

was said to be unsystematic and without material justification, since, pursuant to an obsolete theory, it declared the *lex contractus* to be applicable, and made the applicable law contingent upon arbitrary and frequently unforeseeable incidental circumstances.<sup>89</sup>

39. According to other views, however, the place where the order was given and received was different from that where the contract was concluded. Thus, the representative of Iran expressed the opinion that it would be preferable if the applicable law were the *lex loci contractus* instead of that of the place where the order was given.<sup>90</sup> The Secretary-General of the Hague Conference noted that the *lex loci contractus* was one of the most controversial questions and that it was for that reason that the law of the place where the order was given was chosen in the Convention.<sup>91</sup> The representative of Italy pointed out the usefulness of eliminating the criterion of the place where the contract was concluded.<sup>92</sup>

(d) *Article 4*

40. In the opinion of the United Kingdom, one of the disadvantages of the Convention was that article 4 of the Convention involved a more frequent application of more than one law to a single contract, which tended to complicate rather than to simplify the legal rules affecting international transaction.<sup>93</sup>

<sup>89</sup> A/CN.9/12, pp. 6-7.

<sup>90</sup> A/7618, annex II, para. 19.

<sup>91</sup> *Ibid.*, para. 19.

<sup>92</sup> *Ibid.*, para. 19.

<sup>93</sup> A/CN.9/12/Add.1, p. 14.

41. The representative of the USSR suggested that since inspection of goods might take place in two stages, namely a preliminary inspection in the country of the seller and a final one in the country of the buyer, it should be made clear in article 4 which inspection is intended.<sup>94</sup>

(e) *Article 5*

42. The representative of the USSR proposed the inclusion in sub-paragraph 2 of the words "and procedures for their signing", noting that the law of the USSR provided for a special procedure for signing international sale contracts.<sup>95</sup>

43. Mexico considered that the relationship established in sub-paragraph 3 of article 5 between the transfer of ownership and the transfer of risk was a defect resulting from the rule *res perit domino*, for which it submitted there was no justification.<sup>96</sup>

(f) *Articles 10 and 12*

44. The representative of the USSR considered that article 10 and paragraph 4 of article 12 were contrary to the 1960 Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960) and that the provisions of the said articles, therefore, could not be included in a new international convention.<sup>97</sup>

<sup>94</sup> A/7618, annex II, para. 21.

<sup>95</sup> *Ibid.*, para. 22.

<sup>96</sup> A/CN.9/12/Add.1, p. 8.

<sup>97</sup> A/7618, annex II, para. 23.

**C. General conditions of sale and standard contracts, incoterms and other trade terms:**

**1. Promotion of wider use of existing general conditions of sale and standard contracts: report of the Secretary-General\***

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\* A/CN.9/18.

## I. INTRODUCTION

1. The United Nations Commission on International Trade Law, at its first session, decided to include in its work programme, as a priority topic, the law of international sale of goods. The Commission selected, as one of the items falling within the scope of the international sale of goods, the subject "general conditions of sale, standard contracts, Incoterms and other trade terms".<sup>1</sup>

2. With respect to general conditions of sale and standard contracts, the Commission requested the Secretary-General "in consultation with the secretariats of ECE, the other regional economic commissions and other organizations concerned, to submit to the second session of the Commission a preliminary report examining the possibility of promoting the wider use of the existing general conditions of sale and standard contracts".<sup>2</sup> The Commission also specified that the report "should state the considerations and factors which are impeding a wider use of general conditions of sale [and] standard contracts".<sup>3</sup>

3. Pursuant to the above request of the Commission, the Secretary-General invited the organs and organizations listed in annex I to this report to submit comments and suggestions on the matter. He also asked these organs and organizations to assist the Secretariat by providing information that may be helpful in obtaining the texts of general conditions of sale and standard contracts prepared by or under the auspices of international or national organizations and used in international trade, and, if possible, to supply copies of those instruments.

4. The secretariats of the following United Nations organs and intergovernmental organizations have sent substantive replies to the Secretary-General's request: the Commission of the European Communities, Economic Commission for Europe, Economic Commission for Latin America, Food and Agriculture Organization, Latin American Free Trade Association and the Organization of American States. A substantive reply was also received from the secretariat of the International Chamber of Commerce. The substantive portions of the replies are reproduced in annex II to this report.

5. In addition, several organizations have supplied the Secretariat with the texts of a number of general conditions and standard contracts.

## II. ACTIVITIES OF ORGANIZATIONS IN THE FIELD OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS

6. With respect to activities in this field by intergovernmental organizations, the United Nations Economic Commission for Europe has undertaken the most extensive work to date. The Commission sponsored the drawing up of thirty general conditions of sale and standard contracts. It also sponsored the preparation of unified regulations for the standardization of methods

of sampling and general conditions for international furniture removal. It is presently engaged in finalizing a guide on the international transfer of know-how. The list of general conditions and standard contract forms prepared by the Economic Commission for Europe is contained in annex III of this report.

7. In addition to the Economic Commission for Europe, a large number of international as well as national organizations have been or are active in the field of general conditions of sale and standard contracts. Most of these organizations, primarily trade associations, have prepared instruments for the use in international trade by their own members. Not infrequently, however, these instruments are also used by non-members and in transactions concluded outside the country of the association which originally prepared them.

