constructed in accordance with the contract or if the plant is not complete or if the tests have not been successfully carried out. However, the purchaser has to accept if there are only minor or immaterial defects (see clause 32.1 FIDIC-EMW, *supra,* paragraph 121).

124. In the UNIDO models minor defects do not permit the purchaser to refuse acceptance. This is not stated in the drafts but it follows from other provisions. It seems that the provisional acceptance certificate will be issued even if:

(*a*) The tests are not successful and the purchaser claims liquidated damages (article 18.17 of UNIDO-TKL);

(*b*) Repairs are necessary which the contractor has to carry out (article 18.18 of UNIDO-TKL).

G. *Legal effects of take-over and acceptance*

125. By accepting the plant the purchaser acknowledges that the contract has been duly performed. However, the parties may state in the acceptance protocol the defects, if any, and agree on the period for their rectification.

126. According to clause 32.1 of FIDIC-EMW "the issue of a Taking-Over Certificate shall not operate as an admission that the Works have been completed in every respect."

127. A similar provision is contained in both UNIDO-TKL and UNIDO-CRC:

Article 18.16: "The *Provisional Acceptance* of the Plant or the Take-Over of any specified part or section of the Plant(s) by the PURCHASER . . . *shall not be* construed as *evidence that any portions* of the Work(s), part(s), section(s) and/or material(s) thereof *are complete.*"

Similarly in UNIDO-STC:

Article 18.28: "The Provisional Acceptance of the Plant(s) or the Take-Over of any specified part or section of the Plant(s) by the PURCHASER shall not in any way release the CONTRACTOR from his obligations under the terms of this Contract, and shall not be construed as evidence that the Plant(s) are free of defects."

128. An international group of contractors has criticized those provisions, stating that a signed report must mean what it says and any reservations thereon should be written into the report (see ID/WG.318/4, page 23).

129. According to clause 32.1 of FIDIC-EMW the legal effect of the acceptance and take-over is that title to and risk of loss or damage to the works pass to the purchaser.

130. According to clause 22.1 of both ECE 188A/574A the guarantee period commences on the date of acceptance.

131. According to article 18.19 of UNIDO-TKL the purchaser, upon take-over, "shall be responsible for the management, operation and maintenance of the Work(s), and shall take out and carry such insurances as may be deemed necessary."

132. Sometimes the credit period, payment of installments or payment of interests commences on the date of acceptance. However, this effect is sometimes expressly excluded. For instance, according to clause 62 (1) of FIDIC-CEC, the maintenance certificate which marks the approval or acceptance of the works is not a condition precedent to payment to the contractor.

133. On the other hand according to article 26.15 of UNIDO-TKL the acceptance certificate entitles the contractor to receive payment:

"The issue of these Provisional Acceptance Certificates shall . . . entitle the CONTRACTOR to receive due payments on completion of the Performance Guarantees and Acceptance of the Plant in accordance with Article 20."

[A/CN.9/WG.V/WP.4/Add.4*]

XI. Delays and remedies

A. *Preliminary remarks*

1. As a general rule, the parties to a contract must perform the contract according to its terms. This obligation relates not only to the performance itself but also to the time within which the performance must be completed. If the party does not perform within the time fixed by the contract, there exists a "delay" under the terms of the contract.

2. Delays in the execution of a contract may occur at different stages of the contract and can be caused by a breach of the contract by the parties or may be attributable to causes beyond the control of the parties.

3. If a delay occurs the aggrieved party may ask that this situation be remedied. The remedy will depend on the gravity and the seriousness of the delay. In view of the nature of contracts for the supply and construction of large industrial works, it is to be expected that they will be essentially performance oriented and that it will be only as a measure of last resort that the aggrieved party will be entitled to put an end to the contract.

* 27 May 1981.

B. *Kinds of delays and their remedies*

1. *Delay in performing the main obligations*

(a) *Completion*

4. In the event of a delay in the completion of the works, clause 47 of FIDIC-CEC provides that:

". . . the Contractor shall pay to the Employer the sum stated in the Contract as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by Clause 43 hereof and the date of certified completion of the Works . . ."

5. However, the same clause of FIDIC-CEC goes on further:

"The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract."

6. Under clause 31.1 of FIDIC-EMW, the purchaser is also entitled "to a reduction of the Contract Sum unless it can be reasonably concluded from the circumstances of the particular case that the Employer has suffered no loss." The exact amount of such reduction will be determined in accordance with the figures provided for in an appendix to the tender.

