

Group.⁵ The Working Group considered the draft chapters submitted by the secretariat at its fourth⁶, fifth⁷, sixth⁸, seventh⁹ and eighth¹⁰ sessions.

4. At its eighth session the Working Group asked the secretariat to revise the Introduction and all draft chapters of the Guide and submit them to a further session of the Working Group.¹¹ In accordance with this mandate the secretariat has revised the Introduction and draft chapters of the Guide in the light of the discussion of the Working Group during previous sessions. The Foreword and Introduction as revised are found in document A/CN.9/WG.V/WP.20 and draft chapters I to XXIX are found in Add. 1 to 29 of that document.

5. The contents of the revised draft Guide are as follows:

Foreword and Introduction

Chapter I:	Pre-contract studies
Chapter II:	Choice of contracting approach
Chapter III:	Procedure for concluding contract

⁵A/CN.9/WG.V/WP.9 and Add. 1-8; A/CN.9/WG.V/WP.11 and Add. 1-9; A/CN.9/WG.V/WP.13 and Add. 1-6; A/CN.9/WG.V/WP.15 and Add. 1-10; A/CN.9/WG.V/WP.17 and Add. 1-9.

⁶A/CN.9/234.

⁷A/CN.9/247.

⁸A/CN.9/259.

⁹A/CN.9/262.

¹⁰A/CN.9/276.

¹¹A/CN.9/276, para. 209.

Chapter IV:	General remarks on drafting
Chapter V:	Description of works
Chapter VI:	Transfer of technology
Chapter VII:	Price and payment conditions
Chapter VIII:	Supply of equipment and materials
Chapter IX:	Construction on site
Chapter X:	Consulting engineer
Chapter XI:	Subcontracting
Chapter XII:	Inspections and tests during manufacture and construction
Chapter XIII:	Completion, take over and acceptance
Chapter XIV:	Passing of risk
Chapter XV:	Transfer of ownership of property
Chapter XVI:	Insurance
Chapter XVII:	Security for performance
Chapter XVIII:	Delay, defects and other failures to perform
Chapter XIX:	Liquidated damages and penalty clauses
Chapter XX:	Damages
Chapter XXI:	Exemption clauses
Chapter XXII:	Hardship clauses
Chapter XXIII:	Variation clauses
Chapter XXIV:	Suspension clauses
Chapter XXV:	Termination of contract
Chapter XXVI:	Supply of spare parts and services after construction
Chapter XXVII:	Transfer of contractual rights and obligations
Chapter XXVIII:	Choice of law
Chapter XXIX:	Settlement of disputes

3. Draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works: report of the Secretary-General (A/CN.9/WG.V/WP.20)^a

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^aThis document contains the draft Foreword and Introduction to the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* considered by the Working Group on the New International Economic Order at its ninth session (see this *Yearbook*, part two, II, A, 1). Due to their length, the remaining draft chapters of the *UNCITRAL Legal Guide* considered by the Working Group (A/CN.9/WG.V/WP.20/Add. 1-29) are not reproduced in this *Yearbook*. The *UNCITRAL Legal Guide* has been published by the United Nations under Sales No. E.87.V.10, document A/CN.9/SER.B/2.

*The issues dealt with in the Foreword and Introduction were previously dealt with in the Introduction (A/CN.9/WG.V/WP.17/Add.1). They were considered by the Working Group at its eighth session (A/CN.9/276, paras. 12-21).

Foreword

The preparation of this Guide was carried out within the Working Group on the New International Economic Order of the United Nations Commission on International Trade Law (UNCITRAL), which is composed of all 36 member States of UNCITRAL. In drafting chapters of the Guide for consideration by the Working Group, the secretariat consulted with practitioners and other experts in the field of international works contracts. In addition, the secretariat consulted numerous materials, including books, articles and other

textual materials, as well as model forms of contract, general conditions of contract and actual contracts between parties. Such materials are too numerous to be able to acknowledge them individually; however, recognition is hereby given to the contributions made by these resources in the preparation of the Guide.

