Руководство по составлению контрактов промышленной кооперации

Guide on Drawing up international contracts on industrial co-operation

UNECE

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1. Introduction

1. The growing importance of industrial co-operation in the development of international trade bas presented both the theory and the practice of international trade law with a series of new problems. In many cases, industrial co-operation assumes complex forms which do not correspond to any of the known forms of commercial contracts but incorporate many different elements of such contracts. Consequently, the drafters of contracts relating to industrial co-operation are obliged to use their imagination and to resort to legal innovation while endeavoring to conform as closely as possible to the economic, financial and commercial realities of industrial co-operation transactions. The preparation of a Guide on Drawing up International Contracts on Industrial Co-operation1 may thus be considered useful in the development of this new form of international economic relations.

2. In so far as the content of industrial co-operation contracts is modeled on ordinary contracts concluded under economic and commercial law, the draftsmen of international contracts on industrial co-operation may draw upon the rules of national laws, international law and international practice relating to certain parts of the over-all operation. This applies, in particular, to contracts for the international transfer of technology2, contracts for the supply and assembly of plant and machinery3, technical assistance contracts, and contracts for' the construction of large industrial works4. However, the simple juxtaposition of these specific contracts and, even more so, their incorporation in a set of industrial Co-operation contracts confront the draftsmen of such contracts with new problems which are often difficult to solve. The present Guide is designed expressly to provide practical assistance in identifying these problems and in seeking possible solutions with due regard to the potential consequences of a particular solution. In this task, it is necessary constantly to bear in mind the existence of mandatory national laws in the various countries and of intergovernmental agreements which enterprises and agencies belonging to the countries concerned are bound to take into account in drawing up their contracts.

A. Delimitation of the subject-matter of the Guide

3. The simplest way to delimit the scope of the Guide on Drawing up International Contracts on Industrial Co-operation would be to start by defining precisely what is meant by industrial co-operation. However, because of the relative novelty of the phenomenon of industrial co\-operation, its great potential for further development and the variety of forms it may take, it is difficult to draft a legal definition of industrial co-operation which would cover, in a general manner, all the requirements which this phenomenon may bc called upon to meet. Accordingly, in the various publications of the secretariat of the United Nations Economic Commission for Europe analyzing industrial co-operation agreements, the approach adopted bas been net to formulate a general uniform definition but, rather, to list concrete examples of co-operation agreements which might serve as a basis for wider application of this institution in the future5. The Analytical Report on Industrial Co-operation among ECE Countries, prepared by the Executive Secretary6, follows the same line by adopting at the outset a very wide-ranging "working definition" according to which industrial co-operation denotes the economic relationships and activities arising from:

(a) contracts extending over a number of years which go beyond the straightforward sale or purchase of goods and services to include a set of complementary or reciprocally matching operation (in production, development and transfer of technology, marketing, etc.); and

(b) contracts which have been identified as industrial cooperation contracts by governments in bilateral or multilateral agreements E/ECE/844/Rev.1, para.3). In order to clarify the concept of industrial co-operation, the Analytical Report divides the different forms of industrial co-operation contracts into six main categories7.

4. Following this procedure and taking into account the legal nature of the clauses making up these contracts, the present Guide assumes industrial co-operation contracts to mean operations which go beyond the straightforward sale or purchase of goods and services and which involve the creation - between parties belonging to different countries - of a lasting community of interests designed to provide the parties with mutual advantages. Such contracts relate to, inter alia, the following:

(i) transfer of technology and of technical experience;

(ii) Co-operation in the field of production including, where appropriate, co-operation in research and development in the specialization of production;

(iii) Co-operation in developing natural resources; and

(iv) Joint marketing or marketing on joint account, in the countries of the parties to the contract or in third markets, of the products of industrial co-operation8.

5. The above operations, which may be undertaken in varied forms and combinations, may or may not be linked with the construction of large industrial works in the country, of one of the parties or in a third country. It is therefore essential to consider, in the present Guide, the effects which the link between the construction of large industrial works and one or more of the operations listed above, or a similar operation, may have on both contracts for the construction of large works and industrial co-operation contracts.

6. This Guide is designed, for application to international contracts on industrial co-operation in general. Where necessary, specific aspects of industrial co-operation between parties belonging to countries with different economic systems are taken into account.

7. It should by emphasized that industrial co-operation contracts, in whole or in part, may apply

only in those countries to which the interested enterprises or agencies belong or may extend to third countries. (The latter possibility creates new problems in drawing up industrial cooperation contracts which are dealt with in a separate section of the present Guide.)

B. Main characteristics of international contracts on industrial co-operation

8. Irrespective of the basic reasons for concluding contracts on industrial co-operation - the furnishing or sharing of technical knowledge, the search for better conditions for production and labor utilization, the expansion of series production, the specialization of production, the search for new markets, reduction in production costs, etc. - in a great number of cases, such contracts involve an exchange of services or goods between the parties concerned. In some cases, the products resulting from industrial co-operation arc used to pay for other benefits, supplies or services which are the subject of the contract. In all cases, a real spirit of cooperation, creating a community of interests, should prevail in these contracts.

9. The very nature of contracts on industrial co-operation implies their remaining in force for a certain length of time. If they are associated with the construction of a large industrial works, they must necessarily be extended beyond the final acceptance of the works for a number of years sufficient for all the results of industrial co-operation to be seen. The period of validity of contracts on co-operation, the date of their entry into force and the procedure for their renewal or termination must in every case be precisely specified in the contracts.

