

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

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

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

to the Working Group. Early decisions on structure and approach would prevent the waste of time and resources.

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

**B. Working paper submitted to the Working Group on the New International Economic Order at its third session (New York, 12-23 July 1982): Study II of the Secretary-General: clauses related to contracts for the supply and construction of large industrial works (A/CN.9/WG.V/WP.7 and Add. 1 to 6)**

**CONTENTS**

	<i>Paragraphs</i>	<i>Page</i>
<b>Part One</b>		
[A/CN.9/WG.V/WP.7]		
INTRODUCTION .....	1-5	328
<b>Part Two</b>		
[A/CN.9/WG.V/WP.7/Add.1]		
I. FEASIBILITY STUDIES .....	1-12	329
II. FORMATION OF CONTRACT		
A. General remarks .....	13-15	330
B. Procedures leading to formation.....	16-22	331
III. VARIATIONS		
A. General remarks .....	23-25	332
B. Variation by mutual agreement .....	26-28	332
C. Variation required by the engineer ...	29-37	332
1. Extent of engineer's authority ...	29-30	332
2. Procedure for variation .....	31-32	333
3. Effects of variation .....	33-37	333
D. Variation required by the purchaser	38-42	334
E. Variation required by the contractor	43	334
IV. INTERPRETATION OF CONTRACTS		
A. General rules on interpretation .....	44-54	334
B. Annexures and general conditions...	55-58	335
C. Relevance of headings for interpretation .....	59-60	336
D. Definitions in contracts .....	61-99	336
1. "Contract" .....	62-65	336
2. "Writing" .....	66-67	336
3. "Contractor" .....	68-71	336
4. "Purchaser" .....	72-75	337
5. "Sub-contractor" .....	76-78	337
6. "Engineer" .....	79-83	337
7. "Works", "plant", and "equipment" .....	84-94	338

	<i>Paragraphs</i>	<i>Page</i>
8. "Contractor's equipment" .....	95-96	339
9. "Site" .....	97-99	339
E. Language.....	100-104	339
[A/CN.9/WG.V/WP.7/Add.2]		
V. ASSIGNMENT OR TRANSFER OF CONTRACT		
A. General remarks .....	1	339
B. Assignment of contract .....	2-4	340
C. Assignment of contractual benefits ..	5-7	340
VI. SUB-CONTRACTING		
A. General remarks .....	8-10	340
B. Sub-contracting by contractor .....	11-31	340
1. Selection of sub-contractor .....	11-26	340
2. Compatibility of sub-contract with main contract .....	27-28	342
3. Payment of sub-contracted work	29-31	343
C. Sub-contracting by or on behalf of purchaser .....	32-38	343
1. Direct sub-contracting by purchaser .....	34	344
2. Procurement by contractor on behalf of purchaser .....	35-38	344
D. Joint and several liability of contractors .....	39-41	345
VII. CO-ORDINATION AND LIAISON AGENTS		
A. General remarks .....	42	345
B. Co-ordination procedures .....	43-45	345
C. Duties and powers of liaison agents ..	46-49	345
VIII. ENGINEER		
A. General remarks .....	50-51	346
B. Engineer as purchaser's representative .....	52-54	346
C. Engineer's functions as representative of purchaser .....	55-57	346

