# Standardization of Commercial and Banking Practice for Facilitating International Transactions

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by

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## Introduction

It is an undeniable fact that day-to-day business transactions among world nations go well chiefly because they are conducted in accordance with internationally standardized commercial and banking practice established over the years.

The businessmen can avoid various difficulties arising from diverging practices by defining clearly and precisely in their contracts concluded with foreign partners the scope of rights and obligations pertaining to each of the parties to the contracts. If sales contracts concluded with foreign buyers are defective, whatever success that may have been achieved in making products competitive in both quality and price on the world market will have come to no avail.

However, when negotiating an international contract, selfish demands and unilateral interpretation of contract terms by any of the contracting parties will not only obstruct the smooth progress of the transaction but also may result in a loss to the parties involved. For the real development of trade, each of the contracting parties should always bear in mind the other's position.

For these reasons, the general use of standardized rules is of paramount importance, and this report will give an outline of international commercial and banking practice and rules now in force.

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## I. Various Factors Involved in International Transactions and the Need for Standardization

External activities of private enterprise can involve various facets of international, national and individual business characteristics, none of which can be ignored. Factors here to be considered are:

a) Basically, trade between parties of different nationalities with different economic, social and cultural backgrounds entails many difficult problems. Varied degrees of economic development of countries have helped foster the different national economic and trade policies which have a direct bearing on each individual business transaction.

b) The provisions laid down in customs procedures and foreign exchange controls and the way they are enforced also require careful consideration, because the least change in them can affect the profitability of the individual transaction.

c) Different national laws and regulations controlling business activities constitute obstacles to the development of international trade. To overcome these, voluntary international standards and rules have been adopted by businessmen for overseas transactions, but these undergo frequent modifications in order to adjust themselves to new developments in world business.

d) Overseas sales involve many ancillary contracts. To assure safe delivery of goods to foreign buyers, various steps must be taken involving carriage of goods by sea, land and air, insurance, trade financing, and transferring and receiving of payments through foreign exchange banks, etc., those procedures are also subject to continual modifications to meet new requirements of international trade.

e) Overseas licensing contracts of patents, trade marks and technical know-how have become increasingly important as the industrialization programs of the developing countries progress and foreign industrial investments expand correspondingly. Trading firms are becoming more and more involved in this type of contract in connection with the export of industrial plant and heavy equipment.

The causes of business conflicts may be classified in two groups — those arising from dishonesty or negligence of partners, and those arising as a result of unawareness of the laws and regulations of the foreign countries

concerned.

Thus businessmen engaged in international trade should seriously consider the promotion of standardization of commercial practice through mutual agreement, with a view to minimizing hindrances caused by the variation in laws and practice among nations.

Standardization is a difficult task which requires the pooling of experience and wisdom of businessmen throughout the world. It is an undertaking in which private businessmen can successfully cooperate. And for that reason, great credit should be given to the ICC for what degrees of standardization have already been achieved.

## II. Role of UNCITRAL

The inaugural session of the United Nations Commission on International Trade Law (UNCITRAL), the creation of which was decided at the 21st Session of General Assembly of the United Nations in December, 1966, was held in New York in January, 1968. This U.N. decision was in accordance with the suggestions made by the U.N. Sectetary General in his report on "The Progressive Development of Law of International Trade". According to the Secretary General's report, the Unification and harmonization of laws of international trade are decisive factor in the development of international trade and, in this sense, the creation of UNCITRAL should be regarded as a significant step toward the effective accomplishment of that goal. It is appropriate that UNCITRAL is to work within the scope of the U.N. organization, because under the terms of the U.N. Charter, the U.N.'s objectives are "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character", and "to promote international cooperation in the political field and encourage the progressive development of international law and its codification". Viewed the matter in this way, we may say it would not too be premature for the U.N. to start its study of law of international trade at this time.

