

## II. TEXTS ON LIQUIDATED DAMAGES AND PENALTY CLAUSES<sup>a</sup>

### A. Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (A/38/17, annex I) (A/CN.9/243, annex I)<sup>b</sup>

### B. Draft United Nations Convention on Contract Clauses for an Agreed Sum Due upon Failure of Performance (A/38/17, annex II) (A/CN.9/243, annex II)<sup>c</sup>

[A/CN.9/243, annex I]

*Article 4*

#### A. Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance<sup>1</sup>

These Rules do not apply to contracts concerning goods, other property or services which are to be supplied for the personal, family or household purposes of a party, unless the other party, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the contract was concluded for such purposes.

#### PART ONE: SCOPE OF APPLICATION

*Article 1<sup>2</sup>*

These Rules apply to international contracts in which the parties have agreed that, upon a failure of performance by one party (the obligor), the other party (the obligee) is entitled to an agreed sum from the obligor, whether as a penalty or as compensation.

#### PART TWO: SUBSTANTIVE PROVISIONS

*Article 5*

*Article 2*

For the purposes of these Rules:

The obligee is not entitled to the agreed sum if the obligor is not liable for the failure of performance.

*Article 6*

(a) A contract shall be considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States;

(b) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of these Rules.

(1) If the contract provides that the obligee is entitled to the agreed sum upon delay in performance, he is entitled to both performance of the obligation and the agreed sum.

(2) If the contract provides that the obligee is entitled to the agreed sum upon a failure of performance other than delay, he is entitled either to performance or to the agreed sum. If, however, the agreed sum cannot reasonably be regarded as compensation for that failure of performance, the obligee is entitled to both performance of the obligation and the agreed sum.

*Article 3*

For the purposes of these Rules:

*Article 7*

(a) If a party has more than one place of business, his place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

If the obligee is entitled to the agreed sum, he may not claim damages to the extent of the loss covered by the agreed sum. Nevertheless, he may claim damages to the extent of the loss not covered by the agreed sum if the loss substantially exceeds the agreed sum.

*Article 8*

<sup>a</sup>For consideration by the Commission see Report, chapter II (part one, A). See also in this volume part two, I.

<sup>b</sup>29 June 1983. Referred to in Report, para. 76.

<sup>c</sup>29 June 1983. Referred to in Report, para. 77.

<sup>1</sup>The text of the Rules was adopted by the Commission in paragraph 76 of the report. The title was provisionally adopted by the Commission in paragraph 75 of the report.

<sup>2</sup>See table of correspondence between articles as numbered in the Rules as adopted, and the Rules as discussed in the Commission.

*Article 9*

The parties may derogate from or vary the effect of articles 5, 6 and 7 of these Rules.

*Table of correspondence*

<i>Article as adopted</i>	<i>Article before the Commission</i>
1	A
2	A bis
3	B
4	C
5	D
6	E
7	F
8	G
9	X

**[A/CN.9/243, annex II]****B. Draft United Nations Convention on Contract Clauses for an Agreed Sum Due upon Failure of Performance<sup>1</sup>***Article I (Vienna Sales Convention, art. 1)<sup>2</sup>*

Each Contracting State shall apply the Uniform Rules on Contract Clauses for an Agreed Sum due upon a Failure of Performance (hereinafter referred to as "the Uniform Rules") contained in the annex to this Convention to the contracts described in article 1 of the Uniform Rules

(a) When, at the time of the conclusion of the contract, the parties have their places of business, as described in articles 2 and 3 of the Uniform Rules, in different Contracting States; or

(b) When the rules of private international law lead to the application of the law of a contracting State.

*Article II (Vienna Sales Convention, art. 90)*

The Uniform Rules do not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by the Uniform Rules, provided that the parties to the contract have their places of business in States parties to such agreement.

*Article III (Vienna Sales Convention, art. 95)*

Any State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by subparagraph (b) of article I.

*Article IV (Vienna Sales Convention, art. 96)<sup>3</sup>*

A Contracting State whose legislation requires contracts to be concluded in or evidenced by writing may at any time

<sup>1</sup>The draft Convention was prepared by the secretariat in the eventuality that it was decided to annex the Rules to a convention. See paragraphs 77 and 78 of the report.

<sup>2</sup>The source used as a model for article I was the United Nations Convention on Contracts for the International Sale of Goods, hereafter referred to as the Vienna Sales Convention, article 1 (Yearbook ... 1980, part three, I, B) (A/CONF.97/18, annex I).

<sup>3</sup>The Commission agreed to the substance of articles IV and V in the eventuality that a convention was prepared. See paragraph 67 of the report.

make a declaration that it will apply the Uniform Rules only to a contract concluded in or evidenced by writing where any party has his place of business in that State.

*Article V (ULIS, art. V)<sup>4</sup>*

Any State may declare at the time of signature, ratification, acceptance, approval or accession to this Convention that it will apply the Uniform Rules only to a contract in which the parties to the contract have agreed that the Uniform Rules be applied thereto.

*Article VI (Vienna Sales Convention, art. 94)*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by the Uniform Rules may at any time declare that the Uniform Rules are not to apply to a contract where the parties thereto have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by the Uniform Rules as one or more non-contracting States may at any time declare that the Uniform Rules are not to apply to contracts where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new contracting State joins in such declaration or makes a reciprocal unilateral declaration.

*Article VII (Vienna Sales Convention, art. 28)<sup>5</sup>*

If, in accordance with the provisions of the Uniform Rules the obligee is entitled to performance of an obligation, a court is not bound to enter a judgment for specific performance unless the court would do so in respect of similar contracts not governed by the Uniform Rules.

*Article VIII (Vienna Sales Convention, art. 89)*

The Secretary-General of the United Nations is hereby designated as the depository for this Convention.

*Article IX (Vienna Sales Convention, art. 91)*

(1) This Convention is open for signature by all States at the Headquarters of the United Nations in New York until ....

(2) This Convention is subject to ratification, acceptance or approval by the Signatory States.

(3) This Convention is open for accession by all States which are not Signatory States as from the date it is open for signature.

<sup>4</sup>The source used as a model for article V was article V of the Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964) (United Nations, *Treaty Series*, vol. 834, No. 11929, p. 107).

<sup>5</sup>The Commission considered article VII in the context of the substance of the Rules. See paragraphs 43, 44 and 73 of the report.