7. If the works remain uncompleted for a long period of time, clause 31.2 of FIDIC-EMW provides that:

"If any Portion of the Works in respect of which the Employer has become entitled to the maximum reduction under Sub-Clause 1 of this Clause remains uncompleted the Employer may by notice in writing to the Contractor require him to complete and by such notice fix a final time for completion which shall be reasonable having regard to such delay as has already occured. If for any reason, other than one for which the Employer or some other contractor employed by him is responsible, the Contractor fails to complete within such time, the Employer may by further written notice to the Contractor elect either

"(*a*) To require the Contractor to complete, or

"(*b*) To terminate the Contract in respect of such Portion of the Works

"and recover from the Contractor any loss suffered by the Employer by reason of the said failure up to an amount not exceeding the sum named in the Appendix to the Tender or, if no sum is named, that part of the Contract Sum that is properly apportionable to such Portion of the Works as cannot by reason of the Contractor's failure be put to the use intended."

8. The solution envisaged by FIDIC-EMW is similar to that in the ECE General Conditions in case the delay in the completion of the works is not remedied immediately. Clause 20.5 of both ECE 188A/574A provides that:

"If any portion of the Works in respect of which the Purchaser has become entitled to the maximum reduction provided for by paragraph 3 hereof, or in respect of which he would have been so entitled had he given the notice referred to therein, remains uncompleted, the Purchaser may by notice in writing to the Contractor require him to complete and by such last mentioned notice fix a final time for completion which shall be reasonable taking into account such delay as has already occurred. If for any cause other than one for which the Purchaser or some other Contractor employed by him is responsible, the Contractor fails to complete within such time, the Purchaser shall be entitled by notice in writing to the Contractor, and without requiring the consent of any Court, to terminate the Contract in respect of such portion of the Works and thereupon to recover from the Contractor any loss suffered by the Purchaser by reason of the failure of the Contractor as aforesaid up to an amount not exceeding the sum named in . . . the Appendix, or, if no sum be named, that part of the price payable under the Contract which is properly attributable to such portion of the Works as could not in consequence of the Contractor's failure be put to the use intended."

9. The remedies for delay in completion or for non-completion are usually damages (see XII, *Damages and limitation of liability, infra*) or liquidated damages and termination (see part two, XVII, *Termination*).*

(b) *Payment*

10. If the purchaser delays in making payment, clause 11.5 of both ECE 188A/574A provides that:

"the Contractor may postpone the fulfilment of his own obligations until such payment is made, unless the failure of the Purchaser is due to an act or omission of the Contractor".

11. When the delay in paying continues, clause 11.7 of both ECE 188A/574A provides that:

". . . the Contractor shall on giving to the Purchaser within a reasonable time notice in writing be entitled to the payment of interest on the sum due at the rate fixed in . . . the Appendix from the date on which such sum became due. If at the end of the period fixed in . . . the Appendix, the Purchaser shall still have failed to pay the sum due, the Contractor shall be entitled by notice in writing to the Purchaser, and without requiring the consent of any Court, to terminate the Contract and thereupon to recover from the Purchaser the amount of his loss up to the sum mentioned in . . . the Appendix."

* A/CN.9/WG.V/WP.4/Add.7 (reproduced below).

12. Under clause 69 (1) of FIDIC-CEC, the contractor may terminate the contract:

"In the event of the Employer:

"(*a*) Failing to pay to the Contractor the amount due under any certificate of the Engineer within thirty days after the same shall have become due under the terms of the Contract, subject to any deduction that the Employer is entitled to make under the Contract . . ."

13. The UNIDO-TKL model does not contain any provision granting the contractor remedies in the event the purchaser delays in making payment under the terms of the contract. The remedies available to the contractor in such a case would, therefore, be those existing under the applicable law.

(c) *Taking delivery*

14. If the purchaser delays in taking delivery, clause 10.1 of both ECE 188A/574A provides that "he shall nevertheless make any payment conditional on delivery as if the Plant had been delivered. The Contractor shall arrange for the storage of the Plant at the risk and cost of the Purchaser. If required by the Purchaser, the Contractor shall insure the Plant at the cost of the Purchaser . . ."

