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NEGOTIATIONS AND CONTRACTING

Selected Topics for the Preparatory Stage

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INTRODUCTION

This document was prepared with the aim of covering the main issues that project initiators and prospective investors should be aware of before taking concrete steps related to negotiations with potential technology suppliers or partners in co-operative arrangements, including joint-ventures.

At investment promotion meetings, parties are often interested to establish contacts and start negotiations with a view of concluding a contract but are not always sure about the legal implications of the various acts which they undertake in such contracts. It is very often the case that the parties, although wishing to negotiate, are not willing to undertake any firm commitments. They are therefore often interested to have some information which would explain some of the basic legal notions necessary for such initial stages of negotiations and contracting.

On the other hand, parties are often interested to learn something about the basic characteristics of contracts which they are likely to negotiate.

The present document is not intended to present a complete outline of the laws on formation of contracts which are different from one legal system to another and from one country to another. However, some of the observations contained in the outline may be helpful to parties negotiating with the aim of concluding a contract.

Similarly, this document is not intended to provide an exhaustive analyses of various types of contracts and agreements which are practiced these days in foreign trade and in transfer of technology transactions. For such a purpose UNIDO has a programme designated Technological Advisory Services (TAS) aimed at providing ad-hoc advice to governments and entrepreneurs on concrete negotiations they have to face.

The objective of this document is therefore, to show the variety of some of the contracts which are being practiced in international trade and transfer of technology and which are likely to be negotiated at the meetings held under the auspices of UNIDO and some of their main characteristics.

It is thought useful to underline the fact that in international trade new contracts do appear from time to time. Developing countries should be alert and should, for the benefit of their own economies, promptly provide facilities for studying and spreading the knowledge and understanding of such new contractual forms.

The content of this document has greatly been influenced by the participants at UNIDO's sponsored meetings since their questions, inquiries and discussions at these meetings served as the guideline in preparing it. It is expected that after future meetings, this document may be updated having in view future interest of participants at such meetings.

LEGAL SYSTEMS IN THE WORLD TODAY

Although, every country in the World has its own legal system which is in some way different from the legal system of other countries, we can, generally speaking, state that in the World today we can discern two basic legal systems - civil law and common law systems. The differences in these two legal systems are particularly visible in the laws regulating contracts and trade. Most national legal systems in the field of contracts have their origin either in the civil law or in the common law, while some national legal systems have elements of both.

Common law system originated in Great Britain and is often associated with English speaking countries. Civil law has its origin in the Roman law and has developed in countries of continental Europe. Different countries in the World have in one way or another shaped their own legal system either on the principles of the common law or on the principles of the civil law. Although this division is not always visible in all fields of law, it is almost always present in the area of trade and commercial law. In the last decade certain influence of Islamic legal concepts are also visible in matters of interest to financing of international trade.

Through centuries countries have allowed their merchants a great freedom in their commercial dealings. Countries did not force the merchants to always subject their commercial dealings to the legal system of their countries, but

allowed them to agree between themselves which legal system they wish to be applicable to a particular commercial transaction. Similarly, countries traditionally allowed their merchants to make, together with merchants from other countries, their own rules and usages of trade, to develop new contractual forms and legal modalities of trade relations, and did not try to impose on them rules from their own codes and laws. This freedom to make contracts in the forms and in the manner in which they deem appropriate, has made international merchants sometimes less aware that there are differences between various legal systems for which they must watch out.

However, the fact is that each country's legal system has its own specifics and that, ultimately, most commercial relations do fall under a legal system of a certain country. For obvious reasons we are not in the position in such a short presentation to draw the attention to all the differences which may appear between legal systems of different countries. We shall rather draw the attention to some differences between civil law and common law which may sometimes appear. The examples given here are not exhaustive but rather illustrative of situations which may appear in foreign trade transactions.

CAN NEGOTIATIONS CREATE OBLIGATIONS ?

Negotiations we usually call oral or written exchange of views and contacts of parties related to a specific offer before the conclusion of an agreement. During negotiations parties often exchange letters, telexes or other oral or

written communications in which they express their intentions regarding an offer to conclude a contract. Once an offer is accepted, we have a contract.

In principle, negotiations which precede the formation of a contract do not create obligations and the parties are free to break up negotiations at any time before they have finally committed themselves i.e. before they have entered into a contract.