After being approved by the Working Group, the Guide was adopted by UNCITRAL at its twentieth session in August 1987.¹

INTRODUCTION

A. *Origin, purpose and approach of the Guide*

1. In 1974 and 1975, the United Nations General Assembly adopted a number of resolutions dealing with economic development and the establishment of a new international economic order.² As one of the organs of the United Nations, UNCITRAL was called upon by the General Assembly to take account of the relevant provisions of those resolutions. It responded by including in its programme of work the topic of the legal implications of the new international economic order,³ and considered how, having regard to its special expertise, and within the context of its mandate, it could most effectively advance the objectives set forth in the General Assembly resolutions. In doing so, it also took into account a recommendation of the Asian-African Legal Consultative Committee (AALCC) that the Commission should deal with the topic.⁴

2. To assist it in defining the nature and scope of possible work in this area, in 1978 the Commission established a Working Group on the New International Economic Order and charged it with the task of making recommendations as to specific topics which could appropriately form part of the programme of work of

¹Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 315.

²See Charter of Economic Rights and Duties of States, General Assembly resolution 3281 (XXIX), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 31 (A/9631)*; also, Resolutions adopted by the General Assembly during its Sixth Special Session, *Official Records of the General Assembly, Sixth Special Session, Supplement No. 1 (A/9559)*; Resolutions adopted by the General Assembly during its Seventh Special Session, *Official Records of the General Assembly, Seventh Special Session, Supplement No. 1 (A/10301)*.

³Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 67(c)(vi), 68, 69 (*Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as "*UNCITRAL Yearbook*"), Volume IX: 1978, Part One, II, A, paras. 67(c)(vi), 68, 69 (United Nations publication, Sales No. E.80.V.8)).

⁴This recommendation is set forth in Recommendations of the Asian-African Legal Consultative Committee: note by the Secretary-General, A/CN.9/155, Annex (*UNCITRAL Yearbook*, Volume IX: 1978, Part Two, IV, B); see, also, Legal implications of the new international economic order: note by the secretariat, A/CN.9/194 (*UNCITRAL Yearbook*, Volume XI: 1980, Part Two, V, D (United Nations publication, Sales No. E.81.V.8)).

the Commission.⁵ The Working Group reported to the Commission its conclusion that a study of contractual provisions commonly occurring in international industrial development contracts would be of special importance to developing countries, in view of the role of industrialization in the process of economic development.⁶ Based upon the discussions and conclusion of the Working Group, the Commission decided in 1980 to accord priority to work related to contracts in the field of industrial development. In 1981 it instructed the Working Group to prepare a Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.⁷

3. Contracts for the construction of industrial works are typically of great complexity, with respect both to the technical aspects of the construction and to the legal relationships between the parties. The obligations to be performed by contractors under these contracts normally extend over a relatively long period of time, often several years. In these and other ways, contracts for the construction of industrial works differ in important respects from traditional contracts for the sale of goods or the supply of services. Consequently, rules of law drafted to govern sales or services contracts may not settle in an appropriate manner many issues arising in contracts for the construction of industrial works. It may be desirable or advisable for the parties to settle these issues through contract provisions.

4. The preparation of this Guide was largely motivated by an awareness that the complexities and technical nature of this field often make it difficult for purchasers of industrial works, particularly those from developing countries, to acquire the necessary information and expertise required to draw up appropriate contracts. The Guide has therefore been designed to be of particular benefit to those purchasers, while seeking at the same time to take account of the legitimate interests of contractors.

5. The Guide seeks to assist parties in negotiating and drawing up international contracts for the construction of industrial works by identifying the legal issues involved in those contracts, discussing possible approaches to the solution of the issues, and, where appropriate, suggesting solutions which the parties may wish to incorporate in their contract. The discussion in the Guide and the suggested solutions are written in the light of the differences between the various legal systems

⁵Report of the United Nations Commission on International Trade Law on the work of its eleventh session, fn. 3, above, para. 71; Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 100 (*UNCITRAL Yearbook*, Volume X: 1979, Part One, II, A, para. 100 (United Nations publication, Sales No. E.81.V.2)).

⁶Report of the Working Group on the New International Economic Order on the work of its session, A/CN.9/176, paras. 31 and 32 (*UNCITRAL Yearbook*, Volume XI: 1980, Part Two, V, A, paras. 31 and 32).

