between the value of the goods delivered and the contract price

is less than 10 per cent, the buyer may only claim a reduction in price; where, however, the difference exceeds that limit, he may terminate the contract and claim damages. According to B.6, where, in case of sales "as per sample", the deficiency in value is less than 5 per cent, or, in case of sales, "as per type", less than 7 per cent, the buyer may only claim an allowance; if, however, the deficiency exceeds the above percentages, he may demand cancellation of the contract and claim damages. According to B.12, if foreign material mixed with the goods exceeds 5 per cent, the buyer may reject such goods, and the contract shall be null and void in respect of the rejected quantity.

157. Under formulations A.5 and A.6, the only remedy that is available to the buyer for any deficiency in quality (or quantity) is compensation.

158. Under A.3, the buyer may demand either elimination of the defect by the seller or reduction in the price. If he requires elimination of the defect, the seller has, at his own expense, to repair the goods or replace them. However, if he fails to eliminate the defect, the buyer shall have the right to eliminate them himself and claim the actual expenses from the seller to the extent that they are justifiable.

159. According to C.9, in case of defect in quality, the buyer is entitled only to a reduction in price. However, in cases where the contract provides that certain characteristics of the goods will not reach a certain minimum or will not exceed a certain maximum, and that condition is not fulfilled, the buyer may cancel the contract or demand replacement of the goods or claim damages for non-performance.

160. Under formulations B.13, B.14 and B.15, the difference in quality does not entitle the buyer to reject the goods except under an arbitration award.

#### S. Remedies for non-performance of other obligations

161. Several general conditions contain provisions in respect of seller's remedies in case the buyer fails to give shipping instructions in time. According to A.1 (Incoterms, in respect of ex works, f.o.b., c.&f., c.i.f., f.a.s. and "freight and carriage paid to..." contracts) the buyer must bear the additional cost incurred and all risks of the goods from the date of expiration of the period for giving such instructions. Under formulation A.3, the seller may place the goods in storage at the buyer's risk and expense. According to B.1, the seller may (a) ship the goods and demand performance of the contract by the buyer, or (b) request instructions by the buyer, or (c) terminate the contract or (d) claim damages for non-performance. In cases (b), (c) and (d) the seller has to give notice that he will not ship the goods at least three days prior to exercising any of these rights.

162. Under E.1 and E.2, if the buyer does not give loading instructions the seller may nevertheless load the goods at his own discretion. According to A.8 and A.9, where the seller does not get the shipping instructions he will not be held responsible for late shipment; A.8 also provides that the seller is entitled to charge interest on



the price at 6 per cent per annum from the contractual shipment date to the date of the bill of lading, or to cancel the contract and claim damages if he does not receive the instructions within one month from the contractual shipment date.

163. Some general conditions also provide remedies for failure by the seller to notify the buyer of the fact that shipment of the goods has been effected, or for non-observance of shipping instructions by the seller. Thus, formulation A.3 provides that the seller shall pay a certain penalty in case of failure to notify the buyer of the effectuation of shipment, and shall reimburse the buyer for all expenses incurred by the latter in case of non-observance of the shipping instructions. According to D.3, however, the seller simply reimburses the buyer for all expenses the latter may have incurred as a result of the seller's failure to inform him of particulars relating to effectuation of shipment. Under formulation B.1, in cases of a sale of floating goods or goods to be carried by sea, failure by the seller to notify the buyer of the particulars of the shipment entitles the buyer, after the expiry of an additional period of three days, to terminate the contract or to claim damages.

#### T. Remedies of the seller in respect of delay in payment by the buyer

164. Several general conditions provide that where the buyer fails to effect payment in time, the seller may postpone fulfilment of his own obligations until payment is made (A.8, C.1, C.2, C.4, E.4 and E.5). In addition, formulation C.1 provides that the seller may recover, after a written notice to buyer, interest on the sum due at the rate of 6 per cent. Should the buyer fail to effect payment within an additional period agreed by the parties, or, failing such agreement, within one month from the date on which payment became due, the seller may, by notice in writing, and to the exclusion of any other remedy, terminate the contract. Under C.2 and C.4, however, if the seller gives notice to the buyer within a reasonable time, he may claim interest on the sum due, and if at the end of the additional period fixed in the contract the buyer still fails to pay, the seller may, by notice in writing and without the consent of any court, terminate the contract and claim damages.

