(1) STANDARD/MODEL CONTRACTS SUITED TO THE NEEDS OF THE REGION

Resume of the work done at Kuala Lumpur (1976), Baghdad (1977) and Doha (1978) Sessions of the Committee

During the eleventh session of the Committee held in Accra in 1970, when the UNCITRAL's work on Uniform Law on International Sales (ULIS) and its draft of 'General' General Conditions were being discussed, the representative of the UNCITRAL Secretariat had suggested that the Committee could usefully undertake the preparation of standard or model contracts or general conditions of sale in respect of commodities of particular interest to the Asian-African region on the same pattern as was being followed by the Economic Commission for Europe (ECE). In the course of discussion at that session it was pointed out that the bulk of the trade in regard to agricultural produce and other primary commodities was being carried on under standard contracts drawn up by trading institutions in the West which were not evenly balanced and often worked unfavourably to the sellers who primarily came from the developing countries in Asia and Africa. Most of the member governments of the Committee and various trade organisations in the region who were consulted in the matter expressed the view that the Committee should prepare new standard contract forms which would be more evenly balanced. The suggestions concerning the commodities to be covered by such contract forms specifically mentioned the following: rubber, timber, textiles, light machinery, oil, minerals including bauxite and iron ore, animal products, hides, paper, maize, wheat, bananas, jute, jute products and cocoa.

Since the commodities recommended were too numerous to be covered by any single contract form, it was decided to proceed with this work in stages. To begin with, the draft of a standard contract form based on F.O.B./F.A.S. terms was prepared which was intended to be made applicable to

sales of agricultural produce in respect of which the countries in the Asian-African region were primarily exporters. The draft was submitted to Asian-African governments and trading organizations in the region and the suggestions received were incorporated in the draft. The draft was thereafter considered by the Standing Sub-Committee on International Sale of Goods during the thirteenth session of the Committee held in Lagos in 1972. The Sub-Committee, after considering the draft standard contract form, drew up a report suggesting certain amendments to it. On the same lines the Secretariat prepared the draft of a second model contract form together with general conditions of sale relating to the purchase of durable consumer goods and light machinery in respect of which most of the countries in Asia and Africa are mainly buyers.

The drafts prepared by the Committee's Secretariat were then considered by the Standing Sub-Committee during the sixteenth session of the Committee held in Teheran in 1975, in which the representatives of UNCITRAL, UNIDROIT and the Commonwealth Secretariat also participated. The drafts finalized at that session were:

(1) Standard Form of Contract on F.O.B. basis applicable in respect of certain types of agricultural produce and other commodities which are generally exported by countries in the Asian-African region;

(2) Standard Form of Contract on F.A.S. basis applicable to the commodities covered by the F.O.B. contract but which are of a perishable nature;

(3) Standard Form of Contract on C.I.F. basis applicable to light machinery and durable consumer goods which are generally imported by the countries in the Asian-African region; and

(4) General Conditions of Sale on C.I.F. (Maritime) basis applicable to light machinery and durable consumer goods as an alternative to the corresponding standard contract.

The Committee, accepting the recommendations of the Sub-Committee, decided to submit these draft contract forms together with explanatory notes, which were to be prepared by the Secretariat, to the member governments, a few non-member governments and trading organisations in the region, United Nations organs and international organisations concerned with trade law for their comments. The Committee directed that these draft contract forms should be submitted, together with the comments received, to a Special Meeting of Experts to be convened under the auspices of the Committee during 1976. The comments received included those from the Commonwealth Secretariat and the Economic Commission for Europe which had constituted an informal group of experts to study the drafts finalised at Teheran.

Kuala Lumpur Session (1976)

Pursuant to the decision taken at the Teheran session, a Special Meeting of Experts was convened in Kuala Lumpur in July 1976 after the closure of the session under the chairmanship of the Hon'ble Tan Sri Datuk Haji Mohammed Salleh bin Abbas, Solicitor-General of Malaysia and was attended, among others, by the representatives of the Commonwealth Secretariat, the UNCITRAL and the Economic Commission for Africa. Professor K. Sono (Japan) was appointed as the Rapporteur. The Meeting of Experts finalised the F.O.B. and F.A.S. contract forms but due to lack of time could not take up the C.I.F. contract and the corresponding General Conditions.