The work of UNCITRAL is aimed, as outlined in the following, at the promotion of harmonization and unification of the law of international trade. Specifically, its objects are:

a) To coordinate the work of organizations active in this field and encourage cooperation among them;

b) To promote wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
c) To prepare or promote adoption of new international conventions, model laws and uniform laws and the codification and wider acceptance of international trade terms, provisions, customs and practices;
d) To promote ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of international trade law;
e) To collect and disseminate information on national legislation and modern legal developments in the field of international trade;
f) To maintain liaison with ECOSOC, UNCTAD and other U.N. organs and specialized agencies concerned with international trade;
g) To take any other action that may be deemed useful to achieve its purposes.

Among its objects, the UNCITRAL places great emphasis on creating a favorable atmosphere for the development of external trade of the developing countries through the modernization of their legal structure concerning foreign trade. In this respect, close working liaison is expected to be established between UNCITRAL and UNCTAD.

The term, "Law of International Trade", as referred to in the U.N. Secretary General's report, may be defined as a code of rules pertaining to private laws governing commercial relationships in international trade involving different countries. More specifically, the U.N. Secretary General's report enumerates the following fields:

a) International sale of goods;
   — Hague Convention relating to Uniform Law on the International Sale of Goods, 1964
   — Hague Convention relating to Uniform Law on the Formation of Contract for the International Sale of Goods, 1964
   — Guide for Drawing up of Commercial Agency Contracts, 1960 (ICC Brochure 213)
   — Incoterms, 1953 (ICC Brochure 166) and Two New Trade Terms (ICC Brochure "dp")
   — Warsaw-Oxford Rules for C.I.F. Contract, 1932
   — General terms and conditions of sale and standard contracts for international sale of different kind of goods (ECE)

b) Negotiable instruments and banker's commercial credits;
   — Geneva Convention on Uniform Law on Cheque, 1931
   — Geneva Convention on Uniform Law on Bill of Exchange, 1930
   — Uniform Customs and Practice for Documentary Credits, 1962 (ICC Brochure 222)
   — Uniform Rules for the Collection of Commercial Paper, 1967 (ICC Brochure 254)

c) Insurance;
   — York Antwerp Rules, 1950
   — Tables of Practical Equivalents (IUMI/ICC)

d) Transportation;
   — Hague Rules, 1921
   — International Convention for the Unification of Certain Rules relating to Bill of Lading, 1924
   — The Problems of Clean Bills of Lading, 1962 (ICC Brochure 223)
   — Chicago Convention on International Civil Aviation, 1944
   — International Convention concerning the Carriage of Goods by Rail, 1952 (CIM)
   — Convention on the Contract for the International Carriage of Goods by Road, 1956 (CMR)
   — Draft Convention relating to Combined International Transport of Goods (UNIDROIT)
   — Draft Convention on International Combined Transport, 1968 (CMI),

e) Industrial property and copyright;
   — Paris Convention and Agreements for the Protection of Industrial Property
   — BIRPI Model Law for Developing Countries on Invention, 1965
   — BIRPI Draft Model Law for Developing Countries on Marks, Trade Names, Indications of Source, and Unfair Competition, 1966

f) Arbitration;
   — New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
   — World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965

— European Convention on International Commercial Arbitration, 1961

— ICC Rules of Conciliation and Arbitration, 1955

— ECAFE Rules for International Commercial Arbitration, 1966

As can be seen from the above, all areas within the scope of international trade are included. However, laws with a character of public law, that is, bilateral treaties, such as treaties of commerce and navigation, and multilateral treaties, such as GATT or international commodity arrangements, are excluded.

It is widely recognized that the ICC has achieved remarkable results, incomparable to other organizations, in the establishment of international rules governing commercial and banking practice and in the promotion of adoption of new international conventions, model laws and uniform laws. The role of the ICC, which is consonant with that of the newly established UNCITRAL, has been highly regarded by the U.N. In November 1966, the ICC unanimously adopted the resolution entitled "Progressive Development of Law of International Trade" in which the ICC welcomed the U.N. Secretary General's report for the establishment of UNCITRAL and assured the ICC's willingness to cooperate with UNCITRAL. Thus, the valuable experience and knowledge of businessmen in international transactions can be expected to be utilized to the full in the UNCITRAL's work toward the establishment of legal harmony throughout the world.