165. Formulations E.1 and E.2 provide that where the buyer fails to make any payment due before delivery, or to open a letter of credit, the seller may choose between maintaining the contract and terminating it. In the latter case, the seller has to give notice to the buyer within 15 calendar days from the date on which payment was due, specifying the date after which he will regard the contract as discharged. The seller may also claim damages in addition to reimbursement of additional expenses incurred by him through buyer's delay. Termination of the contract by the seller on due notice in cases where the buyer fails to effect payment in time is also provided for in formulations C.7, D.8, D.9 and D.10.

166. The only formulation that grants the seller the right of stoppage *in transitu* is A.8. Under this formulation, if the buyer fails to make payment within a certain

period after presentation of seller's draft or bill covering goods shipped in accordance with the contract, the seller may, *inter alia*, "dispose of the goods already shipped under the contract to private sale or public auction on buyer's account and risk and without notice to the buyer . . .".

#### U. Relief

167. Most general conditions contain provisions relating to the circumstances which relieve the parties of their liability for non-performance of their obligations.

168. While some general conditions define these circumstances in general terms, many formulations list, in varying degrees of detail, the particular events which fall within the scope of these circumstances. Thus, formulation A.3 describes the relief circumstances as "circumstances of insuperable force" and defines them as "circumstances which arose after the conclusion of the contract as a result of events of an extraordinary character, unforeseen and unavoidable by the party". Formulation A.9 provides that the seller shall not be responsible for damage resulting from any cause without his actual fault and privity and without the fault or neglect of his agents or servants. Furthermore, while formulation A.6 relieves the seller of liability for delay in shipment caused by circumstances beyond his control, formulations E.1 and E.2 define cases of relief as any circumstance, beyond the control of the parties, which a diligent party could not have avoided and the consequences of which he could not have prevented, provided that this circumstance intervenes after the formation of the contract and prevents its fulfilment whether wholly or partially.

169. On the other hand, many formulations enumerate two or more of the following specific events as a definition of *force majeure* or simply as causes for relief where they result in delay in performance or give rise to impossibility of performance whether wholly or partially: state of war, severe floods, fires, natural disasters, droughts, ice, strike, lock-out, act of God, riot, civil commotion, breakdown of machinery, mobilization, requisition or acquisition by government, currency restrictions, prohibition of import or export, shortage of transport or general shortage of materials, restrictions in the use of power, pestilence, refusal to issue export or import licence, blockade, embargoes, insurrection, sabotage, plague or other epidemic, quarantine, typhoons, hurricanes, tidal waves, lightning, shortage of labour, and other causes beyond the control of the parties (A.4, A.6, A.8, A.9, B.5, B.6, B.7, B.8, C.2, C.6, D.1, D.7, E.3, E.4, E.5, E.6, etc.).

170. A special case of relief is contained in formulation E.4. According to this formulation the buyer is relieved of his obligation to take delivery of the contracted goods not yet manufactured by the seller when the buyer's works or factory is destroyed by fire or any other cause beyond his control.

171. Formulation D.2 provides that if the contract becomes illegal by English law or by the law of the country from which the goods are to be shipped or the country of the destination of the goods, the contract shall be cancelled without allowance to either party, and any

money which was paid shall be repaid in accordance with the provisions of the United Kingdom Law Reform (Frustration of Contracts) Act, 1943.

172. A great number of general conditions require the party who intends to claim a case of relief to notify the other party of the occurrence of the relieving event; many of these formulations also require notification of the cessation of such event (for instance, A.3, B.16, B.17, B.19, C.1, C.2, C.4, C.7, E.1, E.2, E.4, E.5).