Baghdad Session (1977)

At the eighteenth session held in Baghdad in February 1977 the following points were dealt with by the Trade Law Sub-Committee :

(1) The mode and manner by which the two model contracts finalised at Kuala Lumpur by the Group of Experts should be brought to the notice of governments and trading organisations with a view to encouraging the use of these model contracts in international trade transactions;

(2) The time and place of the Special Meeting of Experts for finalisation of the remaining draft C.I.F. contract and the draft conditions of sale; and

(3) Whether the Committee's Secretariat should proceed with the formulation of standard/model contracts relatable to other articles and commodities and also in regard to setting up of plant and machinery.

The Sub-Committee approved the F.O.B. and F.A.S. standard contracts which had been finalised by the Special Meeting of Experts at Kuala Lumpur and directed that another meeting of experts be convened immediately after the nineteenth session of the Committee to consider and finalise the drafts of the standard form of C.I.F. contract and the corresponding General Conditions applicable in respect of light machinery and durable consumer goods.

The Sub-Committee was also of the opinion that the Committee's Secretariat should proceed with the formulation of standard contract forms relating to other commodities, as well as contract forms for the construction of plants which would be suited to the region.

In regard to the F.O.B. and F.A.S. contract forms approved by it, the Sub-Committee was of the opinion that the use of these contract forms would depend largely on the support that would be received from the governments in the region, and also from the various international and national organisations concerned with trade. The Sub-Committee, therefore, recommended that the Secretariat of the Committee should be requested to circulate these forms as widely as possible to the appropriate institutions and organisations

for use in international transactions and to request each of the member States of the Committee to take appropriate measures for their wider circulation within their respective jurisdictions. It was also agreed that in so doing the Secretariat should be requested to prepare a note to be annexed to each standard contract form setting out the specific provisions in which the parties to the contract either have to fill in the blanks in the contract or have to determine between the alternatives set out in the standard form.

The Secretariat accordingly printed one thousand copies each of the two contract forms and a request was made to all the member governments and certain selected non-member Asian-African States (Afghanistan, Burma, China, Bhutan, Cyprus, Ethiopia, Lebanon, Lesotho, Liberia, Maldive Islands, Mongolia, Sudan, Swaziland, Uganda, Democratic Republic of Yemen and Zambia) to furnish the Secretariat with the list of government departments and their national chambers of commerce and trade organisations who would be interested in receiving the standard contracts. A similar communication was also sent to thirty-three chambers of commerce and ten inter-governmental organisations. Over 900 copies of the contract forms have since been distributed.

Both contract forms have been translated into Arabic by the Government of the Hashemite Kingdom of Jordan. The International Chamber of Commerce in Paris, with which discussions were held in regard to the use of the standard contracts, were of the view that the terms contained therein appeared to be more appropriate than those currently in use. The UNCITRAL during its tenth session took note of these standard contracts and were appreciative of the reference made therein to the UNCITRAL Arbitration Rules for the settlement of disputes. The Commonwealth Secretariat included news about these contracts in their Bulletin and the American Arbitration Association was also favourably inclined to considering the terms incorporated in the standard contracts.

The F.O.B. contract is suitable for use in sale transactions of agricultural produce such as grain, rubber, oil, coconut products, spices and other similar commodities where parties agree the delivery terms to be on F.O.B. basis. The F.A.S. contract, although applicable to the same type of commodities, is more suitable for goods which are of a perishable nature or goods which are likely to deteriorate during the shipment, if not properly handled or secured. It is well known that in many cases the masters of vessels refuse to issue clean bills of lading with the result that payments against letters of credit are held up and the seller has to wait until the goods are inspected at the port of discharge. If the goods deteriorate in quality during the voyage for any reason including the fault of the ship's master or his crew, the chances of the seller recovering his full value for his goods become remote. The F.A.S. contract, which provides for delivery alongside ship, is thus more suitable in respect of perishable goods or goods which by their nature are likely to deteriorate in the course of the voyage.

