

## 6. Report of the Secretary-General: general conditions of sale and standard contracts (A/CN.9/98)\*

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## INTRODUCTION

1. The Commission at its third session requested the Secretary-General: "To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, *inter alia*, the conclusions in [a progress report to be submitted at the fourth session], and the analysis of the General Conditions of the Economic Commission for Europe, to be submitted by the representative of Japan."<sup>1</sup>

2. Pursuant to this request, the Secretary-General submitted to the Commission at its fourth session a report comprising the first phase of the study on the feasibility of developing general conditions embracing a wider scope of commodities.<sup>2</sup> This phase of the study was directed towards the identification and analysis of the issues that were dealt with in the general conditions the text of which appears in document A/CN.9/R.6.

3. In the light of this report the Commission requested the Secretary-General "to continue the study on the feasibility of developing general conditions embracing a wider scope of commodities, and to submit the study, if possible, to the Commission at its fifth session".<sup>3</sup>

4. In response to this decision, the Secretary-General submitted to the Commission at its fifth session a progress report on the second phase of the feasibility study.<sup>4</sup> On the basis of this report the Commission requested the Secretary-General: "To submit to the Commission at its sixth session his final study on the feasibility of developing general conditions embracing a wider scope of commodities and, to the extent feasi-

ble, to commence the preparation of guidelines on this subject and of a draft set of such general conditions".<sup>5</sup>

5. In accordance with this request, the Secretary-General submitted to the Commission at its sixth session a final report on the feasibility study.<sup>6</sup> The report concluded that "it appears feasible to draw up a set of 'general' general conditions that would be applicable at least to a wide range of commodities."<sup>7</sup>

6. On the basis of this report the Commission requested the Secretary-General:

"To continue work on the preparation of a set of uniform general conditions;

[and]

" . . .

"to report to the Commission at its seventh session of this project."<sup>8</sup>

7. Annex I of the present report contains the draft set of general conditions which has been prepared pursuant to this request.

## I. RELATIONSHIP BETWEEN THE PROPOSED GENERAL CONDITIONS OF SALE AND THE UNIFORM LAW ON INTERNATIONAL SALES

8. A previous report called attention to the distinction between a document "which the parties to a contract can use as the contract itself, provided that they sign it and fill in those clauses which require completion, such as those relating to the names of the parties, price, port of dispatch, quantity and description" and a document which "provide[s] a list of clauses which the parties to a contract can incorporate or refer to in their own contract . . . [but which] is . . . not supposed to constitute the parties' contract."<sup>9</sup> Al-

\* 6 February 1975.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)*, para. 102 (b); UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A. The study concerning the ECE general conditions prepared by the representative of Japan was distributed to representatives at the fifth session of the Commission.

<sup>2</sup> A/CN.9/54, UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 106, UNCITRAL Yearbook, vol. II: 1971, part one, II, 4.

<sup>4</sup> A/CN.9/69.

<sup>5</sup> Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 43, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

<sup>6</sup> A/CN.9/78, UNCITRAL Yearbook, vol. IV: 1973, part two, B.

<sup>7</sup> *Ibid.*, para. 198.

<sup>8</sup> Report of the United Nations Commission on International Trade Law on the work of its sixth session (1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 24, UNCITRAL Yearbook, vol. IV: 1973, part one, II, A.

<sup>9</sup> A/CN.9/18, para. 10, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, C, 1.

though the terminology is not always consistent, the former is generally referred to as a standard contract while the latter is generally referred to as general conditions.<sup>10</sup>

9. In practice there is a further distinction between standard contracts and general conditions. Standard contracts are normally printed on one or both sides of one piece of paper. As a result of the limitations of space, they tend to have clauses governing only a small number of the total range of legal problems which might arise in the formation or performance of the contract.<sup>11</sup> The remainder of the terms which govern the substantive obligations of the parties are found in trade usages and in the substantive law of some country. Normally that country is the country of the party or trade association which drafted the standard contract. In some standard contracts the reference to a particular substantive law is specific, in others, it is implied from the arbitration clause which specifies the location of the arbitration and provides for appeal on matters of law to the local courts.