173. The time-limit within which the notification should be made differs widely. Thus, the notification should be made:

- immediately or without delay (A.3, A.4, A.6, A.8, B.16, B.17, B.19, B.21, C.1, C.2, C.4, C.7, E.1 and E.2);
- within a reasonable time (D.3, D.9, D.10, E.5);
- within seven days from occurrence of the relieving event (B.6, B.12, D.7, E.4);
- within two days (Sundays and holidays excepted) after the last day of guaranteed time for shipment (B.7, B.13, B.14 and B.15);
- within seven days after the end of the contractual shipping period (D.5 and D.6).

174. Several formulations also require the furnishing of proof of the occurrence of the relieving event (e.g., A.3, A.4, A.6, B.7, B.13, B.14, B.15, B.16, B.17, B.19, D.3, D.9).

175. Almost all formulations contain provisions relating to the consequences of the occurrence of a relieving event. Some general conditions, however, draw a distinction between cases where performance is rendered totally or partially impossible and cases where performance is simply delayed.

176. All formulations that contain provisions on relief provide that where performance is rendered absolutely impossible, the contract shall be "cancelled" or deemed to be "null and void" to the extent of that impossibility (A.8, B.3, B.4, B.10, B.11, B.13, B.14, B.15, B.16, B.17, B.18, B.19, E.3, E.4, E.5).

177. Formulation C.1, on the other hand, provides that if the performance of the contract within a reasonable time becomes impossible, either party may terminate the contract by notice to the other party.

178. Divergent solutions are adopted in different general conditions in cases where the interrupting cause is of a temporary nature. The following are a few examples:

- If the interruption of hindrance lasts more than 30 days, the contract may be cancelled (A.4, B.4, B.9, B.10, B.12, C.9, E.4, E.5);

- Under A.9, the same result follows after lapse of a reasonable time;

- Under D.5 and D.6, after 60 days;

- If the interruption lasts more than five or eight months, depending on the period allowed for delivery, either party may terminate the contract (A.3);

- Under D.9, D.10 and E.6, the contract becomes null and void if the interruption lasts more than six weeks; According to E.5 and E.3, the delivery time will be extended to the same extent as the length of the interruption;

A similar solution of extension of delivery time is adopted in B.7, B.14 and B.15, but only if the interruption is caused by a strike, riot or lock-out within the last 28 days of the delivery period.

Under B.18 and, with slight differences, under B.16, B.17 and B.19, the extension solution applies if the cause arises during the last 28 days of the period and is the result of an event other than official stoppage of navigation for such reasons as ice, floods or shallow water. Failure to deliver after the extended date is considered as default;

Under B.1, the delivery period is suspended for the duration of the interruption;

Under B.3, the parties will have to agree on amendment, extension or cancellation of the contract.

## V. Miscellaneous provisions

179. Almost all general conditions provide that disputes which could not be amicably settled by the parties should be submitted to arbitration by a specified tribunal, usually according to the arbitration rules adopted by the trade association, commodity exchange or other similar organization which drew up the particular general conditions form.

180. Many formulations also include provisions relating to the measure of damages that a non-defaulting party could claim. Some general conditions also contain provisions relating to one or more of the following issues: bankruptcy, prescription, assignment, applicable law and "string" (successive) contracts.

## V. CONCLUSIONS AND FUTURE WORK

### A. Conclusions

181. As stated in paragraph 7 above, one of the purposes of the present analysis is to compare the issues dealt with in "general" general conditions with those included in general conditions with a restricted scope, that is, those relating to a group of commodities or a specific commodity.

182. It will be noted from this analysis that none of the general conditions under consideration covers all issues or settles all the questions dealt with in part IV of this study.

183. In a few cases, the absence in certain formulations of provisions on specific issues or problems is due to the specific kind or nature of the goods to which the particular formulation applies. For instance, though most formulations for agricultural products contain provisions relating to the percentage of the allowable tolerance (see paras. 44-45), formulations for engineering goods of course do not. On the other hand, general conditions for plant and machinery include provisions relating to the guarantee with respect to the quality or performance of the goods for a specific period (see paras. 100-106), while formulations for agricultural products do not.

