

and/or Government as may be necessary for the timely execution of the Contract inclusive of import licences, visas for CONTRACTOR's personnel, entry permits, work permits, etc."

105. Under clause 5.1 of both ECE 188A/574A, the contractor may request the purchaser for the necessary information on the local laws and regulations that may be applicable to the works.

#### D. Subsequent changes in the laws

106. Even where the parties have taken into account the implications of existing law, their expectations may not be realized because of subsequent changes in the applicable laws. Subsequent changes in the laws may in fact make the performance of the contract unusually burdensome. (For the effects of this situation on the parties' obligations, see part two, XIV, *Renegotiation*.)\*

107. The FIDIC Conditions provide for a revision of the contract price to reflect changes in the law which may affect the performance of the contract. Clause 70.(2) of FIDIC-CEC provides:

"(2) If, after the date thirty days prior to the latest date for submission of tenders for the Works there occur in the country in which the Works are being or are to be executed changes to any National or State Statute, Ordinance, Decree or other Law or any regulation or bye-law of any local or other duly constituted authority, or the introduction of any such State Statute, Ordinance, Decree, Law, regulation or bye-law, which causes additional or reduced cost to the Contractor . . . in the execution of the Works, such additional or reduced cost shall be certified by the Engineer and shall be paid by or credited to the Employer and the Contract Price adjusted accordingly."

108. All UNIDO model contracts have also provided for subsequent changes in the laws which may affect the performance of the work. Article 36.2 of UNIDO-CRC provides:

"... In the event that any code, law or regulations are enacted after the Effective Date of the Contract . . . to have adverse effect on the CONTRACTOR's obligations, scope of work, prices and/or time schedule under this Contract, the PURCHASER shall either:

"36.2.1 Obtain appropriate exemption(s) from the relevant authorities on the CONTRACTOR's behalf, or

"36.2.2 Negotiate with the CONTRACTOR for commensurate change(s) in the scope of the work to be

performed under the Contract, together with such changes in price as properly reflect the actual increased costs that are anticipated . . ."

109. Under the counter-proposal the reference point of subsequent changes in the law in force is the date of issue of the invitation to bid.

110. Under the ECE General Conditions, there is also provision for a commensurate adjustment of the contract price. Clause 5.2 of both ECE 188A/574A provides:

"If, by reason of any change in such laws and regulations occurring after the date of the tender, the cost of erection is increased or reduced, the amount of such increase or reduction shall be added to or deducted from the price, as the case may be."

### Part three

#### [A/CN.9/WG.V/WP.4/Add.8\*]

#### LIST OF QUESTIONS FOR POSSIBLE CONSIDERATION BY THE WORKING GROUP

##### A. Introduction

1. General questions concerning the future work of the Working Group have already been described in part one. This part of the study, which identifies specific questions, is not intended to be exhaustive. The questions have to be considered in the context of each of the specific topics under study.

2. It may, however, be emphasized that general questions regarding the methodology for any future work (see part one, paragraphs 39-46) would have to be kept in mind throughout because an adequate formula may be found only after consideration of the specific questions related to each topic.

3. In addition it would be important to point out that the following questions would also be relevant to the entirety of specific questions:

(a) Bearing in mind the various types of contract for the supply and construction of large industrial works (see part one, paragraphs 22-26), can a common approach be adopted for each topic under consideration irrespective of the type of contract, or should different approaches be adopted? Or is there another approach—that a common approach be taken to certain topics, while others have to be tailored to certain types of contract?

\* A/CN.9/WG.V/WP.4/Add.5 (reproduced above).

\* 12 May 1981.

(b) Bearing in mind that there are different types of industrial plant (see part one, paragraph 27), can a common approach be adopted, irrespective of the type of plant involved?

## B. *Specific questions*

### I. *Drawings and descriptive documents*

4. What types of drawings and/or documents should the contractor provide?

5. What should be the legal consequences of failure to provide the drawings and/or documents?

6. Would it be advisable to allow the contractor and/or the purchaser to modify or vary the drawings and/or descriptive documents after the conclusion of the contract?