15. The FIDIC-EMW Conditions also contain similar provisions on the consequences of the purchaser's delay in taking delivery, i.e. payment, storage and insurance (clauses 26.2, 26.4, 26.5, 26.7).

2. *Delay in performing other obligations*

16. Some of the possible cases of delay and their consequences have been dealt with in other chapters and will, therefore, not be repeated here. As regards delayed tests, see part two, VIII, *Inspection and Tests,** for delays in curing defects, see part two, XV, *Guaranties*** and XVI, *Rectification of Defects.****

3. *Delays due to exonerating events*

17. Certain aspects of the question are discussed in chapter XIII, *Exoneration,***** which deals with events of *force majeure* or frustration and with other types of events which prevent the parties from performing the contract.

18. Some of the forms under study deal with events other than *force majeure,* frustration or exoneration that may result in delays in the performance of the contract. Such other causes for delay to which for instance clause 44 of FIDIC-CEC refers are "extra or additional work of any kind" and to "exceptional adverse climatic conditions".

19. In the event that the contractor's performance is delayed for a reason beyond the control of the parties, article 44 of FIDIC-CEC provides that the contractor is entitled "to an extension of time for the completion of the Works". The period of extension is to be determined by the engineer who "shall notify the Employer and the Contractor accordingly".

20. In order for the engineer to take account of the additional or extra work or of other special circumstances, the contractor must notify him in writing. This notice must be sent "within twenty-eight days after such work has been commenced, or such circumstances have arisen, or as soon thereafter as is practicable" and it must contain "full and detailed particulars of any extension of time to which [the Contractor] may consider himself entitled in order that such submission may be investigated at the time".

21. Article 19 of UNIDO-TKL deals with the extension of time for completion if delay is caused by circumstances beyond the control of the parties. Article 19.1 of UNIDO-TKL refers to "Vandalism, Malicious Damage and Death or Injury to essential personnel" but excludes occurrences or events covered by articles 18.18 (repairs and modifications of the plant), 29.10 (inability to prove and demonstrate the guaranty tests) and 34 (*force majeure*) which may also delay the completion of the works.

22. Under article 19.1 of UNIDO-TKL, the contractor must also make a written request to the purchaser "for a reasonable extension of time for completion of work or any portion of it to the extent that the factors affecting delay prevailed in the circumstances." This written request must be made within ten days of the occurrence specified above which resulted in the delay.

XII. Damages and limitation of liability

A. *Introduction*

23. The liability to pay damages for breach of contract is one of the most important consequences of the failure to perform. The importance appears to be particularly significant in international contracts for the supply and construction of large industrial plants because of the extent of damages that may result from the breach of such contracts. Moreover, there may be problems relating to damages presented by a guaranty. Therefore, clauses providing for damages which are to be

* A/CN.9/WG.V/WP.4/Add.3 (reproduced above).
** A/CN.9/WG.V/WP.4/Add.6 (reproduced below).
*** *Ibid.*
**** A/CN.9/WG.V/WP.4/Add.5 (reproduced below).

paid in case of failure to perform are often found in such contracts.

24. The limitation of liability in case of exonerating events is dealt with in chapter XIII. This chapter covers only limitations of liability in respect of the extent of damages to be paid. Such limitations may be summed up as follows:

Exclusion of unforeseeable damage,

Exclusion of indirect and consequential loss and anticipated profits,

Reduction in damages in case of failure to mitigate the loss,

Stipulation of limited amount of damages,

Exclusion of damages caused by defects of materials provided or design stipulated by the purchaser,

Exclusion of personal injury and damage to property not being the subject matter of the contract.

B. *Exclusion of unforeseeable damage*

25. Rules excluding from liability for loss which could not have been foreseen by a party in breach can be found in many international conventions, legal systems, as well as general conditions. In all these rules, the only relevant time is that of the conclusion of the contract. Knowledge which is subsequently acquired is not relevant to the measure of damages.

26. Article 74 of the Sales Convention reads:

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract."

27. Such a principle of excluding recovery of damages for unforeseeable loss is contained in clause 26.1 of both ECE 188A/574A which reads:

"Where either party is liable in damages to the other, these shall not exceed the damage which the party in default could reasonably have foreseen at the time of the formation of the contract."

28. A similar provision is contained in the FIDIC-EMW Conditions clause 16.2:

"Where either the Employer or the Contractor is liable in damages to the other these shall not exceed the damage which the party in default could reasonably have foreseen at the date of the Contract."