8. Some organizations have been dealing with the legal principles underlying general conditions of sale and standard contracts. For example, the International Association of Legal Science devoted its conferences and colloquia in Helsinki (1960), London (1962) and New York (1964) to comparative law problems relating to international trade including also general conditions of sale and standard contracts.<sup>4</sup> The International Institute for the Unification of Private Law (UNIDROIT) selected the subject "Unification and harmonization: the criteria governing the choice between the various methods" as the theme of the fourth meeting of the organizations concerned with the unification of law, held in Rome from 22 to 24 April 1968. Among others, the following matters were considered at the meeting: unification or harmonization by means of legal instruments that have no binding force, and unification and harmonization by means of standard contracts general conditions, etc.<sup>5</sup>

## III. PURPOSE AND NATURE OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS

9. The principle purpose of general conditions of sale and standard forms has been described as "undoubtedly to facilitate international trade by the avoidance or reduction of the uncertainty that sometimes surrounds international sales contracts due to the vagaries of private international law, on the one hand, and the difficulties of obtaining evidence on a system of foreign law, on the other hand. Notwithstanding the importance of this aspect of the general conditions, reference should also be made to their operation as a means of codifying trade usages with the resultant uniformity of

<sup>1</sup> Report of the Commission on the work of its first session, (A/7216), para. 12 (iv).

<sup>2</sup> *Ibid.*, para. 19.

<sup>3</sup> *Ibid.*, para. 21.

<sup>4</sup> The reports presented at, and the records of, the Helsinki colloquium have been published in *Some Problems of Non-Performance and Force Majeure in International Contracts of Sale* (Helsinki, 1961, Institutum Jurisprudentiae Comparativae Universitatis Helsingiensis, those of the London colloquium in *The Sources of the Law of International Trade*, edited by C. M. Schmitthoff (London, 1964, Stevens and Sons and those of the New York colloquium in *Unification of the Law Governing International Sale of Goods*, edited by J. Honnold (Paris, 1966, Librairie Dalloz).

<sup>5</sup> On the latter method, see the report by C. M. Schmitthoff in *The International and Comparative Law Quarterly*, 1968, Vol. 17, part 3, pp. 551 ff.

law, and that they offer a possibility to persons to enter into contracts that are not completely one-sided by their provisions. The latter aspect of the general conditions of sale and the standard forms of contract is more or less the application to the international field of the maxim 'equality is equity'.<sup>6</sup>

10. General conditions and standard contracts differ in their form from each other. General conditions "provide a list of clauses which the parties to a contract can incorporate or refer to in their own contract. The printed document itself, in which the general conditions of sales are found, is, however, not supposed to constitute the parties' contract".<sup>7</sup> The standard contracts "are the printed document which the parties to a contract can use as the contract itself, provided that they sign it and fill in those clauses which require completion, such as those relating to the names of the parties, price, port of dispatch, quantity and description.<sup>8</sup> According to another definition, a standard contract "can be described as a model contract or set of standard conditions in the written form, the term of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction in hand".<sup>9</sup>

11. The term "standard contract" is used in two different meanings, denoting model contract forms and contracts of adhesion: "These two meanings are by no means identical. A model contract form is a specimen form to which the lawyer or businessman will turn when charged with the duty of drafting a contract and which will be altered and adapted to meet the situation in hand. A contract of adhesion is a form proposed by one of the contracting parties to the other as the definitive form of the contract which is intended to be unalterable except in trifling and unimportant detail; the party to whom this type of contract is offered may 'take it or leave it' but cannot negotiate its terms and conditions".<sup>10</sup>

12. A distinction between general conditions and standard contracts is also made in respect of their field of application. According to one view, "a scientific study of the subject of standard contracts or trading rules will distinguish between standard contracts or trading rules on two levels: the general conditions of general character applying to all commodities or trades and the standard contracts or trading rules applying only to certain commodities or trades".<sup>11</sup> With respect to general conditions and standard contracts it has also been suggested that vertical standardization occurs where trade usages are standardized in a particular trade, while horizontal

standardization applies across the board to all types of international sales.<sup>12</sup>

13. Most of the existing general conditions of sale and standard contracts are the result of vertical standardization, i.e. they apply only to certain commodities or trades. Only two existing general conditions of sale apply to all commodities or trades: Incoterms 1953 prepared by the International Chamber of Commerce and the "COMECON GCD of 1968".

14. Incoterms 1953 is a set of international rules for the interpretation of nine terms<sup>13</sup> used in foreign trade contracts. Accordingly, its scope differs from that of other general conditions of sale and standard contracts, which generally contain a more or less complete set of rules on most aspects of international sales of goods. The possible promotion of the wider use of Incoterms 1953 is dealt with in a separate study prepared by the International Chamber of Commerce<sup>14</sup> for submission to the second session of UNCITRAL. This report, therefore, does not deal with that subject.

15. The "COMECON GCD of 1968"<sup>15</sup> applies to all contracts of sale concluded between foreign trade organizations of the member States of the Council for Mutual Economic Assistance. The application of the General Conditions has been made mandatory by the competent legislative organs of each member State. Under the preamble of the General Conditions, the parties may, however, modify any of its provisions, if, when entering into the contract, they arrive at the conclusion that the special character of the goods or of the transport demands such modification. In view of its partly mandatory and partly optional character, the COMECON GCD may be characterized as a borderline case between uniform law and general conditions.