10. Since general conditions are not restricted to a single piece of paper, and indeed are often printed in small brochures, they tend to be longer and govern by their own terms more of the questions of contract formation and performance than the standard contracts. Some general conditions are virtual codes of the law of sales as applied to the type of goods in question. This is particularly true in trades with a long history of international co-operation between national trade associations.

11. The all-inclusive nature of general conditions as codes of the law of sales is often reinforced by a reference of all disputes to arbitration under rules either contained in the general conditions of sales or in a separate document promulgated by the same or an allied trade association. The general conditions often do not specify either the use of the substantive law of sales of any country or the appeal to national courts from the decision of the arbitration tribunal.

12. The interchangeability of statute and contract is also evident when the role of the law of sales is examined. The principal function of a national law of sales is to provide a set of general conditions for sales contracts. A basic framework of rights and obligations is established and the parties need only agree on the

<sup>10</sup> According to another definition, a standard contract "can be described as a model contract or set of standard conditions in the written form, the terms of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction in hand". C. M. Schmitt-hof, *The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions*, *International and Comparative Law Quarterly*, 1968, vol. 17, p. 551, 557. On the other hand a number of standard contracts, as defined in the text, refer to the individual terms to be filled in by the parties as the "special conditions" of the contract while the printed terms are the "general conditions".

<sup>11</sup> The decision whether to use a standard contract or general conditions undoubtedly follows from the decision as to the extent to which the general contract terms need to be set down and the extent to which the parties can rely on general law and does not follow from the amount of paper available. If general conditions are to be used, it is always possible to have a short contract form which incorporates the general conditions by reference.

elements unique to the individual contract, i.e., description of the goods, quantity, price, delivery date, etc. The parties are free, however, to vary the rights and obligations arising out of the contract as those rights and obligations would be determined by the general law by expressly so providing in their individual contract.<sup>12</sup>

13. Both the Uniform Law on International Sales (ULIS) and the proposed UNCITRAL general conditions are intended to perform this function of providing a basic framework of rights and obligations with respect to the international sale of goods just as the national law of sales performs that function for domestic sales of goods.

14. It is because of this interchangeability of ULIS and the proposed general conditions that it has been suggested that once the revision of ULIS is completed, no UNCITRAL general conditions would be necessary.<sup>13</sup> However, the proposed general conditions will still serve three functions. They will make available a law of sales approved by UNCITRAL which the individual parties to an international sales contract can make applicable to their transaction even though their countries have not as yet enacted the revised ULIS. Secondly, even after ULIS has been enacted by their country, many businessmen and lawyers may feel more comfortable with a text which they can adopt by agreement than with a new statute. If this estimate is correct, it would be better for UNCITRAL to furnish a set of contract terms which the parties can adopt rather than to leave this role completely to others. Thirdly, a set of UNCITRAL "general" general conditions will furnish the basis on which special clauses can be developed for specialized trades as discussed in paragraphs 18 to 23 below.

15. It has also been pointed out previously by several representatives that any general conditions proposed by UNCITRAL should be in harmony with ULIS.<sup>14</sup> It would not make sense for UNCITRAL to recommend that the Governments adopt one set of solutions for common sales problems and to recommend that the parties adopt a different set of solutions for exactly the same problems.

16. It was this thought which guided the preparation of the draft set of general conditions attached to this report as annex I. As the work progressed, it became increasingly evident that the general conditions would constitute a code of the law of sales for adoption by the parties parallel to ULIS which is being revised for enactment by the Governments. The best manner for assuring that the general conditions would be in harmony with ULIS was to use the language of ULIS

<sup>12</sup> "The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions." Art. 5, revised text of the Uniform Law on International Sales of Goods as approved or deferred for further consideration by the UNCITRAL Working Group on the International Sale of Goods at its first five sessions (hereinafter cited as revised ULIS). A/CN.9/87, annex I (UNCITRAL Yearbook, vol. V: 1974, part two, I, 2).

<sup>13</sup> Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 38, UNCITRAL Yearbook, vol. III: 1972, part one, II. A.