7. What should be the legal effects of subsequent amendments to drawings and descriptive documents?

8. Should the question of ownership concerning drawings and descriptive documents be dealt with and, if so, which party should be the owner of such documents?

### II. *Supply*

9. Should there be a distinction between the legal position of the contractor and that of the seller in connexion with supply?

10. If the previous question is answered in the affirmative, is the contractor responsible for defects of equipment in individual shipment or for supply of the plant as a whole only?

11. What should be the responsibility of the contractor if he engages a third person to supply the whole or a part of the plant or equipment?

12. Should a provision deal with costs of transportation?

13. If the previous question is answered in the affirmative, what transport is to be arranged by the contractor and what transport costs are to be borne by him?

14. Should the contractor be obliged to supply equipment and/or materials not mentioned in the contract which are, however, necessary for completion of the work, including auxiliary materials and equipment?

15. Should there be a provision in respect of notification of lack of conformity in connexion with supply of plant and legal consequences of failure to notify defects in time?

16. In case of any defects of the materials or the plant supplied by the contractor, is the purchaser to have any remedy in this respect before the date stipulated for

the completion of the work and, if so, what kind of remedies?

17. Should the contractor be responsible for supplies of materials and parts of plant before the date agreed upon for the completion of work and, if so, what should be the legal consequences of failure to supply them?

### III. *Erection*

18. Should the contractor be responsible for the erection of individual parts of the plant or only for completion of the work as a whole within an agreed period of time?

19. If the contractor fails to erect the plant in the agreed time is the purchaser entitled to engage another contractor to do so?

20. What should be the responsibility of the contractor if the personnel of the purchaser or other persons engaged by him participate in the erection of the plant?

21. What should be the extent of the responsibility of the contractor if his undertaking is only in respect of the supervision of the erection of the plant?

22. Should the contractor be obliged to supply all materials and equipment needed for the purpose of erection?

23. Who bears the loss of or damage to materials and equipment mentioned in the previous question?

24. Should the question of co-operation and/or co-ordination between the contractor and the purchaser be regulated and, if so, in what way?

### IV. *Passing of risk*

25. Would it be advisable to determine the legal effects of the passing of risk?

26. If the parties do not agree otherwise, should risk pass at the time of the transfer of ownership to plant or equipment?

27. If the previous question is answered in the negative, would it be preferable to stipulate passing of risk in connexion with supply of individual parts (on "ex works", FOB, CIF, or other bases) or should passing of risk be provided for the works as a whole at a later stage (e.g. completion of the works, take-over or acceptance)?

28. In case the risk is to pass at a later stage (after delivery of individual parts of plant) should certain kinds of risks (e.g. war) pass at an earlier stage?

29. If the plant or equipment or a part of it is lost, destroyed, damaged or deteriorated after the passing of risk, should the contractor, nevertheless, be obliged to cure the defects at the costs of the purchaser?

30. Should there be a provision on risk in respect of materials and equipment used only for construction and not for permanent incorporation into the plant?

31. Should the defects of the plant or of parts of the plant have an effect on the passing of risk and, if so, in what way?

32. Who should bear the risk of transport of defective parts returned to the contractor and of the repaired parts or parts supplied in replacement of the defective parts?

33. Would it be advisable to have a provision on insurance against risk and, if so, to what extent?

34. Should delay in taking delivery have effect on passing of risk?

#### V. *Transfer of property*

35. Is the purchaser to acquire title to the plant:

- (a) Upon its delivery in accordance with the contract;
- (b) Upon delivery to the erection site;
- (c) Upon completion of the works;
- (d) Upon take-over or acceptance;
- (e) Upon payment of the price;
- (f) At some other time?

36. Should an agreement on transfer of property be recognized only if it is in accordance with the law in force in the country where the plant is to be erected?

37. Should the purchaser have a right of detention of the contractor's assets to enforce his rights, if any, in case of breach of contract?