The AALCC standard contracts unlike most of the standard forms prepared by trading institutions are not contracts of adhesion. They contain general terms which can be modified by the parties to suit their needs. Important changes relating to quality check, shipment, the applicable law and the settlement of disputes have been made in these standard contracts as compared to the contracts currently in use, in order to strike a balance between the interests of both the seller and the buyer. The AALCC standard contracts provide in regard to the applicable law, that unless the parties otherwise agree it will be the law of the seller's country which would govern the transaction. Such a provision was considered to be more equitable because whilst the parties are free to choose the applicable law, in the absence of agreement the law of the seller's country would be more apt in sale transactions of agricultural produce and other raw material. Another feature of these contract

forms is that disputes arising out of these contracts should be settled by arbitration in accordance with UNCITRAL Arbitration Rules which are evenly balanced and enjoy a very wide acceptability. Thus, their use will do away with the system of compulsory arbitration under the auspices of a trading association in the West as provided for in the standard contracts currently in use. Another feature of these contracts is the provision in regard to the fluctuations in price and currencies which will enable the parties to deal with that problem more satisfactorily then was hitherto possible.

Doha Session (1978)

At the nineteenth session of the Committee held in Doha in January 1978, the question of progressive use of the standard contracts approved by it at the Baghdad Session, was reviewed by the Trade Law Sub-Committee. The Sub-Committee invited the plenary to recommend that member States take appropriate measures to encourage their progressive use in international transactions. The Sub-Committee was also of the view that the two regional centres for commercial arbitration which were to be set up at Kuala-Lumpur and Cairo respectively should widely circulate the text of the standard contract forms to interested trade circles. In addition, the Sub-Committee requested the Committee's Secretariat to prepare a booklet containing explanatory notes on the standard contract forms and to distribute them together with the standard forms to the chambers of commerce and leading legal periodicals.

With regard to the formulation of other standard contract forms suited to the region, the Sub-Committee noted that the Legal Adviser of the Kuwait Fund for Arab Economic Development had suggested that the Committee prepare contract forms on :

(a) Consultancy agreements, particularly those relating to the preparation of feasibility studies, engineering

design and supervision of execution of projects:

(b) Construction contracts, particularly those relating to plant and machinery;

(c) The transfer of technology and know-how licensing agreements; and

(d) Contracts for grant of concessions in regard to the exploitation of natural resources and mineral deposits.

With reference to construction contracts and contracts for grant of concessions in regard to exploitation of natural resources and mineral resources, the question was raised whether these matters justified the preparation of standard contract forms in view of the fact that development or investment contracts could contain elements pertaining to each of these matters. After an exchange of views, the Sub-Committee was generally agreed that the preparation of standard contract forms on these matters would serve a useful purpose, namely that the forms would assist in identifying the issues which should be taken into account when concluding a contract, even though the standard contract forms as such might not be used.

In connection with the preparation of standard forms relating to the transfer of technology, the Sub-Committee noted that an international code of conduct was under preparation by the UNCTAD Inter-Governmental Working Group on Transfer of Technology. In view of its relevance to the above-mentioned matter, it was agreed that the preparation of standard contract forms could be postponed until after the Sub-Committee had examined, at the next session, the code of conduct or drafts thereof.

In the light of the above, the Sub-Committee requested the Secretariat to prepare preliminary studies which would

serve as a catalogue of issues relevant to the preparation of model contract forms on these matters.