<sup>14</sup> *Ibid.*

for the basic provisions of the general conditions. Similarly the provisions on formation have been taken from the Uniform Law on Formation of Contracts (ULFC)<sup>15</sup> and the arbitration clause is that proposed in the report of the Secretary-General on a preliminary draft set of arbitration rules.<sup>16</sup>

17. If the Commission approves of this approach to the drafting of the general conditions, all future amendments to ULIS, ULFC or the UNCITRAL arbitration clause would be reflected in the final version of these general conditions.

18. Because the general conditions are a part of the contract between the parties, the Commission may consider it appropriate to provide certain clauses which are not considered appropriate for ULIS.<sup>17</sup> A number of additional clauses are suggested in annex I. Most of the suggested new clauses would govern the trade in all goods but several by their own terms would be applicable only to the trade in specific categories of goods.

19. It is probable that a set of general conditions of the nature proposed would be adequate for the trade in most goods. It would not, however, be sufficient for a number of specific trades. In some cases the members of the trade would wish to vary the terms of the general conditions (and, therefore, substitute a solution different from that of ULIS also). In other cases additional clauses not in the "general" general conditions would be necessary. Examples of the latter might include the designation of specific means of testing the quality of certain commodities or the length and scope of the guarantee of quality after sale.

20. The Commission could approach this problem in several different ways. It could publish a set of "general" general conditions and invite individual importers, exporters or trade associations to adapt them to their own needs as they see fit.

21. Alternatively, the Commission itself could propose clauses to be substituted for or added to the "general" general conditions for those specialized trades in which such clauses are necessary or useful. If the latter approach is chosen, the Commission may wish to invite the representatives of these trades to participate in the work of proposing the substitute and additional clauses of the "general" general conditions for the use of their trade.

22. Although the Commission could not preclude individual importers, exporters or trade associations from adapting the UNCITRAL general conditions to their own needs even if it wished to, there are significant advantages if the process of adapting the "general" general conditions to the needs of individual trades were to take place under the aegis of the Commission.

23. This would tend to guard the uniformity of the text. Deviations from the "general" general conditions

<sup>15</sup> *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. I (United Nations Publication, Sales No. E.71.V.3).

<sup>16</sup> A/CN.9/97 (reproduced in this volume, part two, III, 1).

<sup>17</sup> One negative effect of including additional clauses is to lengthen the text and make it more complicated. However, it is difficult to see how this can be avoided if the general conditions are to provide in the contract agreed upon terms for all major questions which can arise in the course of formation and performance.

would have to be justified before they received the Commission's approval. Deviations or additions to the text could be standardized for related trades. All of this might be represented by a single numbering system which would permit easy cross-references between different provisions on the same subject.

24. If the Commission approves this approach, the end result would be a co-ordinated series of texts proposed by UNCITRAL. There would be a series of uniform laws for adoption by Governments on the validity and formation of sales contracts, on the substantive law of sales (ULIS), and on such other matters as the Commission may later consider. There would also be a set of "general" general conditions by which the parties to the sales contract could, in effect, adopt the uniform laws and a series of "special" general condition clauses which would adapt the "general" general conditions to the needs of specialized trades.

25. Although the use of this procedure would preclude the drafting of a final text of the "general" general conditions until the final text of the revised ULIS is approved, and perhaps even until the Commission's work on formation and validity of contracts is completed, it would not delay the Commission from considering the clauses which should be substituted for or added to the "general" general conditions for the use of specialized trades. The revision of ULIS is sufficiently completed that the interested parties will have few questions as to how the remaining issues to be resolved would affect their trade. Moreover, it is doubtful that either the problems of contract formation or validity would call for major variations from one trade to another.

## II. PROVISIONS ON FORMATION

26. As noted in paragraph 16 above, the proposed draft of the general conditions contains a chapter on the formation of contracts taken from the Uniform Law on the Formation of Contracts. In this respect it is similar to many of the sets of general conditions studied which also contain provisions on formation.<sup>18</sup>

27. Such provisions raise a difficult conceptual problem. The general conditions become binding on the parties only by the contract of the parties. It is difficult to see, therefore, how the provisions on formation can become binding until the contract has already been formed.

