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WEST-EUROPEAN APPROACHES ON THE ACQUISITION OF TECHNOLOGY THROUGH LICENSING 1/

by

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CONTENTS

I. WHAT IS LICENSING?

Licensing is an ambiguous term, but it usually contains the basic element of granting a right. In the export trade one talks of export and import licences, i.e. the official permit to take the goods in and out of a country. For investments one is used e.g. in India to talk about industrial licences; that is the right to make that particular investment as granted by the authorities. When visiting a British pub, you will find a sign over the door proving that your host is licensed to cater for your needs.

Generally, in West European countries, licensing in the sense in which we discuss it here, is looked upon essentially as a commercial activity between licensor and licensee. The private business angle therefore is the predominant element in West European licensing practices, and it is therefore proper that this paper should accept the same attitude.

For illustration, and in spite of the fact that standard contract forms are only useful as collections of typical clauses, a model of a Know-how contract established by ORGALIME (Organisme de Liaison des Industries Métalliques Européenes) is annexed to this paper.

Definition

For our purposes the following rough definition could be useful: A licence is an agreement whereby the licensor extends to the licensee a limited right to make, use and/or sell the licensed object, usually against consideration of a royalty. In the simplest legal terms then, a licence is the right to make use of e.g. a trademark or a patented method.

Somehow this definition lacks a vital element. From the licensor's point of view, licensing is an important, alternate marketing strategy. Where heavy transport costs or other factors make the physical move of goods difficult, or where import regulations or sheer market size make

export impracticable, it may be advisable to move the production to the market in question by means of licensing. In this sense licensing has several advantages. It does not call for heavy investments or heavy management resources, and it has been found an extremely important field of economic business cooperation. It has a multitude of aspects, and briefly one can go into some of the more important ones.

Size

Many casual observers often believe that licensing is restricted to big firms. This is not so. Size moreover is a relative term. According to a definition in "LES Nouvelles" firms above one billion US dollar yearly turnover were called big, others small. In the present context let us accept that a business below 10 million dollar yearly turnover could be called small, medium from that to 100 million dollar, and that we call a firm big when the yearly turnover is above 100 million dollar. Even in these terms one should not hesitate to say that many small firms could be highly successful licensors. In fact they often are.

Invention/ Innovation

An important distinction in licensing is between the licensing of inventions and the licensing of innovation. Invention licensing is often done by the inventors themselves, really the smallest kind of firm you could find. It is also, of course, done by research institutes, whereas there is a notable trend that industry is concentrating their licensing efforts (apart from sheer spin-offs) to innovation, that is to say where the invention has been used and developed into a practical, industrial experience with complete know-how regarding equipment, processing, distribution and the rest.

Patent/ Know-how

Another main distinction is between the licensing of industrial rights on the one hand and know-how licensing on the other. A licensing agreement would usually include a bit of both, but there is a trend that know-how licensing is gathering ground in the sense that know-how is becoming more and more important in licensing, although it seldom stands quite alone. One reason could be the high rate of change and development that we see in the modern world. Esperts, especially patent lawyers, seem to focus their

interest on the legal distinction between patents and other industrial rights as opposed to know-how. There is another side, however, that could be stressed, namely that industrial rights as such carry a static connotation, whereas know-how, on the other hand, points to something which is always changing. Patent licences tend therefore to be fairly rigid, and often by law extend only to the lifetime of the patent. Know-how licensing has a higher element of dynamics, and could therefore last for much longer periods. This is because a licensee will only be interested in renewing an agreement when he is getting something tangible, i.e. that the licensor is steadily developing the licensing object. In this sense one might say that an aspect of licensing is that the licensee is hiring the R & D function of the licensor in the particular area which is covered by the agreement.

R & D

High/low technology

This leads us to another notable distinction. Many people believe that licensing is something typical for high technology. This is not so, but there is a clear distinction between high technology and low technology licensing. This may be a direct consequence of the investment concerned. High technology licensing will often be patent licensing. It will nearly always contain a fairly high element of down payment as compensation for successful research and very often, as in the case of licensing of big gaz tankers from Norway, it will happen on a very limited market. There are not many shipyards that are in a position to accept a licence agreemet of this kind. Low technology licensing, on the other hand, often contains an important element of marketing. In the case of licensing of systems for laboratory and shop equipment, the amount of initial research is not big. On the other hand, it is of great interest to the licensing family that members can develop their designs and technology faster than their competitors and that, especially as an international group, they are in a better position to judge market trends and marketing approaches.

Product/ Process

It is also useful to distinguish between product licensing on the one hand and the licensing of secret processes, which is typical for the chemical industry, on the other.

Licensing/ Distribution

Another type of licensing contains an important element of distribution. This happens in the case of franchising where the licence object centres on methods and trademarks. Another example is a trademark licence to a distributor in a foreign market.

These examples will illustrate the amazing scope of licensing. Hopefully they also convey an idea of how licensing is developing. Here two main trends should be stressed:

First, the development of so-called licensing families where the licensor is creating a net of licensees in different markets and they all act as a family in developing the specific technology and know-how. This is typical for some of the licences mentioned above, e.g. the one concerning systems for laboratory and shop equipment. An important characteristic of licensing families is the creation of special committees to promote systematic development on the technical and marketing aspects.

Last, but not least, the trend of licensing in a bigger package should be mentioned. Licensing as a part of joint venture is a most important development. This can also be seen in the new cooperation agreements between East and West European firms built upon the technical, economic and industrial cooperation formulae invented some years ago.

To sum up, the basic idea of licensing is the legal granting of a right. To the licensor it appears as a marketing alternative - the essence of which is to move the production to the market in question into the hands of a licensee. Licensing is extremely

adaptable and appears in very many forms, but the main feature is usually that licensing essentially is a long-term cooperation between licensor and licensee.

II. LICENSING AS A MARKETING TOOL

Most licensors would agree that the essential factor in licensing is to find the right licensee, because essentially licensing is industrial cooperation to mutual benefit. This implies that the marketing of the licence is essential to licensing success.

Main requirements in a licensing strategy are:

- to define the right licensing package in light of the market;
- to define potential licensees;
- to prove the identity and credibility of the licensor;
- to prove the relevance of the licence in technical and commercial terms to the licensee;
- to convince the licensee that he is able and willing to service the licensee.

Marketing of licence usually takes a long time, on an average something like three years. It has been said that more than 50% of licensing agreements stem from initiative on behalf of the licensee. May be this is why the marketing of licences is a fairly unknown and unappreciated art. It will vary with the type of licence, e.g. in the licensing of big gas tankers there are very few well-known potential licensees, whereas in licensing small machinery or equipment there might be thousands in one single market.

To the licence-conscious producer, direct marketing is the preferred approach. He will start by making an evaluation of the possibilities of the market in question

and define the potential licensees. That being done, he will have to secure their interest by a direct approach, which is specially difficult in selling the first licence. To smaller firms that are not very licensing-conscious, indirect methods as the use of brokers could be practical. Also there are special licensing publications issued by banks or special organisations which serve as marketing places for licensing. They are used by many, but there does not seem to be much enthusiasm about this marketing tool. Serious trade papers like "Financial Times" have also been used in licensing with considerable success. Government agencies and trade promotion institutions also play a significant part in getting the parties together. Some of the best-known marketing places are the big trade fairs, especially the machine fairs. Lately specialised fairs have appeared like "KNOW-HOW '74", which is going to be held in Oslo end October 1974.

To conclude the marketing of licences varies about as much as licensing in itself. It is usually fairly costly and time-consuming - even after the first contact has been made until a final agreement is found. It will nearly always contain a visit by the licensee to the licensor's plant and probably vise versa. The final negotiations are usually not all that difficult, but it should be noticed that they call for considerable skill, simply because they consist in trying to find a good solution to a long-term cooperation which must be based on mutual trust.

Of course, to the more experienced licensor this stage may not really contain many difficulties.

It should be stressed that on the whole, in professional licensing, the distance between the licensor and the licensee is not big. There are instances where small licensors have been able to renew licence agreements with big international concerns for very long periods of time.

III. LICENSING AND TRANSFER OF TECHNOLOGY

What is just said may throw some light on licensing and the acquisition of technology. From a West European point of view these are inter-related, but slightly different concepts.

From the point of view of the parties, there is a definite idea of transfering know-how to the licensee. That transfer, however, is limited to the use within the licensing agreement. When the licensor confers upon the licensee the right to produce and sell under licence, it is with the idea that he will transfer all his technology to the licensee, but within the context of a long-term cooperation.

This is often true also for the licensee, especially in know-how licensing. He is also interested in keeping the technology within the family and developing it there. That is why licensing agreements might run much longer than originally expected. Again the great variety within licensing can be recalled. Obviously the firm who is seeking the right to use another man's patent in order to be able to produce on his own formula, is not interested in a long-term economic agreement. In process licensing also one is usually interested in the patented process until the time when it is freely available. Where, however, know-how considerations and marketing aspects play a more important part, the idea of long-term cooperation becomes very noticeable. This is not necessarily a question of size. A big chemical and pharmaceutical concern may be interested in working a licence from a small but highly competent producer in a specialised field. In this type of licensing the technology rests within the cooperation, whereas very often all the parties use the skills and profits obtained to develop other products or processes.

In high technology or lumpsum licensing the idea of technology transfer is more marked. Here very often the licensee is buying the licensed object, whether on a cash

or on a credit basis. This is also true for inventions. Often the inventor lacks both the production and marketing facilities required to develop his brainchild into an accomplished industrial success. He may opt for a royalty, but often he makes an outright sale. This could be true also for technical spin-offs.

It should be noted moreover that transfer of technology takes place in many other forms than licensing. The installation of new machinery, the buying of new equipment and many kinds of contracting are important means of technology transfer.

Officials are usually more concerned with the idea of technology transfer than the licensing parties. This is noticeable even in France, but most West European countries leave licensing to the agreement of the parties themselves. Japan took a fairly different angle and imposed severe restrictions on licensing. This obviously played a certain part in the great technological development that has taken place in Japan, but it is not easy to see whether it is the dynamics of the Japanese society which has been the main force or indeed what licensing policies and technological transfer within this context has meant.

It is noticeable, however, that in licensing the official policy could be different from the interest of both licensor and licensee.

It follows from this argumentation that there are more interested parties to licensing than the licensor and the licensee.

Transfer of technology is of vital interest to the authorities in most countries. For that reason many countries have introduced rules which really make the state more or less a partner to the licensing agreement or rather more than a partner - a sort of controlling party. Many countries ordain that all licensing agreements should be scrutinized and expressly authorized by the authorities,

with a view to accepting the licence object as well as the specific clauses within the agreement - exclusivly, price, period, etc. This aspect is not important in West European licensing, and it shall not be further looked into here. There are other restraints, however, which are of growing importance in West European countries: the interest of the society in defending itself against monopolization and in safe-guarding the consumer generally.

In some countries cartelization, price-fixing etc. are expressly forbidden. In others, all such agreements should be registered with the authorities. It is important to note, however, that in principle these regulations only come into operation when there is a question of a noticeable restraint of competition. This is also the case with the special regulations of the ECE countries. A special paper has dealt with this subject.

There is moreover a strong trend for consumer protection in general, which also affects licensing. These regulations touch upon a wide variety of aspects - from packaging and labelling to safety requirements. They are not limited to licensing, but are geared to the total distribution system.

What is typical of West European licensing is that there are no regulations specially concerned with framing any official policy with regard to transfer of technology.

Taking one country as an example, Norway has strict limitations on investments with a view to safeguarding valuable natural resources and industrial activity, but apart from exchange regulations, there are no special limitations on licensing.

IV. FINANCIAL CONSIDERATIONS

An essential element in licensing, as in all business, is the question of price. It follows from what has been said above about the complexity of licensing - that the price question has got very many sides to it. It is quite a paradox, therefore, to note that very little has been done in order to rationalize this question. Pricing the licence is very much a question of rule of thumb considerations.

There are, of course, some fundamental approaches. In some fields there are more or less accepted sizes of royalty. A main consideration is what the buyer will consider a fair price. There is a natural claim of having a fair reward for the cost involved in research and development; the other side of which is that the buyer often takes the licence to save himself the risk and the cost involved in R & D effort. None of these considerations can, however, be used automatically. In order to arrive at an equitable price, which will be accepted and work successfully throughout the life of the agreement, it is therefore necessary to make a detailed evaluation of all the factors involved.

Some of the more important items can therefore be briefly looked at:

Modes of payment

There are two main ways of paying for a licence - the lumpsum and the royalty. Very often there is a split proposition where there is a down-payment followed by a royalty and with a minimum of royalty for the first years. In addition there may be separate payments for certain aspects, e.g. training and technical assistance, special rights such as trademarks or royalty, or the transfer of know-how, eg. manuals and drawings. There could even be a straightout service fee and separate payment for R & D efforts. In combined distribution/licensing agreements the payment could be included in the price.