Special Meeting of Experts, Doha

Pursuant to the decision taken at the Baghdad Session, a Special Meeting of Experts was convened in Doha from 24th to 26th January 1978 to consider and finalise the Draft CIF Maritime Standard Contract and corresponding General Conditions applicable to light machinery and durable consumer goods which had been approved by the Trade Law Sub-Committee during the Teheran Session (1975). The meeting was chaired by Mr. Mohamed S. Turay, Solicitor General of Sierra Leone. Prof. K. Sono of Japan acted as the rapporteur. The meeting was attended by experts from Ethiopia, Ghana, India, Indonesia, Japan, Kenya, Republic of Korea, Malaysia, Nepal, Oman, Pakistan, the Philippines, Senegal, Sierra Leone, Somali Democratic Republic, Sri Lanka, Tanzania, Thailand, Turkey, Uganda and United Arab Emirates. The Secretary of UNCITRAL, Mr. Willem Vis, also participated in the meeting. The Special Meeting was, however, unable to complete the consideration of the draft contracts and therefore decided to resume its consideration of the drafts at its next meeting.

(II) INTERNATIONAL COMMERCIAL ARBITRATION

The Committee during its thirteenth session held in Lagos in 1973 proposed that apart from following up the work of UNCITRAL in the field of International Commercial Arbitration, the Committee should make an independent study of some of the more important practical problems relating to the subject from the point of view of the Asian-African region. The Committee's Secretariat accordingly prepared an outline of a study which elicited a very favourable response from the member governments and other governments of the region. The Secretariat also conducted an

extensive survey with regard to current arbitration law and practice. Enquiries in this respect were directed to institutions and bodies engaged in the field not only in the Asian-African region but in other regions as well as it was felt that useful conclusions could be arrived at only by a comparative study based upon the practices as developed in different regions. In the first place enquiries were addressed to the national and international arbitral institutions and trade associations asking for information about arbitrations conducted under their auspices. A large number of replies were received furnishing information on the relevant rules of arbitration of the institutions or associations in question. Secondly, enquiries were also addressed to member governments and certain other governments of the region. A certain number of responses were received which varied both in scope and in details given in regard to the various topics under investigation. The Secretariat thereafter prepared a detailed and comprehensive study on the basis of these materials which covered the following topics :-

A. Institutional Arbitration and *Ad Hoc* Arbitration (respective merits and demerits).

B. Constituting the Arbitral Tribunal.

C. Venue of Arbitration.

D. The applicable law to determine the rights and obligations of the parties under the contract which is the subject-matter of arbitration.

E. Procedure in Arbitration.

F. Arbitral Awards.

G. The enforcement of foreign arbitral awards.

This study was considered by the Trade Law Sub-Committee during the Tokyo Session of the Committee held in 1974 and certain preliminary comments were made on the topics covered by the study. The Committee thereafter decided that the Secretariat should prepare a revised study on the same topics so as to enable the Trade Law Sub-Committee during one of its future sessions to formulate principles or model rules for consideration of member governments with a view to incorporation in the municipal laws or adoption of a regional convention.

Accordingly, the Committee's Secretariat prepared a revised study on the subject for consideration of the Trade Law Sub-Committee during the Kuala Lumpur Session (1976). Reviewing the progress made in UNCITRAL on the subject and the work already done in the Committee the study suggested the following questions of practical value for consideration of the Trade Law Sub-Committee at its Kuala Lumpur Session :

(1) Promotion of arbitral institutions or centres in the Asian-African region - inter-institutional co-operation- the types of diputes where institutional arbitration may be resorted to and disputes where *ad hoc* arbitrations would be preferable.

(2) Considering that in institutional arbitrations the proceedings are to be governed by the rules adopted by the arbitral institutions, what practical measures may be adopted to ensure that the rules of the institutions concerned conform to the minimum safeguards which are necessary to protect the interests of developing countries and their nationals.

(3) Formulation of principles concerning the constitution of arbitral tribunals, venue of arbitration, the applicable rule governing the rights and obligations of the parties, procedure in arbitration and the

award for possible incorporation in municipal laws or model rules.

(4) Examination of the UNCITRAL model rules for optional use in *ad hoc* arbitrations and other model rules.

(5) Considering that the municipal laws of various countries have direct impact on arbitration proceedings which may be at variance, what suitable means could be adopted to bring about a certain degree of uniformity in the matter of arbitration proceedings - possibility of adoption of a regional convention.