28. This conceptual dilemma is of no concern unless there is a dispute as to whether the contract was ever formed, one party relying on an allegedly appropriate national law, the other party relying on the general conditions.

29. Two answers could be given to this difficulty. A tribunal, and especially an arbitration tribunal, may be willing to overlook the conceptual problem and decide the case on the basis of the text upon which the two parties apparently agreed. This result is more likely to occur if the parties habitually employ the UNCITRAL general conditions in their transactions with one another.

<sup>18</sup> For a discussion of the provisions on formation in the general conditions studied, see A/CN.9/78, paras. 30 to 36, UNCITRAL Yearbook, vol. IV: 1973, part two, I, B.

30. A second answer is that the provisions on formation were in the offer and therefore governed the manner in which the offeree could accept the offer. If this is an acceptable approach to the problem, the Commission may wish to consider whether it should also prepare a short standard form for the offer which would clearly specify that the general terms of the offer, including the manner of acceptance, were contained in the UNCITRAL general conditions. The Commission may also wish to consider preparing a similar short standard form for the acceptance.

### III. USE OF TRADE TERMS

31. At its second session the Commission decided that "it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their world-wide use in international trade".<sup>19</sup> The Commission may, therefore, wish to consider adopting a clause in the general conditions by which Incoterms 1953 are incorporated by reference as the definition of those trade terms.<sup>20</sup>

32. However, the fact that Incoterms 1953 approaches the unification of contract conditions in a completely different manner from that of the general conditions causes some difficulties in the integration of the two. Incoterms 1953 starts with nine commonly used trade terms (e.g. FOB, CIF, C and F) and defines the obligations of seller and buyer for each of them.<sup>21</sup> In this way the consequences of quoting a price as, for example, FOB can be determined. On the other hand general conditions, like a typical statute, are organized in such a manner that all the problems of delivery or payment or risk of loss are treated together in one or consecutive articles. This is true whether the general conditions are drafted for the trade in only one industry or commodity or whether they are "general" general conditions. The focus is not on the trade term used but the substantive question to be considered.

33. Another significant difference between Incoterms 1953, and other definitions of trade terms, and general conditions is that general conditions are drafted in the form of a code and can be as complete as the drafters wish whereas Incoterms 1953 are necessarily limited. They do not purport to define all trade terms used in international commerce nor do they state all the obligations of seller and buyer. For instance, Incoterms 1953 do not govern the obligations of seller or buyer on breach of contract, a subject which is often covered in general conditions.

34. There are several means by which the desire to define the rights and obligations of the parties by

<sup>19</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), para. 60 (3) (a), UNCITRAL Yearbook, vol. I: 1968-1970, part two, I, A.

<sup>20</sup> The draft set of general conditions in annex I contains such a clause in article 2.1 (5).

<sup>21</sup> In addition to the nine terms defined in Incoterms 1953, two additional terms covering "Delivered . . ." have been defined by the International Chamber of Commerce (ICC). These two additional terms, which are not included in Incoterms 1953, appear as a supplement in the brochure "Incoterms 1953" published by the ICC. In the *Register of Texts* they appear as a separate item under the general heading of "Incoterms 1953".

reference to a trade term can be reconciled with the desire to state the obligations of the parties beyond those determined by the trade term. In some trades different standard contract forms are drafted for sales on FOB terms, on CIF terms, and for any other terms commonly used in the particular trade.<sup>22</sup> The forms will differ only in respect to those provisions governed by the trade term while the remaining provisions will be identical.

35. Another approach is to include definitions of some of the more important trade terms in the text of a single set of general conditions. The definitions are apt to be restricted in scope, setting forth fewer of the rights and obligations of the parties than do Incoterms 1953. The remainder of the rights and obligations of the parties, including some which Incoterms 1953 considers to flow from the use of the trade term, are set out in other articles in the general conditions. For example, the Uniform Commercial Code in the United States of America defines "f.o.b.", "f.a.s.", "c.i.f.", "C and F" and "Ex-ship" in sections 2-320 to 2-322. However, risk of loss is governed by sections 2-509 and 2-510 no matter which trade term is used.