#### VI. *Transfer of technology*

38. Should the contractor be liable to provide the purchaser with know-how relating to the plant to be delivered?

39. If the previous question is to be answered in the affirmative should the obligation of the contractor cover know-how agreed in the contract or the latest know-how available to the contractor at the time of the conclusion of the contract, or at the time when the purchaser is provided with documents relating to know-how?

40. Would the contractor be obliged to supply only technology which is available to him or should the purchaser be provided with technology available to other persons (licensors) as well?

41. Would it be advisable to deal with terms of payment concerning the transfer of technology?

42. Should a provision deal with transfer of technology in connexion with technological developments and improvements in operative techniques after the completion (or take-over or acceptance) of the works?

43. If the previous question is to be answered in the affirmative, should the contractor be obliged to make technological developments and improvements available

to the purchaser free of charge or is the purchaser to pay reasonable costs?

44. Should the purchaser be obliged to supply the contractor with technological developments and improvements in operative technique which the purchaser may discover in connexion with using the work?

45. If so, should the conditions of such transfer of technology be the same as those under which the contractor is obliged to make available the mentioned technological developments and improvements to the purchaser?

46. Should the right of the purchaser to use the transferred technology be limited only to using it in connexion with supplied plant?

47. Would it be useful to have a provision dealing with confidentiality in connexion with transferred technology?

48. In case of such a provision, should there be any exceptions from the principle that the purchaser (contractor) is obliged to treat as confidential the information given to him in connexion with transfer of technology?

49. Should there be a provision on responsibility of the contractor (purchaser) towards the purchaser (contractor) if a third party claims rights based on industrial or other intellectual property in the technology?

#### VII. *Quality*

50. Should there be a provision that all material and workmanship are to conform to the contract or is it advisable to have a specific provision on quality of the plant?

51. In case of such a provision would it be useful to provide for performance standards in a general way (e.g. meeting the full requirements of normal operation, capacity, quality of products and consumption of raw-materials) or should it be preferable to refer to standards and regulations regarding the quality standards of a particular country (e.g. purchaser's country, country in which plant is to be erected)?

52. Is the contractor obliged to conform to a superior standard if required by law of the country in which plant is to be erected and, if so, under what conditions?

53. Should the contractor be obliged to supply other quality if it becomes clear that the quality of plant specified in the contract will not produce a plant capable of performing the intended purpose?

54. If the previous question is answered in the affirmative, who should bear the higher costs caused by a variation of the works?

55. In connexion with the answer to the previous question, should a modification of the works be necessary due to exonerating circumstances?

### VIII. *Inspection and tests*

56. Is the purchaser entitled to examine the plant or equipment and/or materials before their dispatch?

57. If the previous question is answered in the affirmative, what should be the extent of examination? Should provision be made for the place and date of examination?

58. What should the procedure be in respect of examination effected before dispatch of the plant or the equipment?

59. What should be the legal effects of such examination?

60. Who should bear costs concerning examination before dispatch of plant or equipment?

61. What should be the rights and the duties of parties in case of defects in the materials, plant or equipment before their dispatch?

62. Should performance tests be dealt with?

63. If the previous question is answered in the affirmative what provisions should be made regarding:

(a) Pre-conditions for performance tests;

(b) Time of such tests;

(c) Rights and duties of parties in connexion with preparation and execution of such tests;

(d) Procedure to be followed in this respect (including protocol of performance test).

64. Which party is to bear the costs concerning performance tests?

65. What should be the legal effects of successful performance tests?

66. What should be the legal effects if performance tests are not carried out in time?

67. What should be the legal effects if performance tests are not successful?

### IX. *Completion*

68. Is a definition of completion of work needed?

69. If the previous question is answered in the affirmative, what should be the main elements of such a definition?

70. When should the completion period begin to run in case of doubt?

71. Would it be advisable to provide for an estimated period and, if so, how is a fixed period to be determined if parties fail to agree upon it?

72. What should be the legal consequences if no such time is agreed upon in the contract?

73. What should be the legal consequences of completion?

74. Is it advisable to have a provision on prolongation of completion time and if so, under what conditions should such a prolongation be permitted?