⁷Report of the United Nations Commission on International Trade Law on the work of its fourteenth session *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 84 (*UNCITRAL Yearbook*, Volume XII: 1981, Part One, A, para. 84 (United Nations publication, Sales No. E.82.V.6)).

in the world. It is hoped that one result of the Guide will be to promote the development of an international common understanding as to the identification and resolution of issues arising in connection with those contracts.

6. As conceived in this Guide, an industrial works is an installation which incorporates one or more major pieces of equipment and a technological process to produce an output. Examples of industrial works include petrochemical plants, fertilizer plants and hydroelectric plants. The Guide deals with contracts in which the contractor assumes the obligation to supply equipment and materials to be incorporated in the works, and either to erect the works or to supervise such erection by others. For brevity, these contracts are referred to in the Guide as "works contracts". In addition to the obligations just mentioned, which are the essence of a works contract, a contractor often assumes other important obligations, such as the design of the works, the transfer of technology, and the training of the purchaser's personnel. Works contracts may therefore be distinguished from other types of contracts from which one or more of the elements mentioned above are absent, for example, contracts exclusively for building or for civil engineering.

7. The term "works contract" is used in this Guide merely to indicate the type of contract to which the discussion in the Guide is directed, rather than to delimit precisely the scope of application of the Guide. Although certain parts of the discussion in the Guide may be irrelevant to or inappropriate for contracts other than works contracts (for example, the discussion of performance tests in chapter XII, "Inspection and tests during manufacture and construction", may be irrelevant for contracts exclusively for building), persons involved in the negotiation and drafting of contracts other than works contracts may also derive some assistance from the Guide.

8. The Guide has been designed to be of use to persons involved at various levels in negotiating and drawing up works contracts. It is intended for use by lawyers representing the parties, as well as non-legal staff of and advisers to the parties (e.g., engineers) who participate in the negotiation and drawing up of the contracts. The Guide is also intended to be of assistance to persons who have overall managerial responsibility for the conclusion of works contracts, and who require a broad awareness of the structure of those contracts and the principal legal issues to be covered by them. Such persons may include, for example, high-level officials of a Government ministry under the auspices of which the works is being constructed. It is emphasized, however, that the Guide should not be regarded by the parties as a substitute for obtaining legal and technical advice and services from competent professional advisers.

9. The Guide does not have an independent juridical status; it is intended merely to assist parties in negotiating and drafting their contract. The various solutions to issues discussed in the Guide will not govern the relationship between the parties unless they expressly

agree upon such solutions and provide for them in the contract, or unless the solutions result from legal rules under the applicable system of law. In addition, the Guide is intended only to assist the parties in negotiating and drafting their contract; it is not intended to be used for interpreting contracts entered into before or after its publication.

B. *Arrangement of the Guide*

10. The Guide is arranged in two parts. Part One deals with certain matters arising prior to the time when the contract is drawn up. These include the identification of the project and its parameters through feasibility studies (chapter I); the various contracting approaches which the parties may adopt (chapter II); the possible procedures for concluding the contract (i.e., tendering, or negotiation without prior tendering), and the form and validity of the contract (chapter III). The discussion of these subjects has two aims: to direct the attention of the parties to important matters which they should consider prior to commencing to negotiate and draw up a works contract, and to provide a setting for the discussion of the legal issues involved in the contract.

11. Particular notice may be taken of the discussion in chapter II, "Choice of contracting approach". The settlement of certain issues in the contract may depend upon the contracting approach which is adopted by the parties. Throughout the Guide, whenever appropriate, the discussion points out that different situations or solutions may apply under different contracting approaches.

12. Part Two of the Guide deals with the drawing up of specific provisions of a works contract. It discusses the issues to be addressed in those provisions and in many cases suggests approaches to the treatment of those issues (see paragraph 16, below). Part Two is thus the core of the Guide. Each chapter in Part Two deals with a particular issue which may be addressed in a works contract. To the extent possible, the chapters have been arranged in the order in which the issues dealt with in those chapters are frequently addressed in works contracts.

