

Chapter I. Scope and terminology of the *Legal Guide*

SUMMARY

Countertrade transactions covered by the *Legal Guide* are those transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value. A distinctive feature of these transactions is the existence of a link between the supply contracts in the two directions in that the conclusion of the supply contract or contracts in one direction is conditioned upon the conclusion of the supply contract or contracts in the other direction (paragraph 1). The discussion in the *Guide* on goods is generally applicable also to services, and can be used as a broad guidance also for transactions involving technology and investment (paragraph 2). The focus of the *Guide* is on countertrade transactions in which the goods are delivered across national boundaries (paragraph 3).

Countertrade transactions take a variety of forms and display differing features. The discussion in the *Legal Guide* is relevant generally to all types of countertrade unless otherwise indicated (paragraphs 4-6).

The *Guide* focuses on the drawing up of contractual clauses that are specific to or of particular importance for international countertrade (paragraph 7). As a rule, it does not deal with the content of the contracts for individual supplies of goods under a countertrade transaction since those contracts generally resemble contracts concluded as discrete and independent transactions (paragraph 8).

In some countries, countertrade is subject to governmental regulations, which may promote or restrict countertrade in a variety of ways. In addition, various aspects of countertrade transactions are likely to be subject to regulations that are not specifically oriented to countertrade. Since the regulations are disparate and often changed, advice is given, where appropriate, in the form of a general warning that a matter being discussed may be subject to mandatory regulations (paragraphs 9 and 10). Private law questions involved in countertrade generally do not vary from region to region (paragraph 11).

Terminology used in countertrade varies, and no prevailing terminology has developed. The chapter establishes the terminology used in the *Legal Guide* for various types of countertrade transactions as well as for parties, contracts and subject-matters involved in a transaction (paragraphs 12-28).

The terms used for various types of countertrade are: "barter" (paragraph 14); "counter-purchase" (paragraph 15); "buy-back" (paragraph 16); "direct offset" and "indirect offset" (paragraph 17).

The terms used to denote parties to countertrade transactions are: "purchaser", "supplier" or "party" (paragraph 18); "exporter" or "counter-importer" (paragraph 19); and "importer" or "counter-exporter" (paragraph 20).

The term “countertrade transaction” is used to refer to the whole countertrade arrangement (paragraph 23). The expressions for various contracts forming part of a countertrade transaction are: “countertrade agreement” (an agreement setting forth various stipulations on the manner in which the countertrade transaction is to be implemented (paragraph 24)); “countertrade commitment” (a commitment of the parties to enter into a future contract (paragraph 25)); “supply contracts” (paragraph 26); “export contract”, “import contract”, “counter-export contract” and “counter-import contract” (paragraph 27).

The use of the term “goods” is explained in paragraph 28.

A. Transactions covered

1. Countertrade transactions covered by the *Legal Guide* are those transactions in which one party supplies goods, services, technology or other economic value to the second party, and, in return, the first party purchases from the second party an agreed amount of goods, services, technology or other economic value. A distinctive feature of these transactions is the existence of a link between the supplies in the two directions in that the conclusion of the supply contract or contracts in one direction is conditioned upon the conclusion of the supply contract or contracts in the other direction. When the parties enter into contracts in opposite directions without expressing such a link between them, the contracts, as regards contractual rights and obligations of the parties, cannot be distinguished from straightforward independent transactions. Therefore, the *Legal Guide* deals only with transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction.
2. For the sake of simplicity, the *Legal Guide* refers only to “goods” as the subject-matter of countertrade transactions. However, the discussion in the Guide on transactions involving goods is generally applicable also to transactions involving services. The *Guide* can be used as a broad guidance also for transactions involving technology or investment. In some instances the *Guide* makes particular reference to services or to technology and investment.
3. The *Legal Guide* discusses primarily countertrade transactions in which the goods are delivered across national boundaries. Countertrade transactions in domestic trade may have features that are not considered in the present Guide. Nevertheless, to the extent domestic transactions fall within the varieties of countertrade transactions described herein, the *Legal Guide* can be used by parties to those transactions.
4. Countertrade transactions take a variety of forms and display differing features depending upon the particular circumstances of the transaction. The differences concern such matters as the contractual structure of the transaction (i.e., the number and sequence of the component contracts), whether goods supplied in one direction are to be used in the production of goods to be supplied in the other direction, the manner of payment and the number of parties involved in the transaction.
5. Another aspect of the variety of countertrade transactions is the degree of interest the parties may have in the different segments of a countertrade transaction. In many transactions one of the parties is interested primarily in the export of its own