Lumpsum

The lumpsum method is usual in high technology licensing. It has also been a standing feature in West European licensing to East European countries. Where heavy investment is involved and the element of research is considerable, payment is looked upon as a financial entity and capitalized in a lumpsum. Also where one can foresee that a factory will run according to a licensed process for a certain amount of years on a given capacity, it is not too difficult to calculate what a given royalty could be as long as the inflationary trend is not too erratic. In these cases, therefore, where the continued servicing costs are not important and where the continued economic cooperation is not a strong motive, it seems practical and acceptable for both parties to make up a capital sum. It would consist of an equitable part of the R & D involved, certain elements of know-how transfer, technical assistance and training, and a capitalized royalty. The sum total would then give the lumpsum and could be paid either cash or by instalments. This is a very simplified example because it may be difficult to calculate the R & D costs and even more difficult to define its value which could be very different. Take a small invention within a whole package, a new type of ballbearing, or a way of fixing a light wall construction to the ceiling. It is obvious that the value could be considerable. It could in fact be more or less the thing which makes the whole system competitive. If the price of this were related to the whole system which could be equitable, let us say at 2%, that would seem small. If, on the other hand, the royalty was calculated as a percentage of that unit, the price would seem very high indeed.

Total assessment

There is then only one way for the prospective licensor, and that is to go fully into a detailed examination of all the relevant factors and try and assess both the marketing situation and the costs

involved. On that basis he may formulate a framework for negotiations and define how the payment situation could be made interesting to the licensee. It is impossible to make an exhaustive list, but one could go briefly into some aspects which the licensor will have to look into:

- On the marketing side, he will have to assess the future competitive situation for the licensee in light of the length of the agreement and anticipated sales. This should lead to a possibility of anticipating the profit situation for the licensee, and the advantage that an exclusive agreement can be for him. Relevant factors here will be the strength of the patent situation and other industrial rights, especially trademark, then the value of savings for the licensee and especially how the know-how will develop. Another main factor could be possible guarantees from the licensor on the efficiency of machinery, etc.

- Also on the cost side, a list of relevant items should be made. The first item would be to define developing costs and the R & D situation. Then the preparatory costs for licensing and costs of negotiations should be estimated. An important item, of course, is to define administrative and technical staff costs. More specific costs of preparing drawings, manuals, etc. must be added.

  An important item often overlooked is the cost of assessing special provisions, e.g. the use of new raw materials, designs, special procurements, etc. for this specific agreement. The expences involved in technical assistance, e.g. training, both on the technical and on the marketing aspects, starting up costs and other costs involved in the general servicing of the agreement. Another typical item to watch is what licensees are paying. This goes further than

only looking at the licensor's other agreements. It may be question of usage within that field of industry or within the given territory, and it may have a bearing on the competitive situation, but also on the trust between the parties. On the basis of this assessment, the licensor should be able to get a fair idea of the maximum and the minimum requirements and detailed guidelines for the ultimate negotiations.

- It is not only a question of establishing the size of payment, however, it is also a psychological question regarding how the payment is to be made. It is mentioned earlier that in process licensing, it may be in the interest of both parties to capitalize at least certain items in a lumpsum. Certainly the idea of some kind of down payment is made already for a provisional agreement, specially when secrecy is involved or where there is a question of a valuable option. In know-how agreements, it is generally accepted to make a down payment at the transfer of the know-how in question. The size of this would seem to be in proportion partly with the view that this is part of royalty for the period until production starts, e.g. a three year's optimum royalty.

Down payment

Royalty

On royalty as such, which is the essential element of payment in most licensing agreements, it is difficult to say much without going squarely into detail. Royalties can go from ½% for use of patent or trademark, and up to 30%-40% on major technical break-throughs, but could probably be said to be in the region of 3% in case of low technology and process licensing with a heavy turnover and up to 10%-15% on high technology. It is a function of the size of the market, distribution, the customs of the trade, and could be dependant upon official authorization. It could be computed on a falling scale according to size of production or length of time involved. A flat rate, however, is probably

the most common, as well as the simplest method. The basis on which the royalty is to be computed and the period of time involved, are of course of major importance. Therefore the notion of standard rates is not very informative.

Royalty and any other consideration would be computed in the currency of the territory in question, and the question of taxes and tariffs, double taxation agreements, etc. are important elements to be considered.

The licensor is interested in inducing his partner into fast action. For that reason he may claim a minimum royalty, especially if the licence is exclusive. In many cases one could split the royalty in payment for trademark, patent, know-how, etc.

Royalty should not be seen in isolation but as part of the whole picture of payments. Other important items are the various service charges, e.g. payment for technical assistance whether that be training, visits of engineers or otherwise. Usually it is easier for the licensee to accept these costs. This may also be the case with management services or even a running service fee to cover e.g. the R & D situation. One important thing to watch here is the cost involved in management and the interest of all parties to have an efficient use of manpower and expertise. This would indicate that payment for direct services should be put at a high figure.

It is very important to compose the various elements of payment in such a way as to be acceptable to the licensee, not only from a marketing point of view, but it may have direct bearing upon the success of the future cooperation.

V. EXCLUSIVE RIGHTS

A licensor will often have great difficulties in arousing the interest of his potential licensee if he is willing to grant him an exclusive licence for a given

territory. The main advantage of a licensee indeed is the right to make and sell the licensed process or product, and he is not likely to make considerable investments and other efforts if he is not allowed an exclusive right, at least for a limited period. A licensor would oppose this, and exclusive rights are also by some countries frowned upon by the authorities. Especially the small or medium licensor, however, may be interested in granting exclusive rights on individual territories from the point of view of planning his total marketing efforts. For that same reason he will not be in great favour, however, of granting sub-licensing rights to the licensee. It would probably be right to say that it is usual practice in West European countries to grant exclusive rights. Obviously, however, the special circumstances of the European Common Market may create certain difficulties in this respect because the very aim is to create one common market out of the whole territory.

VI. GUARANTEES

We have stated that the licensee's dominating interest is to acquire a right to use a definite piece of technology. A problem here is that he will usually not know exactly what he is getting, and would like an assurance on this point. This is particularly embarrassing to the new licensor. As mentioned earlier, there are several ways of trying to meet this situation.

One of them is the joint venture formula where the licensor is willing to forego part of his payment and invest it in a minority shareholding. The licensee will very often feel that this proof of interest puts him in a more secured position. In other cases the licensor has got a production of his own or other licences. The licensee will be able to satisfy himself by an arrangement to go and see for himself.

Also where the licence consists of fairly well-known elements, some rules of standard performance could be devised, e.g. along with the General Conditions of Sale of the Economic Commission of Europe, enclosed as Annex 2. This would be especially appropriate where procurement is part of the licensing arrangement. One situation is particularly difficult and should be mentioned because it has a direct bearing on licensing to developing countries, viz. where different raw materials, different machinery or other changed conditions are introduced under the licensing agreement. In general terms the licensor will be prepared to take some kind of responsibility for the performance of the process with use of known raw materials and run according to his own instructions, but that special arrangements will have to be found beyond this point. The marketing aspect is usually the responsibility of the licensee. This is not an easy matter, but it is reassuring to note that in practice it is being solved.

VII. ASSISTANCE AND GRANT BACK RIGHTS

"The proof of the pudding is in the eating", and a main interest of the licensee, and indeed of both parties in successful licensing, is the efficient servicing of the agreement. In a patent licence on a well-defined process this may not involve much more than a contract for the supply and erection of machinery. In most agreements, however, technical assistance and the transfer of know-how by training and otherwise, take a vital place both in the agreement and in the actual cooperation.

Transfer and assistance usually start immediately after signature where the licensor has to give over the know-how; drawings, specifications, manuals, etc. as described in the contract. Very often, however, this is not enough, and either the licensor will receive technicians in his factory or he may supply experts to supervise, control, and train. This

process goes on until the start of production. After that the control element may be stronger. In know-how licensing, however, the dynamic element is essential to the economic success, and there is at least one licensing agreement which really changed so much and so fast that the original agreement was superseded already when the first product was made. In this situation, of course, the licensee is most interested in being a party to all new developments as and when they are being developed. On the other hand, the licensor will insist that developments made by the licensee should also be granted back to him and his other licensees for free, and very often on an exclusive basis. This is really the corner stone of what is called the licensing family arrangement, and as far as know-how is concerned, it usually creates no big problem. When a significant development of a patentable kind has been made by one of the parties, however, it may often pose a tricky problem both from a national point of view and from the point of view of the parties, to find an equitable solution. This has a bearing on the definition of the licence object, and in most established licence families one would try to find a way to keep new patentable developments inside that framework. It should be noted here that all the parties to the contract might in the final analysis be very interested in sticking to this principle. Here again we have a situation where the interests of the parties might be different from official policy.

VIII. GOVERNMENT CONTROL AND REGULATIONS

It has been stressed that, in general, licensing between West European countries is a matter for the parties themselves. Certain countries have formal exchange regulations which necessitate that the agreement be registered with the state bank. In all countries, questions of taxes and tariffs need to be looked into. Also the regulations

regarding restraints of competition and other rules to safequard the consumer must be adhered to, but this would be true for any contract of sale and distribution, and usually they do not imply any serious considerations. Naturally, in the licensing of industrial rights, one has to observe the particular regulations concerning patents, trademarks, etc. where it could be question of registering the licence, or of controi of the quality for the use of trademark.

Certain countries, however, do have special regulations to secure that the agreements and the transfer of technology involved is in the national interest. One of these countries is France, others are Spain, Portugal, Greece and to a certain extent Italy.

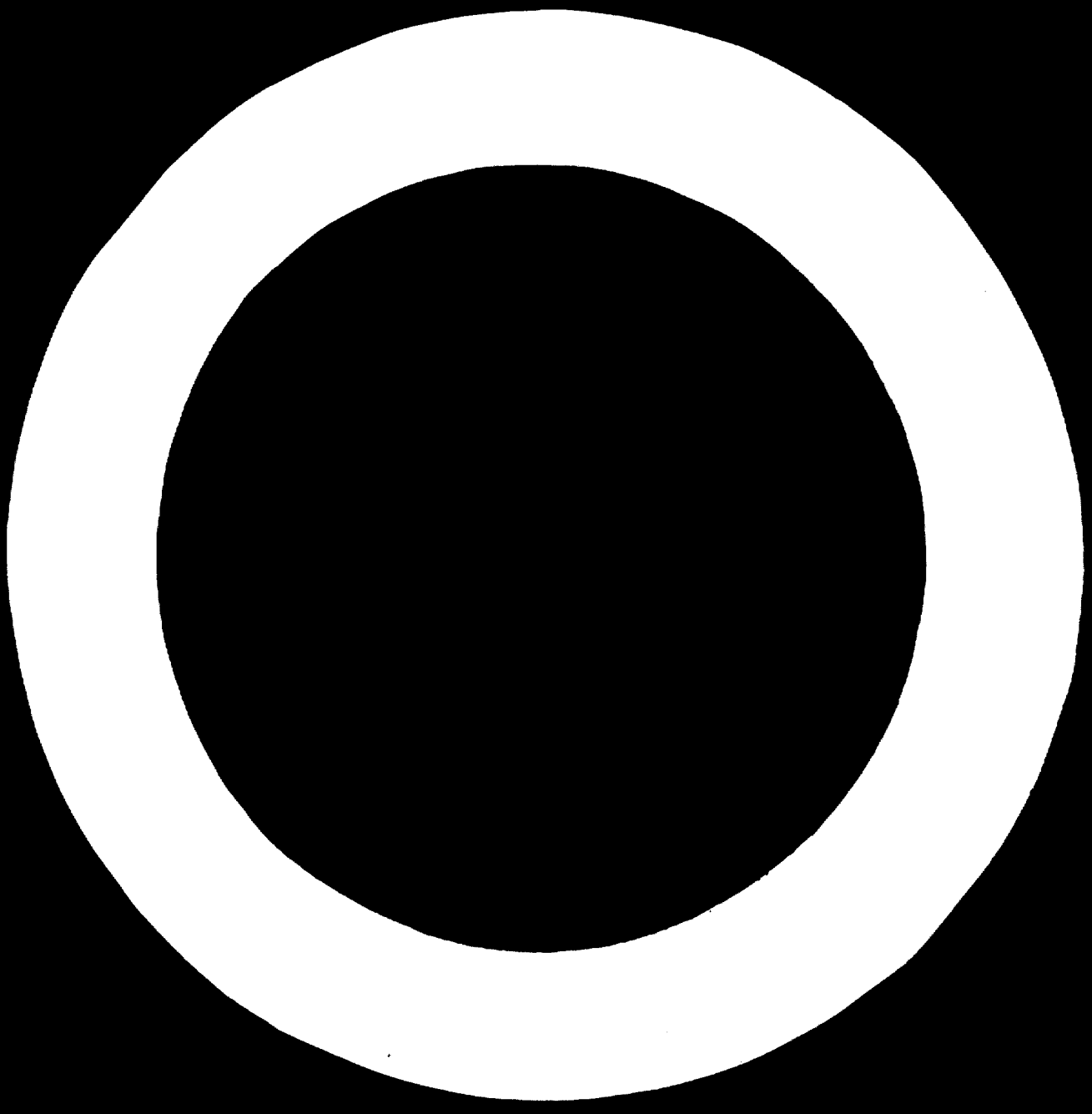
IX. CONCLUSION

This paper has concentrated on licensing as a private cooperation agreement between licensor and licensee, and on West European practices in this regard. This might seem a little bit unfair to the title of the paper, and especially so when given a UNIDO seminar. Other papers cover the official side and the need for developing countries to find a balanced approach to utilize their very limited resources.