10. Often - although not in every case - industrial co-operation operations are of a developing nature. Thus, in many cases, industrial cooperation begins in a relatively limited field but is later extended to cover other fields. It is useful, where the parties intend industrial co-operation to take this form, for express reference to this fact to be included in the contract.

C. Questions to be examined before the conclusion of international contracts on industrial co-operation

11. Before concluding an international contract on industrial cooperation, the interested enterprises and agencies normally carry out a series of preliminary studies on the possibilities and profitability of the operation contemplated. Generally speaking, these studies should relate to:

- the national laws and economic situations of the countries of the other prospective parties, including the facilities offered in those countries for industrial co-operation contracts as well as the possible repercussions of financial laws in the relevant countries on the functioning of these contracts;

- Any intergovernmental agreements which may affect the contracts on industrial co-operation to

be negotiated;

- Market trends and possible outlets for the product to which the industrial co-operation pertains; and

- Possible areas of industrial co-operation.

12. In addition to this general study, it is important to choose the most suitable other party, by taking into account, in particular, for each of the prospective contracting parties, the following considerations:

- technical level and specialization;

- The possibility of making satisfactory use of technology transfer and technical assistance;

- The economic standing and financial situation of the prospective other party;

- Position acquired on the market and readiness to enable the other party to benefit therefrom;

- The cost of products likely to result from industrial co-operation as compared with that of competitive products; and

-the methodology for marketing the products likely to remit from industrial co-operation.

13. Having chosen a possible other Party, the two parties then enter into negotiations with a view to concluding a formal contract. However, before deciding on the definitive wording of an industrial co-operation contract, the parties sometimes conclude an arrangement or a preliminary contract stating, inter alia:

- The duration of the proposed co-operation;

- The broad lines of co-operation;

- Provisions relating to technical and trade secrets which have arisen in the course of the preliminary negotiations;

- The first measures to be taken in order to achieve practical co-operation, and the contractual provisions to be adapted to that end;

- The conditions of entry into force of the final contract; and

- The possibility of development of more advanced co-operation.

II. The different elements of industrial co-operation contracts

A. Co-operation in the sphere of technology

14. Certain elements of industrial co-operation may already be found in contracts concerned with the transfer of technology, such as technical assistance and supply of certain equipment. In the case of such contracts which combine several co-operation elements, it may happen that payment for the technology supplied by one of the parties to the other is based not on the volume of production but on the profits earned or savings achieved in industrial operations. Where this is the case, the contracting parties should devise common methods of estimating inputs, forecasting results and keeping accounts. In addition, they should specify in their contract the advantages on which payment for technology supplied is to be based. Payment for the technology may also take the form of supply of the final product, or of some of its constituent parts, to the provider of the technology, which creates an 'important element of community of interests between the parties. In some cases of industrial co-operation, payment for technology may even take the form of participation by the licensor in the activities of the licensee.

15. The creation of a community of interests between the participants in an industrial co-operation transaction in the field of technology could entail a series of joint actions in addition to the simple communication of technological data. At the beginning, this community of interests may take the form of technical assistance, with the licensor either sending a given number of engineers and technicians to work at the licensee's plant or training engineers and technicians of the licensee at the licensor's plant, or both. Later on, it would be to the advantage of the parties to keep each other fully informed as to the use being made in the licensee's plant of the technology supplied. From simple exchanges of information in that regard the parties may move on to consultation procedures whose form and method should be specified in the contract.

16. At a more advanced stage of co-operation, the one-way supply of technical information (from licensor to licensee) would be replaced by a system of exchange of technical information between licensor and licensee. This kind of development is, it is true, already in operation to some extent in licensing contracts, both those associated and those not associated with industrial

co-operation contracts. Present-day production licensing contracts usually contain a clause whereby the licensor and the licensee each undertake to inform the other party, in a way to be specified, of any improvements which they may make in the basic technology.

17. Beyond this simple exchange of technical information, however, provision may be made, in industrial co-operation contracts, for cooperation in research and development. There is thus closer co-operation between the design offices of the licensor and the licensee, possibly with a distribution of tasks between the design offices,' so that the results of research in a field defined by the industrial co-operation contract may become the common property of all participants.

18. However, this raises the difficult problem of ownership of the results of research undertaken on such a co-operative basis. If the results of this kind of joint research are considered to be patentable, the question arises in whose name and where the patent should be taken out. One solution, which is sometimes encountered in contracts involving co-operation between the design offices of agencies or enterprises associated in an industrial co-operation contract, is to permit the agency or enterprise whose design office has produced a patentable invention to take out, and in due course renew, the patent in its own name, and to grant a license free of charge to the other party or parties. Another solution is to take out a joint patent in the name of all enterprises associated in the industrial co-operation contract. In certain cases, where the agency or enterprise whose design office has produced a patentable invention has reserved the right to take out a patent in its own name the other parties may lie free to file an application for a patent for the invention concerned if the aforementioned agency or enterprise does not consider it necessary to exercise its right of application.

19. Whatever solution the parties may adopt on this point - and it is essential that the principle adopted should lie defined unequivocally in the contract - and also with regard to the results of joint work by design offices which none of the parties considers it necessary to patent, it would seem advisable that the contract contain a provision stating that results obtained by design offices of parties to an industrial co-operation contract, on the questions which are the subject of these contracts, are to be communicated fully to the other parties, who shall bc free to use them in their operations under circumstances which must also lie specified in the contract. Lastly, it is necessary to specify in the contract that will be responsible for meeting the costs of registering or renewing patents in the countries concerned, or how these costs are to bc shared.