184. In most cases, however, the absence of provisions on a certain issue or problem does not appear to be related

to the kind or nature of the goods. For instance, formulation C.6 (drawn up by the Federation of Oils, Seeds and Fats Associations for contracts "for general business") contains provisions only on payment, delay, bankruptcy, domicile, arbitration and non-business days. Similarly, formulation A.4 (Sino-Japanese Trade Contracts for Imports to Japan) includes provisions only on the terms of payment and of shipment, inspection, arbitration and *force majeure*. Thus, in all general conditions many questions relating to the sale transaction remain unsettled.

185. It will also be noted that of the nine "general" general considerations listed under category A in annex II, seven formulations apply only to sales in a specific geographical area or between two specific countries. The remaining two (A.1 and A.2) deal only with interpretation of trade terms and are used only in certain parts of the world. Consequently there are at present no universally applicable general conditions for the sale of a wide range of commodities. Furthermore, many of the existing forms that cover a certain group or a specific kind of commodity apply only to a restricted number of trade terms.

186. These circumstances seem to point up the need for a set of truly "general" general conditions that could be used in international trade among the various regions of the world.

187. The fact that most formulations do not include provisions on several issues relating to the sale transaction may not by itself affect the feasibility of drawing up a set of "general" general conditions covering a wide range of issues. Such a set of general conditions might facilitate the conclusion of contracts of sale and help to minimize the possibility of disputes.

188. Similarly, the feasibility of drawing up such a set of general conditions might not be affected by the fact that in certain cases a provision on a particular issue would not be appropriate for certain kinds of goods. In such cases, a restricted applicability of the relevant provision might be provided for in the text.

189. In the earlier part of this study (see para. 6 above), and in the conclusion reached in the analysis of ECE general conditions relating to cereals in respect of trade terms (see para. 23 (c)), it was suggested that there was no need to have separate general conditions forms for each trade term (f.o.b., c.i.f., c.&f., etc.) and mode of transport. The analysis in part IV of the present report also supports this view. The provisions relating to various trade terms and modes of transport could be set forth as alternatives in a single "general" general conditions form; in such a case the parties would choose which trade term or mode of transport would apply to their contract, in the same manner as they now choose the form that applies to the agreed trade term or mode of transport.

190. With respect to the substance of the provisions that might be included in a new set of "general" general conditions, it may be recalled that provisions in existing general conditions that are applicable only to a particular commodity (see para. 29 above) have been excluded from the present analysis. In view of the fact that such provision

are required only in connexion with certain commodities and that they embrace a small number of the issues to be settled in the sale of such commodities, it is considered that they do not fit in a scheme of "general" general conditions that would be applicable to a wide range of commodities. Such questions could be left outside the scope of the "general" general conditions, to be settled either by the agreement of the parties or by including them in special annexes to the general form.

191. It will be recalled that the earlier part of the present study led to the tentative conclusion that the feasibility of drawing up a set of "general" general conditions depended, to a large measure, on whether it was possible to develop solutions on basic issues that could be applicable to a wide range of commodities (see para. 6 (c)). The analysis of the provisions relating to the various issues dealt with in parts III and IV of this report shows that there is a great variety of solutions in respect of each issue in the existing formulations. At first sight it could appear that this diversity in solutions might have resulted from the difference in the nature of the commodities dealt with in the various formulations. However, a closer examination seems to indicate that, in many instances, these differences are due to the fact that the various formulations were drawn up, independently of each other and at different times, by different organizations.

192. Support for this conclusion may be found in the fact that different solutions have been adopted in the various formulations for issues which by their very nature have no connexion with the kind of goods covered by the particular formulation, such as formation of the contract, licences, taxes, duties and fees, interpretation of trade terms, passing of risk (see for instance paras. 33, 35, 36, 38, 43, 70-72, 108).