## III. ICC's Work for Standardization

The ICC, which has been striving for the expansion and development of world economy, has worked tirelessly, responding to the demands of the business community of the world, for the unification and standardization of commercial and banking practice and customs and their usage. Noteworthy results have been achieved to date. These efforts have been widely recognized as the basic international rules for international contracts. As we have seen, the fruits of the ICC's study and efforts in this field have been highly acclaimed by the U.N. and other international organizations concerned. They have become the indispensable guide for international business contracts in all countries throughout the world, even in nations featuring a collectivist economy.

The following are the fields of standardization wherein ICC achievements

are most remarkable.

### 1) Standardization of Commercial Practice

Standardized commercial practice essential to the development of international business are most evident in the form of customary law, which growing independently from intergovernmental legislation, has been developed through the efforts of businessmen to meet their actual daily business needs. Since their commercial activities extend beyond national boundaries, there has been an ever-growing tendency toward international standardization of trade and commercial practice.

a) *INCOTERMS* (International Rules for the Interpretation of Trade Terms)

In 1953, the ICC published the second edition of INCOTERMS (Br. 166) — a set of international rules for the interpretation of major trade terms used in foreign trade contracts. INCOTERMS 1953 is a revised edition of INCOTERMS 1936. The purpose of this publication was to eliminate difficulties arising from varied interpretation by different countries of the same trade terms and to facilitate negotiation of overseas sales contracts. By using INCOTERMS, businessmen engaged in international trade are able to remove sources of misunderstanding and disputes which arise from 1) difference in law applicable to contracts, 2) inadequate information on different rules and regulations and 3) diversity of interpretation of terms of contract. In order to obtain the widest possible adoption throughout the world, the INCOTERMS reflects truly the most common commercial practice currently used in international trade.

INCOTERMS 1953 covers nine major trade terms used in international sale of goods, viz.; Ex Works, Free on Rail/Truck, F.A.S., F.O.B., C. & F., C.I.F., Freight or Carriage Paid to ..., Ex Ship, Ex Quay, each of which defines clearly and precisely the liabilities of the seller and the buyer in the contracts.

According to the introduction to INCOTERMS 1953, businessmen may stipulate the application of INCOTERMS with or without particular variations thereof or additions thereto. In any case speical agreements take precedence over these rules.

Besides the ICC INCOTERMS, there are other international rules for

the interpretation of trade terms, such as the Warsaw Oxford Rules for CIF Contract, 1932 and the Revised American Foreign Trade Definitions, 1941. These rules fully respect agreements between seller and buyer as the basis of contract. However, there are slight differences among these three rules; businessmen are, therefore, required to specify the name of the rule they are using when they negotiate terms of sales contracts with foreign entities.

b) *Definitions of New Trade Terms*

Uniform definitions of two new trade terms (Br. "dp") — "Delivered at Frontier (named place of delivery at frontier)" and "Delivered ... (named place of destination in the country of importation) Duty Paid" were completed and published in 1967, in addition to INCOTERMS 1953.

The term "Delivered at Frontier" is being used in many European countries but is not likely to be used frequently outside Europe. Previously, trouble arose from varied interpretation of the term, particularly concerning the transfer of risk. The term "Delivered ..." is more likely to come to the attention of businessmen in the ECAFE region if the practice of quoting completely inclusive prices becomes prevalent in the region. Originally the term "Franco Rendu", a French version of the "Delivered" was among the trade terms defined in INCOTERMS 1936, but in the course of preparing INCOTERMS 1953 it was decided that, owing to too many discrepanicies in its interpretation, the term should be dropped from INCOTERMS 1953.

Further it was concluded that these two new trade terms would be published separately from INCOTERMS 1953, until such time as the use of these terms by businessmen is established throughout the world as the "most current practice" and thus qualifies for themselves inclusion in the ICC INCOTERMS.

c) *Guide for Commercial Agency Contract*

In view of the increasing number of agency agreements being concluded in the field of international transactions, the ICC published in 1960, a practical guide for the better definition of contract relations between commercial agents and firms on whose behalf they sell goods in overseas markets.