However, there are certain jurisdictions in which even negotiations may create certain obligations. There are jurisdictions where a party who has carried negotiations without an intention to conclude a contract may be liable to the other party for damages caused by such behavior. Jurisdictions where such obligations may be created are usually the ones based on civil law tradition and not on common law.

Parties sometimes sign documents which they do not wish to call contracts because they did not yet agree on all the points they consider necessary. In such documents parties may actually commit themselves to continue negotiations, or even to conclude a specific contract in the future. Such intentions of the parties may be contained in simple letters, cables, telexes, telefax messages. Sometimes parties during negotiations sign documents entitled Minutes of Discussions, Letters of Understanding, Heads of Agreement, Letters of Intent, Letters of Award, etc. All of such documents may be later interpreted as being either true contracts or mere non-binding declarations of the parties, depending on the intention of the parties to bind themselves. If a document contains truly all the elements

necessary for a contract, the courts shall interpret such documents as expressing the will of the parties to contract, regardless of the title or the name the parties have given to the document itself.

Although there are no rules and every document should be judged at its own merit, in many cases a "letter of intent" only express an intention to conclude a contract at some future time. Contrary to this, in most cases a "letter of award" expresses a decision of a party to conclude a contract with the other party. Such letters are very often issued in connection with engineering contracts and they are often considered as the acceptance of the offer. Consequently, such "letters of award" are considered as forming the contract. "Heads of Agreement" are sometimes true contracts but sometimes only an indication of the intent to conclude a contract in the future. The same is true for the "Letters of Understanding" or "Memoranda of Understanding".

Sometimes parties enter into arrangements which in essence amount only to a commitment to continue with negotiations. In common law a "contract to negotiate" is considered too vague to be enforced.

Parties sometimes, make a commitment to enter into a binding contract at a later time. Such "agreements to agree" or "contracts to make a contract" are similarly in most cases not considered as binding. In civil law jurisdictions the approach is sometimes different. There are jurisdictions where an "agreement to agree" shall be considered binding if it contains all the elements necessary for the second agreement.

Sometimes parties make an agreement "subject to formal contract". In common law jurisdictions it was very often held that such arrangements are not binding. However, it is considered that the courts may judge whether the parties have really intended the conclusion of a formal agreement to be the condition for the contract; or they have merely expressed only a desire to make such a formal agreement without it being essential for existence of the contract. However, if the parties made an arrangement and stated that the arrangement is valid "subject to contract" it is considered that they did not intend to be legally bound by that arrangement.

Parties sometimes issue the so called "letters of intent" on which they act pending preparation of a formal contract. Although there is yet no clear authority in common law on the precise meaning of such arrangements, it is stated that it would be open to the courts to consider parties bound by such letters, especially if the parties has acted on those terms for a long period of time or if they had expenced considerable sums of money in reliance on them. Such "letters of intent" are often issued in negotiations of large engineering contracts. Although the title "letter of intent" would indicate that the parties are expressing their common intent to enter into a contract at some future time and probably depending on some conditions yet to be fulfilled, it has been shown that the contents of such letters may be entirely different and may have varied intentions. For example, a client may wish in such a letter to bind the contractor while at the same time keeping for himself the freedom not to conclude the contract at a later date. Therefore, the very title "letter of intent" is not enough to judge the

content and the legal character of such a document. Each document has to be judged on its own merits.

There are cases where parties conclude incomplete agreement, i.e. such agreements which lack the necessary elements to be enforced. For example a contract for rent without a date in a common law jurisdiction was considered as not binding because it could not be determined from which date the rent started. However, contracts for sale which did not have the exact price for the goods sold were in common law and civil law jurisdictions alike considered as binding by the courts. This is particularly true if a sales contract does not contain the exact price of certain goods but contains only elements on the basis of which a price may be determined. In such cases lack of an essential element in the contract was not considered as being an insurmountable obstacle to the courts to consider that the parties have actually concluded a contract although all the essential elements were not agreed upon at the time of the conclusion of the contract.

In civil law jurisdictions sometimes a difference is made between sale contracts made between merchants and sale contracts made between non-merchants. In the first type, even if a contract does not have elements for fixing the price, the buyer will be obliged to pay the price which the seller "usually" received at the time when the contract was concluded, and if there is no such price, then a "reasonable" price to be determined by the court.

We can see that, if the parties did not express themselves clearly during negotiations, the courts may be put in a position to interpret their behavior. Such interpretation

of their behavior shall be made in such cases in accordance with the law applicable to that relationship and such laws, being different, may bring entirely different results from what the parties really wished to achieve and what they have expected.