Chapter II. Contracting approach

SUMMARY

Parties may embody their obligations in regard to the shipments of goods in the two directions in a single contract or in separate contracts. A single contract may take the form of a barter contract, which is a contract involving an exchange of goods for goods, or the form of a “merged contract”, an arrangement in which the two contracts, one for the delivery of goods in one direction and the other for the delivery of goods in the other direction, are merged into one comprehensive contract. The difference between a barter contract and a merged contract is that, under a barter contract, the delivery of goods in one direction constitutes payment for the delivery of goods in the other direction, while, under a merged contract, each delivery of goods gives rise to a monetary payment obligation (paragraphs 1-10).

When the shipments in the two directions are embodied in separate contracts, various contracting approaches may be used. Under one approach, the export contract and the countertrade agreement are concluded simultaneously and the counter-export contract is concluded subsequently (paragraphs 11-19). This approach is used when the parties wish to finalize a contract for the shipment in one direction (export contract) before they are able to agree on the contract for the shipment in the other direction (counter-export contract). The purpose of the countertrade agreement in such a case is to express the commitment to conclude the counter-export contract or contracts and, to the extent possible, to outline the terms of the future contract and to establish procedures for concluding and carrying out the supply contracts to be concluded. Possible issues to be addressed in such a countertrade agreement are enumerated in paragraphs 29-39.

Under another approach, the countertrade agreement is concluded prior to the conclusion of any definite supply contracts. This approach is usually used when the parties wish to lay down a contractual framework within which a certain level of reciprocal trade should be generated over a period of time. The aim of the countertrade agreement in such a case is to express the commitment to conclude supply contracts in the two directions and, to the extent possible, to outline the terms of the future contracts and to establish procedures for concluding and carrying out those contracts (paragraphs 11, 12, 20 and 21). Possible issues to be addressed in such a countertrade agreement are enumerated in paragraphs 29-39.

Under yet another approach, the parties conclude simultaneously the separate supply contracts for the shipment in each direction and the countertrade agreement establishing a relationship between those contracts (paragraphs 11, 12, 40 and 41). Since this approach does not require a commitment to conclude future contracts, this contracting approach raises a limited number of issues. The main issue to be addressed in the countertrade agreement is the manner in which the obligations of the parties with respect to the shipments in the two directions are to be linked. Other possible issues are mentioned in paragraphs 41 and 42.

In many countries a party exporting goods, services or technology may obtain insurance against the risk that the payment claim arising from the export will not be paid. Insurable risks include commercial and non-commercial risks (paragraphs 43-52). Among the principles on which export-credit insurance is based, some are particularly relevant to countertrade transactions (paragraphs 49-52).

Parties often require financing in order to be able to carry out the transaction. An important factor in the assessment by the financial institution of whether to grant financing is the ability of the party requesting financing to insure the risk that the payment claim arising from its delivery of goods will not be paid. Financing may be in the form of a supplier credit or a buyer credit (paragraphs 53-55).

A. Structure of countertrade transaction

1. A preliminary question the parties have to address is the contract structure of the countertrade transaction. The parties may embody the obligations in regard to the shipments of goods in the two directions in one contract or they may embody those obligations into separate contracts. (For the discussion of insurance and financing considerations that may be related to the structure of the countertrade transaction, see below, paragraphs 8 and 9, and section C.)

1. *Single contract*

2. Under a single-contract approach the parties conclude one contract for the supply of goods in the two directions. Such a single contract may take the form of a barter contract (below, paragraphs 3-8) or the form of a merged contract (below, paragraphs 9 and 10).

(a) *Barter contract*

3. As noted in chapter I, "Scope and terminology of the *Legal Guide*", paragraph 14, the *Legal Guide* uses the term barter in its strict legal sense to refer to a transaction involving an exchange of goods for goods, so that the supply of goods in one direction entirely or partly replaces the monetary payment for the supply of goods in the other direction. In a barter contract there is no need for a countertrade commitment since the parties agree at the outset of the transaction on all the contract terms for the shipments in the two directions. If the goods to be supplied in one direction are agreed to be of the same value as the goods to be supplied in the other direction, no monetary payment would be made. If the values are agreed to be different, the difference may be settled by monetary payment or by delivery of additional goods. The parties may or may not express the value of the goods in monetary terms. If they do so, the attachment of a price to the goods serves to compare the value of the deliveries. The parties may have to express the value of shipments in monetary terms due to customs or other administrative requirements.