193. The above conclusion may also be supported by the fact that different solutions have been adopted on certain issues relating to the same kind of commodities. For instance, in the case of tolerance, which is applicable only in respect of goods sold in bulk, the amount of tolerance that is allowed in the various forms differs greatly (see para. 44). Similarly, the interpretations of expressions relating to the time of delivery, such as "immediate delivery", "prompt delivery", etc., which are found mainly in formulations relating to agricultural products, also differ widely (see para. 60 above).

194. In a limited number of cases, however, the difference in the provisions relating to some issues is to a certain extent due to the difference in the kind of goods involved; for example, the time within which the buyer has to notify the seller of his claim may be different for perishable goods and for machinery. The same is true in respect of the provision, usually found in formulations relating to agricultural products and other goods that have a quoted market price, that the damage payable to the buyer in case of non-delivery shall consist of the difference between the contract price and the market price at the time of the breach; such provision, of course, cannot be applied in respect of goods that are not readily available in the market.

195. This circumstance, however, does not seem to affect materially the feasibility of preparing a set of "general" general conditions. Since each of these competing provisions generally relates to a large group of commodities, it might be possible to accommodate them within the uniform general conditions form by indicating under the relevant issue the particular solution that should apply in the case of each group of commodities.

196. The preliminary first draft of a set of general conditions referred to in paragraph 5 above has been drawn up in the light of the above considerations and suggested guidelines.

197. These "general" general conditions are not intended to replace any of the existing formulations. The set of general conditions that might emerge from this preliminary draft would of course be used only if chosen by the parties, who would be free to amend, alter or abolish any of its provisions, either by detailed agreement or by reference to provisions in any existing formulation. Thus, the uniform general conditions could also be used to fill in the gaps in existing formulations to the extent that the parties concerned found them suitable for that purpose.

#### B. Future work

198. In the light of the above conclusions and suggested guidelines, and in view of the work done on the preliminary first draft, it appears feasible to draw up a set of "general" general conditions that would be applicable at least to a wide range of commodities. However, the preparation of a final draft of uniform general conditions would require the co-operation of trade associations, chambers of commerce and other similar organizations in different regions, since only they would be in a position to determine which of the competing rules relating to the various issues would be most appropriate for such a scheme.

199. The Commission might therefore wish to request the Secretary-General to set up a group of experts that would be representative of the various organizations mentioned in paragraph 198 above. The immediate task of this group would be to assist the Secretariat in the preparation of a final draft to be submitted to the Commission.

200. The Commission might also wish to request the Secretary-General to report to the Commission at its seventh session on the progress made on this project.

#### ANNEX I

##### Standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe

No.

- |    |   |
|----|---|
| 1A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Weight and condition—final at shipment. |
| 1B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Weight and condition—final at shipment.     |

No.

- |    |   |
|----|---|
| 2A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Condition final at shipment; Full out-turn.                           |
| 2B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Condition final at shipment; Full out-turn.                               |
| 3A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final. |
| 3B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final.     |
| 4A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge).                        |
| 4B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Full out-turn.             |
| 5A | f.o.b. (maritime); Non-reciprocal; Cargoes and parcels.   |
| 5B | f.o.b. (maritime); Reciprocal; Cargoes and parcels.   |
| 6A | Consignment by rail in complete wagon loads; Non-reciprocal.  |
| 6B | Consignment by rail in complete wagon loads; Reciprocal.  |
| 7A | c.i.f. (Inland Waterway); Non-reciprocal.   |
| 7B | c.i.f. (Inland Waterway); Reciprocal.   |
| 8A | f.o.b. (Inland Waterway); Non-reciprocal.   |
| 8B | f.o.b. (Inland Waterway); Reciprocal.   |