OFFER AND ACCEPTANCE

As a rule, contracts are created through acceptance of offers. An offer may be described as a proposal to make a contract provided that the proposal contains all the necessary elements which, if accepted, may create a contract. It is usual that one of the parties in the course of negotiations makes an offer. The party who makes an offer is called the offeror. If such an offer is accepted unequivocally by the party to whom the offer was made (the offeree), a contract shall be created between them.

The first question of interest to the party who made an offer is the question whether such party is bound by the offer it made and for how long ?

Differences between common and civil law, once again, are vividly present in this area. In common law, in principle, it is considered that an offer is not binding and that it can be revoked at any time. Contrary to this, in civil law countries, an offer is binding and cannot be revoked at will.

Common law approach is based on the so called doctrine of "consideration", namely, a principle which states that nobody can be bound to a promise if he did not receive anything "of value" for making that promise. In other words, since there are no "gratuitous promises", an offer made without receiving anything in return is not binding and can be revoked by the one who made it at any time. This is true even in cases when the offeror has promised to keep the offer open for a certain period of time. If the offeror did not set a specific time for acceptance and did not revoke the offer, it is considered that the offer is valid during a reasonable time. However, if the offer was not revoked before acceptance, it is binding.

Civil law approach is different since under it an offer, once made, is considered binding for a certain period of time, unless the offeror has explicitly stated that the offer is not binding.

Thus, for example, the general rule is that if the offeror has given a term within which the offer will remain in force, it is binding on him until the expiry of such a term. If the offer was made to a present person (including sometimes offers made by telephones and telexes, and if no term for the validity of the offer was given, the offer has to be accepted at once or it ceases to be binding. If the offer was made to an absent person, what is most often the case in international trade, and no term of its validity was set, it is considered that the offer is binding during a period which is in the normal course of events necessary for the offer to reach the offeree, to have him study it and to have the acceptance to reach the offeror. In all such cases the offer cannot be

unilaterally revoked as is the case in the common law legal systems.

An offer has to be distinguished from mere inquiries, statements or invitations to make an offer ("invitation to treat"). Such acts usually lack the will or the intention of the parties who make them to contract. For example, if a buyer makes an inquiry with the seller for prices of certain goods, and the seller sends a reply, the buyer cannot accept the price and thereby make a contract. His inquiry was simply a question concerning prices and not an offer to buy.

An invitation to submit tenders for a specific construction or sale of goods is not considered an offer to construct or to sell, but merely an indication of the readiness to receive offers. Similarly, the display of goods in the window, in common law, is not an offer to sell, but an "invitation to treat". In civil law, display of goods in windows, is generally considered to be an offer to sell, unless something different is indicated or customary.

Mailing of catalogues, price lists, as well as announcements in newspapers, on radio or television networks is generally not considered an offer, but only an invitation to make an offer under the publicized conditions.

An acceptance made to present persons (instantaneous contracts) and this include acceptance made through telexes and telephones, is valid when it has been received

by the offeror. "Received" means that it has been received by the addressee's office and it is not necessary that the responsible official within an organization has actually received it.

ACCEPTANCE THROUGH MAIL

Common law and civil law rules are also different in a very important area, namely, in treatment of mailed acceptances (letters and telegrams). In common law, as a general rule, it is considered that a postal acceptance becomes valid once it is posted, while in civil law, as a general rule, an acceptance is valid when it is received by the offeror. One rationale for this approach is that, in common law, it is considered that the post office acts as the agent of the offeree and once the postal message (letter or cable) has been received by the post office, it has the same effect as if it has been received by the offeree himself. Another explanation is that the offeror must assume the risk of loss or delay of his message when he chooses to use the post office as the medium for communications. These rules are applicable to letters and cables, and not to telephones and telexes.

The burden of having the risk on the offeror for lost or delayed post messages, is not valid if the offeree made a mistake in addressing the letter. In such cases it will be considered that for purposes of contracting the acceptance was not mailed, except if the mistake of the offeree was the result of a previous mistake of the offeror (for example, when the offeree gave his wrong address and the offeror repeated the mistake).

A consequence of the application of these rules is that an acceptance is effective even if it did not reach the offeror since it was lost in the mail. In common law, the time of the contract will be considered the time when the acceptance was posted. Of course, if offeror stated in his offer that he will be bound by acceptance only if and when the acceptance is actually received by him, the posting rule will not be applied because the parties are free to regulate their relations as they wish.