### X. *Take-over and acceptance*

75. Should a distinction be made between "take-over" and "acceptance"?

76. What should be the legal consequences of take-over and/or acceptance?

77. Should the purchaser be entitled or obliged to take-over only a part of the works?

78. What should be the legal consequences of such a partial take-over and/or acceptance?

79. What should be the legal consequences of refusal to take-over and/or accept the works?

80. What should be the legal consequences of the purchaser's failure to take-over and/or to accept the works?

### XI. *Delays and remedies*

81. Should delay cover cases where the contractor has not supplied the plant (equipment) and/or has not constructed the works at all or should delay cover partial failure of performance as well?

82. Should delay be considered separately for each part of the installation or is it preferable to take into consideration, in this connexion, only the date of completion of the works as a whole?

83. Should the purchaser have a right to claim performance in case of delay in supply and/or in construction of the works?

84. If the previous question is answered in the affirmative, should such a right be limited as in article 28 of the Sales Convention?

85. As regards questions relating to penalty or liquidated damages, see the Report of the Working Group on International Contract Practices on the work of its second session (A/CN.9/197)\* and the background documents mentioned in paragraph 10 of that Report.

### XII. *Damages and limitation of liability*

86. Are damages to be limited only to direct damage?

87. Should damages include loss of profit?

88. Should the loss which could not reasonably be foreseen by the debtor be excluded from damages?

89. Should any other limitation of damages apply and, if so, to what extent?

90. Should personal injury and/or damage to property not being ordinarily the subject matter of the

\* Reproduced in this volume, part two, I, A.



contract be excluded from the scope of the application of a possible rule?

91. Should the rules on limitation of damages be of an exhaustive nature or should other limitations of damages be admitted on the basis of applicable law?

92. If damages are to be limited by an amount should this amount be stipulated (e.g. by a percentage of price) or is it to be left to the parties to agree upon?

93. Should limitation of damages apply generally or only in certain cases (e.g. termination of contract)?

94. Should the party who relies on a breach of contract be obliged to take measures to mitigate the loss?

95. Should the party in breach of contract claim a reduction in the damages if the party who relies on the breach fails to mitigate the loss?

96. Should there be a distinction between damages in respect of loss caused by delay in performance and loss caused by defective performance?

97. Should damages be excluded in respect of loss caused by defects of materials provided or by a design stipulated by the purchaser?

### XIII. Exoneration

98. Should a possible rule on exoneration be of an exhaustive nature or should other exonerating circumstances be admitted on the basis of applicable law?

99. Should a definition of exoneration be in accordance with the definition of "Exemptions" under article 79 of the Sales Convention or would a different definition be preferable?

100. If a different definition of exoneration is desirable, what elements of the definition of "Exemptions" in the Sales Convention are to be excluded and/or what elements, if any, are to be included?

101. Should exoneration be defined only generally or in terms of a list of exonerating events?

102. If a definition should spell out specific exonerating events, should it be exhaustive?

103. Should the definition cover obstacles of:

(a) A factual nature (e.g. earthquakes) which make performance impossible under all circumstances;

(b) A legal nature (i.e. performance is legally prohibited);

(c) An economic nature (i.e. performance is possible and allowed but at a higher cost, e.g. rising prices of raw materials)?

104. Should the exonerating events be notified?

105. If a notification is to be required, should there be any legal consequences in case of a failure to notify the exonerating event?

106. If so, what are to be legal consequences of such a failure (e.g. loss of right to rely on exonerating events or liability to damages)?

107. Should the legal consequences of exonerating circumstances be limited to the exclusion of damages (as under article 79 of the Sales Convention) or would it be desirable to make further provision for legal effects in connexion with the time for performance or the termination of contract?

108. In case of dealing with the legal effects in connexion with performance time should exonerating events entail an extension of the time for performance or suspension of obligation?

109. If the answer to the previous question is positive, should a time-limit be given for such an extension or suspension?