4. Under a barter contract the quantity and quality of goods to be shipped in one direction is often measured by the quantity and quality of goods to be shipped in the other direction, rather than in terms of the market price for each shipment. The absence of a price in a barter contract or the use of prices that do not reflect the

Chapter III. Countertrade commitment

SUMMARY

A countertrade commitment is an undertaking to conclude a future contract or a series of supply contracts in one or in both directions (paragraph 1). A commitment may be a “firm” commitment or a more limited “best-efforts” type of commitment. The *Legal Guide* focuses on firm countertrade commitments (paragraph 2).

The extent of a countertrade commitment, i.e., the amount of goods to be purchased by a party, may be expressed as an absolute monetary value, as a percentage of the value of the goods supplied by that party, or as a number of units of a given type of goods (paragraphs 3 and 4). The countertrade agreement may provide that only the purchases that exceed the usual quantities purchased will be considered as fulfilling the countertrade commitment (“additionality”) (paragraphs 5 and 6).

It is advisable that the countertrade agreement indicate the specific action that must be taken in order for the countertrade commitment to be fulfilled. The parties may agree either that fulfilment occurs upon the conclusion of a supply contract or upon the performance of a supply contract (paragraphs 7-9).

The parties may specify in the countertrade agreement that the period for fulfilment of the countertrade commitment is to commence on a fixed date and to expire on a fixed date (paragraph 10), or that the fulfilment period of an agreed length is to commence when an event specified in the countertrade agreement takes place (paragraph 11). A number of factors are relevant in the determination of the length of the fulfilment period (paragraphs 12-15). The fulfilment period may be extended in certain circumstances (paragraphs 16-19). Where fulfilment of the countertrade commitment involves many shipments over a long period of time, the parties may wish to divide the fulfilment period into subperiods (paragraphs 20-23).

The parties should define the supply contracts that will be counted towards fulfilment of the countertrade commitment (“eligible supply contracts”). Eligible supply contracts may be defined by specifying the type of goods to be purchased (paragraphs 24-27), by the geographical origin of the goods (paragraphs 28 and 29), by the identity or the type of the supplier (paragraphs 30 and 31), or by the identity or type of purchaser (paragraph 32). It may be agreed that under certain circumstances non-conforming purchases will be counted towards fulfilment of the countertrade commitment (paragraph 33).

In many countertrade transactions, the full purchase price of a supply contract is deducted from the outstanding countertrade commitment (the deducted amount is referred to as “fulfilment credit”). Sometimes it is agreed that fulfilment credit will be granted at a rate higher or lower than the full purchase price, depending on the type of goods purchased, the identity of the supplier or the time when a purchase is made (paragraphs 34-37).

It is advisable that the parties include in the countertrade agreement, in as definite a manner as feasible, the terms of the future contract (paragraphs 38-43) or provide for means for subsequent determination of those terms. Those means include standards or guidelines to be used in determining a particular contract term (paragraphs 44-46), determination of a contract term by a third person (paragraphs 47-54), and determination of a contract term by a contract party (paragraphs 55 and 56). In addition, the countertrade agreement may provide for negotiation procedures for the conclusion of a supply contract (paragraphs 57-60).

The parties may wish to consider establishing procedures for monitoring and recording progress made in fulfilment of the countertrade commitment (paragraph 61). Such procedures include the exchange of information (paragraphs 62-64), the confirmation of partial or complete fulfilment of a countertrade commitment (paragraphs 65-67), and "evidence accounts" (paragraphs 68-74).

A. General remarks

1. A countertrade commitment, a commitment to conclude a future contract, is an essential feature present in two types of countertrade transactions. The first type is when the parties at the outset of the transaction finalize a contract in one direction (export contract) and then commit themselves to conclude a counter-export contract (see chapter II, paragraphs 13-19); the second type is when the parties commit themselves at the outset of the transaction to conclude a series of supply contracts in the two directions (see chapter II, paragraphs 20 and 21). The term countertrade commitment is explained in chapter I, paragraph 25.