It is generally considered that the silence of the offeree is not an acceptance of the offer. This rule is generally valid even if the offer explicitly states that the silence will be interpreted as an acceptance. Such rules are aimed at protecting people from too aggressive selling methods. However, there may be cases when the courts will interpret silence as an acceptance. This is sometimes the case when the parties have a long standing business contacts in relations to some specific goods. It is held that standing business partners have to react promptly to mutual offers. Similarly, if an offer to represent someone has been made to a person whose business is to represent other people (lawyers, solicitors, chartered accountants etc.), the offer has to be rejected outright or it will be held that the offer has been accepted and the requested representation act has to be carried out.

COUNTER-OFFER

In international trade parties often negotiate various terms and conditions of deals they intend to make. In common law and civil law alike, unless an acceptance fully corresponds to the terms of the offer, it will not be considered as an acceptance but as a counter-offer. A counter-offer is in substance a rejection of the original offer and it is considered as a new offer. A counter-offer will be considered also an acceptance of an offer with a proposal to vary a term or a condition of the original offer. Once a counter-offer was made, the original offer is no longer binding.

For example, in a case decided by British courts, a farmer offered to sell his house for 1,000 Pounds. The offeree made a counter-offer to buy the house for 950 Pounds which was rejected by the offeror. The offeree then accepted the original price of 1,000 Pounds and when the offeror refused to sell, sued for specific performance. It was held that there was no contract. In a similar case, also decided by British courts, a seller sold a plane for 50,000 Pounds. The buyer mailed the amount to the seller's bank with instructions to hold the amount "in trust" for the seller until delivery, which he stated was to be made within 30 days. Seller sold the plane to another buyer. The court held that instructions to the bank to hold the amount "in trust" as well as the delivery terms were not a satisfactory acceptance and were in substance a counter-offer and a rejection of the original offer because these terms were not included in the original offer for the sale of the plane.

The counter-proposal in the first case, as well as the varying of the sales terms in the second case, destroyed the original offer and the offeror was no longer bound by his first offer.

An acceptance which has come after the deadline of the offer is also considered as a counter-offer or as a new offer.

CONTRACTING UNDER CERTAIN CONDITIONS

In international trade it often happens that parties make contracts although they did not receive all the necessary licenses or approvals to enter into such contracts. Licenses are often necessary for importation of certain goods, and approvals may be required either by governmental authorities or management organs. In all such cases parties wish to complete negotiations by signing a contract, but do not wish to bind themselves before the receipt of necessary licenses or approvals. In such cases parties may sign a contract and agree that the contract shall enter into force only after they obtain the necessary licenses or approvals. Such conditions are in common law called "conditions precedent" and in civil law "condition suspensive". In such cases, although parties have signed a contract, they are really not obliged to perform it unless and until the condition is fulfilled, i.e. until they obtain the necessary license or approval. However, in such cases parties may not refuse the fulfillment of the contract for any other reason except the one for which they have agreed to be the condition.

Another type of conditions are the "conditions subsequent"(in common law) or "resolutory conditions" (in civil law). If a contract was signed under a resolutory condition, the contract is valid from the moment it has been signed, but the parties are entitled to rescind it if the event described as resolutory condition did not materialize. In such cases termination of the contract will not be treated as a breach, but as a legitimate termination.

Certain contracts, like construction and building contracts, foreign investment (joint venture)contracts, transfer of technology contracts, etc. are very often concluded under conditions precedent or conditions subsequent, because special approvals and licenses are more often required in such contracts than in some other types.

FORM OF CONTRACTS

In principle, contracts can be made informally, i. e. no special form (in writing, under seal, etc.) is required. If a form (in writing) is prescribed, national legislations may provide that the form is complied with if the agreement is contained in an exchange of letters or even in exchange of telexes, cables or other printed messages.

The consequences of non-compliance with the prescribed form may vary from case to case and from one national legislation to another. National legislations may sometimes prescribe that certain contracts must be made in a certain form (for example "in writing") and sometimes even that they cannot enter into force unless approved in writing by a certain national authority. This is particularly true for certain more complex modern contracts like foreign investment or transfer of technology contracts.

It is therefore advisable to verify each time what are the requirements concerning the form of particular contracts under certain national legislations and what are the consequences of non-compliance with the prescribed form. The consequences of non-compliance with the prescribed form may vary from case to case and from one national legislation to another. Sometimes, non-compliance may result in total nullity of the contract sometimes in avoidance of a contract, and sometimes in unenforceability by only one party or by both parties.