C. *Exclusion of indirect or consequential loss and anticipated profits*

29. In clause 16.1 of FIDIC-EMW indirect or consequential damage is excluded to some extent:

"Except as provided in Clause 31.1 (Delay in Completion) for a reduction of the Contract Sum for delay and except as provided in Clause 33.11 (Gross Misconduct), the Contractor shall not be liable to the Employer by way of indemnity or by reason of any breach of the Contract for loss of use (whether complete or partial) of the Works or of profit or of any contract or for any indirect or consequential damage that may be suffered by the Employer."

30. Article 30.6 of the UNIDO-TKL model contract and article 30.6 of UNIDO-CRC model contract exclude anticipated profits and consequential loss in the following manner:

"The CONTRACTOR shall not be liable under the Contract for loss of anticipated profits or for any consequential loss or damage arising from any cause, except to the extent of repaying to the PURCHASER any amount receivable under Article 24 and/or pursuant to other insurance policies held by the CONTRACTOR solely in connection with the types of losses referred to in this Article 30.6."

31. On the other hand, article 30.3 of UNIDO-CRC counter-proposal contains a broader limitation of anticipated profits and consequential loss:

"The CONTRACTOR shall not be liable, in any event, whether under the Contract, negligence, or otherwise for loss of anticipated profits, or for any consequential loss or damage arising from any cause."

D. *Reduction in damages in case of failure to mitigate the loss*

32. The party who relies on breach of contract is usually required by applicable legal rules or the contract to mitigate the loss resulting from the breach of contract. The purpose of such provisions is to prevent the damages from swelling.

33. Article 77 of the Sales Convention reads:

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

34. Similar provisions are contained in clause 26.2 of both ECE 188A/574A which reads:

"The party who sets up a breach of Contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages."

35. A similar provision is also found in clause 16.3 of FIDIC-EMW:

"In all cases the party establishing a breach of contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party in breach of the Contract may claim a reduction in the damages."

E. *Stipulation of limited amount of damages*

36. The extent of damages to be paid in case of breach of contract is often limited by the parties in the contract, either by a percentage of the price of the works or by a certain amount stipulated directly in the contract. In such a case the right to claim damages is governed by rules otherwise applicable but the right to damages cannot exceed the amount agreed upon by the parties.

37. Clause 30.5 of the UNIDO-TKL model contract provides as follows:

"The total liability of the CONTRACTOR under the Contract shall not exceed . . . % of the total Project Cost, or, (state amount) whichever is the greater, with the exception of the CONTRACTOR's unlimited liability for the fulfillment of warranties, Absolute Guarantees, modifications, rectifications and completion of the Work(s) as well as the reimbursement to the PURCHASER of any amount(s) received by the CONTRACTOR under any Insurance Policies held by the CONTRACTOR as well as through those other specifically taken out for the purposes of this Contract."

An identical provision is contained in clause 30.5 of UNIDO-CRC.

38. A similar provision is contained in clause 30.5 of UNIDO-STC. However, the limitation of liability is determined only by a percentage of the total contract price.

39. Clause 30.1 of UNIDO-CRC counter-proposal is of a more general nature:

"The overall financial liability, whether founded on Contract, negligence or otherwise, of the CONTRACTOR arising out of or in connection with the realisation of the Contract shall not exceed (. . .)% of the firm price stated in Article 20.1.1."

40. Such a limitation of damages is included in clause 16.4 of FIDIC-EMW in this way:

"The liability of the Contractor to the Employer under Clause 15 for any one act or default shall not exceed the sum stated in Part II of these Conditions, and the Contractor shall have no liability to the Employer in respect of any loss of or damage to property which shall occur after the expiration of the period stated in Part II of these Conditions."

41. International contracts for supply and construction often provide for the payment of a sum of money (penalty, liquidated damages) upon a breach of a contractual obligation. Such clauses are inserted by parties to determine, at the time of the conclusion of the contract, the damages to be paid in case of its breach, without the need of proving the extent of loss actually brought about by such a breach. At the same time, however, the agreed amount very often serves as a limitation of liability of the debtor.