20. Another problem relates to the possible communication to third parties of the results of research of the kind referred to above. If a technical invention has been concluded entirely in co-operation between the design offices, it would seem reasonable to stipulate that it may be assigned to third parties only with the agreement of all parties to the industrial co-operation contract, and for their benefit, and that their respective shares in the benefit bc specified in the contract. In cases where the invention or technical innovation is essentially the result of research carried out by one of the design offices, it might be stipulated that a design office is free to dispose of, such part of the technical information as it alone bas developed; and the principle of joint decision and the possible sharing of earnings would then, only apply, as a rule, to improvements resulting from technological co-operation. All these details should, in any case, be regulated in those parts of industrial co-operation contracts which relate to co-operation in the

field of technology.

21. One difficult problem might arise in another direction, i.e. with regard especially to the utilization, in the course of co-operation between design offices, of technological information which one of the participants in the co-operation bas obtained front a third party. It might be suggested that, in licensing contracts entered into with third-party censors, each of the participants should make a specific reservation with reference to its obligations under the industrial co-operation contract in the field of technology. This problem is still more complicated in the case of co\- operation in a field in which one of the parties is already a licensee under a licensing agreement relating to a process which is to be the subject of industrial co-operation. With regard to licenses which it has already obtained and which may be of relevance to the industrial co-operation contract in the field of technology which it is about to conclude, such party would be well advised to obtain from its licensor - if the latter is not a party to the same contract - authorization for the technical information which it has previously obtained from the licensor to be used in the course of its co-operation with the design offices of the other parties. To this end, an additional payment might be made to the licensor and the cost borne by one or other of the parties to the co-operation contract, or by both, in a way to be specified in the contract.

22. The parties to an industrial co-operation contract involving cooperation in the field of technology would also be well advised to take strictly into account any contracts for exclusive licensing of production which they may have granted previously to third parties in respect of countries that may lay of interest for their co-operation contracts. There is always a risk that the existence of such exclusive contracts may hinder the subsequent conclusion of industrial co-operation contracts, employing the same technology, with third parties. In order to avoid such a situation, the party concerned should negotiate with its exclusive licensee an exception clause in favor of an industrial co-operation contract with third parties.

B. Co-operation in the field of production

23. In the field of production, too, industrial co-operation may take a wide variety of forms ranging from relatively simple operations to very elaborate and specialized production. First, mention should be made of contracts under which, on the basis of technological data, specialization or raw materials - as the case may be - supplied by one of the parties to the other, part of the total output is regularly delivered by the recipient to the supplier of the technology or of other related inputs. To a certain extent, even contracts of this nature may be regarded as a beginning of specialization of production. In many cases, however, the specialization is still very rudimentary and production by the recipient of the technology or of other inputs is governed by the needs of the supplier and carried out under the latter's instructions. In such cases, the range of industrial co-operation is still limited. A distinction should, of course, be drawn between such cases and those where the operation is governed by the fact that the recipient of part of an order specializes in certain types of production, for which it has its own technology. However, such situations depend on the importance of a particular technology. Beyond this first stage, industrial co-operation may involve joint determination of the different components of a final product, definition of the technical specifications of these components and distribution of the production of such components among the various parties, each of whom, in accordance with a long-term

plan subject to periodic adjustment, indicates the required amounts of components to bc produced by the other party or parties for incorporation in the final product to be manufactured by each party individually. Where the specifications of the various components are prepared jointly by different design offices, it may be said that industrial co-operation between the partners has really taken the form of two-way co-operation.

24. Side by side with specialization in the production of components for a single final product, another possibility is that the parties may divide between them the manufacture of the various types of a given product (taking into account sizes, designs, models, raw materials used, transport costs and similar factors) so as to increase production runs, to simplify supplies of raw materials which are accessible to one or other party, and to enable each party to acquire greater skills in the type of production assigned to it.

25. However, detailed contracts on production specialization are obviously difficult to devise. While contracts which resemble sub-contracting can bc broken down into a two-way sales operation - the sale of technology or of an industrial works, in one direction, and the delivery of components of the final product, or even of the final product itself, in the other direction - arrangements for sharing the production of components, and especially for sharing the manufacture of different types of products, call for strict contractual precision in the division of tasks between the parties. In addition, the parties should specify in their contracts - among other things - the procedure for setting the prices at which components and products are to bc sold between the other parties, the technical standards of production and the conditions affecting their development, the rate of deliveries and the arrangements for supplying raw materials. They should also establish procedures for monitoring the quality of - the components and final products manufactured by each of them and methods of settling disputes between them regarding such quality. Lastly, they should take steps to co-ordinate their various activities as efficiently as possible; and here, too, the procedures of consultation and information referred to above in connation with co-operation in the field of technology (sec Para. 15) may prove useful.

C. Delivery of products resulting from industrial co-operation between the parties and the marketing of such products in relations with third parties

26. In somas cases, industrial co-operation also incorporates contracts for the delivery by one party to the other of the products resulting from the co-operation, or by contracts for the sale of such products to third parties. Here, a distinction should lie made between the components of a product and the final product itself.

27, In the case of components, the delivery may be in one direction only, for example, from the recipient of technology to the supplier, often in full or part payment for the transfer of technology. Where there is specialization of production, the parties may agree that the components manufactured by each of them shall be delivered to the other and that each will use the components supplied to it by the other party in its own production - which it will then market independently, under a common or individual trade-mark.

28. Where there is specialization of production for different types of final product, it is also possible to provide that each shall deliver to the other the types of product it manufactures, also with a view to the sale of the products to third parties by each of the parties in its own trade network. Another possibility is joint marketing of the various components or final products manufactured by each party, the proceeds to be divided between the parties in accordance with a scale - to be specified in the contracts - which might lie used as an alternative method of financing certain services or supplies provided by one party to the other. In addition, it should be noted that the relationship established between parties to industrial co-operation contracts may well encourage them to conclude contracts for the marketing of other products not necessarily resulting from a specific industrial co-operation contract.