36. The approach which has been used in the draft attached as annex I is to define the rights and obligations of the parties as completely as possible in the general conditions. Where necessary, the provisions of the general conditions give different solutions depending on the trade term used.<sup>23</sup> At the same time these general conditions incorporate the Incoterms 1953 definitions by reference. Since this will lead to overlap, every effort has been made to eliminate potential conflicts. However, conflicts cannot be totally excluded and the Commission may wish to consider this problem.

### IV. FUTURE WORK

37. The Commission may wish to consider whether the preparatory work carried out at its direction is now sufficiently advanced to enable it to decide on the following:

(a) The continuation of its work in respect to developing general conditions for use in the trade in a broad range of goods; and if so

(b) Which approach should be followed;

(c) The methods of work.

#### (a) Continuation of the work

38. As has been pointed out earlier in this report,<sup>24</sup> even after a revised ULIS is adopted, the proposed general conditions may be useful in the following ways:

(a) They will make available a law of sales approved by UNCITRAL which the individual parties to an international sales contract can make applicable to their transaction even though their countries have enacted the revised ULIS;

(b) Many businessmen will feel more comfortable with a text which they can adopt by agreement than with a new statute;

<sup>22</sup> e.g. see the list of standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe in annex II.

<sup>23</sup> For example, see article 15.1 (alternative A).

<sup>24</sup> Para 14.

(c) A set of UNCITRAL "general" general conditions will furnish the basis on which special clauses can be developed for specialized trades.

39. In the light of these observations, the Commission may wish to conclude that work in respect of general conditions for use in the trade in a broad range of goods should be carried forward.

(b) *Approach to be followed*

40. It was suggested above that the best means of assuring that the proposed general conditions would be in harmony with ULIS is to use the language of ULIS for the basic provisions of the general conditions.<sup>25</sup> Similarly, it was suggested that the provisions on formation might be taken from the Uniform Law on Formation of Contracts for the International Sale of Goods. Any future amendments to either Law would be reflected in the terms of the general conditions.

41. It was also suggested that the general conditions could be adapted for the use of specialized trades by the preparation of special clauses which could be in substitution for or in addition to the clauses in the "general" general conditions.<sup>26</sup> To the largest extent possible special clauses could be made uniform for several trades with similar problems and a common numbering system might be developed which would facilitate cross-referencing between comparable provisions.

42. In the light of the above suggestions, if it now decides that work on the preparations of a set of general conditions be continued, the Commission may wish to consider whether it wishes to employ the text of the revised ULIS and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFC) as the basis for the basic provisions of the general conditions.

43. The Commission may further wish to consider whether it is desirable that the "general" general conditions be adapted for the use in specialized trades.

<sup>25</sup> Para. 16.

<sup>26</sup> Paras. 19 to 23.

(c) *Methods of work*

44. If the Commission decides that work on the preparation of a set of general conditions should be continued and also that there should be identity of substance and use of language between these general conditions and ULIS and ULFC, the final text of the general conditions could not be prepared until the revision of ULIS and ULFC is completed. It was suggested that this need not retard the preparation of special provisions in substitution for or in addition to the provisions of the "general" general conditions since the revision of ULIS has progressed to such a point that few trades would be concerned as to how the matters yet to be decided would affect them. It was also suggested that the questions of formation and validity of contracts are not apt to raise many questions unique to particular trades.

45. In the light of these conclusions the Commission may wish to request the Secretariat to establish a study group, similar to the UNCITRAL Study Group on International Payments, that would be composed of representatives of regional economic commissions, interested international organizations, trade associations, and other interested groups and to request the Secretariat to prepare, in consultation with such group, special provisions for the use of the trades for which such provisions would be desirable.

ANNEX I

Draft general conditions of sale

[Not reproduced in the present volume.]

ANNEX II

Standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe

[Not reproduced in the present volume.]

ANNEX III

List of general conditions cited in comments in Annex I

[Not reproduced in the present volume.]