42. The UNCITRAL Working Group on International Contract Practices was requested to deal with the question of liquidated damages and penalty clauses.[1] The Secretariat submitted two studies.[2] At its second session (New York, 13-17 April 1981) the Working Group adopted a draft rule on the relationship between the right to obtain the agreed sum (liquidated damages, penalty) and to claim damages for breach of the contractual obligation to which it is accessory. The rule reads:

"Unless the parties have agreed otherwise, if a failure of performance in respect of which the parties have agreed that a sum of money is to be recoverable or forfeited occurs, the creditor is entitled, in respect of the failure, to recover or forfeit the sum, and is entitled to damages to the extent of the loss not covered by the agreed sum, but only if he can prove that this loss grossly exceeds the agreed sum."[3]

F. *Exclusion of damages caused by defects of materials provided or design stipulated by the purchaser*

43. Contracts for the supply and construction of large industrial works sometimes stipulate that the purchaser is to provide some materials and/or design

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[1] Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 31 (Yearbook . . . 1979, part one, II, A).

[2] Report of the Secretary-General entitled "Liquidated damages and penalty clauses" (A/CN.9/196) (reproduced in this volume, part two, II, A) and Report of the Secretary-General entitled "Liquidated damages and penalty clauses (II)" (A/CN.9/WG.2/WP.33 and Add.1) (reproduced in this volume, part two, I, B).

[3] Report of the Working Group on International Contract Practices on the work of its second session (A/CN.9/197), para. 52 (reproduced in this volume, part two, I, A).

needed for the production of the plant or construction of the works. In such cases the contracts usually exclude responsibility of the contractor for defects caused by such materials or designs. The exclusion of liability covers the curing of defects as well as damages concerning loss brought about by such defects.

44. Clause 23.12 of both ECE 188A/574A reads:

"The Contractor's liability does not apply to defects arising out of materials provided, or out of a design stipulated, by the Purchaser."

45. A similar principle follows from clause 33.2 of the FIDIC-EMW Conditions:

"The Contractor shall be responsible for making good with all possible speed at his expense any defect in or damage to any portion of the Works which may appear or occur during the Defects Liability Period and which arises either:

"(*a*) From any defective materials, workmanship or design (other than a design made, furnished or specified by the Employer and for which the Contractor has disclaimed responsibility in writing within a reasonable time after receipt of the Employer's instructions), or . . ."

G. *Exclusion of personal injury and damage to property not being the subject-matter of the contract*

46. In many contracts for the supply and construction of large industrial plants there is express provision excluding personal injury and damage to property not being the subject matter of the contract. Such injury or damages may be governed, however, by applicable legal rules of a mandatory nature.

47. The sphere of application of the Sales Convention is limited in this respect in article 5 which reads:

"This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person."

48. Contracts for the supply and construction of large industrial plants cannot, of course, disentitle third persons not being parties to such a contract. Some general conditions, however, deal with the responsibility of the contractor in relationship to the purchaser in case of such damage. Clause 23.14 of both ECE 188A/574A provides:

"After taking over and save as in this Clause expressed, the Contractor shall be under no liability even in respect of defects due to causes existing before taking over. It is expressly agreed that the Purchaser shall have no claim in respect of personal injury or of damage to property not the subject-matter of the Contract arising after taking over nor for loss of profit unless it is shown from the circumstances of the case that the Contractor has been guilty of gross misconduct."

49. According to clause 23.15 of both ECE 188A/574A:

"'Gross misconduct' does not comprise any and every lack of proper care or skill, but means an act or omission on the part of the Contractor implying either a failure to pay due regard to serious consequences which a conscientious Contractor would normally foresee as likely to ensue, or a deliberate disregard of any consequences of such act or omission."

50. Liability for personal injury or damage to property occurring before all the works have been taken over is dealt with in clause 24.1 of both ECE 188A/574A.

51. Clause 15.5 of FIDIC-EMW reads:

"If there shall occur, after the commencement of the Defects Liability Period in respect of any Section or Portion of the Works, any loss of or damage or injury to any property (other than property forming part of the Works not yet taken over) or person as a result of a cause occurring prior to the commencement of the Defects Liability Period the Contractor's liability, subject to Clause 16.4 (Limitation of Liability), shall be as follows:

". . .

"(*b*) In respect of damage or injury to any property or to any person and of any actions, claims, demands, costs, charges and expenses arising in connection therewith, the Contractor shall be liable to the extent that such damage or injury was caused by the negligence of the Contractor or a Sub-Contractor or by defective design (other than a design made, furnished or specified by the Employer and for which the Contractor has disclaimed responsibility in writing within a reasonable time after receipt of the Employer's instructions) materials or workmanship but not otherwise."