Called the "Guide for Drawing up of Commercial Agency Contracts

between Parties Residing in Different Countries" (Br. 213), its aim is to facilitate agency contract negotiations and to eliminate causes of misunderstandings between contracting parties. The Guide was purposefully limited in scope to the indication of problems and points which the parties have to consider so that the final decision on matters of contract are left to the parties themselves. However, since the Guide was prepared on an international scale through the ICC, its wider use will greatly facilitate sales transactions through agencies on a commission basis; such transactions are steadily increasing in number throughout the world.

d) *Practical Problems of Clean Bills of Lading*

In international trade, buyers usually require clean negotiable bills of lading bearing no superimposed clause or notation which expressly declares that goods and/or their packaging are in a defective condition. However, under special conditions in certain fields of international trade, it is difficult for sellers to present a "clean" bill of lading bearing no such clauses or notations. This is because, if clauses are superimposed on the bills of lading by carriers who want to make reservations as to the contents and/or packaging of the goods they carry, the bill of lading ceases to be "clean" and the seller may be faced with difficulties in dealing with the said bill of lading even though he himself is not in default.

Sometimes the seller avoids such difficulties by obtaining a clean bill of lading from the carriers by their favor in exchange for a letter of indemnity. This practice was not supported by the ICC.

The ICC, on the principle that the bill of lading should give a true account of the merchandise in question, believes that in the cases mentioned above, it should be possible for the buyer to accept certain clauses added on the bill of lading. These acceptable bills of lading, while, if not "clean", would facilitate and simplify trade procedures and do away with certain serious difficulties which arise from the abuse of letters of indemnity. This would benefit both buyers and sellers as well as insurance companies and banks issuing documentary credits.

Detailed studies and inquiries by the ICC have led to the concludion that a better course of action would be for buyers and sellers to reach prior agreement for the acceptance of specified carriers' clauses on bills of lading on a case-by-case basis.

The ICC therefore published the report "The Problem of Clean Bills

of Lading" (Br. 223) in 1962 and recommended that the seller should, before the conclusion of the contract, secure the agreement of the buyer to 1) accept delivery of the goods in a specified condition and packing and 2) give instructions for payment against bills of lading so claused. In order to facilitate the solution recommended by the ICC, the report has attached, for reference and optional adoption, a list of superimposed clauses currently used by carriers. This report should be of great assistance to businessmen in that it suggests ways to eventual agreement, among parties contracting for international sales, on clauses acceptable for superimposition on bills of lading.

### 2) Standardization of Banking Practice

International transactions cannot be completed without participation of banks financing these transactions. The techniques and practice for carrying out these banking operations are following a tendency toward world-wide unification and standardization, as in the case of standardization of commercial practice. In the field of banking techniques and practice, the ICC's work of standardization on the international level is primarily aimed at the establishment of uniform rules, which are formulated and put into effect by bankers themselves individually or collectively through bankers' associations in various countries.

Well-known among the ICC's work toward standardization in this area are such codifications as "Uniform Customs and Practice for Documentary Credits" and "Uniform Rules for the Collection of Commercial Paper". These two Codes provide standards 1) for private banks to limit their own powers of discretion in order to reduce costs and standardize their methods of work, and 2) for customers to have a better understanding of banking procedure and take broader responsibilities for instructions the ygive to their banks.

#### a) *Uniform Customs and Practice for Documentary Credits*

Documentary credit, one of the major tools of financing international transactions, differs form other methods in that it is a conditional undertaking by a bank to settle customer's account against documents representing goods and not against the goods themselves. In this sense, the "Uniform Customs and Practice for Documentary Credits" (Br. 222) published

by the ICC in 1962 is of great value in its listing of definitions of various terms and their uniform interpretation concerning documentary credit operation. The present Uniform Customs and Practice has received virtually universal acceptance, being adhered to by banks in 173 countries and territories, collectively or individually; 57 in Africa, 36 in Asia, 36 in the Americas, 33 in Europe and 11 in Oceania.