#### IV. SOME FACTORS IMPEDING A WIDER USE

16. While insufficient information is available to the Secretariat as to the extent of the use of general conditions of sale and standard contracts in international trade,<sup>16</sup> it is possible to identify some of the factors that

<sup>12</sup> F. Eisemann, *Die Incoterms in Handel und Verkehr*, 1963, Vienna, p. 4, n. 2. (referred to in C. M. Schmitthoff *supra* note 5, *op. cit.*, p. 556).

<sup>13</sup> Ex works, for-fot, fas, fob, c and f, cif, freight or carriage paid to . . . , ex ship . . . , ex quay . . .

<sup>14</sup> A/CN.9/14.

<sup>15</sup> The COMECON GCD (General Conditions of Delivery) of 1968, an expanded text of the COMECON General Conditions of Delivery of 1958, entered into force on 1 January 1969. The full title of the General Conditions is: "General Conditions for Delivery of Goods between organizations of the Member States of COMECON\* (COMECON GCD of 1968)".

\* Wording of 1968.

<sup>16</sup> According to a report prepared by the American Bar Association, a study had been made on the use of general conditions and standard contracts. In the preparation of the study, a large number of American trade associations was approached to obtain information. Forty-seven and two-tenth per cent of the consulted importers' trade associations and 39.7 per cent of the consulted exporters' trade associations confirmed the use of standard contracts in international trade, and 50 per cent and 22.7 per cent, respectively, of these associations recommended the use of such contracts. The report does not contain any information whether the formula-

<sup>6</sup> Peter Benjamin, ECE General Conditions of Sale and Standard Forms of Contract, in *The Journal of Business Law*, 1961, p. 114.

<sup>7</sup> Shinichiro Michida, Possible Avenues to Preparation of Standard Contracts, in *Unification of the Law Governing International Sale of Goods*, *op. cit.*, p. 257.

<sup>8</sup> *Ibid.*, p. 256.

<sup>9</sup> C. M. Schmitthoff, *op. cit. supra* note 5, p. 557.

<sup>10</sup> *Ibid.*, p. 551.

<sup>11</sup> S. Michida, *op. cit.*, p. 255.

tend to impede their wider use. The large number and variety of existing general conditions and standard contracts is one of these factors.

17. As regards the general conditions and standard contracts applying to certain commodities, the abundance of general conditions and standard contracts in existence which apply to the same type of goods may be illustrated by those relating to the sale of cereals. The Economic Commission for Europe prepared sixteen such instruments,<sup>17</sup> the London Corn Trade Association forty,<sup>18</sup> and others have been prepared by various national organizations. Formulations prepared by the same organization are basically identical showing "only minor variations depending on the types and categories of grain, and their origin, destination and method and form of shipping,"<sup>19</sup> but for the most part they differ from formulations prepared by other organizations. A great variety of general conditions and standard contracts used in international trade is also found in respect of the sale of other commodities such as seeds, timber, cotton, coal, rubber, silk, coffee, etc.

18. The large number of existing formulations may often result in difficulties and uncertainties for the parties. "The would-be user is very often confronted with an embarrassingly large choice of forms of contract which he could use. He is also confronted with the fact that nearly all these instruments refer to one legal system alone, and have been drawn solely with that system in view, namely, that of the country of the trade association or organization that drafted them. Hence, not only is the would-be user exposed to the possible conflicts of interpretation. . . , but he is often faced with the fact that while he may prefer a particular form of contract or a series of clauses to be found in a particular form of contract, the other party may prefer to see the contract concluded on the basis of a totally different form of contract, or on the basis of clauses to be found therein."<sup>20</sup> This may lead to "one hazard in the use of standard forms" i.e. "the danger of causing 'a battle of the forms'. This may occur when an exporter sends out one form and a buyer accepts on his own form which contains printed terms inconsistent with those on the seller's form, the difference not being noticed in the ordinary course of events."<sup>21</sup> It has therefore rightly been

referred to by the associations as used by their members where drawn up by a formulating agency by the exporters and importers themselves, respectively. See *Unification of International Private Law*, Report of the American Bar Association Special Committee on International Unification of Private Law, American Bar Foundation, Chicago 1961, Appendix A, pp. 46-47. Concerning the use of the ECE General Conditions outside Europe, the ECE secretariat has indicated that the ECE General Conditions of Sale in the engineering industry are sometimes used in international contracts between European exporters and importers in Latin America, Africa, the Near East and Asia, on the initiative of the European vendor (see annex II reply of the ECE, para. 42).

<sup>17</sup> See annex III.

<sup>18</sup> See reply of the FAO, annex II.

<sup>19</sup> *Ibid.*

<sup>20</sup> P. Benjamin, *op. cit.*, p. 114.