2. The degree to which parties may commit themselves to enter into a future contract may range from a "firm" commitment to enter into a supply contract to a more limited "serious intention" type of commitment (referred to also as "best efforts" or "good faith" commitments). Under a firm countertrade commitment, the parties undertake to conclude a contract in accordance with the terms set out in the countertrade agreement, without retaining a discretionary right to refuse to conclude a contract. Under a serious-intention type of commitment, the undertaking is limited to an obligation to negotiate in good faith, with the committed party retaining the right to refuse to enter into a contract if none of the contract offers is acceptable to it. Under the latter commitment, any sanctions for failing to comply with the commitment can apply only in the limited cases when the party fails to participate in negotiations or does not negotiate in good faith. The *Legal Guide* focuses on firm countertrade commitments. It does not deal with serious-intention type of commitments since such commitments do not provide sufficient assurance to the parties that the objectives of the countertrade transaction will be achieved.

B. Extent of countertrade commitment

3. The extent of a countertrade commitment is frequently expressed in a monetary value. In counter-purchase, buy-back or indirect offset transactions, in which the parties conclude first a supply contract in one direction (export contract) (see chapter II, paragraphs 13-19), the extent of the countertrade commitment is often expressed as a percentage of the value of the goods delivered under the export contract. In

Chapter IV. General remarks on drafting

SUMMARY

The parties may find it desirable to establish a check-list of the necessary steps to be taken in negotiating and drawing up contracts constituting the transaction (the countertrade agreement and the supply contracts) (paragraphs 1 and 2). The applicable law may require that the contracts should be in writing; even if no such requirement exists, it is recommended that the contracts be in writing (paragraph 3).

In drawing up contracts that make up the countertrade transaction, in particular the following matters should be taken into account: the relationship between the contract documents, on the one hand, and the oral exchanges, correspondence and draft documents, on the other hand (paragraph 4); designation of one person primarily responsible for supervising the preparation of the drafts (paragraph 5); provisions of the applicable law on the interpretation of contracts and presumptions on the meaning of certain expressions (paragraph 6); mandatory provisions (paragraph 7); introductory recitals (paragraph 8); use of standard forms, general conditions, standard clauses and previously concluded contracts (paragraph 9); use of one or more than one language for the contractual documents (paragraphs 10-12); identification and description of the parties in a principal document designed to come first in logical sequence amongst various documents (paragraph 13); the source of the legal status of parties that are legal persons, and any particular considerations when a party is a governmental agency (e.g., authorization for the conclusion of a contract or an arbitration agreement) (paragraph 14); the name, address, status and authority of any agents (paragraph 15).

It is desirable for the parties to consider the form that notifications under the countertrade transaction are to take and the means of transmittal (paragraphs 16 and 17), the point in time when notifications are to be deemed effective (paragraph 18), the addressees of notifications (paragraph 19), and the consequences of a failure to notify and of a failure to respond to a notification (paragraph 20).

It is advisable to define certain key expressions or concepts that are frequently used in the countertrade agreement or in the supply contracts (paragraphs 21-24).

A. General remarks

1. A countertrade transaction is usually the result of extensive written and oral communications between the parties. Each party may find it desirable to establish a check-list of the necessary steps to be taken in negotiating and drawing up contracts constituting the transaction (the countertrade agreement and the supply contracts). Such a check-list could reduce the possibility of omissions or errors occurring in the steps taken prior to entering into the contracts. A party may also wish to consider seeking legal or technical advice in drawing up the contracts. While countertrade

Chapter V. Type, quality and quantity of goods

SUMMARY

The discussion concerning “goods” in the *Legal Guide* is broadly applicable also to transactions involving services, technology and investment (paragraph 1).

The parties may either identify in the countertrade agreement the type of goods that will be the subject of the future supply contract, possibly stating only broad categories of goods, or not stipulate the type of goods. Precision as to type, quality and quantity increases the likelihood that the intended supply contract will be concluded. Sometimes, even though the type of countertrade goods is identified in the countertrade agreement, the exact quality and quantity of the goods are left for later determination because the conditions on which the parties wish to base their decision on quantity and quality are not yet fully known (paragraph 2).

Various commercial considerations enter into the selection of the type of goods to be supplied under the countertrade transaction. The freedom of the parties to agree on the type of goods may be affected by government regulations (paragraphs 3-6).

When the parties conclude a countertrade agreement without determining the type of goods, they may wish to include in the countertrade agreement a list of goods the purchase of which would count toward fulfilment of the countertrade commitment. If such a list is used, the parties may settle questions such as the availability of goods on the list, purchaser’s duty to provide specifications and requirements, “additionality” and procedure for deciding on the type of goods (paragraphs 7-14). Services, technology and investment as subject-matters of countertrade are discussed in paragraphs 15-26.