Thus the ICC Uniform Customs and Practice has become an international rule on banking practice all over the world. At the same time it has helped the less experienced banks in developing countries to participate in the international standard banking operation. The outstanding feature of this code lies in providing concrete rules of inspection of documents by banks; the buyer (applicant for the credit) must give more complete and precise intructions on the basis of which banks are able to check the conformity of documents presented by the seller (beneficiary).

Recently, however, there have been difficulties relating to letters of credit which failed to follow the basic principles of the Uniform Customs and Practice. Certain issuing banks have maintained that, in the case of irrevocable letters of credit providing for beneficiary's drafts on the applicant, their undertaking, except where otherwise clearly and precisely stipulated in the credits, was confined solely to remitting the documents to the applicant against payment or acceptance of the draft. Such incidents would seem to show that the function of the documentary credit is still overlooked. If the issuing banks are not obliged to make payment on the draft and consider themselves free of responsibility once the draft has been accepted by the party on whom it was drawn, there will be no ground for the issuing bank to intervene under the stipulated terms and conditions.

Documentary credit transactions involving a complicated system lead to frequent minunderstandings and even to court cases. In order to avoid confusion and discrepancies and to secure proper application of the Uniform Customs and Practice, the ICC is conducting a study of practical problems arising among various countries in connection with the application of the ICC standards. It is recommended that bankers and businessmen participate in the ICC study by supplying their experience and views.

As a next step, after the world-wide adoption of the Uniform Customs and Practice for Documentary Credits, 1962, the ICC is now preparing a new set of "Standard Forms for the Opening of Documentary Credits"

b) *Uniform Rules for the Collection of Commercial Paper*

In an international transaction, the use of commercial paper has a twofold advantage — as an instrument of credit and, above all, as an instrument of payment. Consequently, in order to eliminate the difficulties arising out of differences in banking phraseology and variation in banking practice, such as the collection of commercial paper, the ICC drew up in 1957 the "Uniform Rules for the Collection of Commercial Paper" and submitted it, through banks and banking associations, to the test of practice and experience. However, at that time few banks adhered to the Rules.

From the experience obtained in the case of implementation of the Uniform Customs and Practice (Br. 222), the ICC revised "Uniform Rules for the Collection of Commercial Paper" and the revised Rules (Br. 254)went into effect on January 1st, 1968. The new code is expected to become a universal set of rules as in the case of the "Uniform Customs and Practice", because it will greatly facilitate the task of banks financing overseas trade.

The new Rules are written in simple, clear, accurate and uniform language. The key-point is the General Provision and Definition that "all commercial paper sent for collection must be accompanied by a remittance letter giving complete and precise instructions". There should be little room for doubts and ambiguities as to the instructions given to banks concerning presentation, payment, protest in the event of non-acceptance or non-payment, etc.

According to the provisional lists of adhesions announced by the ICC Headquarters on March 11st, 1968, banks in 53 countries including U.S., U.K. and other leading Western countries had collectively or individually adhered to the new Rules. The list includes the ECAFE countries and territories, such as Australia, Brunei, Cambodia, Fiji, Hong-Kong, Iran, Japan, New Zealand, the Philippines and Viet-Nam. It is strongly recommended that banks in nations not yet adhering this Rules, particularly those in the developing countries, do so in the near future.

which is applicable to documentary credit transactions. These forms are drafted on the basis of the guiding rules of the Uniform Customs and Practice and aimed at making it possible to give complete and precise instruction to the banks issuing credits thus eliminating the difficulties arising in practice when the terms used are improper and confusing.

c) *Simplification of International Payment Orders*

Banks daily receive so large numbers of international payment orders made out in various languages and in different forms, that they have difficulty in handling these orders quickly. Recognizing the need for simplification of international payment orders, the ICC adopted in 1957 the resolution (Brochure 205) recommending that banking associations in different countries to ensure the standardization of international payment orders by standardizing the form to be used by the banks issuing such orders.

In the opinion of the ICC, the standard form should include the following items:

i) The title "Payment Order" appearing at the top
ii) Items essential for the execution of the order
iii) The wording conforming to a uniform terminology
iv) The title and items written in four languages, including English and French

With respect to the format of the standardized forms, the ICC called attention to the specimens it had prepared, which banks could use, with necessary modifications according to their respective needs.