<sup>21</sup> M. Meek and I. Feltham, Foreign sales, distribution, licensing and joint venture agreements, *De Paul Law Review*, vol. XVII (1967), p. 50.

stated that "although the efforts for legal formulation of international trade practice are inspired by the desire to remove uncertainty and insecurity, it cannot be denied that they have resulted in the creation of numerous and various forms of standard contracts which, owing to the lack of common principles, often bring contracting parties into unexpected situations".<sup>22</sup>

19. Besides the difficulties caused by the great number of competing formulations, there is another factor that might reduce the use of general conditions and standard contracts. As already stated, most of the general conditions of sale and standard contracts applicable to particular commodities have been drawn up by trade associations representing primarily the interests of the sellers or that of the buyers. These forms "are often drafted with reference to a particular system of law, sometimes designed to be somewhat onesided in safeguarding either the seller's interests to the detriment of the buyer's interests, or vice versa, or sometimes drawn up many years ago and only adaptable with difficulty to the needs of modern trade".<sup>23</sup> In the view of another author, "the weakness of such standard contracts or general conditions drawn up by trade associations of producers or sellers of goods and services derives, in a legal or rather *judicial* — context, from the fact that they emanate from one economic force which offers them to buyers or users who are dispersed or unorganized; this is the reason why they are regarded with a certain amount of suspicion. . . A promising development in certain sectors has been the collective contract negotiated by spokesmen for all the groups concerned, sometimes under the auspices of a national or international authority and sometimes with the endorsement of the executive power."<sup>24</sup>

## V. PROMOTION OF THE WIDER USE OF SELECTED GENERAL CONDITIONS AND STANDARD CONTRACTS

### A. General observations

20. As there is a great number of existing general conditions of sale and standard contracts, many of which are applicable to the same commodities, it would appear necessary, in the first instance, for the Commission to select those the wider use of which it might find desirable to promote.

21. A selection might be based on the considerations quoted in paragraph 19 above that the rights of both sellers and buyers are better reflected in the general conditions and standard contracts that have been drawn up with the participation of representatives of sellers and buyers, by independent organizations such as the Economic Commission for Europe, than in those prepared by international or national organizations representing either the sellers or the buyers which often

<sup>22</sup> A. Goldstajn, International conventions and standard contracts as means of escaping from the application of municipal law, in *The Sources of the Law of International Trade*, *op. cit.*, p. 116.

<sup>23</sup> S. Michida, *op. cit.*, p. 256.

<sup>24</sup> Ch. del Marmol, Standard clauses in contracts, a factor in the unification of commercial law. *Liber Amicorum Baron Louis Frédéricq*. Ghent Faculty of Law, 1966, p. 313.

contain onesided terms.<sup>25</sup> This might lead to the conclusion that the general conditions and standard contracts prepared by the ECE and similar independent organizations are more widely used than those prepared by trade associations or other organizations interested, under which the interests of the sellers and buyers are less well balanced, and that the possibility of promoting the wider use of the former offers better prospects. On the other hand, there are also indications that in some instances business circles might prefer the formulations of trade associations.<sup>26</sup>

22. In addition to the possibility of promoting certain existing instruments in their present form, consideration might also be given to a revision of these formulations, if necessary, or the drawing up of new general conditions and standard contracts which might be more readily acceptable to both sellers and buyers on either regional or world-wide level.

23. It would appear that, should the Commission decide to prepare new general conditions and standard contracts, whether of a general or a specific character, the preparation of such new formulations should be preceded by, and based on, an analysis of existing ones. Such an analysis might help in assessing what, in the existing formulations, is common to all commodities<sup>27</sup> or to a certain category of commodities and what are the main differences which should be resolved. As the United States stated in its reply concerning The Hague Conventions of 1964: "The development of standard contracts and general conditions of sale must be based upon full information regarding the rules, customs and practices employed not only in the various parts of the world but also in the many fields of international trade. In collecting, analyzing and collating these data it will be necessary to make full use of the experience of all organizations and bodies in the world that have been concerned in this field. An important and immediate task for UNCITRAL is the determination and adoption of

methods by which all the necessary activities can be organized and co-ordinated."<sup>28</sup>

#### B. Selection of existing formulations or preparation of new ones

24. In the light of the foregoing observations the Commission might wish to consider:

(a) Promoting the wider use of ECE general conditions. This could be done in the following ways:

- (i) Promoting the wider use of all ECE general conditions in their present form;
- (ii) Selecting from the ECE general conditions those which have proved to be best suited to international trade, and promoting their wider use;<sup>29</sup>
- (iii) Revising the ECE general conditions and promoting the use of the revised texts;<sup>30</sup>

(b) Promoting general conditions and standard contracts other than those drawn up by the ECE. This could be done in the following ways:

- (i) Selecting certain general conditions and standard contracts which are widely used in international trade, and promoting the use of such formulations in their present form;
- (ii) Revising the formulations mentioned in (b) (i) above in order to make them more widely acceptable, and promoting the use of the revised texts:

(c) Preparing new general conditions and standard contracts. This could be done in the following ways:

- (i) Drawing up of "additional standard contracts and conditions for separate commodities, other than those which are now available",<sup>31</sup>
- (ii) Preparing, for world-wide use, "standard contracts for the principal categories of commodities, such as Machinery and Equipment, Durable Consumer Goods, Agricultural Products, and the like, coupled, where necessary, with annexes to meet the special problems of particular commodities";<sup>32</sup>

<sup>25</sup> Under the Standard Contract Law of 1964 of Israel, restrictive terms of standard contracts should be approved by a Board appointed for the purposes of the Restrictive Trade Practices Law. Section 15 of the Law enumerates the onerous clauses which are deemed to be restrictive terms. Such clauses may be refused approval by the Board, or the restrictive term of any part of it may be regarded as void by a court. See Ole Lando: Standard Contracts. A proposal and a perspective. Appendix: Israeli Standard Contracts Law 1964, *Scandinavian Studies in Law*, (Almqvist and Wiksell, Stockholm), pp. 129 ff.