29. In all these cases, the parties are obliged to define in their contracts, With due precision, the procedures to be adopted for their marketing operations. Depending on need, the parties should settle in their contracts the procedures for determining and revising prices, quantities and delivery dates; the currency of the contract and the consequences of its fluctuation; the markets in which the products will be sold; the possible effects of changes in the general economic context on the balance of the contract; and other terms relating to the delivery of components or of final products, both in their mutual relations and in their dealings with third parties. These questions are normally dealt with in the joint marketing operations and transfer contracts of the parties. They sometimes appear in contracts for the marketing of products resulting from co-operation through the respective commercial channels of each of the contracting parties. There are, however, situations in which the parties retain their freedom of action in one or more of the areas just mentioned. Whatever solution the parties ultimately choose, they should take into account regulations governing such arrangements which may exist in the countries concerned - those involved in the production of the components or of the final products; or those in which the goods are marketed. In general, contracts on delivery or marketing of products resulting from industrial co-operation should take into account the commercial regulations in force in the countries concerned.

30. The addition of product delivery or marketing contracts to industrial co-operation contracts is likely to cause the parties to arrange for a system of checking the quality of the products to be marketed, and also to take account of the possible existence of exclusive sales contracts which one or the other of the parties may have entered into with third parties in respect of a territory in which they intend to engage in individual or joint marketing. The comments in paragraph 22 above concerning exclusive production licenses granted to third parties apply also to exclusive sales rights granted or to be granted to third parties. Lastly, parties to industrial co-operation contracts involving marketing contracts should settle in the contract documents procedures and respective obligations as regards the important problem of after-sales service.

D. Harmonization of all activities covered by international industrial co-operation contracts

31. Reference has been made above to the need to provide for consultation procedures to harmonize the various co-operation activities in the fields of technology and production (cf. pares. 15 and 25). When an industrial co-operation contract is considered as a whole, the need for such harmonization appears even greater, in view of the interdependence of all the elements

of the contract and the importance, to the parties of being kept informed of developments in, and the functioning of, transfer and marketing contracts. It is therefore advisable to name in the contracts the authorized bodies or persons responsible for the effective implementation of the various activities provided for in the co-operation contracts, taking care, in particular, to ensure that the persons in question possess the necessary language qualifications to be able to communicate easily with the representatives named by the other parties.

III. Industrial co-operation affecting enterprises of third countries

32. It has been pointed out above (cuff, Para. 7) that the extension of industrial co-operation to third countries is liable to raise further problems in addition to those associated with co-operation not involving third countries. It is true that the extension to third markets of marketing operations resulting from industrial co-operation between enterprises of two or more countries may promote the development of such cooperation. On the other hand, co-operation in the spheres of transfer of technology and production introduces new complications, especially to the relationships of two or more enterprises of different countries engaged in industrial co-operation to be carried out in a third country, with enterprises of the latter. These problems are indeed closely related to those which develop between agencies or enterprises of two different countries which enter into industrial co-operation agreements - the problems which have been dealt with in the preceding sections of this Guide. But some new and highly complex problems arise in the relationships between enterprises engaged in industrial co-operation in a third country which can only encourage the parties to an operation of the latter kind to intensify co-ordination of efforts beyond a simple consultation procedure such as that recommended in the provisions of the Guide which relate to the harmonization of all activities covered by industrial co-operation contracts (cf. para.31), In such a case, it is advisable:

(a) For the contract to spell out the division of duties between the enterprises involved in an industrial co-operation operation in a third country;

(b) To divide the risks and liabilities between the enterprises;

(c) To determine their respective shares in the remuneration for their goods and services (whatever form the remuneration takes); and

(d) To see that qualified staff are sent out in the field.

The complexity of these three-way operations in some cases leads enterprises associated by means of industrial co-operation in a third country to establish more integrated forms of co-ordination for their activities, as far as possible preserving the confidential nature of the relationships between the associated parties. This co-ordination may, for example, take the form of joint meetings of the responsible authorities of the associated enterprises, committees with

equal representation or even trading groups formed in accordance with the legal requirements of one of the countries concerned, or of a third country. Such a group may be merely an association without separate legal status, or it may entail the establishment of a company having the necessary financial means to carry out a co-operation scheme with an enterprise of a third country.

33. The solution to be adopted depends on various factual elements, such as the size of the operation, the demands of the other party in the third country - which may prefer to deal with a single enterprise rather than a multiplicity of contracts - the way in which the transaction is to be financed, and so forth. The final - multilateral - contract should take account of all these different elements.

IV. Industrial co-operation agreements connected with the construction of a large industrial works

34. The foregoing observations relate to all industrial co-operation contracts whether or not they are associated with the prior construction of large industrial works by one of the parties to a contract in the country of the other. The linking of a co-operation agreement to the prior construction of a large industrial works poses a number of new problems which the parties should take into account when drawing up contracts combining the two types of operation.

35. In the Guide on Drawing up Contracts for Large Industrial Works, it was indicated that contracts of this kind may by drawn up either between two contracting parties - the main contracting party and the client - or between several suppliers of goods or services, on the one hand, and the client, on the other. In the case of comprehensive or turnkey contracts, in which the client's contracting party - called the "main contracting party" - assumes responsibility for the work as a whole, it is natural that the related industrial co-operation contracts should be concluded between those two parties.