A number of banks in Europe are now using the standard forms, while banks in the ECAFE countries have not yet to decide on its adoption.

d) *Handbook of the Laws on Cheques and Bills of Exhange*

Two international conventions respectively concerning the uniform law on cheques and the law on bills of exchange were concluded in 1930 and 1931, and a number of countries have adhered to these conventions. However, there are many slight variations even in the laws of the acceding countries which reserved their own right to derogate from provisions of the Uniform Laws laid down in the conventions.

Therefore, some ten years ago, the ICC conducted out an inquiry among ICC member countries to find out whether it would be worthwhile to publish a handbook on the laws of cheques and exchanges of various countries. The ICC also collected essential information on provisions of the national laws in these countries. It is to be regretted that the ICC's work in this regard has been discontinued.

Thus, the laws on cheques and bills of exchange vary from country to country and this fact, constituting an obstacle to the facilitation of interna-

tional trade, is inconvenient for bankers and traders. For this reason, the compilation of such a handbook by the ICC will be of great value to the bankers, traders and lawyers engaged in international business.

### 3) Protection of Industrial Property

Intangible property, such as patents, trade marks and industrial designs, is called industrial property and is the subject for international protection under the Convention for the Protection of Industrial Property, or the Paris Convention.

The long-established system of protection for industrial property under the Paris Convention of 1883 is one of the prime factors which has helped further highly developed industrial technology as seen in the advanced countries. In the developing countries, however, the system of proptection is generally poor as to organization and operation.

This fact constitutes an obstacle to the increased flow of industrial investments and trade from the developed to the developing countries, and consequently hinders the economic development of the latter, because industrial investments involving export of technology and merchandise trade involving modern marketing techniques using brand names can be developed only in the countries where patents and trade marks are adequately protected.

The ICC therefore has long been urging the necessity for the developing countries to establish or modernize the system of protection of industrial property regardless of whether or not it is of foreign origin, and for that purpose, has cooperated with the United International Bureau for the Protection of Intellectual Property (BIRPI) in their efforts for the establishment of an industrial proporty system in the developing countries.

#### a) *Model Law on Trade Marks*

The Paris Convention does not deal with all aspects of trade mark law. It establishes certain principles on a number of problems of international regulation and leaves the rest to the national law of each country.

For this reason, the ICC decided to draft, and recommended to various countries — particularly to the developing countries — a text which would be a model for national legislation for the protection of trade marks, trade names, indication of origin, and against unfair competition (Brochure 210).

The ICC model law is not a complete text of law, but rather a set of basic provisions of law for the protection of trade marks. It leaves out matters with which each country may deal in accordance with its own law or administrative and procedural background; for example, a country may determine the formalities for filing a trade mark for registration, and whether or not the patent office will record the mark without any examination.

It is hoped that countries in the region which are revising their national trade mark law or establishing a new trade mark law will be guided by this proposed model law, and the subsequent BIRPI text, because they reflect the experience gathered in this field throughout a large part of the world.

b) *Protection of Know-how*

Technological improvements developed by business enterprises whether patentable or not, are commonly referred to as know-how. In recent times they have become tremendously valuable items of industrial property supplementing patents and other rights, and are the objects of an increasing number of very important agreements among business enterprises.

The protection of know-how on an international basis is therefore a keenly felt need if the communication of know-how among enterprises to promote economic and technical progress is to be encouraged.

Hardly any country so far has dealt in an adequate and comprehensive way with the protection of industrial know-how in modern industry, although existing national laws on contract, breach of confidence and unfair competition are sometimes applicable to the subject.

In international terms, however, BIRPI made an epoch-making contribution in establishing the provisions for the protection of technical know-how in its Model Law for Developing Countries on Invesntion, which was prepared in 1965 for the use of the developing countries as a model in their legislation for the protection of inventions.

This inclusion of the clauses of protection of know-how in the BIRPI Model Law can be attributed largely to the efforts of the ICC, which has strenuously advocated the need for legal protection of know-how. The ICC resolution "Protection of Know-how", adopted in 1961, laid out the following standard provisions to be incorporated in national legislation.