<sup>26</sup> See annex II, p. 27. For example, in the opinion of the Timber Trade Association of the United Kingdom, the ECE Standard Contracts for the Sale of Sawn Softwood and Sawn Hardwood are not well suited for practical use in the trade and the Association's own standard contracts are therefore preferred in the United Kingdom.

<sup>27</sup> In the opinion of E. A. Farnsworth, "what is really needed is a *common core* of contract provisions . . . From this base of 'core' regional variations could be made as needed." (*Unification of the Law Governing International Sales of Goods, Summary of the Proceedings, op. cit.*, p. 396.) C. M. Schmitt-hoff suggested that "the standard form contracts be analyzed to find what is common to all of them. It is only possible to have a core if there is sufficient material to work from — if there are enough recurring problems. Although some problems are treated differently, there are already some regularly recurring problems emerging from the present contract." (*Ibid.*, p. 398.)

<sup>28</sup> A/CN.9/11/Add.1, p. 38.

<sup>29</sup> There are indications that some of the ECE general conditions might also be accepted outside of Europe, e.g. in the United States: "It does seem likely that the need for and willingness to use ECE forms will increase in the United States. The growing economic strength of the European states will decrease the willingness of European firms to accept American terms in international dealings." See Richard J. Cummins: The General Conditions and Trading Form Contract of the United Nations Economic Commission for Europe, *New York University Law Review*, 1963, vol. XXXVIII, p. 568.

<sup>30</sup> According to the comments submitted by the ECE secretariat, the experts of some European countries feel that the ECE formulations "might be re-examined by interested parties in non-European countries, with a view to their possible adaptation to conditions in those countries," whereas the experts from other European countries "emphasize the desirability of establishing a universally applicable document." See annex II, para. 49, p. 10.

<sup>31</sup> S. Michida, *op. cit.*, p. 263.

<sup>32</sup> J. Honnold, A comparison of national unifications of the law of sales and avenues toward their harmonization: prospects and problems, in *Unification of the Law Governing International Sales of Goods, op. cit.*, p. 32.

- (iii) Formulating general conditions of a general character for all categories of commodities coupled, where necessary, with annexes to meet special problems of the principal categories of commodities or of particular commodities.

C. *Methods that could be used in carrying out the work*

25. Should the Commission wish to promote on a world-wide basis the use of general conditions drawn up by the ECE or of any other formulation already used in international trade, one approach that might be considered could be the establishment of a joint committee of the four United Nations Regional Economic Commissions to make the necessary selection.<sup>33</sup> It would seem desirable that such a committee should include also representatives of business associations of both sellers and buyers of the four regions, who would be best qualified to consider which of the existing formulations meet the requirements of all interested parties. It should also be taken into consideration that existing general conditions and standard contracts are used for the sale of a great variety of goods and that this might require that separate committees be established for each principal category of commodities.

26. Should the Commission wish to promote the wider use of certain general conditions and standard contracts on a regional basis a selection of the most suitable formulations might be made by separate committees established within the framework of each regional Economic Commission. This method would possi-

<sup>33</sup> A suggestion along these lines was made by C. M. Schmitt-hoff. See *op. cit. supra* note 5, p. 570.

bly result in the selection of different formulations for the different regions, depending on the particular requirements of the regions concerned.

27. If the Commission considers that it would be desirable to enlist the participation of the United Nations Regional Economic Commissions in this work it would be necessary, of course, to undertake appropriate consultations with the Regional Economic Commissions on the subject. In considering the most suitable organizational arrangements for that purpose it would seem desirable to take also into account the possibility of utilizing such existing machinery or facilities as may be available within the Regional Economic Commissions.

28. The selection of general conditions of sale and standard contracts might also be carried out by a working group of members of the Commission, or, subject to the approval of the financial implications, by retaining experts, if necessary. The same method might be used for drawing up new formulations.

29. Whatever method or procedure may be selected by the Commission, a certain amount of preparatory work would have to be performed in collecting and making a preliminary analysis of existing general conditions and standard contracts.

30. It does not seem necessary, at this stage, to discuss the possible ways and means by which the wider use of formulations selected by the Commission might be promoted. It may be noted, however, that certain suggestions in this respect have been made by the secretariat of the ECE in its reply to the Secretary-General's request for comments on this topic.<sup>34</sup>

<sup>34</sup> See reply of the ECE, para. 46, annex II.

#### ANNEX I

Organs and organizations requested by the Secretary-General to submit comments and suggestions on item "General Conditions of Sale and Standard Contracts"

[Annex not reproduced]

#### ANNEX II

Replies of organs and organizations

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## United Nations organs and specialized agencies

**Economic Commission for Europe**

## EXTENSION OF THE USE OF THE GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS DRAWN UP UNDER THE AUSPICES OF THE ECONOMIC COMMISSION FOR EUROPE

## I. Introduction - Procedure

1. Having been requested by the secretariat of the United Nations Commission on International Trade Law to submit comments and suggestions on the two points raised in paragraphs 19 and 21 of the document reproduced in paragraph 48 of the Commission's report on the work of its first session (A/7216), namely:

- (a) "The possibility of promoting the wider use of the existing general conditions of sale and standard contracts;
- (b) Factors which are impeding a wider use and acceptance of general conditions of sale, standard contracts, . . .", the ECE secretariat addressed a preliminary inquiry to the experts of the national industrial federations which took part in the preparation, under ECE auspices, of the General Conditions of Sale in the Engineering Industry<sup>1</sup> in order to ascertain the views of the parties concerned on these points.