36. On the other hand, in the case of separate contracts for the construction of large industrial works, in which the client base to deal with several suppliers of equipment or services (the supplier or suppliers of plant, the supplier of the technological process, and possibly the enterprise responsible for installing the plant), the various contracting parties engaged in the construction of the large industrial works with which the co-operation contracts are associated may participate in industrial cooperation arrangements in widely different ways. For example, if the supplier of the technical process on which the operation of the works is based is not the supplier or one of the suppliers of the plant, in many cases the industrial co-operation contracts are concluded between the supplier of the process and the client. However, the builder of a large industrial works may also participate in the operation of the works, primarily because of his technical knowledge of the manner in which the plant constructed by him should be operated. A situation of this kind may arise, in particular, in the chemicals industry, where the client may avail himself simultaneously of the skills of the supplier of the process and, of the builder of the mechanical part of the plant. In cases of this kind, industrial co-operation contracts are concluded with several other parties whose respective tasks should be specified in the terms of the contract.

37. It seems at first sight that an extension of relations between the parties to contracts for the construction of large industrial works, covering industrial co-operation subsequent to the construction of the works, introduces an important change in the nature of the relations between the various parties concerned. Whereas in, contracts relating to, the construction of large industrial works the interests of the various contracting parties - beyond their common desire to build the works - remain divergent, the establishment of lasting relations between them with a view to the operation of the industrial works, under an industrial co-operation contract, helps to create among all participants a certain community of interests based, on their common desire 'that the works should be as' efficiently operated as possible. This community of interests becomes even more evident when one considers how, in the case of contracts combining the construction of large industrial works with industrial co-operation, certain essential problems are raised by the construction alone of industrial works in another country, such as the liability of the supplier and the methods of financing,

38. The complexity of the problems of the liability of the supplier or suppliers of the industrial plant and of the guarantees associated therewith has already been emphasized in the Guide on Drawing up Contracts for Large Industrial Works9. The addition of industrial co-operation contracts to contracts for the construction of large industrial works does not legally alter the principles of the liability of the supplier. Nevertheless, the community of interests created between the parties by the conclusion of industrial co-operation contracts may help to solve the problems of the liabilities assumed and guarantees offered by the supplier of an industrial plant, from the time when the supplier and his client come to have a mutual interest in the proper functioning of the plant which is the subject both of construction contracts and 'of industrial co-operation contracts requiring the client to supply products or components resulting from the co-operation to the supplier of the plant. Thus, in effect, they are obliged to seek the best methods of adapting the industrial work-plan to the technical requirements for its satisfactory operation.

39. The addition of co-operation contracts to contracts for the construction of large industrial works is likely to facilitate the adoption of certain arrangements for easing the financial burden borne by the client. It is true that some of these arrangements, such as the furnishing, of component parts or of the final product by the, client to the supplier, may likewise take place within the framework of contracts for the construction of industrial works which are not accompanied by co-operation agreements. However, in the case of multi-purpose contracts, combining the construction of large industrial works with. Co-operation contracts, the supplier of the plant may more readily accept total or partial repayment of the cost of the plant through the transfer of component parts of final products, since this is closely associated with the operation of the plant and may obtain greater guarantees as to quality, regularity of supplies and price levels. This consideration is still more valid in cases where co-operation contracts associated with the construction of a large industrial works provide for joint marketing.

40. Amortization of the construction costs of the industrial plant may be made still easier for the client if the parties, in their contract, adopt certain solutions such as those referred to above in connation with technology - i.e. that technology provided should, be paid for out of the profits earned as a result of the use of the said technology (see Para. 14). A similar solution may also be envisaged with regard to the cost of loans, which is normally borne by the client. There could,

for instance, be a provision stating that the supplier of the industrial plant should, bear the cost of financing on the understanding that he would receive an additional percentage when the operating profits were distributed. As has already been suggested above, the parties would obviously have to reach agreement, in these various cases, on the concept of "operating profits" and on the accounting methods to be used in determining the profits.

41. The addition of industrial co-operation contracts to contracts for the construction of large industrial works will obviously complicate the financial relations between the parties. In addition to the various problems raised by the financial clauses concerning payment for supplies and services needed in the construction of a large industrial works1\f0 0 there will - in the various cases considered here - be additional financial problems arising from the marketing contracts between the parties themselves, and even more from contracts for marketing on third markets.

42. The problems raised by the association of industrial co-operation contracts with the construction of a large industrial works, in the country of one of the parties or in a third country, recur to a very large extent in operations relating to the development of natural resources, likewise in the country of one of the parties or in a third country. It is true that both cases entail the supply of technology and equipment by one contracting party to the others, co-operation in running the installations that have been established jointly and contracts for marketing the products resulting from the co-operation. Nevertheless, the development of natural resources presents certain special features that warrant closer consideration.

V. Co-operation in the development of natural resources

43. Firstly, co-operation in the development of natural resources presupposes that the relevant contracts are often forthcoming as early as the preliminary prospecting stage. This is an essential point as regards the relationship of the parties concerned because, quite apart from the technical importance of prospecting, the work it entails is often extremely costly and very often involves investment with no guarantee of positive results. Hence, those contracts relating to co-operation in developing natural resources which include co-operation at the prospecting stage should - irrespective of the other questions to be settled in the industrial co-operation contract - make provision for the distribution of the costs, which are nearly always considerable, between the contracting parties, the amortization of these costs and the distribution of risks if the operation proves unsuccessful. When the prospecting operation is successful and leads to the actual exploitation of natural resources, the contracts should determine how the two parties concerned are to co-operate, in organizing and carrying out the exploitation. If, however, the results are negative, in some cases the costs are borne by the foreign enterprise that undertook the prospecting work; in others, they are shared by the parties on the basis of an arrangement specified in the preliminary contract. If the prospecting operation is successful and the resources are also to be developed by co-operation between the parties which have carried out the work, the preliminary contracts should specify who bears the cost of prospecting work, as well as the distribution of responsibilities and benefits between the parties during the exploitation stage.