#### ANNEX II

##### List of general conditions analysed in part IV of the report

##### A. "General" general conditions

Identifying symbol	Title
A.1	Incoterms 1953—International Rules for the Interpretation of Trade Terms (International Chamber of Commerce)
A.2	International Rules for the Interpretation of the Terms: <ol style="list-style-type: none"> <li>I. "Delivered at frontier . . . (named place of delivery at frontier)"</li> <li>II. "Delivered . . . (named place of destination in the country of information) duty paid" (International Chamber of Commerce)</li> </ol>
A.3	General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (GCD, CMEA 1968)
A.4	Sino-Japanese Trade Contracts: (a) Friendly Trade Import Contract (Import to Japan)
A.5	Sino-Japanese Trade Contracts: (b) L-T Trade Import Contract (Import to Japan)
A.6	Sino-Japanese Trade Contracts: (c) Friendly Trade Export Contract (Export from Japan)
A.7	Contract of Sale Form between China and Viet-Nam
A.8	Model contract form for use in foreign trade contracts (The Indian Council of Arbitration)
A.9	General Terms and Conditions for the Sale of Sundries (Japan International Trade Arbitration Association)

##### B. General conditions relating to all or a group of agricultural products

- |     |   |
|-----|---|
| B.1 | Geschäftsbedingungen des Waren-Vereins der Hamburger Börse e.V. |
|-----|---|

<i>Identifying symbol</i>	<i>Title</i>	<i>Identifying symbol</i>	<i>Title</i>
B.2	Standard form of contract for sale of Burma products on f.o.b. basis	C.3	Conditions générales de vente—Matériels d'importation (Chambre syndicale des négociants importateurs de matériel de travaux publics et de manutention)
B.3	Standard form of contract for sale of Burma products on c.i.f. basis	C.4	General conditions for the supply for export of railway rolling stock and internal combustion engine locomotives (the International Association of Rolling Stock Builders (AICMR) and the European Builders of Internal Combustion Engine Locomotives (CELT))
B.4	Conditions générales de vente en CAF pour les produits de Madagascar (cafés exceptés) (Fédération nationale des syndicats d'importateurs et d'exportateurs de l'Afrique orientale)	C.5	Conditions générales de vente (Syndicat national des fabricants d'engrenages et constructeurs d'organes de transmission)
B.5	General Contract No. 1 (The Grain and Feed Trade Association)	C.6	Contract for general business, No. 12 (Federation of Oils, Seeds and Fats Associations Ltd.)
B.6	General Contract No. 1 (The Cattle Food Trade Association)	C.7	Geschäftsbedingungen des Vereins des Deutschen Einfuhr-grosshandels von Harz, Terpentinöl und Lack-rohstoffen e.V.
B.7	f.o.b. Contract No. 64 (London Corn Trade Association Ltd.)	C.8	Allgemeine Verkaufs-und Lieferungsbedingungen für pflanzliche und tierische Öle, Fette, Fettsäuren und Trane (Verband des Deutschen Grosshandels mit Ölen, Fetten und Ölrohstoffen e.V. Grofor, Hamburg)
B.8	General Contract f.o.b. terms for goods in bags or bulk, No. 119 (The Grain and Freed Trade Association)	C.9	c.i.f. Contract terms for vegetable and animal oils and fats, fatty acids, acid oils and marine oils (Association of German Importers, Exporters and Wholesalers in Oils, Fats and Raw Materials of Oil)
B.9	Copenhagen Contract for Transactions in Grain "free on board"		
B.10	Copenhagen Contract for Transactions in Grain "including freight" (c.f.) or "including freight and insurance" (c.i.f.)	D.	<i>General conditions relating to a specific agricultural product</i>
B.11	Contract for...; ...Basis—Delivered Terms ex ship, No. 81 (The Incorporated Oil Seed Association)	D.1	General conditions for international dealings in potatoes (United Nations Economic Commission for Europe)
B.12	Contract for full container loads (FCLs), No. 107 (The Grain and Feed Trade Association)	D.2	Conditions of sale (The Coffee Trade Federation)
B.13	Canadian and United States of America grain contract, cargoes, tale quale, No. 27 (London Corn Trade Association Ltd.)	D.3	f.o.b., c.&f. and c.i.f. Contract (The Coffee Trade Federation)
B.14	La Plata grain contract, cargoes, rye terms, No. 32 (London Corn Trade Association Ltd.)	D.4	The London Jute Association Contract
B.15	Black Sea and Danubian grain contract, cargoes, tale quale, No. 48 (London Corn Trade Association Ltd.)	D.5	Contract form for the purchase/sale of Thai mesta fibre (Indian Jute Mills Association/Thai Jute Association)
B.16	Contract for the sale of cereals No. 1B—c.i.f. (maritime); Reciprocal cargoes and parcels; Weight and condition—final at shipment (United Nations Economic Commission for Europe)	D.6	Agreement between the Jute Association of Thailand and the Japan Jute Association
B.17	Contract for the sale of cereals No. 5B—f.o.b. (maritime); Reciprocal, cargoes and parcels (United Nations Economic Commission for Europe)	D.7	Contract for feeding fish meal, c.i.f. terms, No. 10 (The Grain and Feed Trade Association, Ltd.)
B.18	Contract for the sale of cereals No. 7A (inland waterway)—non-reciprocal (United Nations Economic Commission for Europe)	D.8	Conditions of sale of rubber f.o.b. Colombo (The Ceylon Chamber of Commerce)
B.19	Contract for the sale of cereals No. 6A—consignment by rail in complete wagon loads—non-reciprocal (United Nations Economic Commission for Europe)	D.9	International f.o.b. contract for hides No. 1 (International Council of Hide and Skin Sellers' Associations and the International Council of Tanners)
B.20	FIS Rules and Usages for the international trade in agricultural seeds (Fédération internationale du commerce des semences)	D.10	International c.i.f., c.&f. contract for hides No. 14 (International Council of Hide and Skin Sellers' Associations and the International Council of Tanners)
B.21	FIS Rules and Usages for the international trade in vegetable seeds, root seeds, mangel seeds, peas, dwarf and broad bean seeds (Fédération internationale du commerce des semences)		
		E.	<i>General conditions relating to specific non-agricultural commodities</i>
C.	<i>General conditions relating to a group of non-agricultural commodities</i>	E.1	General conditions for export and import of sawn softwood, No. 410 (United Nations Economic Commission for Europe)
C.1	General conditions of sale for the import and export of durable consumer goods and of other engineering stock articles, No. 730 (United Nations Economic Commission for Europe)	E.2	General conditions for the export and import of hardwood logs and sawn hardwood from the temperate zone (United Nations Economic Commission for Europe)
C.2	General conditions for the supply of plant and machinery for export, No. 188 (United Nations Economic Commission for Europe)		