In this connection it may be of some value to realize the pragmatic approach of even the smaller countries in Western Europe.

Before finishing one special point might be raised. A few times the special situation of developing countries has been touched upon. One matter which is in this respect of very great importance, especially to the medium or the smaller licensor from Western Europe, is that usually in developing countries he will not be able to find a potential licensee with a general level of technical and marketing know-how, which he would expect to meet in other West European countries. Added to this is the difficulty that

conditions of climate and availability of raw materials etc. may be very different from the licensing conditions in which he is used to work. It is a must for any developing country that just these two conditions could be met. It is therefore reasonable to suggest that there is a gap which could be bigger the less developed the country in question and the more specific the climate and other conditions. It has been discussed at several international forums how one could try and meet this gap, which e.g. for one single licensing proposal amounted to about half a million US dollar. A personal feeling is that it could be met by official aid e.g. on bilateral terms and that it would be of great interest to the licensing parties and to developing countries if UNIDO could work out a kind of scheme to meet this requirement, which it seems is an essential problem in promoting licensing to developing countries.



ANNEX 1

MODEL FORM OF LICENCE AGREEMENT FOR THE MANUFACTURE OF AN UNPATENTED PRODUCT 1/

drawn up by the Working Group

"Legal Affairs"

of

ORGALIME

"Organisme de Liaison des Industries Métalliques Européennes"

Brussels

1973

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ORGALIME : (Organisme de Liaison des Industries Métalliques Européennes) groups the central engineering and metal-working trade associations in fifteen European countries and provides liaison between these bodies in economic, legal, technical and other matters of concern to the industries they represent.

MODEL FORM OF LICENCE AGREEMENT FOR THE MANUFACTURE OF AN UNPATENTED PRODUCT 1)

Between .....

whose registered office is at .....

represented by ..... (Official capacity) .....

which is hereinafter called "the Licensor"

of the one part,

and

.....

whose registered office is at .....

represented by ..... (official capacity) .....

which is hereinafter called "the Licensee"

of the other part,

whereas :

The Licensor has been manufacturing and selling the articles listed below for .... years : .....

.....(list of articles).

(If applicable) These articles are protected in the following countries

.....

.....(list of countries and close description of the industrial property rights).

---

1) It is recommended to ascertain, whether the contract and especially Clausee 2, 9, 18, 19 and 21 are repugnant to any legislation respecting restrictive practices; see in particular the German Cartel Law as well as the Rome Treaty, clausee 85 and 86. In this respect users of this model form will find it useful to refer to some additional notes provided in 1973 by the Verein Deutecher Maschinenbau-Anstalten e.V; a member of ORGALIME, for its member firms. These notes are included in Appendix I.

ANNEX 1

CLAUSE 1

I - Scope of the licence

The Licensor authorises the Licensee to reproduce, to use and to sell the following articles he has manufactured ..... (1)

.....

II - Nature of the Licence

A. The Licence is exclusive.

A. The Licensor nevertheless retains the right to manufacture, use or sell the goods covered by this licence in the territory or territories defined in Clause 2.

B. The licence is not exclusive.

B. The Licensor undertakes not to manufacture, use or sell, in the territory or territories mentioned in Clause 2, articles covered by this licence (2).

The licence is not assignable and the Licensee shall not assign his rights or obligations thereunder to a third party. Without prejudice to the generality of the foregoing, the Licensee shall not, without the consent of the Licensor, bring the licence into the assets of a company.

III. - Sub-licences

The Licensee shall not grant sub-licences without the consent of the Licensor which shall however not be unreasonably withheld.

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1) Whilst the list in the preamble may be merely indicative and very general, the articles for which this licence is granted should be listed here with the greatest precision, in particular when this licence does not cover the whole range of articles of the Licensor.

2) It may be appropriate to specify the articles the Licensor is not authorised to sell. This is to avoid any future conflicts in case the Licensor delivers articles that, although not covered by this licence, meet the same requirements.

CLAUSE 2

Territory

The present licence is granted for the following territories : .....

.....

The Licensee shall not manufacture or use the article in other territories 1)

I

A The Licensee is authorised to export only to the following territories : .....

.....

B The Licensee shall be entitled to export to any other territories save the following : .....

.....

II

A For each and every breach of his obligation not to export, the Licensee shall pay as liquidated damages ..... The Licensee shall further forbid the export by his purchasers of articles to which this licence applies to the extent that such export is forbidden by the preceding provisions of this Clause, and shall impose on such purchasers a liability to pay as liquidated damages in respect of each and every breach of their obligations not to export..... .....Such liquidated damages shall be paid over by the Licensee to the Licensor.

B The Licensee shall ensure that articles to which this licence applies are not exported to the territories to which export is forbidden as aforesaid. If such articles are so exported, the Licensor shall be entitled, by notice in writing to determine this Agreement and, where such export occurs by the fault of the Licensee to recover damages.

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1) The Licensor may, if appropriate, forbid the Licensee to manufacture, use or sell in countries where the articles are protected by property rights, unless the Licensee is granted an express licence. Even if the articles are not protected by industrial property rights, it may be forbidden to the Licensee to manufacture, use or sell the articles covered by the licence.

ANNEX 1

CLAUSE 3

Technical Assistance

Generally the Licensor shall furnish to the Licensee all data on the article, his experience and methods, including know-how or manufacturing secrets, so that a normally qualified technician can use them after a reasonable period of adaptation .

The Licensor shall furnish to the Licensee within ..... of the signing of this agreement and after payment of the sums mentioned in Clause 10, all drawings, dimensional drawings and tolerances enabling the article to be manufactured or used 1).

Such drawings shall be accompanied with a complete technical dossier including 2) .....

(If applicable) The Licensor shall also furnish the following equipment required for production or use ..... 3).

Any drawings and documents furnished may not be used for purposes other than the performance of the agreement without specific approval by the Licensor.

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1) In consideration of the important part technical assistance plays in know-how contracts, it may be useful either to limit the Licensor's responsibility in respect of such technical assistance to gross negligence or to fix a maximum amount of damages eventually to be paid. The Licensor's obligation in respect of drawings may be limited to supplying drawings in his possession. It may also be advisable, in appropriate cases, to define the Licensor's responsibility in respect of missing or incorrect drawings. It may further be necessary to give the Licensee the right to hand over certain information to his sub-contractors. In this case, the information in question should be carefully specified.

2) The detailed composition of the technical dossier is specific to each particular case : Specification of materials - Translation of technical terms - Conversion of units - Conventions for drawing reading - Notes for calculations - test records - Machining processes - Thermal treatments - Assembly drawings - Drawings for special tooling, etc.....

3) Gauges, moulds, models, dies, special tooling, small equipment, machining equipment, samples, etc. .....

CLAUSE 4

Personnel loaned

The Licensor shall at the cost of the Licensee provide the Licensee with the services of skilled personnel on the following terms and conditions .....

.....

Essential points which should be covered :

- Number and qualifications of the personnel provided
- Length of time for which loaned
- Board and lodging
- Extent of responsibility
- Insurance (accident liability, sickness, etc....)
- Cost
- How the cost is to be paid 1)

CLAUSE 5

Training of the Licensee's employees

The Licensor undertakes to instruct employees of the Licensee in his own work and to explain to them the manufacture or use of the articles under licence on the following terms and conditions : .....

.....

Essential points to be defined :

- Number and qualifications of the employees to be instructed
- Length of instruction
- Board and lodging
- Responsibility
- Insurance (accident liability, sickness, etc....)
- Cost
- How the cost is to be paid 1)

1) The contract should where appropriate specify the qualifications of the employees loaned, how they will be boarded and lodged, which party is to bear the cost etc... It may also be appropriate to indicate whether they require interpreters or have sufficient knowledge of the language.

CLAUSE 6

I - Responsibility for claims by third parties

The Licensor declares he has no knowledge of any valid patents belonging to third parties and covering devices or processes the subject of this agreement, but cannot warrant that such patents might not prove to exist.

If reproduction, sale or use of the article by the Licensee results in a claim for fraudulent imitation against the Licensee, the costs and any damages awarded against him shall be borne by .....
.....

The costs and expenses of any counter-claim or of settling a claim shall be borne by ..... 1). The Licensee shall inform the Licensor of any claim made against the Licensee for fraudulent imitation and shall enable the Licensor to join in any legal proceedings.

II - Technical realisation

Subject to having furnished all the documents and assistance provided for in the above clauses, the Licensor undertakes no responsibility for the risks of technical realisation, which are assumed solely by the Licensee. The Licensee shall be deemed to understand the subject matter of the Licence and shall undertake its technical realisation. If he fails to do so within a period of ..... 2) the Licensor shall be entitled to terminate the contract by simple notice in writing. He shall also be entitled to recover damages.

III - Commercial exploitation

The Licensor does not warrant that the article under licence is capable of commercial exploitation. The risks of such exploitation shall be assumed solely by the Licensee.

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1) The contract should state whether the costs and expenses should be borne by the Licensee or the Licensor or whether they should be shared. Similar provision should be made with respect to any sums which result from the failure of the third party's claim for fraudulent imitation.
2) It may be advisable simply to specify a date before which termination may not take place.

CLAUSE 7

I - Quality of the subject matter

A. The Licensee shall manufacture the subject matter to the same quality as is done by the Licensor.

B. The Licensee shall manufacture the subject matter to the quality set out in the annexed specification.

II - Consequences of poor quality in articles made under licence

A. The Licensor shall be entitled to inspect whether the articles manufactured under licence are of the required quality and to forbid the export of articles of inferior quality.

B. If the Licensee fails to attain the required quality within a period of ..... after the formation of the contract, the Licensor shall be entitled on giving ..... months notice, to terminate the contract but shall have no claim for damages.

CLAUSE 8

Modifications and improvements in articles under licence

The Licensor shall disclose and make available to the Licensee any modification or improvement of the articles under licence devised by the Licensor during the currency of the contract, but shall not be entitled thereby to any increase in royalties 1).

---

1) An appropriate increase of royalty may be provided for if the modifications or improvements amount to a patentable invention. The contract may also state whether and to what extent the Licensee is obliged to make use of improvements.

ANNEX 1

CLAUSE 9

Modifications and improvements made in the articles by the Licensee

I

A. The Licensee shall obtain the consent of the Licensor before undertaking modifications and improvements in the articles under licence 1).

B. No authorisation of the Licensor is required for making modifications and improvements in the articles under licence.
Provided that any modifications or improvements made shall be communicated to the Licensor.

---

1) It may also be provided in appropriate cases that the Licensee may without the Licensor's consent make modifications and improvements provided that he clearly shows that they were made by him. Clause 15 should be made consistent with this clause.

II

A. The Licensor shall be entitled to make use free of charge of modifications and improvements suggested by the Licensee except in territories in which by virtue of this contract the Licensor is not entitled to manufacture, use or sell the articles under licence.

B. The Licensor shall be entitled to make use of modifications and improvements suggested by the Licensee in consideration of reasonable payment on reasonable terms. Provided that this right shall not extend to territories in which by virtue of this contract the Licensor is not entitled to manufacture, use or sell the articles under licence. In default of agreement on the amount and terms of payment the parties may refer the matter to arbitration in accordance with Clause 26 for the determination of the said amount and terms 1) 2).

---

1) It may be advisable in an appropriate case to state whether the Licensor is entitled with or without payment to make use of improvements after the currency of the contract and if so for how long a period. It may also be advisable to provide for the right of a Licensor who is entitled to make use of improvements to grant this right to other licensees. A period exceeding the currency of the contract may be relevant to this right also.
In return for this right the Licensee may often be given the right to make use of improvements made by other licensees.

2) If variant A. of Clause 26 is adopted, the parties should consider whether some person or authority should be appointed for fixing the royalties in case of disagreement.

III

A. If the improvements are patentable the Licensor shall be entitled to patent them in all territories except .....
.....1)
without being required to make any payment to the Licensee.