2. The following questionnaire was sent to each of the experts in this connexion:

(a) To what extent do the bodies you represent use the General Conditions of Sale for Plant and Machinery (No. 188 *et seq.*, No. 574 *et seq.* and No. 730) outside the ECE region? Is the use of these documents outside the ECE region tending to increase?

(b) In your opinion, would it be useful to take special measures to promote the application of these General Conditions to regions other than that of ECE? If so, what measures do you suggest?

(c) Do you consider that changes are needed in the text in order to make the General Conditions of Sale applicable to regions other than that of ECE? If so, what clauses are, in your opinion, particularly likely to require modification?

3. Replies to this questionnaire were submitted by the representatives of industrial associations using the General Conditions of Sale in Belgium, the Federal Republic of Germany, France, Hungary, Italy, Sweden, the United Kingdom and Yugoslavia. Extracts from these replies are reproduced below so that conclusions can be drawn from them.

## II. Use of the ECE General Conditions of Sale for Engineering Products outside Europe

[Not reproduced here. The gist of the replies from eight countries is given in the conclusions under part V of this annex.]

## III. Measures which might facilitate a wider use of the General Conditions of Sale outside Europe

[Not reproduced here. The gist of the replies from six countries is given in the conclusion under part V of this annex.]

<sup>1</sup> Nos. 188 and 574: General Conditions for the Supply of Plant and Machinery for Export.

Nos. 188A and 574A: General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.

Nos. 188B and 574B: Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.

Nos. 188D and 574D: General Conditions for the Erection of Plant and Machinery Abroad.

No. 730: General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles.

## IV. Possible modification of certain clauses

[Not reproduced here. The gist of the replies from eight countries is given in the conclusion under part V of this annex.]

## V. Conclusions

41. It appears possible to draw the following conclusions from the opinions of the various experts which reflect fairly well the general point of view of ECE:

## 1. Observations of fact

42. The ECE General Conditions of Sale in the Engineering Industry are sometimes used in international contracts between European exporters and importers in Latin America, Africa, the Near East and Asia, on the initiative of the European vendors.

43. They are only beginning to be known, however, in countries outside Europe.

44. In particular, the Governments and importers of these countries do not use the ECE Conditions in their tenders.

## 2. Recommendations as to procedure

45. The experts all recognize the need to promote wider use of the ECE General Conditions of Sale outside Europe.

46. In order to achieve this, they all recommend that measures be taken to inform potentially interested parties. In this connexion, the following action was proposed:

(a) Promotion of the ECE Conditions of Sale among firms making tenders;

(b) (i) A campaign to publicize them among Governments and business circles in non-European countries;

(ii) Recourse, for this purpose, to the good offices of the various regional economic commissions of the United Nations;

(iii) A recommendation and dissemination of the Conditions of Sale by UNCITRAL;

(iv) Recourse also to the International Chamber of Commerce and its national committees;

(c) Publication by ECE of an information pamphlet on the General Conditions of Sale;

(d) Convening of an international meeting for purposes of information and discussion.

## 3. Substantive recommendations

47. *Desirability of arranging for a revision of the text.* Whereas the French, Italian and Swedish experts consider that a revision of the present texts is unnecessary and might present some danger, the Belgian expert considers that these documents have so far presented no difficulty, but reserves his position regarding the future; the United Kingdom expert sees no need for any major changes if the texts are to be used in countries whose legal system is based on one of the European systems, but thinks that changes would be necessary if the texts were to be applied in countries with an entirely different system of law; the German expert expresses a similar view. The Hungarian expert and the two Yugoslav experts, while not necessarily supporting a revision of the texts, favoured at least giving all Governments an opportunity to study them and propose any necessary amendments — even if only for psychological reasons, so that these documents will not appear as texts imposed on them by ECE exporters, but rather as instruments in whose preparation they took part and which take into account in a balanced manner the interests of both vendors and purchasers.

48. *Danger to be avoided.* All the experts draw attention to the danger of having several texts on the same subject. It should not be impossible, however, to envisage the possibility of some amendments being made to the original text, to be valid for specific regions or groups of countries.

49. *Requirements for a re-examination of the present texts.* Among the experts who feel that the General Conditions of Sale

might be re-examined by interested parties in non-European countries, with a view to their possible adaptation to conditions in those countries, the experts from Belgium and the Federal Republic of Germany emphasize the desirability of establishing a universally applicable document; the Belgian expert draws attention to the difficulty of that solution, which would probably require considerable time; in any event, he does not think that ECE should take the initiative since it lacks knowledge of the legal problems arising in countries outside Europe; he considers therefore that the other countries should first study the General Conditions of Sale and propose to ECE changes in certain provisions, if necessary; the Yugoslav expert also believes that the establishment of several texts on the same subject should be avoided, but considers that ECE should take the initiative in calling for talks.

#### 4. General conclusion

50. It would seem that a compromise solution might be supported by all the experts. First of all, a campaign should be organized to publicize among interested circles in non-European countries the texts drawn up by ECE.