44. In most cases, the foreign contracting party to a contract for the development of natural

resources is remunerated on the basis of supplies of the resulting product, whether in its original state or after a certain amount of processing has been, carried out in the country of the operation. Although this solution is also adopted in respect of the construction of large industrial works abroad with which industrial co-operation contracts are associated, it is encountered far more frequently in operations for the development of natural resources, and cannot fail to have a certain influence on the motivations of the parties involved in industrial cooperation contracts. Thus, in co-operation contracts associated with the construction of a large industrial works, the supplier of the works may be interested in the sale of technology and equipment, the specialization of production and the use of cheaper labor, whereas the purchaser of the industrial works may be interested in acquiring advanced technology or in the supply of the products resulting from the co-operation, with a view to repaying, in part or in full, the credits provided by the supplier of the works. In the case of the development of natural resources, however, the main reason for remunerating the foreign contracting party by delivering products resulting from such development is to guarantee it access to a product for which it has a need and for which the international market is narrow and subject to considerable fluctuations as regards supplies and price. Regularity of supplies and greater price stability are the reasons why the foreign contracting party, co-operating in the development of natural resources, is prepared to accept the costs and the risks involved in its participation in prospecting and exploiting natural resources in the country of the other contracting party, or in a third country, and this is the main motivation in most operations of this kind.

45. Thus, the supplier of technology and equipment for the development of natural resources in a foreign country is primarily interested in very long-term contracts of this type. It may even wish to obtain contracts for the supply of the products resulting from the co-operation covering a period subsequent to that specified for co-operation in exploiting the resources in question. Examples are found in practice of contracts for co-operation in developing natural resources which, on the expiry of the joint exploitation contract, grant to the contracting party which has supplied the technology, technical assistance and equipment for the development the option of continuing the supply contracts or of terminating the supply of products simultaneously with the co-operative exploitation contracts. Whatever the solution adopted on this point, contracts which entail the supply of products resulting from the operation to the foreign contracting party should specify the quantity of the products to be supplied and how their prices are to be fixed and altered. Prices can, for example, be fixed by reference to the market price, and a discount granted, representing part of the remuneration for the assistance provided by the foreign contracting party during the prospecting and operating stages. Moreover, the inclusion of a price revision clause might be envisaged in contracts of this kind. Prices may also vary according to whether the products of the operation are supplied before or after the expiry of the co-operative exploitation contract.

46. Lastly, it should be remembered, that, in the longer term, the development of natural resources may lead to the establishment of new local industries which are able to use a significant proportion of the product resulting from the co-operation. This tendency to make use of industrial co-operation as a means of industrializing the country in which the joint operation takes place is, of course, also apparent in industrial co-operation contracts associated with the construction of large industrial works in a given branch of industry and even in ordinary industrial co-operation contracts, although it is probably more marked in the case of the creation of new industries on the basis of resources that can be obtained locally.

47. The various problems analyzed above occur in two possible situations - namely, where the natural resources to be developed are situated in the country of one of the contracting parties, and where they are situated in a third country. In the latter case, however, the comments concerning industrial co-operation intended for enterprises of third countries should be taken into account.

VI. General Questions included in all international contracts in the field of industry

A. Financing problems

48. In the interpretation of relationships between the parties in industrial co-operation agreements, it is possible - specially in the most highly developed forms of co-operation - to envisage, side by side with the conventional methods of financing international operations in the field of industry (cash payment, credit by the seller, credit by the purchaser), special methods arising from the very nature of industrial co-operation transactions. Simply as a reminder of the various special methods of financing which may be adopted and which were described above, mention may be made, in particular, of:

- The exchange between partners of the products and components thereof;

- Total or partial repayment of credits granted by one of the parties to the other in, the form of the final products, or components thereof, resulting from the co-operation;

- sharing of research and production costs;

- Joint marketing;

- sharing of the financial profits of the co-operation;

- Payment of the extra expenditure incurred by one of the parties, in cash or in products, or partly in cash and partly in products; and

- Reinvestment of the profits from industrial co-operation in the country in which the industrial co-operation is actually carried out.

49. The complexity of the various methods of financing to be found in the most highly developed forms of industrial co-operation call for the utmost precision on, the part of the parties when drawing up in their contracts the calculations which are to serve as a basis for the determination and distribution of the results of the co-operation which, in turn, provide the means of financing the agreements. It is also useful to attempt to reach agreement on the currency of the contract and the rates of exchange, and possibly their fluctuations, which are to be applied to the financial settlements between the parties.

B. The effect of a change in circumstances on industrial co-operation contracts

50. Changes in international economic relations, particularly by reason of their present instability, compel the parties to international trade contracts of a certain duration to provide for the possibility of adapting their contracts to new circumstances. In industrial co-operation contracts, which are normally of several years' duration, it may be useful to introduce some degree of flexibility so that, if necessary, they can be either modified or, in extreme cases, cancelled. This, flexibility should not, however, be such as to create too much, uncertainty for the parties. Those changes in circumstances which the parties agree might affect the future of the contract should therefore be specified at the outset. In practice, these may include considerable changes in markets using the products, changes in their marketing potential, changes in production plans, programmers and possibilities in the countries of the other contracting parties, radical changes in national laws, technology, production costs or the availability of raw materials, and difficulties that may arise in the course of the co-operation. This list is merely illustrative. It shows, however, that these are not circumstances which may be equated with force majeure unless they constitute an actual impediment to performance of the contract. The fact that these circumstances, or similar ones, may substantially alter the balance of the contract may be a sufficient incentive for the parties to plan measures to be taken with regard to them.