B. If the improvements are patentable, the Licensor shall be entitled to patent them in all territories except .....
.....1)
in consideration of reasonable payment on reasonable terms.
In default of agreement on the amount and terms of payment the parties may refer the matter to arbitration in accordance with Clause 26 for the determination of the said amount and terms 2) 3).

---

1) As a general rule the territory to be inserted here is that for which the licence is granted.

2) If variant A. of Clause 26 is adopted, the parties should consider whether some person or authority should be appointed for fixing the royalties in case of disagreement.

3) The Licensor may authorise the Licensee to patent the articles covered by the licence, provided the Licensor does not want to patent them himself. This right should, however, be given on the condition that, even after the expiration of the contract, these patents are not valid against the Licensor.

CLAUSE 10

Payment on transfer of information

Before drawings and information are transferred the Licensee shall pay to account N° ..... at the ..... Bank the sum of ..... These documents will not be transferred to the Licensee unless and until the whole of said sum has been paid to the ..... Bank.

The Licensee shall not be entitled to the return of this sum by reason of the fact that the contract has for any reason been prematurely terminated 1).

CLAUSE 11

Royalties

A. The Licensee shall pay in respect of articles under licence sold by him a royalty of ..... per cent of the price invoiced to his purchasers for unpacked goods delivered ex works 2) less discounts (other than cash discounts) and sales taxes (e.g. turnover taxes). Incidental charges, such as .... are also to be deducted if invoiced to purchasers separately.

B. The Licensee shall pay in respect of each article under licence sold by him the sum of .....

C. The Licensee shall pay by way of royalties .... at the following times .... 3).

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1) The parties should ascertain before the agreement is made whether the licence requires any foreign currency permit or other authorisation. The parties should ensure that any necessary authorisations are applied for in good time.

2) It may in some cases be appropriate to base the amount of royalty on the cost price, the latter being calculated by an agreed method. This may be particularly the case when the Licensee only produces parts, which are then supplied to other manufacturers.

3) Instead of current royalties which are more appropriate for patents, i.e. lasting monopolies, it may be advisable to provide lump-sum payments spread over a few months only. In this case, Clauses 12, 13, 16 and 17 are not applicable.

ANNEX 1

CLAUSE 12

Minimum Royalties

Irrespective of the sales actually made by the Licensee the royalties payable shall not be less than :

A. ..... in the first year
..... in the second year
..... in the third and each succeeding year.

B. The royalties due on the sale of :
x articles .... in the first year
x articles .... in the second year
x articles .... in the third year and each succeeding year 1)

If the contract is in force for less than 12 months in any calendar year the minimum royalty shall be reduced accordingly.

CLAUSE 13

Time when right to royalty accrues

A. The right to royalty accrues on the receipt by the Licensee of payment from his purchaser.

B. The right to royalty accrues when the article made under licence is despatched from the Licensee's work 2)

The right to such part of a minimum royalty as has not accrued as aforesaid shall accrue at the end of each calendar year.

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1) When articles of different values may be manufactured, a specific number of the most usual type may be taken as the basis for calculating minimum royalties.

2) If preferred any other point of time may be taken, such as the date of the contract between the Licensee and his customer, completion of manufacture, the date of the Licensee's invoice to his customer.

CLAUSE 14

Taxes 1)

A. Direct taxes 2) payable in the Licensee's country by virtue of sums paid to the Licensor in accordance with the terms of the agreement will be for the Licensor's account. Turnover taxes payable in the Licensee's country on such sums will be for the account of the Licensee. When the law of the Licensee's country requires that turnover taxes must be paid by the Licensor, the licensee shall provide assistance to the Licensor to enable him to comply with the obligations and formalities involved 3).

B. Direct taxes 2) and turnover taxes payable in the Licensee's country by virtue of sums paid to the Licensor in accordance with the terms of the agreement will be for the Licensee's account. When the law of the Licensee's country requires that turnover taxes must be paid by the Licensor, the Licensee shall provide assistance to the Licensor to enable him to comply with the obligations and formalities involved 3).

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1) The choice between variants A and B depends on the legislation of the countries concerned and the tax situation of the parties. For example in certain countries - such as Italy - a provision that the Licensor shall not meet direct taxes levied in the Licensee's country is forbidden by law. Users of this document are therefore recommended to read the explanatory note, prepared by the ORGALIME working group "Fiscal Affairs" on the considerations to be taken into account when choosing between the two variants.

2) Direct taxes which may be due in the Licensee's country by virtue of sums received by the Licensor are practically always taxes on income or on profits and are generally withheld at source. Variant A should be used where, by virtue of an international agreement, direct taxes levied or withheld at source in the Licensee's country can be set off by the Licensor against taxes for which he is liable in his own country.

3) In certain countries the formalities for the payment of VAT will involve some costs (for example the necessity to have a fiscal representative). It may be advisable for the parties to specify who will bear these costs.

CLAUSE 15

Marking

The Licensee shall mark all articles made by him under licence and supplied to his customers with serial numbers and shall affix to such articles a plaque inscribed "Licence ..... 1)
(If applicable) The Licensee may (or shall) affix to the article, in addition to his own mark, the mark ..... belonging to the Licensor and registered by him at ..... on .....

CLAUSE 16

Accounts and inspection of accounts

The Licensee shall keep a special register in which he shall record the exact number of articles manufactured by virtue of the contract, the serial numbers marked on such articles and any other information relevant for determining the amount of royalties payable. 2) The Licensor shall have the right by means of an accountant appointed by him and approved by the Licensee to inspect these registers and to examine whether they are consistent with the general accounts of the Licensee. The costs of such inspection and examination shall be borne by ..... 3).

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1) The Licensor's name should be inserted here. If for any reason this is undesirable, this provision should be omitted. (See footnote to Clause 9, I).

2) Such information may include the name of the customer, the date and amount of invoice, any discounts, etc. ... It may in some cases be advisable to specify the exact information to be furnished. The Licensee may also be required to supply to the Licensor copies of invoices rendered to his customer.

3) If necessary the grounds should be stated which entitle the Licensee to reject the accountant appointed by the Licensor, or it should be stated how many times this right of rejection may be exercised.

CLAUSE 17

Settlement of accounts and payment

Royalty accounts shall be rendered at the end of each calendar quarter. The Licensee shall within a month after the expiration of each quarter send to the Licensor a complete account and any sum due to the Licensor thereunder.

A The Licensee shall pay the Licensor in the currency or currencies in which payment is due to the Licensee from the Licensee's customers.

B Payment shall be made in ..... The rate of exchange shall be that prevailing on the last day of the relevant quarter 1). In case of late payment, the Licensor shall be entitled to choose between the said rate of exchange and the rate prevailing on the date when payment is made. He shall also be entitled to interest on the sum overdue.

CLAUSE 18

I - Obligation to exploit the licence - Manufacture of Competing articles

A The Licensee undertakes to exploit the licence and not to manufacture or sell articles to compete with articles under licence 2).

B The Licensee is not obliged to exploit the licence. He may manufacture or sell articles to compete with articles under licence.

II - Loss of Market

If the Licensee shall have shown that the article on which the licence is based has lost its market by reason of technical or economic developments, he shall be entitled, after a reasonable time limit, to terminate the contracts before its performance is complete. In this case, he shall cease to manufacture the articles under licence to use any of the techniques and processes brought to his knowledge by the Licensor.

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1) It may be advisable to state whether the free exchange rate or the official rate is to apply.
2) It may be useful to state whether the Licensee is to advertise the articles under licence and if so on what terms.

CLAUSE 19

Obligation to buy from the Licensor

For the manufacture of the articles under licence the Licensee undertakes to buy from the Licensor the following parts : .....

.....

The said parts shall be supplied in accordance with the General Conditions annexed hereto, and the prices shall be the Licensor's catalogue prices current at the relevant time 1).

CLAUSE 20

Secrecy

The documents and information (know-how) supplied by the Licensor shall be treated as secret by the Licensee, even after the currency of the agreement. The Licensee shall take all proper steps to keep them secret. In particular he shall impose this obligation on his employees and forbid any unauthorised use. He may communicate the said documents and information to third parties, and in particular to sub-contractors, only with the Licensor's prior express consent.

The Licensor shall enter into the same obligation in respect of documents and information supplied by the Licensee 2).

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1) It may be found necessary to adopt a different solution. In particular, the obligation of the Licensee to buy from the Licensor may be limited to a specific period or the Licensee may himself be given the right to manufacture the parts in question in increasing quantities. If there are no catalogue prices, it will be necessary to fix a list of original prices and a method of revising them.
In certain cases, it may be necessary to specify that the price of such supplies shall be deducted from the amount used as a basis for the royalties, such prices being properly defined (ex works, customs value, or cleared value).

2) It may be advisable in appropriate cases to authorise the Licensor to communicate to his other licensees and to his sub-contractors modifications and improvements suggested by the Licensee, on the condition that they shall treat them as secret and that they shall enter into obligations similar to those imposed on the Licensee. This is especially the case, where the Licensee is entitled to make use of modifications and improvements suggested by other Licensees of the Licensor.

CLAUSE 21

Action against imitators

The parties undertake not to acquire any interest, directly or indirectly, in any firm likely to use the documents and information covered by this agreement and to compete with the article; provided that the Licensor may grant licences in countries where the Licensee enjoys no exclusive rights.

The parties shall consult each other on methods of preventing third parties from making exact copies of the article.

In particular they shall assist each other in bringing proceedings for unfair competition against imitators to the full extent permitted by the law (and jurisprudence) of the country of the Licensse or, where appropriate, of the third party against whom such proceedings are taken.

The party which decides to take proceedings shall bear the costs and enjoy the benefits thereof, the other party providing it, if need be, with all necessary authorisations and signatures. If the parties agree to commence proceeding jointly, the costs and benefits thereof shall be divided as follows :

The Licensor..... per cent.

The Licensee..... per cent.

CLAUSE 22

Duration of the contract

The agreement shall not enter into force until signed and until all authorisations required for its performance have been obtained, including any authorisations required for the transfer of currency.

The contract shall come to an end on .....

A Upon normal expiry of the agreement, the Licensse may continue to manufacture the article and use the techniques and processes brought to his knowledge by the Licensor without having to pay any royalties. However, he shall refrain from disclosing any document less than.... years old.

B The documents and articles listed in Clause 3 being expressly regarded as remaining the Licensor's property, upon expiry of the agreement the Licensee shall return all drawings, documents and tools received, in their current condition and without retaining any copy of them.

He shall undertake not to manufacture the article under licence or use or disclose to third parties the techniques and processes brought to his knowledge by the Licensor.

CLAUSE 23

Termination

Without prejudice to any express provisions for termination contained in the contract, the contract may be terminated for any cause sufficient to justify termination under the proper law of the contract.
In the case of a termination for breach or other default of the Licensee, the latter shall return all drawings, documents and tools received and shall cease to manufacture the article under licence or to use or disclose the techniques and processes brought to his knowledge by the Licensor.

CLAUSE 24

Transitional provision

The Licensee shall be entitled to carry out after the expiry of the agreement contracts of sale entered into by him before the expiry of the agreement 1).

CLAUSE 25

Law applicable

The contract shall be governed by ..... 2).

---

1) For mass produced articles, it may be useful to provide for a similar possibility as regards disposal of normal stocks existing at the date of expiry of the contract.

2) The law applicable should be stated by the parties. The Licence Agreement being most closely connected with the law of the country for which the licence is granted, this law is often stipulated, particularly when the main place of business of the Licensee is in that country. On the other hand, they are also good reasons for stipulating the law of the country where the main place of business of the Licensor is situated, e.g. when a licence is granted for several countries and a single law should govern the contract.

CLAUSE 26

Competent jurisdiction - Arbitration

A Any dieputee arising out of or in connection with thie Agreement shall be decided by the competent court of ..... 1).

If the parties agree, euoh diepu-tes and differencee may be refer-red to arbitration.

B Any dispute arising out of or in connection with this Agreement shall be finally settled without recourse to the courts, in accor-dance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules. The arbitrator or arbitrators shall have power to rule on their own competence and on the validity of the agreement to submit to arbitration

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1) If the law of the country of the Licensee is adopted, it is generally advisable to provide for the jurisdiction of the courts of the Licensee's country. If the contract is to be governed by the law of the Licensor's country, the contract should provide for the jurisdiction of the competent court of that country. The parties should ascertain whether a judgement of the court provided for can be enforced in the other party's country. If thie proves not to be the case, the party in whose country judgement is to be given should also be given power to bring an action in the courts of the other party's country in order to avoid the risk of a judgement being unenforceable.

C Any disputes arising out of or in connection with this Agreement shall be finally settled in accordance with the Rules of Arbitration of ORGALIME 1). The arbitrator or arbitrators appointed thereunder shall have power to rule on their own competence and on the validity of the agreement to submit to arbitration.