	Paragraphs	Page
D. Engineer's decisions as independent person .....	58-64	347
E. Engineer's obligations when making decisions .....	65-66	347
IX. PARTIES' LIABILITIES IN RESPECT OF THIRD PARTIES		
A. General remarks .....	67	348
B. Contractor's liabilities to purchaser in respect of performance by third parties .....	68-71	348
C. Contractor's indemnities to purchaser for damage to other persons and their property .....	72-75	348
D. Contractor's responsibility for safety .....	76	349
E. Contractor's responsibility for subcontracting on behalf of purchaser .....	77-78	349
F. Purchaser's indemnities to contractor against liabilities to others ....	79	350
[A/CN.9/WG.V/WP.7/Add.3]		
X. TECHNICAL ASSISTANCE		
A. General remarks .....	1-2	350
B. Technical assistance .....	3-19	350
1. Training .....	4-6	350
2. Management services .....	7-13	350
3. Other technical assistance .....	14-19	351
C. Confidential information .....	20-21	351
XI. MAINTENANCE AND SPARE PARTS		
A. Maintenance and repairs .....	22-24	351
B. Spare parts .....	25-49	352
1. General remarks .....	25-26	352
2. Some problem areas .....	27-35	352
3. Other aspects of spares provisions .....	36-39	353
4. Procurement procedures .....	40-49	353
XII. STORAGE ON SITE		
A. General remarks .....	50-51	354
B. Responsibility for storage .....	52-67	354
C. Access to storage facilities .....	68-69	356
[A/CN.9/WG.V/WP.7/Add.4]		
XIII. PRICE		
A. General remarks .....	1-6	356
B. Methods of pricing work .....	7-24	357
1. Lump-sum price .....	7-12	357
2. Pricing on basis of time incurred and work done .....	13-18	358
3. Reimbursable price .....	19-23	358
4. Price currency .....	24	359
XIV. REVISION OF PRICE		
A. General remarks .....	25-27	359
B. Changes in extent and scope of work .....	28-40	360
1. Incorrect data supplied by engineer or by purchaser .....	29-30	360
2. Uncertainty in contract documents .....	31	360
3. Change in physical conditions .....	32	360
4. Changes in local laws .....	33-36	360
5. Variation of work .....	37	360
6. Technological innovations .....	38-40	360
C. Furnishing of additional supplies and services .....	41-51	361
1. Protection of highways and bridges .....	42	361
2. Additional tests .....	43	361
3. Inspection during erection .....	44-45	361
4. Samples .....	46	362

	Paragraphs	Page
5. Uncovering works and making openings .....	47	362
6. Repairs during maintenance period .....	48	362
7. Detection of defects .....	49	362
8. Services or facilities to other contractors employed by purchaser, or to workmen of purchaser .....	50	362
9. Exploratory excavations .....	51	362
D. Additional costs .....	52-61	362
1. Prolongation or suspension of work .....	53-54	362
2. Circumstances beyond control ...	55-56	363
3. Delay in giving possession of site .....	57	363
4. Delay in issuing drawings or orders .....	58	363
5. Failure to issue interim certificates or make payment .....	59	363
6. Delayed delivery caused by engineer or purchaser .....	60	363
7. Purchaser elects to use higher cost materials .....	61	363
E. Currency fluctuations .....	62	363
XV. PAYMENT CONDITIONS		
A. General remarks .....	63-68	364
B. Time of payment .....	69-92	365
1. Advance payment .....	69-74	365
2. Payment during execution of work .....	75-79	365
3. Payment after completion of works .....	80-83	366
4. Bonus payment .....	84	367
5. Payment after expiration of guarantee period .....	85-87	367
C. Payment documents .....	88-90	367
D. Letters of credit .....	91-92	368
XVI. PERFORMANCE GUARANTEES		
A. General remarks .....	93	368
B. Necessity for performance guarantee .....	94-96	368
C. Time for submitting guarantee .....	97	369
D. Relationship between performance guarantee and contract .....	98-116	369
1. Character of guarantor's obligation .....	98-107	369
2. Reduction in amount of guarantee .....	108-109	370
3. Nature of guarantor's obligations .....	110	370
4. Period covered by guarantee .....	111-112	370
5. Effect of variation of contract ....	113-116	371
[A/CN.9/WG.V/WP.7/Add.5]		
XVII. INSURANCE		
A. General remarks .....	1-4	371
B. General insurance clauses .....	5-7	372
C. Property insurance .....	8-16	372
1. Insurance of materials and equipment to be incorporated in works .....	9-10	372
2. Insurance of works .....	11-15	373
3. Insurance of contractor's equipment .....	16	373
D. Liability insurance .....	17-24	373
1. General liability insurance .....	17-19	373
2. Liability arising from use of transport vehicles .....	20	374
3. Liability for injury to workmen ..	21-24	374
E. Proof of insurance .....	25-28	375
F. Consequences of failure to provide insurance .....	29-31	375