(6) Enforcement of arbitral awards - consideration of the provisions of the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

With regard to the first question, the study drew attention to the fact that institutional arbitration was well developed in America and Europe under the auspices of various chambers of commerce and associations of trade which provided arbitration facilities in accordance with their own rules. The position was, however, quite different in Asia and Africa. Although some of the countries in the region did have chambers of commerce which provided arbitration facilities, their main use was practically confined to settlement of disputes between local parties and not so much in transactions of an international nature. Even the ECAFE Centre for International Arbitration had not proved very popular. At the third session of UNCITRAL held in April 1970, some representatives had expressed the view that the Commission should foster the organisation of new arbitration centres in developing countries and the rendering of technical assistance in that field. It was also proposed that the Commission should encourage the Economic Commission for Africa and the Organisation for African

Unity for the creation of an African Arbitration Association which would have panels of African arbitrators for settlement of disputes in trade with African countries. The Special Rapporteur of UNCITRAL, Prof. Ion Nestor, had advocated the promotion of systematic cooperation among arbitration centres and other organisations concerned. It was felt, however, that promotion of arbitration centres or institutions by itself might not be sufficient because use of such centres would depend primarily in the confidence that could be created in the institutional facilities so provided and the prestige which such institutions could command. In this connection it had been debated as to whether the arbitral centres should be promoted under the auspices of regional economic organisations of the United Nations or should be left to the organisations of the trade. Institutional arbitrations had certain advantages over *ad hoc* arbitrations in certain types of disputes and therefore the study submitted that it would be desirable to promote institutional arbitration in the Asian-African region, that is to say, to establish centres where adequate arbitration facilities would be available for settlement of disputes arising out of international commercial transactions. At the same time, the study drew attention to the fact that trading communities had been using for a considerable period of time the facilities provided by recognised arbitral bodies in Europe and the Americas and it might need some time to presuade them to use the facilities which might be offered by the new centres or institutions to be established in the Asian-African region. The study pointed out that even though it might be of advantage for the commercial communities of the Asian-African region to resort to the arbitration of the newer centres or institutions, the main impediment would be in the attitude of their trading counterparts in the Western world. In the ultimate analysis this matter would also be dependent on the bargaining position of the parties. Once it was appreciated and recognised that the arbitral institutions could no longer remain confined to the West, establishment of such institutions and centres had to be tackled on a

proper basis with the cooperation of the regional agencies of the United Nations and organisations of trade. Once inter-institutional arrangements for cooperation were drawn up, there might not be any superimposed obstacle to the use of facilities provided by the newly established institutions or centres. Moreover, the governments of the region who were major buyers or sellers of commodities in international trade, might have a large say in the use of facilities of the institutions of the region.

With regard to the second question, the study drew attention to the fact that most of the recognised institutions had their own rules for conduct of arbitrations which did not work out favourably for the developing countries, particularly in the matter of venue, choice of arbitrators, as also fees and charges leviable by the institutions concerned. Since most of these institutions functioned under the auspices of chambers of commerce and other associations of trade, it was difficult to visualize the manner or the means by which practical steps could be taken to effect modification of the rules of such institutions to bring them in conformity with the interests of the developing countries. Professor Ion Nestor, the Special Rapporteur of UNCITRAL, had proposed that UNCITRAL should establish a study group to examine the desirability of drawing up a model set of arbitration rules containing basic provisions which arbitration centres would incorporate into their rules. At the fifth session of the Commission, representatives expressed differing views on the advisability of such a step and some representatives pointed out that the implementation of this proposal would be virtually impossible. Nevertheless, it was felt that if Asian-African countries and their nationals were to continue using arbitral centres or institutions in the West, the rules formulated by those bodies must be suitably adapted to meet the needs of the developing countries. The study, therefore, submitted for consideration whether it would not be worthwhile in indicating to those institutions some minimum safeguards for incorporation in the rules of those institu tions.