Either party may ask the competent tribunal to confirm an arbitration award or otherwise provide that it shall be enforceable.

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1) A list of member associations of ORGALIME is given at the end of this document.

The Rules of Arbitration mentioned above are obtainable from these associations or from the Secretariat of ORGALIME, 13 rue des Drapiers, 1050 Brussels, Belgium.

Additional notes provided by the Verein Deutscher Maschinenbau-Anstalten e.V. in 1973

Certain parts of Clauses 9, 18 and 19 may infringe the German law against restrictions of competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB).

The German Federal Cartel Office is also of the opinion that Clauses 9 and 19, and parts of Clauses 2 and 18, may be repugnant to the Rome Treaty and therefore forbidden.

Detailed notes on each of these two aspects are given below.

1. Possible infringements of the German G.W.B.

CLAUSE 9 I A

According to § 21 para. 1 and § 22 para. 1 (first half sentence) together with para. 2 No. 3 of the German Restrictive Trade Practices Act, it may not be forbidden to the Licensee to undertake, with respect to the articles under licence, and independently of the contract performance, modifications and improvements that are outside the scope of protection of the manufacturing secret (know-how), for example in the case of independent and similar products. Clause 9 I A of this model form is therefore invalid in case the above conditions are complied with and if the competent Anti-Cartel Authority has not given the permission provided for in § 21 para. 1 together with § 20 para. 3 of the Restrictive Trade Practices Act. However, according to its § 98 para. 2, this Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of the Act.

CLAUSE 9 II A and B

According to § 21 para. 1 together with § 20 para. 2 No. 3 of the German Restrictive Trade Practices Act, the licensor is entitled to demand reciprocal licences only with respect to the Licensee's dependent modifications and improvements, to the extent that he has made similar undertakings under the contract.

Therefore independent own inventions (parallel inventions) are not exempt from § 21 para. 1 and § 20 para. 2, No. 3 of the aforementioned Act.

As the variants A and B cover also the Licensee's independent modifications and improvements or his own inventions, and as the gratuitous use in favour of the Licensor, provided for in variant A violates § 21 para. 1 and § 20 para. 1 (first half sentence) of the German Restrictive Trade Practices Act, Clause 9 II A and B of this model form is invalid. Upon request, the competent Anti-Cartel Authority may however, according to § 21 para. 1 together with § 20 para. 3 of the aforementioned Act, grant a permission. However, according to its § 98 para. 2, the German Restrictive Trade Practices Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of this Act.

CLAUSE 9 III A and B

According to § 21 para. 1 together with § 20 para. 1 (first half sentence) and § 20 para. 2 No. 3 of the German Restrictive Trade Practices Act, any undertaking made by the Licensee is invalid that entitles the Licensor to acquire in his own name, with or without payment, protective rights for improvements. Clause 9 III A and B is therefore invalid. The competent Anti-Cartel Authority may however, according to § 21 para. 1 together with § 20 para. 2 of the aforementioned Act, grant a permission upon request. However, according to its § 98 para. 2, the aforementioned Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of this Act.

CLAUSE 18 I A

According to § 21 para. 1 together with § 20 para. 1 (first half sentence) of the German Restrictive Trade Practices Act, the Licensee's undertaking not to manufacture or sell competitive articles, is invalid, because such undertaking goes beyond the scope of protection of the manufacturing secret (know-how).

The Licensee may, however, apply for a permission at the competent Anti-Cartel Authority according to §21 para.1 together with §20 para.3 of the aforementioned Act. However, according to its §98 para.2, this Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of this Act.

According to §21 para.1 together with §20 para.1 (first half sentence) of the German Restrictive Trade Practices Act. stipulations obligating the Licensee to advertise the articles under licence, go beyond the scope of protection of the manufacturing secret (know-how) and are therefore invalid. Upon request, the competent Anti-Cartel Authority may however, according to §21 para.1 together with §20 para.3 of the aforementioned Act, grant a permission with respect to the Licensee's undertakings of advertising. However, according to its §98 para.2, the German Restrictive Trade Practices Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of this Act.

CLAUSE 19 and footnote I to this clause

According to §21 para.1 together with §20 para.2 No.1 of the German Restrictive Trade Practices Act, the Licensee's undertakings to buy parts from the Licensor are only valid as long as, and to the extent that they are justified by the Licensor's interest in a technically perfect exploitation of the articles under licence. In case these requirements are not met - which is the rule in the opinion of the German Federal Cartel Office - the competent Anti-Cartel Authority may, according to §21 para.1 together with §20 para.3 of the aforementioned Act, grant a permission upon request, if the Licensee's economic freedom of movement is not unreasonably restricted and if competition on the market is not essentially affected on account of the extent of the restrictions. However, according to its §98 para.2, the German Restrictive Trade Practices Act applies only as long as, and to the extent that the know-how contract produces effects in the area of application of this Act.

Where a permission is granted according to § 21 para. 1 together with § 20 para. 3 of the German Restrictive Trade Practices Act, it may be found necessary to adopt a different solution. In particular, the obligation of the Licensee to buy from the Licensor may be limited to a specific period or the Licensee may himself be given the right to manufacture the parts in question in increasing quantities. If there are no catalogue prices, it will be necessary to fix a list of original prices and a method of revising them. In certain cases, it may be necessary to specify that the price of such supplies shall be deducted from the amount used as a basis for the royalties, such prices being properly defined (ex works, customs value, or cleared value).

2. Clauses which, in the opinion of the German Federal Cartel Office, may be repugnant to the Rome Treaty

CLAUSE 2 sentence I and footnote 1

The Licensor may forbid the Licensee to manufacture, use or sell in countries where the articles are protected by industrial property rights, unless the Licensee is granted an express licence. If the articles are not protected by industrial property rights, the prohibition to manufacture, use or sell, imposed upon the Licensee, may be incompatible with the Rome Treaty and therefore forbidden.

CLAUSE 2 I and II

CLAUSE 9

CLAUSE 18 I A

ANNEX II

LMW

GENERAL CONDITIONS

for the Supply and Erection of

Plant and Machinery for Import and Export No. 188A(*)

Prepared under the auspices of the

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE

GENEVA, MARCH 1957

188A

1. PREAMBLE

1.1. These general conditions shall apply, save as varied by express agreement accepted in writing by both parties.

2. FORMATION OF CONTRACT

2.1. The Contract shall be deemed to have been entered into when, upon receipt of an order, the Contractor has sent an acceptance in writing within the time-limit (if any) fixed by the Purchaser.

2.2. If the Contractor, in drawing up his tender, has fixed a time-limit for acceptance, the Contract shall be deemed to have been entered into when the Purchaser has sent an acceptance in writing before the expiration of such time-limit, provided that there shall be no binding Contract unless the acceptance reaches the Contractor not later than one week after the expiration of such time-limit.

3. DRAWINGS AND DESCRIPTIVE DOCUMENTS

3.1. The weights, dimensions, capacities, prices, performance ratings and other data included in catalogues, prospectuses, circulars, advertisements, illustrated matter and price lists constitute an approximate guide. These data shall not be binding save to the extent that they are by reference expressly included in the Contract.

3.2. Any drawings or technical documents intended for use in the construction or erection of the Works[1]) or of part thereof and submitted to the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Contractor. They may not, without the Contractor's consent, be utilized by the Purchaser or copied, reproduced, transmitted or communicated to a third party. Provided, however, that the said plans and documents shall be the property of the Purchaser:

(*a*) if it is expressly so agreed, or

(*b*) if they are referable to a separate preliminary development contract on which no actual construction was to be performed and in which the property of the Contractor in the said plans and documents was not reserved.

3.3. Any drawings or technical documents intended for use in the construction or erection of the Works or of part thereof and submitted to the Contractor by the Purchaser prior or subsequent to the formation of the Contract remain the exclusive property of the Purchaser. They may not, without his consent, be utilized by the Contractor or copied, reproduced, transmitted or communicated to a third party.

3.4. The Contractor shall, if required by the Purchaser, furnish free of charge to the Purchaser at the commencement of the Guarantee Period, as defined in Clause 23, information and drawings other than manufacturing drawings of the Works in sufficient detail to enable the Purchaser to carry out the operation and maintenance (including running repairs) of all parts of the Works and (except where under the Contract the Contractor is responsible for commissioning the Works) the commissioning thereof. Such information and drawings shall be the property of the Purchaser and the restrictions on their use set out in paragraph 2 hereof shall not apply thereto. Provided that if the Contractor so stipulates, they shall remain confidential.

4. PACKING

4.1. Unless otherwise specified:

(*a*) prices shown in price lists and catalogues shall be deemed to apply to unpacked Plant;

(*b*) prices quoted in tenders and in the Contract shall include the cost of packing or protection required under normal transport conditions to prevent damage to or deterioration of the Plant before it reaches its destination as stated in the Contract.

(*) These Conditions may be used, at the option of the parties, as an alternative to the General Conditions for the Supply and Erection of Plant and Machinery for Import and Export prepared at Geneva, in March 1957 (No. 574 A).

The English, French and Russian texts are equally authentic.

The observations of the experts who drew up these General Conditions, together with a description of the procedure followed, are embodied in the "COMMENTARY ON THE GENERAL CONDITIONS FOR THE SUPPLY OF PLANT AND MACHINERY FOR EXPORT No. 188" (Document E/ECE/t69), published by the Economic Commission for Europe. It can be obtained direct from the Sales Section of the European Office of the United Nations, Geneva, Switzerland, or through United Nations Sales Agents.

t) In these General Conditions "Plant" means all machinery, apparatus, materials and articles to be supplied by the Contractor under the Contract and "the Works" means all Plant to be supplied and work to be done by the Contractor under the Contract.

5. LOCAL LAWS AND REGULATIONS

5.1. The Purchaser shall, at the request of the Contractor and to the best of his ability, assist the Contractor to obtain the necessary information concerning the local laws and regulations applicable to the Works and to taxes and dues connected therewith.

5.2. 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.

6. WORKING CONDITIONS

6.1. The price shall be on the understanding that the following conditions are fulfilled, except so far as the Purchaser has informed the Contractor to the contrary:

(a) the Works shall not be carried out in unhealthy or dangerous surroundings;

(b) the Contractor's employees shall be able to obtain suitable and convenient board and lodging in the neighbourhood of the site and shall have access to adequate medical services;

(c) such equipment, consumable stores, water and power as are specified in the Contract shall be available to the Contractor on the site in good time, and, unless otherwise agreed, free of charge to the Contractor;

(d) the Purchaser shall provide the Contractor (free of charge, unless otherwise agreed) with closed or guarded premises on or near the site as a protection against theft and deterioration of the Plant to be erected, of the tools and equipment required therefor, and of the clothing of the Contractor's employees;

(e) the Contractor shall not be required to undertake any works of construction or demolition or to take any other unusual measures to enable the Plant to be brought from the point where it has been unloaded to the point on the site where it is to be erected, unless the Contractor has agreed to deliver the Plant to the last mentioned point.

Any departure from the conditions mentioned in this paragraph shall attract an extra charge.

6.2. If the circumstances resulting from such departure are such that it would be unreasonable to require the Contractor to proceed with the Works, the Contractor may, without prejudice to his rights under the Contract, refuse to do so.

7. ERECTION ON A TIME BASIS AND LUMP SUM ERECTION

7.1. When erection is carried out on a time basis the following items shall be separately charged:

(a) all travelling expenses incurred by the Contractor in respect of his employees and the transport of their equipment and personal effects (within reasonable limits) in accordance with the specified method and class of travel where these are specified in the Contract;

(b) the living expenses, including any appropriate allowances, of the Contractor's employees for each day's absence from their homes, including non-working days and holidays;

(c) the time worked, which shall be calculated by reference to the number of hours certified as worked in the time-sheets signed by the Purchaser. Overtime and work on Sundays, holidays and at night will be charged at the special rates mentioned in the Contract. Save as otherwise provided, the hourly rates cover the wear and tear and depreciation of the Contractor's tools and light equipment;

(d) time necessarily spent on:

(i) preparation and formalities incidental to the outward and homeward journeys;

(ii) the outward and homeward journeys;

(iii) daily travel morning and evening between lodgings and the site if it exceeds half an hour and there are no suitable lodgings closer to the site;

(iv) waiting when work is prevented by circumstances for which the Contractor is not responsible under the Contract;

(e) any expenses incurred by the Contractor in accordance with the Contract, in connexion with the provision of equipment by him, including where appropriate a charge for the use of the Contractor's own heavy equipment;

(f) any taxes or dues levied on the invoice and paid by the Contractor in the country where erection takes place.

7.2. When erection is carried out for a lump sum, the quoted price includes all the items above mentioned. Provided that if the erection is prolonged for any cause for which the Purchaser or any of his contractors other than the Contractor is responsible and if as a result the work of the Contractor's employees is suspended or added to, a charge will be made for any idle time, any extra work, any extra living expenses of the Contractor's employees and the cost of any extra journey.