	Paragraphs	Page
XVIII. CUSTOMS DUTIES AND TAXES		
A. General remarks .....	32	375
B. Customs duties .....	33-39	375
C. Taxes and levies .....	40-44	376
XIX. BANKRUPTCY		
A. General remarks .....	45-49	376
B. Provisions on bankruptcy in forms under study .....	50-54	377
XX. NOTIFICATION		
A. General remarks .....	55	377
B. Modes of notification .....	56-61	378
C. Time notice takes effect .....	62-69	378
D. Functions of notification .....	70-90	379
1. Notification to enable co-operation and execution of contract .....	71-76	379
2. Notification to enable a party to take action .....	77-81	379
3. Notification as prerequisite to exercise of a right .....	82-88	380
4. Notification of variation .....	89-90	381
E. Legal effects of failure to notify .....	91	381
1. Loss of right .....	92	381
2. Liability for damages resulting from failure to notify .....	93-94	381
F. Failure to respond to notice .....	95	381
XXI. SETTLEMENT OF DISPUTES		
A. General remarks .....	96-103	381
B. Conciliation .....	104-111	382
C. Arbitration .....	112-135	383
D. Court proceedings .....	136-137	385

### Part One

[A/CN.9/WG.V/WP.7\*]

#### INTRODUCTION

1. The present study (hereinafter referred to as "this study") is a supplement to the one submitted to the second session of the Working Group on clauses related to contracts for the supply and construction of large industrial works<sup>1</sup> (hereinafter referred to as "Study I"). The present study has been prepared in conformity with a request by the Working Group which was later endorsed by the Commission.<sup>2</sup>

2. The general observations contained in the Introduction to Study I<sup>3</sup> equally apply to this study and the same approach has been used in preparing it. The discussion of the Working Group on the issues presented in Study I and this study will be taken into account in the drafting of a legal guide by the Secretariat.

3. This study is divided into three parts: introduction (Part One), analysis of topics covered (Part Two) and list

\* 15 April 1982.

<sup>1</sup> A/CN.9/WG.V/WP.4 and Adds. 1-8 (Yearbook . . . 1981, part two, IV, B, 1).

<sup>2</sup> A/CN.9/198, paras. 89-91; Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 84 (Yearbook . . . 1981, part one, A).

<sup>3</sup> A/CN.9/WG.V/WP.4, paras. 1-38 (Yearbook . . . 1981, part two, IV, B, 1).

	Paragraphs	Page
E. Engineer in settlement of disputes....	138-143	385
F. Effect of resort to dispute settlement proceedings on duty to perform .....	144-149	386

### Part Three

[A/CN.9/WG.V/WP.7/Add.6]

#### List of questions for consideration by the Working Group

A. Introduction .....		387
B. Questions		
I. Feasibility studies .....	1-7	387
II. Formation of contract .....	8-9	387
III. Variation .....	10-12	387
IV. Interpretation .....	13-16	387
V. Assignment .....	17-19	388
VI. Sub-contracting .....	20-27	388
VII. Co-ordination and liaison agents .....	28-30	388
VIII. Engineer .....	31-33	388
IX. Liabilities in respect of third parties .....	34-37	388
X. Technical assistance .....	38-42	388
XI. Maintenance and spare parts .....	43-47	389
XII. Storage on site .....	48-50	389
XIII. Price .....	51-54	389
XIV. Revision of price .....	55-56	389
XV. Payment conditions .....	57-62	389
XVI. Performance guarantees .....	63-69	389
XVII. Insurance .....	70-76	390
XVIII. Customs duties and taxes .....	77-78	390
XIX. Bankruptcy .....	79-80	390
XX. Notices .....	81-85	390
XXI. Settlement of disputes .....	86-93	390

of questions on these topics (Part Three). Part Two is contained in Addenda 1-5 and Part Three in Addendum 6 to this document.

4. The same general conditions and model works contracts (hereinafter referred to as "the forms under study") used for Study I are also used as the basis for this study. However, this study further takes into consideration the fact that some issues are also regulated by the following general conditions agreed upon by member countries of the Council for Mutual Economic Assistance (CMEA) and refers to them in analyzing such issues:

(a) General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, hereinafter referred to as GCD-CMEA;

(b) General Conditions of Assembly and Provision of other Technical Services in connection with Reciprocal Deliveries of Machinery and Equipment between Foreign Trade Organizations of Member Countries of the Council for Mutual Economic Assistance, hereinafter referred to as GCA-CMEA;

(c) General Conditions for Technical Servicing of Machinery, Equipment and other Items Delivered between Foreign Trade Organizations of Member Countries of the Council for Mutual Economic Assistance, hereinafter referred to as GCTS-CMEA.