110. If the termination of contract is to be provided for in connexion with exonerating events, should the person entitled have a right to terminate the contract after a lapse of a certain period of time or should the parties be released from further performance *ipso iure*?

111. Should the right to terminate the contract be limited only to the creditor or should the debtor also be entitled to do so? If so, under what conditions?

112. Should an extension of time for the performance of the contract or the suspension of an obligation to perform or the termination of contract be limited to certain cases only?

113. Should other consequences not mentioned above be included in case of exonerating events?

### XIV. Renegotiation

114. Should a renegotiation clause be limited to exonerating circumstances only or should it cover other cases as well?

115. If so, in what circumstances should there be renegotiation?

116. Should a time-limit be set down for the commencement and the completion of the renegotiation?

117. What factors should be taken into consideration in renegotiation?

118. Should the scope of the provision on renegotiation be limited to certain obligations of the parties (e.g. price revision, extension of time for performance)?

119. Should there be a provision for legal consequences of failure to agree on an adaptation of the contract?

120. If the previous question is answered in the affirmative should either party have the right to terminate the contract or ask a court or an arbitrator to revise the contract?

121. Should the insertion of a hardship clause be encouraged?

122. If such a clause is useful, what changes in circumstances should be covered (e.g. fundamental change, circumstances beyond party's control, substantial economic hardship, etc.); is a period of time to be set down when the clause can be invoked by parties?

123. Should a court, an arbitrator or a third person (chosen by the parties) be entitled to readapt or terminate a contract in the event of hardship?

#### XV. *Guaranties*

124. Should there be a provision on guaranty of workmanship and materials?

125. In case of such a guaranty, is it advisable to limit it or to exclude it in certain cases (e.g. improper use of the plant by the purchaser, defects arising out of materials provided by the purchaser etc.)?

126. What should be the commencement and length of the period of guaranty for workmanship and materials?

127. Should there be a maximum period commencing at the date of delivery?

128. Should the period of guaranty for workmanship and materials be extended by a period during which the works cannot be used by reason of defects covered by the guaranty?

129. What should be the obligations of the contractor if defects appear? Should damages be excluded?

130. What should be the legal consequences if the contractor does not cure the defects in time?

131. Is the purchaser to be given the right to rectify minor defects at the cost of the contractor?

132. Is it advisable to have a provision on performance guaranty?

133. If the previous question is to be answered in the affirmative what should be the content of such guaranty and consequences of its breach?

#### XVI. *Rectification of defects*

134. Should there be different consequences in respect of defects found:

- (a) Before dispatch of the plant (equipment);
- (b) After arrival of the plant or of its parts to the place where the plant is to be erected;
- (c) During construction of the work;
- (d) At the time of completion of the work;
- (e) At the time of take-over or acceptance;
- (f) During the guaranty period;

(g) After lapse of the guaranty period?

135. Is the purchaser to be obliged to notify defects? If so, what is the procedure to be followed?

136. What should be the legal consequences of failure to notify defects by the purchaser (e.g. the right is lost or cannot be exercised)?

137. Should the contractor be obliged to cure the defects of the plant by:

- (a) Replacing the defective plant or parts of it or supplementing missing parts;
- (b) Repairing the defects;
- (c) Granting a price reduction or in another way?

138. Should the purchaser be entitled to choose a form of rectification of defects or should it be the contractor to determine in what way the defects are to be rectified?

139. Should the purchaser be entitled to suspend the work due to its defects and if so, under what circumstances?

140. Should a time-limit be determined for such a suspension?

#### XVII. *Termination*

141. Should the purchaser be entitled to terminate the contract under certain conditions in case of failure of the contractor to complete the works in accordance with the contract?

142. If the previous question is answered in the affirmative, would it be advisable to distinguish between cases where the failure is due to *force majeure* and cases where the contractor is responsible for the failure?

143. Should a distinction be made between cases where the failure of performance by the contractor lies in the fact that he did not supply the plant (equipment) or did not erect the plant and cases where the contractor supplied the plant (equipment) and erected it but with defects?