8. INSPECTION AND TESTS OF THE PLANT

Inspection

8.1. If expressly agreed in the Contract, the Purchaser shall be entitled to have the quality of the materials used and the parts of the Plant, both during manufacture and when completed, inspected and checked by his authorized representatives. Such inspection and checking shall be carried out at the place of manufacture during normal working hours after agreement with the Contractor as to date and time.

8.2. If as a result of such inspection and checking the Purchaser shall be of the opinion that any materials or parts are defective or not in accordance with the Contract, he shall state in writing his objections and the reason therefor.

Tests

8.3. Tests provided for in the Contract other than taking over tests will be carried out, unless otherwise agreed, at the Contractor's works and during normal working hours. If the technical requirements of the tests are not specified in the Contract, the tests will be carried out in accordance with the general practice obtaining in the appropriate branch of the industry in the country where the Plant is manufactured.

8.4. The Contractor shall give to the Purchaser sufficient notice of the tests to permit the Purchaser's representatives to attend. If the Purchaser is not represented at the tests, the test report shall be communicated by the Contractor to the Purchaser and shall be accepted as accurate by the Purchaser.

8.5. If on any test (other than a taking-over test as provided for in Clause 21) the Plant shall be found to be defective or not in accordance with the Contract, the Contractor shall with all speed make good the defect or ensure that the Plant complies with the Contract. Thereafter, if the Purchaser so requires, the test shall be repeated.

8.6. Unless otherwise agreed, the Contractor shall bear all the expenses of tests carried out in his works, except the personal expenses of the Purchaser's representatives.

9. PASSING OF RISK

9.1. Save as provided in paragraph 10.1, the time at which the risk shall pass shall be fixed in accordance with the International Rules for the Interpretation of Trade Terms (Incoterms) of the International Chamber of Commerce in force at the date of the formation of the Contract.

Where no indication is given in the Contract of the form of sale the Plant shall be deemed to be sold "ex works."

9.2. In the case of a sale "ex works", the Contractor must give notice in writing to the Purchaser of the date on which the Purchaser must take delivery of the Plant. The notice of the Contractor must be given in sufficient time to allow the Purchaser to take such measures as are normally necessary for the purpose of taking delivery.

10. DELAYED ACCEPTANCE OF DELIVERY

10.1. If the Purchaser fails to accept delivery of the Plant on due date, he shall nevertheless make any payment conditional on delivery as if the Plant had been delivered. The Contractor shall arrange for the storage of the Plant at the risk and cost of the Purchaser. If required by the Purchaser, the Contractor shall insure the Plant at the cost of the Purchaser. Provided that if the delay in accepting delivery is due to one of the circumstances mentioned in Clause 25 and the Contractor is in a position to store it in his premises without prejudice to his business, the cost of storing the Plant shall not be borne by the Purchaser.

10.2. Unless the failure of the Purchaser is due to any of the circumstances mentioned in Clause 25, the Contractor may require the Purchaser by notice in writing to accept delivery within a reasonable time.

If the Purchaser fails for any reason whatever to do so within such time, the Contractor shall be entitled by notice in writing to the Purchaser, and without requiring the consent of any Court, to terminate the Contract in respect of such portion of the Plant as is by reason of the failure of the Purchaser aforesaid not delivered and thereupon to recover from the purchaser any loss suffered by reason of such failure up to an amount not exceeding the sum named in paragraph A of the Appendix or, if no sum be named, that part of the price payable under the Contract which is properly attributable to such portion of the Plant.

11. PAYMENT

11.1. Payment shall be made in the manner and at the time or times agreed by the parties.

11.2. Any advance payments made by the Purchaser are payments on account and do not constitute a deposit, the abandonment of which would entitle either party to terminate the Contract.

11.3. If delivery has been made before payment of the whole sum payable under Contract, Plant delivered shall, to the extent permitted by the law of the country where the Plant is situated after delivery, remain the property of the Contractor until such payment has been effected. If such law does not permit the Contractor to retain the property in the Plant, the Contractor shall be entitled to the benefit of such other rights in respect thereof as such law permits him to retain. The Purchaser shall give the Contractor every assistance in taking any measures required to protect the Contractor's right of property or such other rights as aforesaid.

11.4. A payment conditional on the fulfilment of an obligation by the Contractor shall not be due until such obligation has been fulfilled, unless the failure of the Contractor is due to an act or omission of the Purchaser.

11.5. If the Purchaser delays in making any payment, the Contractor may postpone the fulfilment of his own obligations until such payment is made, unless the failure of the Purchaser is due to an act or omission of the Contractor.

11.6. If delay by the Purchaser in making any payment is due to one of the circumstances mentioned in Clause 25, the Contractor shall not be entitled to any interest on the sum due.

11.7. Save as aforesaid, if the Purchaser delays in making any payment, the Contractor shall on giving to the Purchaser within a reasonable time notice in writing be entitled to the payment of interest on the sum due at the rate fixed in paragraph B of the Appendix from the date on which such sum became due. If at the end of the period fixed in paragraph C of the Appendix, the Purchaser shall still have failed to pay the sum due, the Contractor shall be entitled by notice in writing to the Purchaser, and without requiring the consent of any Court, to terminate the Contract and thereupon to recover from the Purchaser the amount of his loss up to the sum mentioned in paragraph A of the Appendix.

12. PREPARATORY WORK

12.1. The Contractor shall in good time provide drawings showing the manner in which the Plant is to be affixed together with all information relating, unless otherwise agreed, only to the Works, required for preparing suitable foundations, for providing suitable access for the Plant and any necessary equipment to the point on the site where the Plant is to be erected and for making all necessary connexions to the Plant (whether such connexions are to be made by the Contractor under the Contract or not).

12.2. The preparatory work shall be executed by the Purchaser in accordance with the drawings and information provided by the Contractor and mentioned in paragraph 1 hereof. It shall be completed in good time and the foundations shall be capable of taking the Plant at the proper time. Where the Purchaser is responsible for transporting the Plant, it shall be on the site in good time.

12.3. Any expenses resulting from an error or omission in the drawings or information mentioned in paragraph 1 hereof which appears before taking over shall be borne by the Contractor. Any such error or omission which appears after taking over shall be deemed faulty design for purposes of Clause 23.

13. LIAISON AGENTS

13.1. The Contractor and Purchaser shall each designate in writing a competent representative to be his channel of communication with the other party on the day-to-day execution of the Works on the site.

13.2. Each such representative shall be present on or near the site during working hours.

14. ADDITIONAL LABOUR

14.1. If the Contractor so requires in good time the Purchaser shall make available to the Contractor free of charge such skilled and unskilled labour as is provided for in the Contract and such further reasonable amount of unskilled labour as may be found to be necessary even if not provided for in the Contract.

15. SAFETY REGULATIONS

15.1. The Purchaser shall notify the Contractor in full of the safety regulations which the Purchaser imposes on his own employees and the Contractor shall secure the observance by his employees of such safety regulations.

15.2. If breaches of these regulations come to the notice of the Purchaser, he must inform the Contractor in writing forthwith, and may forbid persons guilty of such breeches entry to the site.

15.3. The Contractor shall inform the Purchaser in full of any special dangers which the execution of the Works may entail.

16. OVERTIME

16.1. Any overtime and the conditions thereof shall, within the limits of the laws and regulations of the Contractor's country and of the country where erection is carried out, be as agreed between the parties.

17. WORK OUTSIDE THE CONTRACT

17.1. The Purchaser shall not be entitled to use the Contractor's employees on any work unconnected with the subject-matter of the Contract without the previous consent of the Contractor. Where the Contractor so consents, he shall not be under any liability in respect of such work, and the Purchaser shall be responsible for the safety of the Contractor's employees while employed on such work.

18. CONTRACTOR'S RIGHT OF INSPECTION

18.1. Until the Works are taken over and during any work resulting from the operation of the guarantee the Contractor shall have the right at any time during the hours of work on the site to inspect the Works at his own expense. In proceeding to the site, the inspectors shall observe the regulations as to movement in force at the Purchaser's premises.

19. INSTRUCTION OF THE PURCHASER'S EMPLOYEES

19.1. In appropriate cases the Contract may provide on the terms and conditions therein set out for instruction to be given by the Contractor to the Purchaser's employees who will run the Plant.

20. TIME FOR COMPLETION

20.1. Unless otherwise agreed the completion period shall run from the latest of the following dates:

(a) the date of the formation of the Contract as defined in Clause 2;

(b) the date on which the Contractor receives notice of the issue of a valid import licence where such is necessary for the execution of the Contract;

(c) the date of the receipt by the Contractor of such payment in advance of manufacture as is stipulated in the Contract.

20.2. Should delay in completion be caused by any of the circumstances mentioned in Clause 25 or by an act or omission of the Purchaser and whether such cause occur before or after the time or extended time for completion, there shall be granted subject to the provisions of paragraph 5 hereof such extension of the completion period as is reasonable having regard to all the circumstances of the case.

20.3. If a fixed time for completion is provided for in the Contract, and the Contractor fails to complete the Works within such time or any extension thereof granted under paragraph 2 hereof, the Purchaser shall be entitled, on giving to the Contractor within a reasonable time notice in writing, to claim a reduction of the price payable under the Contract, unless it can be reasonably concluded from the circumstances of the particular case that the Purchaser has suffered no loss. Such reduction shall equal the percentage named in paragraph D of the Appendix of that part of the price payable under the Contract which is properly attributable to such portion of the Works as cannot in consequence of the said failure be put to the use intended for each complete week of delay commencing on the due date of completion but shall not exceed the maximum percentage named in paragraph E of the Appendix. Such reduction shall be allowed when a payment becomes due on or after completion. Save as provided in paragraph 5 hereof, such reduction of price shall be to the exclusion of any other remedy of the Purchaser in respect of the Contractor's failure to complete as aforesaid.

20.4. If the time for completion mentioned in the Contract is an estimate only, either party may after the expiration of two thirds of such estimated time require the other party in writing to agree a fixed time.

Where no time for completion is mentioned in the Contract, this course shall be open to either party after the expiration of nine months from the formation of the Contract.

If in either case the parties fail to agree, either party may have recourse to arbitration, in accordance with the provisions of Clause 28, to determine a reasonable time for completion and the time so determined shall be deemed to be the fixed time for completion provided for in the Contract and paragraph 3 hereof shall apply accordingly.

20.5. If any portion of the Works in respect of which the Purchaser has become entitled to the maximum reduction provided for by paragraph 3 hereof, or in respect of which he would have been so entitled had he given the notice referred to therein, remains uncompleted, the Purchaser may by notice in writing to the Contractor require him to complete and by such last mentioned notice fix a final time for completion which shall be reasonable taking into account such delay as has already occurred. If for any cause other than one for which the Purchaser or some other Contractor employed by him is responsible, the Contractor fails to complete within such time, the Purchaser shall be entitled by notice in writing to the Contractor, and without requiring the consent of any Court, to terminate the Contract in respect of such portion of the Works and thereupon to recover from the Contractor any loss suffered by the Purchaser by reason of the failure of the Contractor as aforesaid up to an amount not exceeding the sum named in paragraph F of the Appendix, or, if no sum be named, that part of the price payable under the Contract which is properly attributable to such portion of the Works as could not in consequence of the Contractor's failure be put to the use intended.

21. TAKING-OVER TESTS

21.1. Unless otherwise agreed, taking-over tests shall be carried out. If such tests are to be carried out, the Contractor shall notify the Purchaser in writing when the Works will be ready, and such notification shall be in sufficient time to enable the Purchaser to make any necessary arrangements. The tests shall take place in the presence of both parties. The technical requirements shall be as specified in the Contract or, if not so specified, in accordance with the general practice existing in the appropriate branch of the industry in the country where the Plant is manufactured.

21.2. If as a result of such tests the Works are found to be defective or not in accordance with the Contract, the Contractor shall with all speed and at his own expense make good the defect or ensure that the Works comply with the contract, and thereafter, if the Purchaser so requires, the test shall be repeated at the expense of the Contractor.

21.3. Subject to the provisions of paragraph 2 hereof the Purchaser shall free of charge provide any power, lubricants, water, fuel and materials of all kinds reasonably required for final adjustments and for taking-over tests. He shall also install free of charge any apparatus necessary for the above mentioned operations.

22. TAKING OVER

22.1. As soon as the Works have been completed in accordance with the Contract and have passed all the taking-over tests to be made on completion of erection, the Purchaser shall be deemed to have taken over the Works and the Guarantee Period shall start to run. The Purchaser shall thereupon issue to the Contractor a certificate, called a "Taking-over Certificate", in which he shall certify the date on which the Works have been completed and have passed the tests.