5. It may be noted that since the completion of Study I the UNIDO International Group of Experts has completed the work on the Model Form of Turnkey Lump Sum Contract for the construction of a fertilizer plant (UNIDO/PC.25), hereinafter referred to as UNIDO-TKL, and the Model Form of Cost Reimbursable Contract for the construction of a fertilizer plant (UNIDO/PC.26), hereinafter referred to as UNIDO-CRC. As the UNIDO Model Form of Semi-Turnkey Contract for the construction of a fertilizer plant is still in a draft form (ID/WG.318/2) and its final form may be adapted in future to the provisions of UNIDO-TKL and UNIDO-CRC, reference to this draft is limited only to issues connected with its semi-turnkey character.

## Part Two

[A/CN.9/WG.V/WP.7/Add.1\*]

### I. FEASIBILITY STUDIES

1. The term "feasibility studies" as commonly used refers to pre-project analyses designed to assist the purchaser in determining whether a contemplated project would be technically and economically viable.<sup>1</sup>

2. Contracts for the supply and construction of large industrial works usually do not provide for feasibility studies in this sense. Normally, by the time a purchaser is ready to enter into such a contract these studies will already have been performed, either by the purchaser or by someone engaged to do it for him. In the latter event certain types of studies may be performed by an engineer or other consultant under a contract which is wholly separate from the works contract.

3. However, information obtained during feasibility studies will serve as a basis for the implementation of the supply and construction contract. Moreover, it is not uncommon for the purchaser to provide to the contractor certain data derived from these studies for use in the performance of his obligations. Such contracts often contain provisions allocating as between the parties responsibility for errors and inadequacies in this information, and establishing the extent to which the contractor must control or verify the information obtained or supplied by the purchaser. Some contracts require the contractor to obtain for himself whatever data and information he requires in order to perform the contract, even though this may duplicate some of the studies already performed by the purchaser.

4. The ECE Guide states, in paragraph (iv):

"If the initial studies which culminate in the planning of a project and in the survey and selection of the site are carried out by the *client himself* or by a *design bureau* or by a *consulting engineer*, the client assumes the

responsibility for this preliminary work *vis-à-vis* the supplier of the industrial plant and *vis-à-vis* the building or civil engineering contractor; the contract may also specify that the building or civil engineering contractor is obliged to check the project data concerning the site on his own responsibility."

5. Some contracts assume that, if the purchaser has obtained information during pre-contract feasibility studies, the purchaser must have provided such information to the contractor before the formation of the contract, and provide that the tender is deemed to be based on such information. They also provide that the contractor is deemed to have obtained all the necessary information which might influence his tender. For example, clause 11 of FIDIC-CEC provides:

"The Employer shall have made available to the Contractor with the Tender documents such data on hydrological and sub-surface conditions as shall have been obtained by or on behalf of the Employer from investigations undertaken relevant to the Works and the Tender shall be deemed to have been based on such data, but the Contractor shall be responsible for his own interpretation thereof.

"The Contractor shall also be deemed to have inspected and examined the Site and its surroundings and information available in connection therewith and to have satisfied himself, so far as is practicable, before submitting his Tender, as to the form and nature thereof, including the sub-surface conditions, the hydrological and climatic conditions, the extent and nature of work and materials necessary for the completion of the Works, the means of access to the Site and the accommodation he may require and, in general, shall be deemed to have obtained all necessary information, subject as above mentioned, as to risks, contingencies and all other circumstances which may influence or affect his Tender."

6. Clause 10.1 of FIDIC-EMW is identical to the first paragraph of clause 11 of FIDIC-CEC (quoted in paragraph 5, above). Clause 10.2 of FIDIC-EMW provides:

"The Contractor by tendering shall be deemed to have satisfied himself as to all the conditions and circumstances affecting the Contract Sum, as to the possibility of executing the Works as shown and described in the Contract, as to the general circumstances at the site of the Works, if access thereto has been made available to him, and as to the general labour position at the Site, and to have determined his prices accordingly. The Contractor shall be responsible for any misunderstanding or incorrect information however obtained except information given in writing by the Employer or the Engineer."

7. The UNIDO model contracts call upon the purchaser to supply certain information to the contractor,

\* 12 February 1982.

<sup>1</sup> See United Nations Industrial Development Organization (UNIDO), *Manual for the Preparation of Industrial Feasibility Studies* (ID/206) (1978).