51. One solution would be to specify in the contract itself what might be the consequences of the occurrence of one of the circumstances which the parties have agreed would have an effect on industrial co-operation contracts. An example of such a solution is a price revision clause. However, there is nothing to prevent the parties specifying in their contract other circumstances producing effects which could likewise be defined in the contract.

52. If the parties do not succeed, in determining in advance the consequences of circumstances which they have defined as capable of affecting the contract, it would be in their interest to 'establish a consultation procedure, to be initiated at the request of either of the parties, for considering whether a change in circumstances is sufficiently important to justify an alteration to or cancellation of the contract - both of which actions could then be decided upon only by agreement between the parties.

53. To provide for the event of the parties being unable to reach agreement, the contract could specify the degree of importance of the effects of changes in circumstances, and specify which changes would give rise only to alterations in the contract and which ones could result in its cancellation, with all the consequences thereof, as set forth in the following section of this

Guide. Obviously, the alteration of the contract or its cancellation should take place only if certain tolerances, to be specified in the contract, are exceeded. Equally, it might be stated in the contract that the parties might provide that, if they fail to reach agreement on the effect a change of circumstances has on the contract, the question of alteration or cancellation should be submitted to arbitration, if such form of settlement of disputes is the one which they have adopted. Should the parties wish to entrust the alteration of the contract to the arbitrator, they should ascertain whether, in their respective countries, the alteration of a contract by a third party - even with the authorization of the parties - is legally valid. Cancellation of the contract, in the manner laid down by the parties, whether by mutual agreement or by decision of the arbitrator, involves a requirement for settlement of the relations between the parties. This, however, is a general question which is discussed in the following section dealing with the termination of contracts.

C. Termination of contracts

54. The parties should indicate in the, contract the way in which it is expected to end (expiry, attainment of its object, conditions under which it can be renewed, notice of termination, or cancellation).

55. Industrial co-operation contracts may end, if so specified in the contract, before their expiry dates, in the event that the parties have agreed to the possibility that they may be terminated or, according to the general principle of law, in the event of non-performance by one or other of the parties.

56. Finally, the termination of an industrial co-operation contract may be caused by the occurrence, and above all the persistence, of a case of force majeure. In connexion, yet again, with the characteristic feature of industrial co-operation contracts resulting from their duration, it might be suggested that the force majeure clause should be made as flexible as possible. It is worth considering whether the time-limit - usually adopted in contracts for the sale of plant and machinery to determine whether a case of force majeure has lasted long enough to cause the termination of the contract -should not be extended by parties to industrial co-operation contracts in view of the nature of their relationship and the difficulties that would be caused by terminating contracts. In any event, it is desirable, even more than in the case of sales of capital goods or supply of industrial works, to include a clause specifying the conditions under which such termination would take place. As already suggested above, in the absence of an amicable agreement between the parties, the financial settlement of their relations should be effected in accordance with the procedure laid down for the settlement of disputes concerning the interpretation or performance of the contract. The task of the arbitrators and judicial authorities responsible for the termination would, of course, be facilitated if the parties were to lay down, in the contract itself, the principles and procedure to be followed. In any case, such a clause should, at the least, make provision for the difference between termination resulting from a change in circumstances and from force majeure, and cancellation resulting from default by one of the parties,

57. Where termination results from a' change in circumstances or force majeure, it would be appropriate to draw up a balance-sheet of what has been obtained by each of the parties, and to grant compensation to each party in proportion to the difference. Where, oil the other hand, there is a cancellation due to default by one of the parties, the normal procedure would seem to be to make the offending party liable for the consequences of the termination of the contract. The parties could, of course, make provision in their contract for legal and financial limitations to such liability, after taking the precaution of finding out whether such limitations are legally admissible in all the countries concerned. It would also be necessary to define in the contract the fate of any licenses which have been granted by one party to the other since on expiry of the term, or in the other cases of termination of the contract (except cancellation due to default by the licensee), the party holding a technology license might continue to use it for a further period, or even indefinitely, with or without payment. Also, other special clauses - for example, clauses relating to marketing - might continue in force beyond the period of validity of the over-all industrial co-operation contract. But that could only happen if the question had been settled in the contract or by subsequent agreement between the parties.

58. Lastly, it might be advisable to define in the contract the principles by which the parties would discharge their respective duties towards creditors and sub-contractors at the time of termination of the contract.

D. Applicable law

59. As with any international contract, the parties to an industrial co-operation contract may exercise their freedom, subject to the mandatory laws of the countries concerned, to choose the applicable law. It has been found, however, that the different forms of national private law do not usually contain rules dealing specifically with the new form of contractual relationship established through industrial co-operation. Consequently, it might be suggested that the parties should include in their contracts, detailed provisions defining their private-law relationships, together with references, in respect of matters not settled in the contract, to trade practices and the law they deem best suited to their relationships.

E. Settlement of disputes

60. Like many international contracts, industrial co-operation contracts generally contain arbitration clauses for the settlement of any dispute among the parties. Recourse to arbitration would seem well suited to the complicated nature of industrial co-operation contracts. On this subject, international business practice offers to those concerned a sufficient variety of arbitration procedures for them to be able to select the one best suited to the particular case.