22.2. If the Purchaser is unwilling to have the taking-over tests carried out, the Works shall be deemed to have been taken over and the Guarantee Period shall start to run on a written notice to that effect being given by the Contractor.

22.3. If by reason of difficulties encountered by the Purchaser (whether or not covered by Clause 25) it becomes impossible to proceed to the taking-over tests, these shall be postponed for a period not exceeding six months, or such other period as the parties agree, and the following provisions shall apply:

(a) The Purchaser shall make payments as if the taking over had taken place, provided that, in the case of a difficulty due to any of the circumstances falling within paragraph 25.1, the Purchaser shall not unless otherwise agreed, be required to pay at the due time of taking over the cost of uncompleted work or, before the expiration of the Guarantee Period fixed in accordance with sub-paragraph (d) hereof, any sum retained by way of guarantee.

(b) At the appropriate time, the Purchaser shall give notice in writing to the Contractor stating the earliest date on which the tests can be carried out and requesting him to fix a new date for the tests. Such new date shall be within the period stated in paragraph G of the Appendix after the date mentioned in such notice.

(c) The Contractor may, at the cost of the Purchaser, examine the Works before making the tests and make good any defect or deterioration therein that may have developed, or loss thereof that may have occurred, after the date when the Works were first ready for testing in accordance with the Contract.

(d) The Guarantee Period shall run from the date when the postponed tests have been successfully carried out.

(e) If the Purchaser so requires, the Contractor shall, subject to the provisions of the Contract in respect of the passing of risk, protect and preserve the Works until the tests are carried out or for one month from the time when the Works were first ready for testing in accordance with the Contract, whichever is the shorter period. The Contractor shall be entitlad to recover from the Purchaser the costs of any measures actually takan by tha Contractor to protect and preserve the Works. Unless otherwise agreed, the liability of the Contractor for protecting and preserving the Works shall cease on the expiry of such month. If by reason of othar commitments the Contractor is unable to laave his employees on the site, ha shall give the Purchaser any directions required to enable the Purchaser to maka satisfactory arrangemants for protecting and preserving the Works.

(f) If at the end of six months or such other period as the parties may have agreed the tests have not taken place the provisions of paragraph 22.2 shall apply unless the provisions of Clause 25 are applicable.

23. GUARANTEE

23.1. Subject as herein after set out, tne Contractor undertakes to remedy any defect resulting from faulty design, materials or workmanship.

23.2. This liability is limited to defects which appear during the period (called "the Guarantee Period") specifiad in paragraph H of the Appendix and commencing on taking ovar.

23.3. In respect of such parts (whether of the Contractor's own manufacture or not) of tha Works as are expressly mentioned in tha Contract, the Guarantee Period shall be such other period (if any) as is specified in respect of each of such parts.

23.4. Tha daily use of the works and tha amount by which the Guarantee Period shall be reduced if the Works are used more intensivaly are stated in paragraph J of the Appendix.

23.5. A fresh Guarantee Period equal to that stated in paragraph H of tha Appendix shall apply, under the same terms and conditions as those applicable to the original Works, to parts supplied in raplacement of the defective parts or to parts renewed in pursuance of this Clause. This provision shall not apply to the remaining parts of the Works, tha Guarantee Period of which shall be extended only by a period equal to the period during which the Works are out of action as a result of a dafect covered by this Clause.

23.6. In order to be able to avail himself of his rights under this Clause the Purchaser shall notify the Contractor in writing without delay of any defacts that have eppeared and shall give him every opportunity of inspecting and remedying them.

23.7. On recaipt of such notificetion the Contractor shall remedy the dafect forthwith and, save as mantioned in paragraph 8 hereof, at his own expense. Save where the nature of the defect is such that it is appropriate to effect repairs on site, the Purchaser shall return to tha Contractor any part in which a defect covered by this clause has appeared, for repair or replacement by the Contractor, and in such case the delivary to tha Purchaser of such part properly repaired or a part in replacement thereof shall be deemed to be a fulfilment by the Contractor of his obligations under this paragraph in respect of such defective part.

23.8. Unless otherwise agreed, tha Purchaser shall bear the cost and risk of transport of defective parts and of repaired parts or parts supplied in replacement of such defective parts between the place whera the Works are situated and ona of the following points:

(i) the Contractor's works if the Contract is "ex works" or F. O. R.;

(ii) the port from which the Contractor dispatched the Plant if the Contract is F. O. B., F. A. S., C. I. F., or C. & F.;

(iii) in all othar cases the frontiar of the country from which the Contractor dispatched the Plant.

23.9. Where, in pursuance of paragraph 7 hereof, repairs are raquired to be effected on site, the incidence of any travelling or living expenses of the Contractor's employaes and the costs and risks of transporting any necessary material or equipment shall be settled, in default of agreement betwaen the partias, in such manner as the arbitrator shall determine to be fair and reasonable.

23.10. Defectiva parts replacad in accordance with this Clause shall be placed at the disposal of the Contractor.

23.11. If the Contractor refuses to fulfil his obligations under this Clause or fails to proceed with due diligence after being required so to do, the Purchaser may proceed to do the necessary work at tha Contractor's risk and expense, provided that he does so in a reasonable manner.

23.12. The Contractor's liability does not apply to defacts arising out of materials provided, or out of a design stipulated, by tha Purchaser.

23.13. The Contractor's liability shall apply only to defects that appear under the conditions of operation provided for by the Contract and under proper use. It does not cover defects due to causes arising after taking over. In particular it does not cover defects arising from the Purchaser's faulty maintenance or from alterations carried out without the Contractor's consent in writing, or from repairs carried out improperly by the Purchaser, nor does it cover normal daterioration.

23.14. After taking over and save as in this Clause expressed, the Contractor shall be under no liability even in respect of defects due to causes existing before taking over. It is expressly agreed that the Purchaser shall have no claim in respect of personal injury or of damage to property not the subject matter of the Contract arising after taking over nor for loss of profit unless it is shown from the circumstances of the case that the Contractor has been guilty of gross misconduct.

23.15. "Gross misconduct" does not comprise any and every lack of proper care or skill, but means an act or omission on the part of the Contractor implying either a failure to pay due regard to serious consequences which a conscientious Contractor would normally foresee as likely to ensue, or a deliberate disregard of any consequences of such act or omission.

24. LIABILITY FOR PERSONAL INJURY AND DAMAGE TO PROPERTY

24.1. In the event of personal injury or damage to property occurring before all the Works have been taken over, the liabilities shall be apportioned as follows:

(a) (i) The Contractor shall at his own expense make good any loss or damage to the Plant or Works occurring before the risk therein has passed and arising from any cause whatsoever other than an act or omission of the Purchaser;

(ii) the Contractor shall at his own expense make good any loss or damage to the Plant or Works occurring after the risk therein has passed, if such loss or damage is caused by an act or omission of the Contractor;

(iii) if any portion of the Plant or Works is lost or damaged from a cause for which the Contractor is not responsible by virtue of sub-paragraphs *(a)* (i) or *(a)* (ii) hereof, the loss or damage shall, if required by the Purchaser, be made good by the Contractor at the expense of the Purchaser.

(b) In respect of damage to the Purchaser's property other than the Works, the Contractor shall indemnify the Purchaser to the extent that such damage was caused by the Contractor, or by the failure of equipment or tools provided by the Contractor for the purpose of the erection, if the circumstances show that the Contractor failed to use proper skill and care.

(c) (i) In respect of personal injury, the respective liabilities of the Purchaser and of the Contractor towards the injured person shall be governed by the law of the country where the injury occurred;

(ii) if the injured person brings a claim against the Purchaser, the Contractor shall indemnify the Purchaser against such claim to the extent that the injury was due to any of the causes mentioned in sub-paragraph *(b)* hereof;

(iii) if the injured person brings a claim against the Contractor, the Purchaser shall, to the extent permitted by the law of the country where the injury occurred, indemnify the Contractor against such claim save to the extent that, by the operation of sub-paragraph *(c)* (ii) hereof, the Contractor would have been liable to indemnify the Purchaser had the claim been brought against the Purchaser.

(d) In respect of damage to property of third parties, the provisions of sub-paragraph *(c)* hereof shall apply mutatis mutandis.

(e) The provisions of this paragraph shall apply to the acts or omissions of the respective servants of the parties as they apply to the acts or omissions of the parties themselves. Provided always that as respects acts or omissions of the additional labour provided by the Purchaser in accordance with paragraph 14. 1. the Contractor shall be liable for the consequences of such orders and instructions as have been incorrectly given, inadequately expressed or given to a person not purporting to possess the necessary qualifications.

24.2. In order to avail himself of his rights under sub-paragraphs *(c)* and *(d)* of paragraph 24. 1 the party against whom a claim is made must notify the other of such claim and must permit the other, if the other so wishes, to conduct all negotiations for the settlement of such claim and to act in his stead or, to the extent permitted by the law of the country where the action is brought, to join in such litigation.

24.3. Any limitation of the indemnities payable by either party by virtue of this clause shall be as stated in paragraph I of the Appendix.

24.4. The provisions of this Clause shall apply equally while the Contractor is on the site in fulfilment of an obligation under Clause 23.

25. RELIEFS

25.1. The following shall be considered as cases of relief if they intervene after the formation of the Contract and impede its performance: industrial disputes and any other circumstances (e. g. fire, mobilisation, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of the parties.

25.2. The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.

25.3. The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in Clauses 10, 11, 20 and 22. Save as provided in paragraphs 10. 2, 11. 7 and 20. 5, if, by reason of any of the said circumstances, the performance of the Contract within a reasonable time becomes impossible, either party shall be entitled to terminate the Contract by notice in writing to the other party without requiring the consent of any Court.

25.4. If the Contract is terminated in accordance with paragraph 3 hereof, the division of the expenses incurred in respect of the Contract shall be determined by agreement between the parties.

25.5. In default of agreement it shall be determined by the arbitrator which party has been prevented from performing his obligations and that party shall refund to the other the amount of the said expenses incurred by the other less any amount to be credited in accordance with paragraph 7 hereof, or, where the amount to be so credited exceeds the amount of such expenses, shall be entitled to recover the excess.

If the arbitrator determines that both parties have been prevented from performing their obligations, he shall apportion the said expenses between the parties in such manner as to him seems fair and reasonable, having regard to all the circumstances of the case.

25.6. For the purposes of this Clause "expenses" means actual out-of-pocket expenses reasonably incurred after both parties shall have mitigated their losses as far as possible. Provided that as respects Plant delivered to the Purchaser the Contractor's expenses shall be deemed to be that part of the price payable under the Contract which is properly attributable thereto, due account being taken of any work done in the erection of such Plant.

25.7. There shall be credited to the Purchaser against the Contractor's expenses all sums paid or payable under the Contract by the Purchaser to the Contractor.

There shall be credited to the Contractor against the Purchaser's expenses that part of the price payable under the Contract which is properly attributable to Plant delivered to the Purchaser or, in the case of an incomplete unit, the value of such Plant having regard to its incomplete state. In either case due account shall be taken of any work done in the erection of such Plant.

26. LIMITATION OF DAMAGES

26.1. Where either party is liable in damages to the other, these shall not exceed the damage which the party in default could reasonably have foreseen at the time of the formation of the Contract.

26.2. The party who sets up a breach of Contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages.

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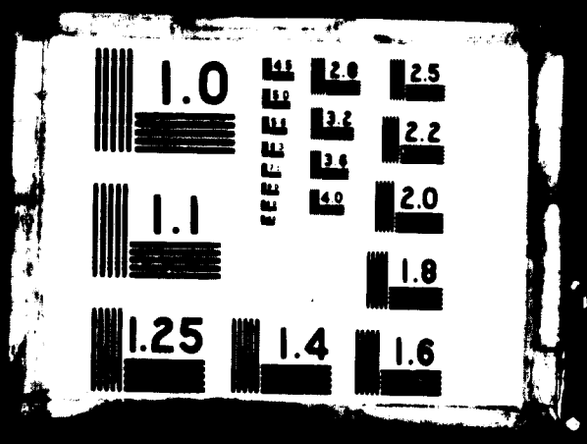

27. RIGHTS AT TERMINATION

27.1. Termination of the Contract, from whatever cause arising, shall be without prejudice to the rights of the parties accrued under the Contract up to the time of termination.

28. ARBITRATION AND LAW APPLICABLE

28.1. Any dispute arising out of the Contract shall be finally settled, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules.

28.2. Unless otherwise agreed, the Contract shall, so far as is permissible under the law of the country where the Works are carried out, be governed by the law of the Contractor's country.

28.3. If the parties expressly so agree, but not otherwise, the arbitrators shall in giving their ruling, act as amiables compositeurs.