The question of quality of countertrade goods raises two main issues that the parties may address in the countertrade agreement: expressing the level of quality that the goods offered for purchase must possess (paragraphs 27-31), and the establishment of procedures to ascertain, before the conclusion of a supply contract, whether goods being offered meet the specified level of quality (paragraphs 32-35).

The quantity of goods to be purchased may be specified in the countertrade agreement or left to be determined at the time of the conclusion of the supply contracts. The quantity may be expressed as a monetary amount or as a number of units to be purchased, or the quantity may be left to be determined on the basis of the purchaser’s requirements or the supplier’s output (paragraphs 36-42).

Particularly in long-term transactions, it may be provided that, at regular intervals or in response to specified changes of circumstances, the parties will review the provisions in the countertrade agreement on the type, quality or

quantity of goods. The parties may wish to stipulate in the countertrade agreement that under certain conditions fulfilment credit would be earned by the purchase of goods other than those stipulated in the countertrade agreement (paragraphs 43 and 44).

A. General remarks

1. As noted in chapter I, paragraph 2, the discussion concerning “goods” in the *Legal Guide* is broadly applicable to services, and the *Guide* can be used as a broad guidance also for transactions involving technology or investment. Where necessary, the present chapter makes reference to certain special issues concerning services, technology and investment.

2. The parties may either identify in the countertrade agreement the type of goods that will be the subject of the future supply contract, possibly stating only broad categories of goods, or not stipulate the type of goods. The more precise the countertrade agreement is with respect to the type of goods, the greater the possibility is of stipulating in the countertrade agreement the quantity and quality of the goods. Precision as to type, quality and quantity increases the likelihood that the intended supply contract will be concluded. Sometimes, even though the type of countertrade goods is identified in the countertrade agreement, the exact quality and quantity of the goods are left for later determination because the conditions on which the parties wish to base their decision on quantity and quality are not yet fully known.

B. Type of goods

1. General remarks

3. Various considerations may enter into the selection of the type of goods. The supplier would prefer that the goods be those that could easily be made available or those that the supplier wishes to introduce in a new market, while the purchaser would like to purchase goods that are needed or could be resold easily. The freedom of the parties to agree on the type of goods to be supplied in one or both directions may be affected by government regulations dealing specifically with the types of goods that may be involved in countertrade transactions. For example, in some countries government regulations exclude certain types of goods from being offered for purchase in a countertrade transaction if the price of the goods is not paid in foreign currency to the exporter’s account. Government regulations may also provide that the import of certain types of goods is permitted only if the exporter agrees to purchase goods in return.

4. The choice of the parties as to the type of goods may also be restricted by government regulations requiring that the countertrade goods must originate in the country, or in a specified region of the country, or must be purchased from a specified economic sector or group of suppliers. Such restrictions on origin and source are particularly likely to be encountered when the party requiring a countertrade commitment is a governmental entity. Clauses in the countertrade agreement concerning origin and source restrictions are discussed in chapter III, “Countertrade commitment”, paragraphs 28-31. In addition to regulations specific to countertrade referred to in this and in the previous paragraph, there may exist restrictions

Chapter VI. Pricing of goods

SUMMARY

The chapter deals with methods for determining the price of goods that will be the subject-matter of the supply contract to be concluded pursuant to the countertrade commitment. It also deals with certain pricing questions encountered in the specific contexts of supplying services and the transfer of technology. In addition, it discusses the choice of the currency in which a price is to be expressed, and the revision of a price.

It is advisable that the parties specify in the countertrade agreement the price of the goods that will be the subject-matter of the future supply contract. When the parties are not able to do so, it is advisable to provide in the countertrade agreement a method for determining the price at the time the supply contract is to be concluded (paragraphs 1-6).

The currency in which the price is to be paid may involve risks arising from the fluctuation in exchange rates between that currency and other currencies. In stipulating the currency, the parties should take into consideration foreign exchange regulations. The parties may wish to consider denominating the price in a stable currency or in a unit of account (paragraphs 7-10).

The countertrade agreement may provide for a determination of the price through the use of a standard, a method that provides a price at the time of the conclusion of a supply contract in a manner not influenced by the will of the parties. Possible price standards include: a reported market price for goods or services of standard quality; production cost of the goods; competitor's price; most-favoured-customer price (paragraphs 11-20).