<i>Identifying symbol</i>	<i>Title</i>	<i>Identifying symbol</i>	<i>Title</i>
E.3	"Uniform" general terms, conditions and warranties 1964 (Timber Trade Federation of the United Kingdom, The Finnish Sawmill Owners' Association and the Swedish Wood Exporters' Association)	E.6	"Albion" general terms, conditions and warranties 1964 (Timber Trade Federation of the United Kingdom, the Finnish Sawmill Owners' Association and the Swedish Wood Exporters' Association)
E.4	General trade rules (adopted by the Norwegian, Swedish and Finnish Paper Makers' Associations and agreed to by the National Association of Wholesale Stationers and Paper Merchants, the United Kingdom Paper Bag Association and the United British (wholesale) Paper Bag Makers' Association)	E.7	General terms and conditions for machines (Japan International Trade Arbitration Association)
E.5	General trade rules for sale to overseas markets (adopted by the Norwegian, Finnish and Swedish Paper Makers' Associations and agreed upon by the Norwegian Oversea Exporters' Association and the Swedish Transmarine Export Union)	E.8	Draft model contract (Fédération européenne des importateurs de machines de bureau)
		E.9	Conditions of sale and resale for export cargo shipments (National Coal Board of the United Kingdom)
		E.10	Convention Fabrique Commerce. Contrat de coopération (Union nationale des négociants en chaussures en gros)