APPENDIX

(To be completed by parties to the Contract)

	Clause	
A. Maximum amount recoverable on termination by Contractor for failure to take delivery or make payment	10.2. & 11.7.	_____ (in the agreed currency)
B. Rate of interest on overdue payments	11.7.	_____ per cent per annum
C. Period of delay in payment authorising termination by Contractor	11.7.	_____ months
D. Percentage to be deducted for each week's delay	20.3.	_____ %
E. Maximum percentage which the deductions above may not exceed .	20.3.	_____ %
F. Maximum amount recoverable for non-completion	20.5	_____ (in the agreed currency)
G. Maximum postponement of taking-over tests by Contractor . . .	22.5.	_____ weeks
H. Guarantee Period for original Works and parts replaced or renewed	23.2. & 23.5.	_____ months
I. Maximum indemnities for personal injury or damage	24.5.	_____ (in the agreed currency)
J. (1) Daily use of Plant	23.4.	_____ hours / day
(2) Reduction of Guarantee Period for more intensive use	23.4.	

SUPPLEMENTARY CLAUSE

PRICE REVISION

Should any change occur in the cost of the relevant materials and/or wages during the period of execution of the contract, the agreed prices shall be subject to revision on the basis of the following formula:

$$P_1 = \frac{P_0}{100}\left(a + b\frac{M_1}{M_0} + c\frac{S_1}{S_0}\right)$$

where:

P_1 = final price for invoicing

P_0 = initial price of goods, as stipulated in the contract and as prevailing at the date of _____ (1)

M_1 = mean (2) of the prices (or price indices) for (type of materials concerned) _____

over the period _____ (3)

M_0 = prices (or price indices) for the same materials at the date stipulated above for P_0.

S_1 = mean (2) of the wages (including social charges) or relevant indices (4) in respect of _____

(specify categories of labour and social charges) over the period _____ (3)

S_0 = wages (including social charges) or relevant indices (4) in respect of the same categories at the date stipulated above for Po,

a, b, c, represent the contractually agreed percentage of the individual elements of the intial price, which add up to 100.

(a + b + c = 100)

a = fixed proportion = _____

b = percentage proportion of materials = _____

c = percentage proportion of wages (including social charges) = _____

Where necessary, b (and if need be, c) can be broken down into as many partial percentages (b_1, b_2, b_3_____) as there are variables taken into account ($b_1 + b_2$_____ + bn = b).

DOCUMENTATION For the purpose of determining the values of materials and wages, the parties agree to use the following documents as sources of reference:

1. Materials: prices (or price indices) _____(type of materials)

published by_____under the headings _____

2. Wages: wages (including related social charges) (or relevant indices)

published by_____under the headings _____ (5)

Rules for applying the Clause. In the case of partial deliveries which are invoiced separately, the final price shall be calculated separately for each such delivery.

Period of application of the Clause. The revision clause shall cover the delivery period fixed in the contract, together with any extension thereof granted under Clause 20. 2, but shall in no case apply after the date on which the work is completed.

Tolerances. Prices shall not be revised unless the application of the formula produces a plus or minus variation of _____ (6)

Saving Clause. If the parties wish the revision formula to be adjusted or replaced by a more accurate method of calculation when the plus or minus variation exceeds a certain percentage, they shall expressly so agree.

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(1) It is recommended that the parties should, as far as possible, adopt as the initial price the price prevailing at the date of the contract and not at an earlier date. This is normally the contract price less cost of packing, transport and insurance.
(2) Arithmetical or weighted.
(3) Specify the datum period, which may be defined as part or the whole of the delivery period.
(4) If legal social charges are covered by the index, they need not be taken into account again.
(5) Indices relating specifically to the engineering and electrical industries should be used as far as possible. engl.
(6) State the percentage plus or minus variation which must be exceeded before the formula is applied.

Addendum to GENERAL CONDITIONS for the supply and erection of Plant and Machinery for import and export

prepared under the auspices of the

United Nations Economic Commission for Europe

Geneva, March 1957

This addendum which has been issued by the federations of the mechanical engineering industries in Denmark, Finland, Norway and Sweden (Denmark: Sammenslutningen af Arbejdsgivere indenfor Jern- og Metalindustrien i Danmark; Finland: Suomen Metalliteollisuusyhdistys — Finlands Metallindustriförening; Norway: Mekaniske Verksteders Landsforening, Sweden: Sveriges Mekanförbund) in 1972, contains the information called for in the Appendix and certain supplementary conditions of agreement between the parties to the Contract.

ADD TO CLAUSE 8

Clause 8.5

Minor defects which the Contractor is required to make good under the provisions of Clause 8.5 do not constitute a basis for requirement of new tests.

ADD TO CLAUSE 10

Clause 10.2

Paragraph A of the Appendix

In cases referred to in Clause 10.2 the parties shall endeavour to agree upon the settlement of claims. The maximum compensation which can be claimed by the Contractor in the event of the Purchaser failing to accept delivery shall be determined according to the circumstances prevailing in each case but shall not exceed the price attributable to that portion of the Plant of which the Purchaser has failed to accept delivery.

ADD TO CLAUSE 11

Clause 11.7

Paragraph B of the Appendix

The rate of interest on overdue payments referred to in Clause 11.7 (Paragraph B of the Appendix) shall exceed the highest official discount rate in the Contractor's country by the following percentages. If the Contractor's country is Denmark 2 %, Finland 3 % Norway 4 %, Sweden 5 %. The rate of interest shall not in any case be less than 8 %.

Clause 11.7

Paragraph C of the Appendix

The period of delay in payment after which the Contractor shall be entitled to terminate the Contract, as provided for in Clause 11.7 is 3 months (Paragraph C of the Appendix).

Clause 11.7

Paragraph A of the Appendix

The maximum amount which the Contractor shall be entitled to recover on terminating the Contract in accordance with Clause 11.7 may not exceed the price of the unpaid portion of the Works (Paragraph A of the Appendix).

ADD TO CLAUSE 20

Clause 20.3

Paragraphs D and E of the Appendix

The reduction mentioned in Clause 20.3 (Paragraph D of the Appendix) shall amount to 0.5 % per week provided that that part of the price to which the reduction applies does not exceed Sw. crowns 500 000, Danish or Norw. crowns 700 000 or Finnish marks 400 000. If the price in question exceeds these figures, the reduction applicable to the amount by which the price exceeds Sw. crowns 500 000, Danish or Norw. crowns 700 000 or Finnish marks 400 000 shall be limited to 0.25 % per week. The maximum percentage, named in Paragraph E of the Appendix which the total reduction may not exceed, shall be 7.5 %.

Clause 20.5

Paragraph F of the Appendix

In cases referred to in Clause 20.5 the parties shall endeavour to agree upon the settlement of claims. The maximum compensation for non-delivery (Paragraph F of the Appendix) shall be determined according to the circumstances prevailing in each case but shall not exceed 7.5 % of the price of such portion of the Works as could not in consequence of the Contractor's failure be put to the use intended.

ADD TO CLAUSE 21

Clause 21.2 and 21.3

The provisions of paragraph 3 shall also apply to tests carried out according to paragraph 2. The first words in paragraph 3 "Subject to the provisions of paragraph 2 hereof" shall be excluded.

ADD TO CLAUSE 22

Clause 22.3

Paragraph G of the Appendix

The maximum postponement of taking over tests by the Contractor as referred to in Clause 22.3 (b) shall be 6 weeks (Paragraph G of the Appendix).

ADD TO CLAUSE 23

Clause 23.1

If not otherwise stated, the delivery comprises only such devices for protection against damage in the use of the Works as are normally in use in the Contractor's country. Any responsibility that may arise on account of other protective devices being prescribed in the Purchaser's country is exclusively to be carried by the Purchaser.

Clause 23.2 and 23.5

Paragraph H of the Appendix

The Guarantee Period referred to in Clause 23.2 and 23.5 (Paragraph H of the Appendix) shall be 12 months unless otherwise specified in the Contract.

Clause 23.4

Paragraph J of the Appendix

The daily use of the Works referred to in Clause 23.4 (Paragraf J of the Appendix) shall amount to 8 hours per day. More intensive use of the Works shall entail a corresponding shortening of the Guarantee Period, unless otherwise agreed in the Contract.

Clause 23

General Remark

Notwithstanding the stipulations of Clause 23, the validity of the Contractor's Guarantee shall not exceed 2 years for any part of the Works, reckoned from the original date of commencement of the Guarantee Period.

ADD TO CLAUSE 24

Clause 24.3

Paragraph I of the Appendix

Indemnities payable by either party by virtue of this Clause shall be limited to:

For personal injuries:
Danish crowns .....
Finnish marks .....
Norwegian crowns .....
Swedish crowns .....

For damage to property:
Danish crowns .....
Finnish marks .....
Norwegian crowns .....
Swedish crowns .....

ADD TO CLAUSE 25

Clause 25.1

As further cases of relief, additional to those quoted in Clause 25.1, shall be included rejection of large workpieces due to scrap as well as delays or defects in subcontractors' deliveries by reason of such circumstances as are mentioned in paragraph 1.

Clause 25.5

The stipulations of Clause 25.5 are not applicable.

Clause 25.6

The word "expenses" in Clause 25.6 shall under no circumstances be construed to mean indirect expenses.

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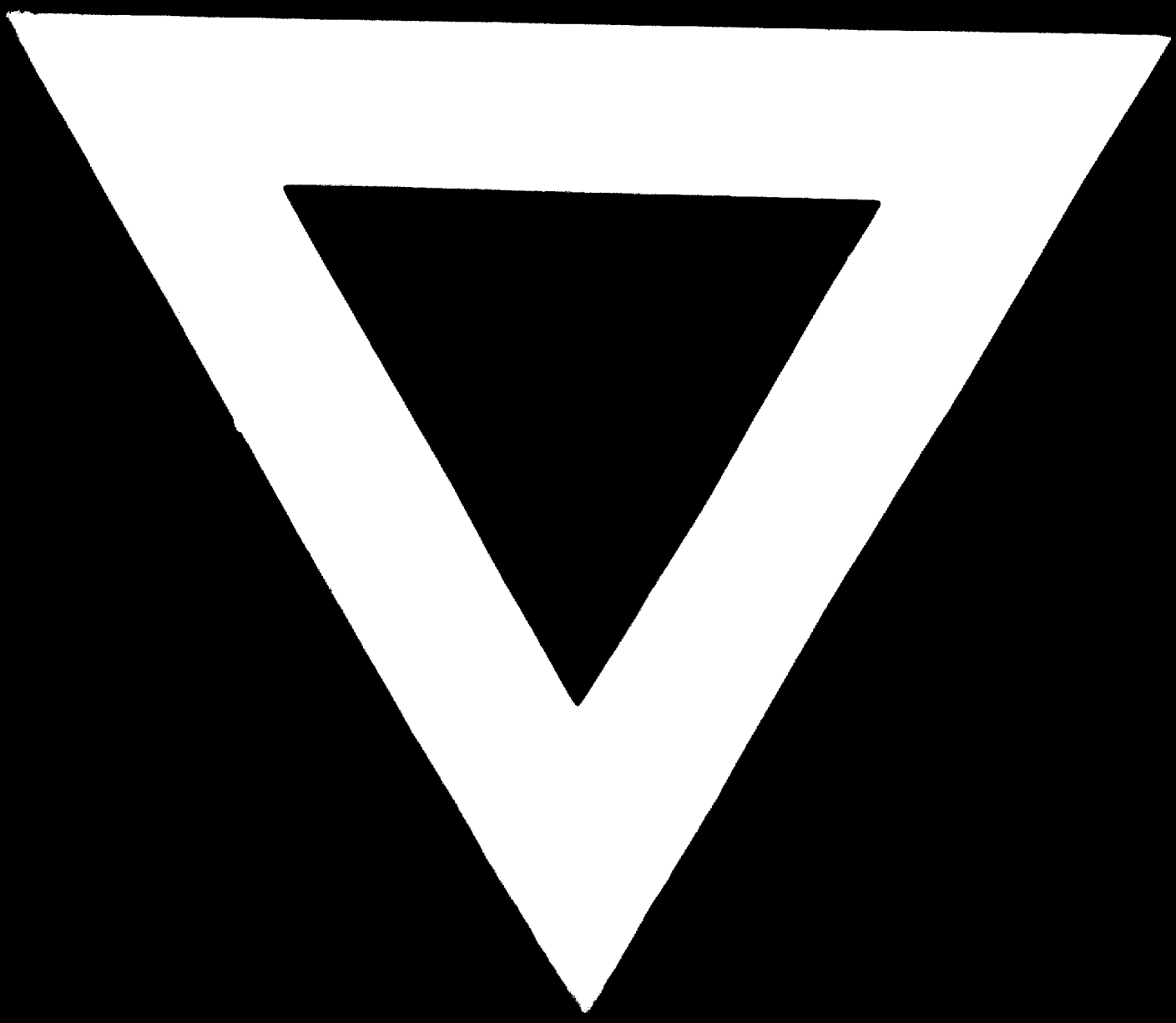

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