MISTAKES IN CONTRACTING

Once a contract is concluded, it must be performed. This is one of the oldest legal principle, common to all legal systems, and expressed in the Latin maxim "Pacta sunt servanda".

There are, however, certain situations when performance of a contract is not required and when the parties may be excused from their obligations to perform. Among such

causes which may come about in the pre-contractual stage, i.e. in the stage of the formation of the contract, are mistakes in the intention or in the will of one or both of the parties. If, for example, a contract is signed under duress (threat of a gun) it is self-evident that such signature did not express the will of the party who signed it. The same result will be achieved if a party mistakenly assumes that it is signing a simple letter while it was given to sign a promissory note or a contract.

Not all mistakes are treated equally in all legal systems. Thus, for example in common law, if the buyer mistakenly believes that the diamonds have more carats then they really have and without vendor making a misrepresentation, the purchase will not be considered as voidable because common law considers that the "buyer should be aware" ("caveat emptor").

In some civil law jurisdictions a contract is voidable if a party is in "fundamental mistake" concerning the subject matter of the contract or of the other party (if that is crucial). Thus, for example, if a party is buying specific goods which were destroyed before the contract was even signed it is considered that the parties were at fundamental mistake concerning the object of the contract.

Sometimes, even mistakes as to the terms of the contract may render a contract voidable. In a British case, sale of some hare skins were being negotiated "per piece" as was usual in the trade. In the contract, by mistake, the price was quoted "per pound". It was held that the contract did not express the true intention of the parties and was

therefore void. However, courts will usually move very cautiously in similar matters when a person of full age and capacity and of commercial experience signs documents such as contracts. It is usual that such mistakes will be allowed only if other circumstances show that the mistake was essential or fundamental and that the mistaken party did exercise such degree of caution which is usual in trade.

If a document was signed in blank and left to another person to fill in the blank , common law will allow the plea of "non est factum", which is usually a mistake induced by fraud. If the person who signed the document can show that he has acted carefully, he will be released from the obligation to perform. However, if the person who signed the document was negligent, the plea will not be allowed.

VARIOUS TYPES OF CONTRACTS

International trade is carried through various types of contracts. Some of the contracts are well known and have a long standing in law, like for example, sale of goods, agency, commission agency, building and construction contracts, while others are new and still developing, like for example, joint venture (foreign investment) contracts, transfer of technology contracts, management contracts etc.

It is important to differentiate among all these various types of contracts, because every contract has its own

specific rules and its own specific balance of rights and obligations of parties involved.

Another very important feature of contracts is, that the parties involved in commercial contracts, have by tradition, a great freedom to make their own arrangements regardless of the legal rules of applicable laws of their respective countries. For many centuries countries have allowed their merchants to make their own rules regulating their trade relations. Therefore, national laws regulating contracts in most of their provisions are not of a mandatory character. All these national rules and regulations are there only for cases when the parties themselves did not provide an adequate solution in their contracts. If the parties have agreed in their contracts on a specific point, national laws will not interfere, unless it is a matter of public policy. Since there are not many questions of public policy in private commercial dealings, one can assume that what the parties agreed upon in their contract will be later enforced by the courts or arbitration tribunals if there is a dispute between the parties.

SALE OF GOODS

This is probably the oldest commercial contract in use. Consequently, contract for sale of goods is very precisely regulated in national codes and these codes contain solutions when the parties themselves did not regulate a specific matter in their contracts. In civil law countries rules on the sale of goods are contained in

Civil Codes, while in common law countries one can often find special Sale of Goods Acts.

There are differences among national legislations concerning various aspects of sales. One are where such differences are visible is the area of transfer of ownership of the goods sold. According to some legal systems ownership of goods sold will be transferred from the moment when the contract was concluded. In some other legal systems for transfer of ownership it is necessary that the goods sold have been handed over to the buyer. According to some other legal systems, it is necessary not only that the contract on sale is concluded and that the goods were handed over, but also that the parties have agreed to transfer the ownership of goods. Principles of transfer of ownership are strongly embedded into and attached to legal systems and it would be difficult to unify these principles. .even with concerted efforts directed toward unification of sales laws. However, certain other areas of sales law, like for example principles on formation of contracts, delivery of goods, conformity of goods, remedies for breach, passing of risk, etc. are more likely to be universally accepted.