If they did not implement such suggestions, then one of the means which could be adopted would be to discontinue use of arbitral facilities provided by those institutions as far as possible. The study stressed that in the present day context of trade and commerce, developing countries were no longer in the helpless position they were in and it might not be difficult to ensure compliance of any reasonable requests for modification in the rules if concerted action was taken by the countries of the region acting together. Furthermore, if the rules of an arbitral institution did not conform to reasonable standards, it would be legitimate not to recognize or enforce the awards made under the auspices of such institutions as being opposed to the public policy within the meaning of the U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

With regard to the third question, the study submitted that formulation of principles concerning the five major aspects of international commercial arbitration would be useful to determine and clarify the basic issues on the subject, particularly in the light of the interests of the Asian-African region. If these principles were formulated, they would be useful for three purposes, namely:

(a) In approaching arbitral institutions with the proposal that they adopt them in their own rules;

(b) In recommending to the governments of the region that they incorporate those principles in their municipal laws; and

(c) Incorporation of the principles in agreements for *ad hoc* arbitrations or in model rules for such purposes.

With regard to the fourth question, the study submitted that in view of the work of UNCITRAL in the matter of preparation of model rules and the existing ECE and ECAFE

Rules of 1966, it would be mere duplication of work if the Committee also drew up a set of model rules for optional use in *ad hoc* arbitrations. The study, therefore, suggested that it would be useful if the model rules drawn up by UNCITRAL were considered by the Trade Law Sub-Committee and suggestion made for any modification or adaptation.

The fifth point, according to the study, was one of the most improtant matters, which should be taken up for consideration by the Trade Law Sub-Committee. Since national laws played a vital role in the arbitration process which might at times be at variance, a good deal of complications had been known to arise. Although the laws of most countries conceded, in principle, the autonomy of the parties in respect of such matters as the submission of a dispute to arbitration, the selection of an institutional or *ad hoc* arbitral tribunal, the appointment of arbitrators, the choice of the law etc., the entire process of arbitration, however, was generally subject to the mandatory provisions of the applicable law, namely the law of the country where the arbitral agreemcnt had been concluded or where the arbitral tribunal held its sittings or where the recognition and enforcement of the award was sought. Even if the parties to an arbitration agreement chose a set of rules to govern the arbitral proceedings, the same would be applicable only to the extent that the municipal law would allow. Consequently, the mere adoption of certain model rules for use in arbitration by itself would not solve the problem. The further question to be tackled was that once model rules such as the UNCITRAL, ECE or ECAFE rules were chosen, how to make their use and application effective in the various countries of the region. One possible means would be to bring about uniformity in the municipal laws of the region. That was not an easy take particularly in a vast region like Asia and Africa because every country would have to enact or amend its national legislation so as to permit the use of rules chosen by the parties including model rules drawn up by recognised institutions or agencies. In Europe that problem had been

tackled by means of adoption of regional conventions, which if accepted and ratified, would serve the purpose. The study drew attention to the fact that the arbitral rules for settlement of investment disputes under the auspices of the World Bank had been included in a multilateral convention so as to make them binding on the States and to exclude the possibility of application of municipal laws. The study submitted that if it was thought proper to have a regional convention for the Asian-African region, two alternative proposals might be considered. One was to set out in the Convention itself, the appropriate rules for application in international commercial arbitration, and the other was merely to provide that where a party chose to be governed by a set of arbitral rules formulated by a United Nations organ or agency or by any other recognised institution, those rules would continue to govern the arbitral proceedings between the parties notwithstanding anything contrary contained in the municipal laws of the contracting States.

With regard to the sixth question, namely the enforcement of arbitral awards, which is now governed by the provisions of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the study drew attention to the difficulties that had arisen by reason of different interpretations given to the provisions of that convention, and invited the Trade Law Sub-Committee to consider whether any proposal should be made concerning amendments to certain provisions of that convention.

Kuala Lumpur Session (1976)

The points raised in the Secretariat's study were discussed by the Trade Law Sub-Committee during the seventeenth session of the Committee held in Kuala Lumpur in June-July, 1976. A summary of the deliberations of the Sub-Committee and the recommendations made by it on the various topics of International Commercial Arbitration are set forth as below;