13. An analytical index is included at the end of the Guide. In addition to serving the usual functions of an index, this index has been designed in particular to enable the reader to locate the meanings of terminology used in the Guide. Where terms are expressly defined in chapters of the Guide, the index refers the reader to those definitions. In some cases, however, terms do not lend themselves to concise definitions; rather, the significance and scope of the terms must be gained from the entire chapters in which they are discussed. In those cases, the reader will be assisted by the index in locating the various aspects of the discussions relating to the terms.

C. *Chapter summaries*

14. Each chapter of the Guide is preceded by a summary. The summaries are designed to serve the needs

of non-legal management or other personnel who need to be aware of the principal issues covered by a particular type of contract clause, but who do not require a discussion of the issues in the depth or detail contained in the main text of a chapter. Those readers might obtain information which they require about the settlement of issues arising in the contract as a whole or in particular types of clauses by reading the summaries alone. To assist such readers who find that they would like further information on particular points, cross-references are provided to paragraphs in the main text of the chapter where points referred to in the summary are discussed. Persons directly involved in drawing up works contracts, for whom the main text of each chapter is principally designed, might find that reading the summaries provides a useful overview of the subject-matter and issues covered by each chapter. They might also use the summaries as a check-list of issues to be addressed in negotiating and drawing up contractual provisions.

D. "General remarks"

15. The main text of each chapter begins with a section entitled "General remarks". This is intended to serve as an introduction to the subject-matter of the chapter, and to cover certain matters which are applicable to the chapter as a whole so as to avoid repeating them in each section of the chapter where they are relevant. In some cases, the section also deals with points which do not easily fit elsewhere within the structure of the chapter. The section often refers readers to the other chapters where related issues are discussed.

E. Recommendations made in the Guide

16. Where appropriate, the Guide contains suggestions as to ways in which certain issues in a works contract might be settled. Three levels of suggestion are used. The highest level is indicated by a statement to the effect that the parties "should" take a particular course

of action. It is used only when that course of action is a logical necessity or is legally mandated. This level is used sparingly in the Guide. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. A formulation such as "the parties may wish to provide", "the parties may wish to consider", or the contract "might" contain a particular provision, is used for the lowest level of suggestion. Occasionally, the wording used to denote a particular level of suggestion is, for editorial reasons, varied somewhat from that just indicated; however, it should be clear from that wording which level is intended.

F. Illustrative provisions

17. Some chapters contain one or more "illustrative provisions" set forth in footnotes. They are included in order to make issues discussed in the text of a chapter easier to understand. They also serve to illustrate how certain solutions discussed in the text might be structured, particularly those that are complex or may otherwise present difficulties in drafting. *It is emphasized, however, that illustrative provisions should not necessarily be regarded as models of provisions which should be included in particular contracts.* The precise content of a clause and language to be used in it may vary with each contract. In addition, there is usually more than one possible solution to an issue, even though only one of those possible solutions is presented in an illustrative provision. The illustrative provisions have been designed to fit within the overall scheme followed and approaches taken in the Guide. It is therefore important that parties who draft a provision for their contract based upon an illustrative provision carefully consider whether the provision fits harmoniously within their own contract. In general, illustrative provisions have not been included where an understanding of an issue and guidance to drafting is clearly obtainable from the text of the chapter, or where a provision dealing with an issue cannot be drafted in isolation from the particular contract in which it is to appear.

4. Draft Legal Guide on Drawing Up International Contracts for Construction of Industrial Works: report of the Secretary-General (A/CN.9/290)^a

1. For the ninth session of the Working Group on the New International Economic Order,¹ the secretariat was requested to prepare an analytical index for the draft Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. The secretariat prepared the index for that session; however, for technical reasons, it was not possible to issue the index in all six languages of the Working Group. Accordingly, the Working Group had before it the entire index only in

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¹The report of the Working Group on its ninth session is contained in A/CN.9/289.

English, although excerpts of the index were made available in the other five languages.

2. In view of those circumstances, the Working Group requested the secretariat to arrange for the entire index, in its then present form, to be issued and distributed in the other five languages as soon as possible.²

3. The Working Group agreed that certain changes to the index should be made, namely that a statement should be inserted at the beginning of the index that the references given therein were to chapters and paragraphs of the Guide, and that references to paragraphs in the

²A/CN.9/289, para. 15.