51. This campaign might have several of the features mentioned above.

52. It should be desirable that the other regional economic commissions of the United Nations publicize the General Conditions of Sale of the Economic Commission for Europe and recommend their use to interested Governments and industrialists of their region.

53. In case of difficulties or reservations made by the possible interested parties on these texts, the Economic Commission for Europe should be informed so that problems might be jointly considered by experts from both regions.

54. It should be understood that this study, at the world level, of the existing texts should not necessarily lead to any major changes, since the ECE Conditions of Sale appear to have been found satisfactory in those cases where they are already being used outside Europe.

### *Food and Agriculture Organization of the United Nations*

We have endeavoured to assemble some material that we felt might be of assistance to UNCITRAL at its second session, with particular reference to texts or sources of instruments used for agricultural products in international trade. While the World Food Programme does, to a limited extent, purchase foodstuffs where not enough of a given commodity has been pledged by contributing Governments, FAO as an organization does not engage in any commercial transactions involving agricultural commodities and therefore has not developed any standard contracts covering the purchase or sale of such commodities. It may be noted that the World Food Programme has no standard contracts of its own either but uses, as a rule, the contract forms developed by the trade associations dealing with particular commodities.

In selecting the sources which might be of interest to UNCITRAL, we have relied almost exclusively on the standard contracts and general conditions elaborated by trade associations that have not been listed among the non-governmental organizations in annex I to document A/CN.9/4 as having been invited to submit comments on the work programme of UNCITRAL, and which may therefore be of some assistance in the further development of standard instruments under the auspices of UNCITRAL.

#### 1. London Corn Trade Association Ltd.

The above Association has published a collection of contract forms entitled "Forms of Contracts in Force—1963", which

contains some forty standard forms. Most of these forms show only minor variations depending on the types and categories of grain, and their origin, destination and method and form of shipping (cargoes, parcels). The aforementioned collection also contains standard rules regarding mainly the weight of various types of grain, as well as forms for grain futures.

The forms are kept up-to-date by means of separate leaflets issued by the Association from time to time.

The Standard Contracts contain provision concerning, *inter alia*, the following subject matters: quality, quantity and weight, sampling, ship's classification, ports of shipment, destination, contract price, freight, payment, policies and certificates, discharge, notice of appropriation and provisional invoice, proof of shipment, and default. In addition, most contracts contain strike and war risk, and war deviation clauses, and all contracts provide for arbitration. The arbitration rules of the Corn Trade Association are declared applicable to each contract but are not included *in extenso* in the Volume of Contract Forms.

#### 2. The Incorporated Oil Seed Association (London)

The above Association has published a similar collection of Contract Forms to be used for transactions in various types of oil seed (linseed, rapeseed, gingellyseed, poppyseed, cottonseed, groundnuts, soyabeans, etc.). The collection contains approximately sixty different Contract Forms for the various types of seed, the variations as between individual clauses depending also on such criteria as origin, destination, and shipping terms (i.e. "ex ship" or "C.F and I Terms").

The Forms are kept up-to-date by means of separate leaflets issued by the Association from time to time.

The Standard Contracts contain provisions concerning, *inter alia*, the following subject matters: warranty, declaration of shipment, payment, strikes, war risks and deviation, discharge, sampling and analyses, quality and condition, rules of admixture, default, cancellation and insolvency. All the contracts contain arbitration clauses and the Arbitration Rules are printed as an Annex to each Contract Form included in the aforementioned Volume. The Oil Seed Association also supplies simplified Forms of Contract and "Appropriation" containing specific references to the full Standard Contract Form relating to the goods to be covered by the transaction.

#### 3. The Cocoa Association of London Ltd.

A collection of ten Standard Contracts has been issued by the above Association in a revised edition in September 1966. The Standard Contracts of the Cocoa Association likewise show certain variations based on origin and destination of the commodities, as well as delivery terms (c.i.f., f.o.b., in/ex store, arrival and/or delivery options).

Certain of the typical clauses enumerated above with respect to corn trade and oil seed transactions also appear in the Cocoa Association's standard contracts but the latter appear to be somewhat less detailed and the variations between the individual contract forms appear to be more extensive. All contract forms, even the very short form intended for "spot contracts", contain a clause providing for the settlement of disputes by arbitration in accordance with the Rules, Regulations and Bye-Laws of the Cocoa Association. The text of the aforementioned Rules, Regulations and Bye-Laws are, however, not included in the collection of contract forms.

#### 4. London Cattle Food Trade Association (Inc.)

The series of Contract Forms in use for trading in cattle food, which was published in 1962 by the above Association, includes twelve Standard Contract Forms covering various types of feeding cakes and meals (groundnut, cottonseed, fishmeal, meat and bone meal, etc.), as well as three general contracts in which

the provisions regarding commodities and certain related clauses (quality, outturn, sampling, etc.) are left blank.

All contracts provide for arbitration and the Rules relating to arbitration are printed on the back of most contract forms, exception being made for the so-called short forms.

The collection is kept up-to-date by way of leaflets containing any amendments to the contract forms that the Association decides on. With the contract forms, the Association has also

put out rules for the sampling of meals, extractions, expellers and slab cakes at the port of discharge.

The four collections described above should be regarded as examples; undoubtedly, a number of other sets of standard contracts have been elaborated, covering a wide range of agricultural commodities including industrial crops (e.g. tobacco, cotton, fibres) as well as timber, fishery and animal products (e.g. wool, hides, meat, bones).