52. A more general rule is contained in clause 22 of FIDIC-CEC:

"(1) The Contractor shall, except if and so far as the Contract provides otherwise, indemnify the Employer against all losses and claims in respect of injuries or damage to any person or material or physical damage to any property whatsoever which may arise out of or in consequence of the execution and maintenance of the Works and against all claims, proceedings, damages, costs, charges and expenses whatsoever in respect of or in relation thereto except any compensation or damages for or with respect to:

"(*a*) The permanent use or occupation of land by the Works or any part thereof.

"(*b*) The right of the Employer to execute the Works or any part thereof on, over, under, in or through any land.

"(*c*) Injuries or damage to persons or property which are the unavoidable result of the execution or maintenance of the Works in accordance with the Contract.

"(*d*) Injuries or damage to persons or property resulting from any act or neglect of the Employer, his agents, servants or other contractors, not being employed by the Contractor, or for or in respect of any claims, proceedings, damages, costs, charges and expenses in respect thereof or in relation thereto or where the injury or damage was contributed to by the Contractor, his servants or agents such part of the compensation as may be just and equitable having regard to the extent of the responsibility of the Employer, his servants or agents or other contractors for the damage or injury.

[A/CN.9/WG.V/WP.4/Add.5*]

XIII. Exoneration

A. *Introduction*

1. Most, if not all, legal systems make provision for unforeseen or unavoidable circumstances which prevent, impede or delay the performance of a contract. The nature and scope of such circumstances affecting a contract differ in varying degrees among different legal systems. The two main doctrines that have been evolved to deal with such circumstances are *force majeure* and frustration, though the former doctrine may mean different things in different legal systems.

2. Parties often insert "*force majeure*" or "frustration" clauses either to expand or narrow the scope of the two doctrines. In such clauses, parties may also allocate their risks in a more precise manner taking into consideration the nature of the performance of the particular contract.

3. In this study, the term "exoneration" is used to cover circumstances relieving parties from liability. Although the circumstances under discussion may straddle the doctrines of *force majeure* or frustration the term "exoneration" is used to avoid confusion, as there may be events under consideration which do not fall within the scope of either one or the other of the two doctrines as understood in the various legal systems. However, the terms "*force majeure*", "frustration" and other epithets will be used where clauses under discussion are taken from contexts which employ these terms.

4. An exoneration clause constitutes one of the most important clauses in a works contract; it deals essentially with the allocation of risks in the event of changed circumstances. Such a clause could save the contract from automatic termination which may be too drastic and may not be to the mutual interests of both parties. At a regional level, attempts at drafting "relief" clauses for use in contracts for the supply and erection of plant and machinery have been made, for example, by ECE. The ECE General Conditions are designed for application in different legal systems. At a global level, the "Exemptions" provision in the Sales Convention provides an example of success in the harmonization of this area of law in the context of sale of goods. Parties to works contracts have also attempted to modify the doctrines of *force majeure* and frustration in order to determine the kinds of contingency that would suspend or terminate their obligations and also the consequences of such suspension or termination.

B. *Exonerating circumstances*

1. Force majeure *clauses in contractual stipulations*

5. An examination of some works contracts indicates a number of approaches:

(*a*) Reference is made to the applicable law of the contract with no attempt to extend or narrow its scope. For example, in one clause reference was made to "Articles 513 and 514 of the Civil Code".

(*b*) *Force majeure* clauses are defined generally by the parties but no attempt is made in spelling out the exonerating events. For example, one such clause reads: "Neither party hereto shall be liable for any failure or delay in performing any obligation hereunder (except the payment of any amount due hereunder) due to *causes which are reasonably beyond its control.*" This clause is from one of the contracts to be performed in Trinidad and Tobago. The clause is to be read with the applicable law of the contract.

(*c*) Some *force majeure* clauses attempt to list, in varying details, the exonerating circumstances. But most are only illustrative of the scope and leave the question to be determined by the judge or arbitrator. Other clauses attempt a more comprehensive, though not exhaustive, list and end with a general clause, as for example, that it is ". . . without prejudice to the generality, any other circumstance or occurrence beyond the reasonable control of the sellers."

6. The following criteria were found in the definition of "*force majeure*" or other such-like clauses but with varying combinations:

* 17 March 1981.