(1) Industrial know-how means applied technical knowledge, methods and data necessary for realizing or carrying out in practice techni-

ques which serve industrial purposes.

(2) Where such know-how is of a secret character it constitutes a valuable business asset and should be protected by law.

(3) Know-how should be regarded as secret in character if it has not been published in a form available to the public, and the undertaking which has developed it or lawfully acquired it takes all reasonable steps to prevent its unauthorized disclosure. Such know-how is hereinafter referred to as "secret know-how."

(4) It should be unlawful for an undertaking to use industrial know-how which it knows or ought to have known to be the secret know-how of another undertaking, without the consent of that undertaking.

(5) It should also be unlawful to divulge the secret know-how of an undertaking, or to transfer it to others, without the consent of that undertaking.

(6) Nothing in these provisions should affect the right of an undertaking to use, divulge or transfer any industrial know-how which it has itself originated and developed by it own independent means or to use any such know-how which has been published in a form available to the public.

(7) An injunction or an order to pay damages or both should be available in respect of the unlawful use, divulgence or transfer of secret know-how.

c) *Guiding Principles of Licensing Patents, Trade Marks, Know-how*

The transfer of technology from the developed to the developing countries, together with a capital flow, is the key to the solution of the development problems of the developing countries. However, compared to the rapid growth of interchange of techniques between the advanced countries, there is no marked increase in the exchange between developed and developing countries with the result that the technical gap between the two is becoming increasingly wider. This led to extensive study of the problem by the U.N., and consequently by UNCTAD, UNIDO (U.N. Industrial Development Organization) and other related international bodies. The problem was first raised by the Brazilian delegate at the U.N. General Assembly in 1960, who proposed that the U.N. thoroughly review the existing patent system

from the point of view of developing countries. Since then, every available opportunity has been taken by the international agencies concerned to stress the urgency of the problem.

The international flow of techniques takes the form of international license contracts on patents, know-how and industrial designs: since these industrial properties are originally privately-owned, they naturally flow only to places where the property rights are properly protected. At present, the international protection of industrial property is maintained by the Convention for the Protection of Industrial Property, or the Paris Convention, established in 1883. The developing countries, which have been dissatisfied with the existing circumstances of technological flow to them, have expressed criticism of the long-established Paris Convention system.

The ICC has been studying the problem of how to harmonize the long-established system of protection of industrial properties with the need for an increasing flow of technology to the developing countries, which consider themselves to be in a disadvantageous position because of the patent system.

Consequently, the ICC reached the conclusion that the international exchange of techniques depends on whether or not there is an efficient and workable licensing system of industrial property and in May, 1967, adopted the resolution entitled, "Licensing of Industrial Property."

In the resolution, the ICC claimed that freedom of contract should be a guiding principle for the contract of licensing. However, it is inevitable that this principle will undergo some modification, if the vital interests of the developing countries are to be met with respect to the technological flow. Therefore, the ICC resolution proposed effective ways to facilitate granting of industrial property licenses, while at the same time giving the closest consideration to the maintenance of the principle of freedom of contract. Specific points of the ICC resolution are as follows:

i) Licensing is an excellent means for disseminating technical and commercial improvements and the parties should be as free to negotiate terms as in any other commercial transactions.

ii) Governments should refrain from indirect restrictions on licensing, particularly by discriminatory taxation of, or limitation of the amount of royalties.

iii) Proper legal protection should be provided.

iv) Compulsory licensing should be enforced only in accordance with

generally recognized principles.

v) Formalities should be limited.

vi) Trade mark lincensing should be permitted.

In connection with ICC work, it should be noted that in the above-mentioned BIRPI Model Law for Developing Countries on Inventions a large part of the text was devoted to the provisions for licensing of patents and know-how from the developed to the developing countries. Thus, the Model Law laying down standard licensing clauses acceptable to the developing countries will provide a guideline for these countries in screening licensing contracts between their nationals and foreign partners.

Transnational cooperation could be an effective instrument for the increased transfer of technology between countries on a private basis, if the policy be adopted by the transnational cooperation for conducting research and development locally in the country where their branches or subsidies are established.

