

reluctant to exclude international commercial contracts from their sphere of application; the difficulties in this area were of a practical nature and varied with each contract, and could not be resolved by a uniform law; and the text of a uniform law would be of a vague and general character, and therefore of doubtful value.

Question 7:

16. *Are there any approaches, other than the drafting of a uniform law, which might reduce the difficulties currently encountered by parties in the use of liquidated damages and penalty clauses (e.g. the drawing up of guidelines to assist parties wishing to use a liquidated damages or penalty clause)?*

17. Two other possible approaches were noted. Firstly, the drawing up of standard contracts or general conditions, which would contain terms resolving the difficulties currently encountered. Secondly, the drawing up of guidelines, with an analysis of the problems encountered, and possible solutions to such problems.

18. Most of the respondents opposed to the drafting of a uniform law saw some merit in one or the other of the above approaches, and a few of the respondents supporting the drafting of a uniform law saw merit in the above approaches as alternatives to a uniform law.⁷

⁷ One expert noted that the drafting of standard or model clauses was not desirable because immunity of a liquidated damages or penalty clause from attack on grounds of public policy, or other grounds, depended primarily on the clause being reasonable in relation to the circumstances of the particular contract in which it was contained.

C. Report of the Secretary-General: clauses protecting parties against the effects of currency fluctuations (A/CN.9/201)*

1. The Commission, at its eleventh session, decided that, as part of the general study of international contract practices, consideration should be given to clauses in international trade contracts by which parties seek to protect themselves against the effects of currency fluctuations.¹ At that session it requested the Secretary-General to make a preparatory study of the question.

2. The Commission, at its twelfth session, had before it a report of the Secretary-General entitled "Clauses protecting parties against the effects of currency fluctuations".² The report described the commercial reasons for clauses designed to protect creditors against changes of the value of a currency in relation to other currencies and for clauses by which creditors seek to maintain the purchasing value of the monetary obligation under the contract. The report examined the various kinds of clauses designed to accomplish these two results and con-

Question 8:

19. *Are there any other observations you wish to make?*

20. Most respondents made no other observations. Those who replied to this question made the following observations on negotiating liquidated damages and penalty clauses:

(1) A ceiling should always be placed on the amount payable. This ceiling should generally be 5% to 8% of the amount of the contract;

(2) In lump-sum contracts, which are very frequent in the industrial construction sector, liquidated damages or penalties should only be inserted for failure to observe the final date of delivery. They should not be inserted for non-compliance with the successive stages of manufacture, transport, and erection;

(3) The contract should not contain provision for the deduction of liquidated damages or penalties from sums due to the supplier;

(4) Clauses providing liquidated damages or penalties for delay were often combined with clauses providing a bonus for early performance.

sidered the legal and policy framework in which such clauses operate in a selected number of countries.

3. The Commission, at its twelfth session, recognized that the subject was of current interest because of the floating of the major trade currencies.³ There was wide agreement that the development of clauses of the type described in the report would benefit international trade. However, doubts were expressed in the Commission whether such clauses were effective as a safeguard against currency fluctuations or world-wide inflation. The view was also expressed that it was doubtful whether it was possible for the Commission to regulate on a world-wide basis the content of clauses that sought to eliminate most or all of the monetary risks involved in long-term contracts.

4. As a result, the Commission requested the Secretariat to carry out further studies in respect of clauses protecting parties against the effects of currency fluctua-

* 2 April 1981. Referred to in Report, para. 48 (part one, A, above).

¹ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 67 (Yearbook . . . 1978, part one, II, A).

² A/CN.9/164 (Yearbook . . . 1979, part two, I, D).

³ *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, paras. 32 to 40 (Yearbook . . . 1979, part one, II, A).

tions, and, with specific reference to the desirability and feasibility of work by the Commission on this topic, to submit a report on its findings to the Commission with appropriate recommendations.⁴

5. The Secretariat is currently studying the problems caused by currency fluctuations in two contexts.

(1) The Commission will have before it at the present session a report on a universal unit of account of constant value for use in international conventions.⁵ The report suggests the use of the SDR linked to an appropriate index with adjustments made for non-member States of the International Monetary Fund. As was noted at the twelfth session, the problem is not identical to that involving international trade contracts.⁶ However, since the decision of the International Monetary Fund to change the composition of the SDR from a 16 currency basket to a 5 currency basket, there has been a revival of interest in the use of the SDR in private financial transactions. Therefore, the conclusions reached in respect of the unit of account will be relevant to some international contracts.

(2) The Secretariat has presented to the second session of the Working Group on the New International Economic Order, which meets from 9 to 18 June 1981 at Vienna, the first half of the study in respect of contracts for the supply and construction of large industrial works.⁷ The second half of the study, which is expected to be presented to the third session of the Working Group, will contain the studies in respect of the price, including the clause on price revision and the clause on currency and rates of exchange.⁸

6. It has become evident from the studies conducted so far that the monetary problems are different, and the

most appropriate solution may also be different, if the contract involves

The periodic delivery of goods over a period of time; a charter-party;⁹

An international loan in the Eurocurrency market,¹⁰ or the construction of a large industrial plant.

7. In some types of contract it may be important to match the currencies of account, and perhaps also of payment, to the currencies in which the creditor will incur his costs. In other types of contract, it may be important to use a currency or unit of account which has no relationship to the currencies in which the creditor will incur his costs or in which the debtor will resell or otherwise recoup his expenditure. Not only do these decisions affect the nature of the clause in respect of the currency and rate of exchange, it also affects the nature of the clause in respect of maintenance of purchasing value. These issues become more complex as the international monetary system is still in the process of change.

8. That difficulty has already been experienced by the Committee on International Monetary Law of the International Law Association which was first requested by the Conference of the Association in The Hague in 1970 to propose several types of formula for currency exchange guarantees based on a unit of account. In view of the substantial work undertaken in this matter and in respect of maintenance of value clauses by the Committee, the Secretariat will remain in contact with the Committee for any new developments.

9. Therefore, the Commission may wish to request the Secretary-General to continue his studies of clauses by which parties seek to protect themselves against currency fluctuations as described in paragraph 5 above.

⁴ *Ibid.*, para. 40.

⁵ A/CN.9/200 (reproduced in this volume, part two, II, C).

⁶ A/CN.9/SR.213, para. 7.

⁷ A/CN.9/WG.V/WP.4, and Add.1 to 8 (reproduced in this volume, part two, IV, B, 1).

⁸ A/CN.9/WG.V/WP.4 (reproduced in this volume, part two, IV, B, 1).

⁹ See, S. Mankabady, "The currency, escalation and bunker clauses in charter-parties", *The International Contract*, vol. 6 (1980), p. 361; L. Gorton, "Escalation and currency clauses in shipping contracts", *Journal of World Trade Law*, vol. 12 (1978), p. 319.

¹⁰ See, A. Jacquemont, "Le contrat d'euro-crédit: un contrat à contenu variable," *Journal du droit international*, vol. 106 (1979), p. 34.