With the purpose of unifying the national rules on sales of goods, several years ago (1980) 62 countries met in Vienna and at the end agreed on the text of the UN Convention on Uniform Law for International Sales. The Convention was ratified by 10 countries and will enter into force on January 1, 1988. It is maybe too early to say whether the Convention will ultimately receive universal recognition and whether it will be widely applied in international sales in the future. However, it could be considered as a success that the Convention was

ratified by sufficient number of countries in order to enter into force. The Convention will be applicable among merchants from the countries which have ratified the Convention. Like national laws, the provisions of the Convention will be applied only if the parties from countries which have ratified the Convention did not provide a different solution in their contracts.

AGENCY AGREEMENTS

An agent is the one who acts on behalf (in the name and for the account) of another. In law an agent is called every person who acts for another, but in trade a commercial agent is the one who is a merchant by profession and who represents another merchant. Commercial agents are very important for international trade because they facilitate trade relations between their principals and third parties. The way commercial agents act is either by having an authority to only represent the principal without an authority to commit him, or by having an authority to conclude contracts on his behalf.

It is usual that an agency contract is concluded for a longer period of time (six months and more). Certain countries have enacted special legislation to protect their agents against sudden termination of agency agreements by their principals by giving their agents special rights to terminal compensation at the end of their agency relation. Such legislation can be found in many Gulf countries as well as in many countries of Western Europe. However, such protective legislation

cannot be found in Great Britain or other countries of the common law.

DISTRIBUTORSHIP AGREEMENTS

Distributors or sole distributors as they are sometimes called, are not agents because they do not act on behalf of their principals. Distributors buy goods from their principals in their own names and for their own accounts and they also sell these goods in their own name and for their own account. They are called "distributors" because they are often bound to one specific manufacturer and they seemingly "distribute" goods of their principals in their respective territories.

COMMISSION AGENTS

In civil law countries commission agents are merchants who conclude contracts in their own names but for the account of their principals. If such a contract is concluded in a civil law country, the principal has no legal relationship with the third party to whom the goods were sold. If there is a dispute between the third party and the commission agent, principal cannot be involved even if the third party knows who is the principal and from where the goods originated. In common law countries the situation is different because of the doctrine of disclosed and undisclosed principal. According to this doctrine, an agent acts on behalf of his principal and the principal's identity can be either disclosed to the third party or

not. If the identity of the principal is disclosed, the third party can sue the principal (the same as in civil law countries). If the identity of the principal is not disclosed, the third party can sue only the agent because the third party is not aware that there is a principal, or if it is aware, it does not know its identity. However, once the identity of the principal is disclosed, the third party can sue directly the disclosed principal.

CONSULTANCY AGREEMENTS

Consultancy agreements are usually concluded in the sphere of engineering services, although they can be found whenever an intellectual service is required. In the engineering field there is a great need for all kinds of pre-feasibility, feasibility, designing, supervision of construction and similar services. All these services are performed through consultancy agreements.

There is a consistent tendency of consultants to limit their liability for the service they perform and we can say that the limitation of liability of consultants is probably the most outstanding issue in such agreements. There are legislations which do not allow any limitation of liability consultants, while other do allow it under certain conditions. It is advisable to find out what is exactly the position of a particular legal system before a contract is concluded.

In civil law countries it is usual to differentiate the gravity of faults. Such differentiation is usually made in three degrees, namely, light fault, grave fault and

intent. In some legal systems which allow such differentiation, limitation of liability is sometimes allowed for light fault of the consultant, but not for grave faults or for intentional fault. common law systems, as a rule, do not provide such differentiation of faults and therefore the limitation of liability is sometimes allowed on wider grounds then in civil law systems.

CONSTRUCTION AND BUILDING CONTRACTS

The area of construction and building contracts is heavily influenced by general conditions which are widely used in this type of contracts. Probably the best known general conditions are the ones published by FIDIC (Federation international des ingenieurs conseils). Since these general conditions have their origin in British general conditions, it could be said that British legal concepts in this field are very influential. The same is true in contracts for supply of electrical and mechanical equipment.

Under the influence of British building and construction concepts, for example, the role of the consulting engineer has gained wide acceptance in international contracts of this kind. The peculiarity of the British concept of the consulting engineer is that, although he is in the service of the client (Employer or Investor), he has wide discretionary powers in the administration of construction contracts. Consequently, consulting engineer may make obligatory decisions in the course of the construction which the contractor has to follow, regardless of his disagreement with such decisions. If the contractor is not

satisfied with some of such decisions, he may opt to go for arbitration, but he is, nevertheless obliged to carry out such decisions of the consulting engineer.