### ANNEX III

#### General Conditions of Sale and Standard Forms of Contract sponsored by the ECE

##### 1. CONTRACTS FOR THE SALE OF CEREALS

<i>Nos.</i>	
1 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Weight and condition – final at shipment.
1 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Weight and condition – final at shipment.
2 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Conditions final at shipment; Full outturn.
2 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Condition final at shipment; Full outturn.
3 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final.
3 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final.
4 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge).
4 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Full outturn.
5 A	F.O.B. (maritime); Non-reciprocal; Cargoes and parcels;
5 B	F.O.B. (maritime); Reciprocal; Cargoes and parcels.
6 A	Consignment by rail in complete wagon loads; Non-reciprocal.
6 B	Consignment by rail in complete wagon loads; Reciprocal.
7 A	C.I.F. (Inland Waterway); Non-reciprocal.
7 B	C.I.F. (Inland Waterway); Reciprocal.
8 A	F.O.B. (Inland Waterway); Non-reciprocal.
8 B	F.O.B. (Inland Waterway); Reciprocal.
9	Regulations for the Standardization of Methods of Sampling.

##### 2. PLANT AND MACHINERY: DURABLE CONSUMER GOODS

188	General Conditions for the Supply of Plant and Machinery for Export.
188 A	General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.
188 B	Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.
188 D	Additional Clauses for Complete Erection of Engineering Plant and Machinery Abroad.
574	General Conditions for the Supply of Plant and Machinery for Export.
574 A	General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.
574 B	Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.
574 D	Additional Clauses for Complete Erection of Plant and Machinery Abroad.
730	General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles.

## 3. MISCELLANEOUS

312	General Conditions for the International Sale of Citrus Fruit.
410	General Conditions for Export and Import of Sawm Softwood
420	General Conditions for the Export and Import of Hardwood. Logs from the Temperate Zone.
Sales 16	General Conditions for the Export and Import of Solid Fuels.
Trans/263	General Conditions for International Furniture Removal.

## 2. Implementation of the Commission's decisions relating to general conditions of sale, standard contracts and incoterms: report of the Secretary-General\*

### I. DECISION OF THE COMMISSION AT ITS SECOND SESSION

1. At its second session the United Nations Commission on International Trade Law made the following decision concerning "general conditions of sale and standard contracts, Incoterms and other trade terms":<sup>1</sup>

*"The Commission decides:*

*"With regard to general conditions of sale and standard contracts:*

"1. (a) To request the Secretary-General to transmit the text of the ECE general conditions relating to plant, machinery, engineering goods and lumber to the Executive Secretaries of the Economic Commission for Africa (ECA), the Economic Commission for Asia and the Far East (ECAFE), and the Economic Commission for Latin America (ECLA), as well as to other regional organizations active in this field;

"(b) To request the Secretary-General to make the aforementioned general conditions available in adequate number of copies and in the appropriate languages; the general conditions should be accompanied by an explanatory note describing, *inter alia*, the purpose of the ECE general conditions, and the practical advantages of the use of general conditions in international commercial transactions;

"(c) To request the regional economic commissions, on receiving the above-mentioned ECE general conditions, to consult the Governments of the respective regions and/or interested trade circles for the purpose of obtaining their views and comments on: (i) the desirability of extending the use of the ECE general conditions to the regions concerned; (ii) whether there are gaps or shortcomings in the ECE general conditions from the point of view of the trade interests of the regions concerned and whether, in particular, it would be desirable to formulate other general conditions for products of special interest to those regions; (iii) whether it would be desirable to convene one or more committees or study groups, on a world-wide or more limited scale, whereby with

the participation (if appropriate) of an expert appointed by the Secretary-General, matters raised at a regional level would be discussed and clarified;

"(d) To request the other organizations to which the ECE general conditions are transmitted to express their views on points (i), (ii) and (iii) of subparagraph (c) above;

"(e) The views and comments sought from the regional economic commissions and other organizations should be transmitted to the Secretary-General, if possible, by 31 October 1969;

"(f) To request the Secretary-General to submit, together with the relevant ECE general conditions, a report to the third session of the Commission which should contain (if appropriate) an analysis of the views and comments received from the regional economic commissions and other organizations concerned;

"(g) To give, at an appropriate time, consideration to the feasibility of developing general conditions embracing a wider scope of commodities than the existing specific formulations. Consideration of the feasibility of this work should be taken up after there has been an opportunity to study the views and comments requested under subparagraphs (c) and (d) above.

"(h) To welcome the generous offer made by the representative of Japan to contribute to the work of the Commission by preparing for its use a comparative study of the ECE general conditions;

*"With regard to General Conditions of Delivery (GCD) of 1968 prepared by the Council of Mutual Economic Assistance (CMEA):*

"2. (a) To request the Secretary-General to invite the CMEA to furnish an adequate number of copies of the General Conditions of Delivery (GCD) of 1968 in English, accompanied by an explanatory note;

"(b) To request the Secretary-General to submit in the four languages of the Commission, as appropriate, the above-mentioned General Conditions of Delivery and explanatory note to members of the Commission and to the Economic Commission for Africa, the Economic Commission for Asia and the

<sup>1</sup> Report of the Commission on the work of its second session (A/7618), para. 60.