61. The relationships established between the different parties to, industrial co-operation contracts are, however, of many different kinds; and this creates special problems as regards arbitration in such cases. The difficulties which may arise between the parties in the course of the operations may, in many cases, be paralleled by identical difficulties in relations between them and their sub-contractors or other contracting parties. Consequently, ill order to avoid conflict

between different arbitration or judicial decisions, it would seem desirable for all disputes arising in the performance of international industrial co-operation contracts to be made subject, when possible, to identical procedures before the same arbitrators, whoever the parties to the disputes may be. However, even' with such a solution, the contents of the various contracts which constitute the whole transaction might give rise to different decisions before the same arbitrators, depending on which contracting parties are involved in the dispute.

62. Although standardization of contract arbitration procedures in international industrial co-operation would seem to be required by reason of the interrelated character of the different operations making up the over-all transaction, it may involve certain procedural difficulties. It might, for instance, be difficult to organize a single arbitration procedure in the case of a transaction which is of an international nature between certain parties but purely domestic in regard to relations between others. In fact, however, the existence of these two procedures would cease to be a source of difficulty if the sub-contractors or the indirect contracting parties agreed - by providing for this principle in their contracts - that arbitration decisions in disputes between the main contracting parties would also apply to the other parties concerned provided, however, that it were possible for the latter to be associated with the arbitration procedure between the main contracting parties.

63. There is a need to harmonize arbitration procedures in order to avoid any conflict of decisions, not only in the case of differences between the parties with regard to legal issues but also with regard to issues relating to the quality of the technology provided and the quality of the various products to be transferred between the parties and jointly marketed.

64. In this connation, it may be noted that, in recent experience of international commercial arbitration, many disputes between parties to industrial transactions arise from technical disagreements. In a normal arbitration procedure in international relations, the technical questions at issue in these disputes come before the arbitrators long after the technical difficulties have arisen. Even if, as usually happens, the arbitrators appoint technical experts, these are called upon to give their opinion at a stage when on-the-spot verification, which might be necessary, has become more difficult. It might be suggested to the parties that they should agree in advance on the appointment of technical experts to who would be submitted, without delay, any disagreements which arise over the quality of the technology, supplies or products. If the parties themselves cannot reach agreement on the choice of experts, they might request that the experts be appointed by a specialized institution selected by agreement between the parties.

65. To avoid any uncertainty as to the actual effect of the opinions given by the technical expert or experts requested to make technical observations during, or at the end of, operations, it would be useful for the parties to specify this effect in the contract, clearly stating whether these opinions should be considered as final or whether they should merely constitute evidence with certain weight in subsequent arbitration proceedings. In the absence of such a stipulation, it should be assumed that the opinion of the expert would not be binding on the arbitrator.

Annex

General conditions relating to plant and machinery drawn up under the auspices of the United Nations Economic Commission for Europe

- General conditions for the supply of plant and machinery for export (No. 188)

- Commentary on the general conditions for the supply of plant and machinery for export (No. 188)

- General conditions for the supply and erection of plant and machinery for import and export (No. 188A)

- Additional clauses for supervision of erection of plant and machinery abroad (No. 188B)

- General conditions for the erection of plant and machinery abroad (No. 188D)

- General conditions for the supply of plant and machinery for export (No. 574)

- Commentary on the general conditions for the supply of plant and machinery for export (No. 574)

- General conditions for the supply and erection of plant and machinery for import and export (No. 574A)

- Additional clauses for supervision of erection of plant and machinery abroad (No. 574B)

- General conditions for the erection of plan and machinery abroad (No. 574D)

United Nations publications on industrial co-operation and related subjects

1. Publications of the United Nations Economic Commission for Europe

- Guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry (TRADE/222/Rev.1)

- Guide on drawing up contracts for large industrial works (ECE/TRADE/117)

- Analytical report on industrial co-operation among ECE countries (E/ECE/844/Rev.1)

- A Research note on industrial co-operation as a factor in the growth of east-west european trade, published in the Economic Bulletin for Europe, Vol. 21, No. 1.

2. Publications of the United Nations conference on trade and development

Innovations in the practice of trade and economic co-operation between the socialist countries of Eastern Europe and the developing countries (TD/B/238/Rev.1)

3. Publications of the United Nations industrial development organization

- Contract planning and organization (ID 117)

- A Guide to industrial purchasing (ID/82)

- Manual on the establishment of industrial joint-venture agreements in developing countries (ID/68)

1 Unless otherwise indicated, the term "international contract", is used in this Guide in its widest sense, to include any agreement between parties belonging to different countries, in whatever form it may be concluded, which relates to one or a set of the operations listed in paragraphs 3-7 of the Guide.

2 Cf. Guide for use in drawing up contracts relating to the international transfer of know-how in the engineering industry (TRADE/222/Rev.1).

3 See the annex to this Guide for the series of the general conditions relating to plant and machinery prepared under the auspices of the Economic Commission for Europe.

4 Cf. Guide on Drawing up Contracts for Large Industrial Works (ECE/ TRADE/117).

5 See the annex to this Guide for a list of United Nations publications on industrial co-operation and related subjects.

6 E/ECE/844/Rev.1.

7 Licensing with payment in resultant products; supply of complete plants or production lines with payment in resultant products; co-production and specialization; sub-contracting; joint ventures; joint tendering or joint construction, or similar projects.

8 This list does not, of course, include the more highly integrated forms of industrial co-operation such as mixed enterprises.

9 ECE/TRADE/117, paras. 38-41.

10 ECE/TRADE/117, Para. 43.