The wide application of general conditions based on British legal concepts has brought about a considerable unification of the rules of carrying out the works of civil engineering and construction works. Lately, general conditions of FIDIC were adopted by the World Bank and are being recommended for use whenever such contracts are financed by the World Bank Loans. This development has also contributed to even wider application of the said general conditions.

JOINT VENTURE (FOREIGN INVESTMENT) CONTRACTS

As a result of changes in the pattern of foreign investments, in the last two decades there was a considerable increase in the number of foreign investments in developing countries which was based on shared ownership of local and foreign partners. Such contracts are usually called "joint venture" agreements, but they should be differentiated from agreements known under the same name and practiced in the engineering field when two or more contractors combine their forces in order to execute a specific project.

Joint venture agreements are novel and quite complex and many developing countries do not have sufficient experience in negotiating and contracting them. Such agreements are sometimes described and considered as

controversial because not all of them were beneficial for developing countries. In order to acquaint developing countries with intricacies of such contracts several United Nations agencies like UNIDO, UNCITRAL. UNCTC, UN ECE, UNCTAD/GATT and others, are trying to spread the knowledge and understanding of these contracts through seminars and workshops.

Also in order to bring more international harmony and understanding in the sensitive field of foreign investments, the UN Centre on Transnational Corporations has been working during the last 10 years on the Code of Conduct for Transnational Corporations. Unfortunately, countries participating in this work were not able to agree on some of the more crucial conditions of the Code and therefore the Code has not yet been agreed upon. If and when the Code is once accepted, it is expected that it may facilitate foreign investment by creating a more favorable climate.

TRANSFER OF TECHNOLOGY CONTRACTS

Such contracts serve as the legal basis for granting to third persons the right to apply or use of a certain knowledge. The knowledge may be protected (patents or trade marks) or unprotected (know-how). Such contracts are very often part and parcel of foreign investment arrangements because new plants built through joint investments usually use new technology supplied by foreign partner. Such technology may be either given as part of the investment, in which case it is valued and invested, and no other payment is expected. However, in such cases

the invested value is expected to be returned at the end of the joint venture. On the other hand, technical knowledge may be given under a license for which separate payments in the form of license fees are provided for. In any case, foreign investors do not provide new technologies free of charge only because they are sharing in the ownership of their joint venture enterprise. They expect special and separate remuneration for the use of their technology .

Since transfer of technology contracts were also criticized by developing countries as being often too restrictive and not always favorable to them, efforts were being made to agree on a Code which would embody certain principles acceptable to all parties to such contracts. Negotiations were held within UNCTAD/GATT for many years, but until now, no final results were achieved.

CONTRACTS WITH BANKS

In most contracts there is a need to involve banks, either as places through which payments are made or guaranteed or as third parties which guarantee the performance of certain obligations of contractual parties. In all such cases banks appear as very important additional contracting parties. Whenever a bank issues a Letter of Credit or a Bank Guarantee we have banks as additional parties, since their commitments are expressed through the above said instruments which, in their legal nature, are contracts.

Banks are sometimes involved even before a contract is formed. This is particularly true in international bidding for construction projects and supply of equipment projects. Bidders in such projects are often requested to submit a bank guarantee, sometimes also called a "tender guarantee". In such cases banks guarantee payment of a certain amount of money in the case if the tenderer does not conclude the contract even if his offer has been accepted by the employer or does not submit a performance guarantee after the acceptance of his offer.

SETTLEMENT OF DISPUTES

Aside from the privilege to the autonomy in their contractual relations concerning their contractual relations, merchants have a further privilege in having the freedom to agree on the forum which shall have the jurisdiction to solve the disputes arising out of their contracts and the freedom to choose the applicable law. Consequently, merchants may agree that their disputes shall be solved either by the courts of a country of their choice, or by arbitration which they chose. Furthermore, they can agree on the application of any legal system they like, even the one which is totally unrelated to their contractual relations.