**4) Promotion of International Arbitration**

In addition to its contribution to standardization, the ICC has also been working to promote arbitration service on a world-wide scale for the amicable, speedy and economical settlement of disputes arising out of international transactions.

The standardization of commercial and banking practice may be one way to avoid the disputes among businessmen who use it, but this is not enough. Disputes may arise not only out of the breach of contract and mistrust between the parties, but also out of diserepancy in interpretation and application of standardized practice in actual transactions. For the settement of these disputes, arbitration is considered to be more suitable that legal procedings because the solution of these cases requires practical knowledge and highly flexible approach by experienced persons.

There are various types of arbitration in the world; multilateral, bilateral or regional. The ICC arbitration service is provided on a multilateral basis, which means that the arbitration is conducted at any place in the world under the standard rule, and that the place for arbitration and the arbitrators can be chosen from any countries of the world if there is agreement between the parties.

In order to secure the uniform implementation of the ICC arbitration

service, the ICC has established the Rules of Conciliation and Arbitration (revised in 1955) and set up the Court of Arbitration in International Headquarters in Paris to administer the ICC arbitration system. Further, the ICC, recognizing the principle of consent of the parties as a guiding principle of arbitration, recommends that businessmen insert in their overseas contracts the arbitration clause reading "all disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the ICC by one or more arbitrators appointed in accordance with the Rules".

It is important to note that recourse is now made to the ICC arbitration service by many businessmen and government agencies not only in free-economy countries but also in collectivist-economy countries.

Furthermore, while at the outset, the disputes submitted to the ICC Court were entirely commercial, there has been a considerable change. The disputes now encompass all types of transactions, concerning sales contracts, agency agreements, contracts for the licensing of industrial property rights, banking operations, shipbuilding, publishing and mining concessions.

This fact indicates that the ICC arbitration is used in an increasing number and variety of fields of business activities. However, the ICC does not intend to monopolize international arbitration. The ICC has established working relations with the American Arbitration Association and the Inter-American Commercial Arbitration Commission (which covers the North and South American) by adopting Joint Arbitration Clauses with them.

The ICC also offers the information and experience it has acquired concerning arbitration to intergovernmental organizations, such as the U.N. Economic Commission for Europe (ECE), the Economic Commission for Asia and the Far East (ECAFE) and the World Bank helping them to create their own arbitration facilities, i.e., the "European Convention on International Commercial Arbitration" for ECE, the "ECFE Rules for International Commercial Arbitration" for ECAFE and the "World Bank Convention on the Settlement of Investment Disputes between States and Nationals of Other States" for capital importing and exporting countries.

The ECAFE Rules, established in 1966 at the ECAFE Conference on Commercial Arbitration in Bangkok, are applicable to the arbitration of disputes arising from international trade in the ECAFE region. The Rules stipulate that "disputes arising from international trade would include dis-

putes arising out of contracts concerning industrial, financial, engineering service or related subjects involving residents of ECAFE countries".

As the arbitration system developed in the ECAFE countries is far from adequate, the businessmen in the region are requested to study closely the ECAFE Arbitration Rules, as well as the ICC Arbitration Rules.

The World Bank Convention on the Settlement of Investment Disputes which came into force on October 14, 1966 and will be administered by the International Center for the Settlement of Investment Disputes (ICSID) established in February 1967, is designed to encourage the growth of private foreign investment for economic development, by creating the possibility, subject to the consent of the parties concerned, for a contracting State and a foreign investor who is a national of another Contracting State to settle any legal dispute that might arise out of such an investment by arbitration before an impartial, international forum. The purpose of the ICSID is to make available to the parties to certain international investment arrangements forum at which they may agree on the settlement of any future disputes, and to assist them in settling any that have already arisen.

As of September 1, 1967, 54 States had already signed the Convention, and of these, 36 had ratified it, thus becoming contracting States. They include such Asian and Far Eastern countries as Afghanistan, Ceylon, China, Japan, Korea, Malaysia, Nepal and Pakistan.

(19 March, 1968)