144. Would it be useful to distinguish between failure to perform in respect of a part of the plant and failure to perform as to the whole of the works?

145. If the contractor fails to perform his obligation to supply and construct the plant should the purchaser be obliged to fix an additional period of a reasonable time for performance in all cases before being entitled to terminate the contract or would it be advisable to grant him a right to terminate the contract under certain conditions (e.g. in case of a fundamental breach of contract) immediately after breach of contract?

146. If the purchaser has the right to declare the contract avoided even in case of a failure of performance regarding a part of the work, should he be entitled to

declare the contract avoided only in respect of the part not performed or the contract as a whole under certain conditions?

147. Would it be advisable to give the purchaser the right to terminate the contract under certain conditions even before the time when the works are to be completed (e.g. if the contractor intimates he will not supply and erect the plant)?

148. Should the right of the purchaser to terminate the contract be limited to certain cases (e.g. fundamental breach of contract)?

149. Should the contractor be entitled to terminate the contract under certain conditions in case of the purchaser's failure to perform his obligation?

150. If the previous question is answered in the affirmative, should such a right of the contractor be limited to:

- (a) Fundamental breach of contract;
- (b) Failure to take over the works;
- (c) Failure to make payment to the contractor in accordance with the contract?

151. If the contractor is entitled to declare the contract avoided, should the principles applicable in respect of right of the purchaser to terminate the contract apply *mutatis mutandis* to such a right of the contractor?

152. What procedure is to be followed as to declaring the contract avoided?

153. Should the contract be terminated in some cases *ipso iure* and if so, under what conditions?

154. Would it be advisable to deal with consequences of termination of the contract?

155. If the previous question is answered in the affirmative, should such consequences be dealt with generally (e.g. to release parties from their obligations to return what has been performed) or in detail?

156. Would it be preferable to maintain the principle that termination of the contract does not affect any contractual provision for the settlement of disputes or any other provision of the contract governing the right and obligations of the parties consequent upon termination of the contract?

157. Should avoidance of the contract exclude the right to claim damages or should it affect the extent to which damages may be claimed?

## XVIII. *Applicable law*

158. Should there be a provision concerning the applicable law?

159. If the previous question is answered in the affirmative and the applicable law is not chosen by the parties, should the applicable law be that:

- (a) Of the country in which plant is to be erected;
- (b) Of the country in which the contractor has his place of business (or his habitual residence);
- (c) Of the country in which the purchaser has his place of business (or his habitual residence);
- (d) Of the country where the contract was concluded;
- or
- (e) Of another country?

160. If the local administrative regulations of the country in which the plant is to be erected or in which the purchaser has his place of business (or his habitual residence), are applicable, should the purchaser be obliged to inform the contractor of such rules?

161. If the previous question is answered in the affirmative, what are to be the legal consequences if the purchaser fails to perform his obligation?

162. If the contractor is obliged to comply with the applicable local administrative regulations amended after conclusion of the contract, who is to bear the higher costs?

## 2. NOTE BY THE SECRETARIAT: CLAUSES RELATED TO INDUSTRIAL CO-OPERATION (A/CN.9/WG.V/WP.5)\*

1. The Commission, at its thirteenth session, agreed to accord priority to work related to contracts in the field of industrial development and requested the Secretary-General to carry out preparatory work in respect of contracts on the supply and construction of large industrial works and on industrial co-operation.<sup>1</sup>

2. The Secretariat was not in a position to deal with both subjects at the same time. All the resources available were concentrated on the study related to contracts for the supply and construction of large industrial works.<sup>2</sup>

3. This was, however, not the only reason for not complying with the request of the Commission. The main difficulty for the Secretariat was the fact that it has not a single contract on industrial co-operation in its

\* 7 May 1981. Referred to in Report, para. 75 (part one, A, above).

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth session, Supplement No. 17 (A/35/17)*, para. 143 (Yearbook . . . 1980, part one, II, A).

<sup>2</sup> A/CN.9/WG.V/WP.4.