As a result of this freedom to make their own choice, international arbitrations are more and more frequently used in international trade contracts. There are today many institutional arbitrations attached to some institution. A good example is the Arbitration Court of the International Chamber of Commerce in Paris. Another

example is the Arbitration Centre established under the auspices of the Afro-Asian Legal Consultative Committee in Kuala Lumpur (Malaysia) and the Regional Arbitration Centre in Cairo. There are many national Chambers of Commerce which have standing arbitration courts and which are ready and willing to arbitrate and offer arbitration facilities if the parties so agree.

More than 10 years ago, within the World Bank, the Convention on Settlement of Investment Disputes has been agreed upon. Until today (end of 1987) there are almost 100 countries which have siged the Convention and 89 countries which have ratified the Convention. The Convention provides for an arbitration facility which is administered by the International Centre on Settlement of Investment Disputes (ICSID) within the World Bank in Washington. ICSID is available in cases of disputes which have their origin in "investments". This term usually encompasses foreign investment, but also disputes connected with long term construction contracts. Another feature of ICSID arbitration is that at least one of the parties involved in the dispute must be a Government or a governmental authority. In all, 23 disputes have already been submitted to ICSID for settlement.

If the parties opt for an ad hoc arbitration and not for an institutional arbitration, they will usually provide in their contract that each party will nominate its own arbitrator and these two arbitrators will nominate the third one. The difficulty of such ad hoc arbitrations is that one of the parties has the possibility not to cooperate diligently in the nomination process and thereby may destroy the efficiency of the dispute settlement procedure. For such cases UNCITRAL in Vienna has devised

the so called UNCITRAL Arbitration Rules. If the parties wish to provide for an ad hoc arbitration procedure, it may be advisable that they provide in the arbitration clause that the dispute shall be settled in accordance with the UNCITRAL Arbitration Rules. In order to facilitate the nomination of arbitrators the parties may also wish to provide in the arbitration clause an "appointing authority" which shall appoint arbitrators if one of the parties does not cooperate in the nomination procedure. However, even if no appointing authority has been named by the parties, Arbitration Rules have a solution. In such cases the Secretary General of the Permanent Court of Arbitration at The Hague shall designate the appointing authority.

As stated hereinabove, parties may also freely choose the applicable law according to which their contracts shall be interpreted. Their choice may relate to the procedural law and/or to the substantive (material) laws alike. However, parties are often not allowed to deviate from the mandatory laws of their own countries. For example, if a national legal system provides that a certain type of contract has to be approved by a national authority before it enters into force, it is almost certain that the contract will be void and will have no effect in the country where such conditions are imposed. Therefore, even when the parties have made a choice of another legal system, they still are bound by the mandatory rules of their own national legal systems.

EXECUTION AND ENFORCEMENT OF ARBITRAL AWARDS

When parties to a contract agree on a dispute settlement procedure by either agreeing on an arbitration or on jurisdiction of foreign courts, they will, once they obtain the arbitral award or a final court judgment, be faced with the problem of execution of such a decision in the national courts of the country where the losing party has its seat. Foreign arbitral awards or court judgments can be enforced only through local courts in the same way as judgments of local courts. In most countries in the World, local codes of procedure or similar codes, contain rules for enforcement of foreign arbitral awards and judgments of foreign courts. That means, that parties who won their disputes abroad will have to apply to local courts to enforce such decisions in the country where the losing party has its seat and that such enforcements will have to be carried out in accordance with the procedure for such enforcement as containec in national codes.

In order to unify the principles and conditions under which a foreign award or a judgment may be enforced in local courts, the so called New York Convention of 1958 has been signed and ratified by more than 50 countries. This Convention provides only a few grounds on which enforcement of a foreign arbitral award may be refused by local courts. Such reasons are few and explicitly enumerated.

Recently (1985), UNCITRAL has worked out a Model Law on International Commercial Arbitration which was aimed to serve as a model to national legislators when drafting provisions of their own codes providing for such

arbitration. The Model Law repeats the grounds on which recognition or enforcement of a foreign arbitral award may be refused under the New York Convention. In this way even a greater degree of unification could be achieved than it exists today through the New York Convention.

CONCLUSION

In the presented paper we have tried to outline some of the differences between civil law and common law concepts in formation of contracts and in some of the contracts which are widely practiced today in international trade. At the same time we have tried, with a few examples, to illustrate the efforts which are constantly being made in order to unify the rules governing the laws of international trade. This paper has no pretension to give either an exhaustive review of all the differences between common and civil law, nor to give an exhaustive picture of these unification efforts. However, it is hoped, that even this limited presentation will illustrate the difficulties faced by merchants when they engage in international trade.