The parties may stipulate in the countertrade agreement that the price to be paid under a future supply contract will be negotiated at a time subsequent to the conclusion of the countertrade agreement. It is advisable that, to the degree possible, the parties agree on guidelines for the negotiation of the price (paragraphs 21-24).

Sometimes the parties provide for the price to be set by an independent third person (e.g., a market specialist in the goods in question) (paragraphs 25 and 26). Sometimes it is agreed that the price will be determined by one of the parties to the countertrade agreement, a method with respect to which utmost caution is advisable (paragraph 27).

Prices for services may be set as rates for units of work processes or as a lump sum, or they may be set on a cost-reimbursable basis (paragraphs 28-31).

For setting the price for a technology transfer, the two principal methods are the lump-sum payment and payment of royalties (paragraphs 32-38).

When multiple shipments are spread out over a period of time, there may be a need to revise the price in order to reflect changes in the underlying economic conditions. A revision may take place at specified points in time or in response to specified changes in the economic conditions (paragraphs 39-43).

Possible methods of price revision include the reapplication of the method used to determine the original price (paragraph 44); an index clause, a method by which the price of the countertrade goods is made to depend on the levels of the prices of specified goods or services (paragraphs 45-47); a currency clause or a unit-of-account clause, whereby the price is linked to an exchange rate between the currency in which the price is to be paid and a stipulated other currency (paragraphs 48-52).

A. General remarks

1. It is advisable that the parties specify in the countertrade agreement the price of the goods that will be the subject-matter of the future supply contract. When the parties are not able to set the price in the countertrade agreement, it is advisable to provide a method according to which the price will be determined at the time the supply contract is to be concluded. When contracts are to be concluded in both directions, methods for price determination may be agreed for contracts in each of the two directions. This chapter deals with methods for determining the price after the countertrade agreement has been concluded. It also deals with certain questions encountered in the specific contexts of the supply of services and the transfer of technology. In addition, the chapter discusses the currency in which the price is expressed and revision of price.
2. The parties may need to defer setting the price, for example, because the specific type of goods has not been identified at the time of the conclusion of the countertrade agreement or because there is to be a long interval between the conclusion of the countertrade agreement and the conclusion of a given supply contract. Such an interval may prompt the parties to defer setting the price because of the possibility of price fluctuation or of a change in the underlying economic conditions during the interval. In some cases, the parties may set the price of an initial shipment, but leave the determination of the price of subsequent shipments for a later time. Providing a method for determining the price may help the parties avoid differences over what the appropriate price should be, which may delay or prevent the conclusion of supply contracts. Such differences may be compounded when a party expects a supply contract in one direction not to be profitable and wishes to offset the expected loss in setting the price for the contract in the other direction.
3. In a barter transaction, it may not be necessary to include a provision on price because the goods shipped in one direction constitute payment for the goods shipped in the other direction. Nevertheless, pricing issues may arise in a barter transaction if the parties decide to measure the relative value of their shipments in monetary terms, rather than merely in terms of volume and quality, or if the shipments are of different values and the imbalance is to be settled in money. Pricing would also be necessary when customs regulations require that goods entering a country indicate a monetary value.
4. In setting the price of the countertrade goods, it is advisable that the parties specify whether or not the price includes costs ancillary to the costs of the goods themselves, such as transportation or insurance, testing, or customs duties and taxes. Some of the elements of the price may be indicated by using appropriate trade terms

Chapter VII. Participation of third parties

SUMMARY

The chapter deals with cases in which a party committed to purchase or committed to supply goods, instead of itself purchasing or supplying goods, engages a third party to do so (sections B and C). Section D deals with "multi-party" transactions that are distinct from the cases discussed in sections B and C.

A party committed under a countertrade agreement to purchase goods (party "originally" committed to purchase goods) often engages a third party ("third-party purchaser") to make those purchases (paragraphs 4-7). When such participation of a third-party purchaser is envisaged, it is advisable to address in the countertrade agreement the question of the selection of the third-party purchaser and the question of who would be liable to the supplier in the event of a failure by the third party to make the purchases needed to fulfil the countertrade commitment (paragraphs 9-20). In addition, the party originally committed to purchase goods and the third-party purchaser should conclude a contract to deal with questions such as the nature of the commitment of the third party (a "firm" commitment or a "best-efforts" commitment, paragraph 22); the fee payable to the third party (paragraphs 30-36); "hold-harmless" clause (paragraph 37); and the question whether the third party should have an exclusive or non-exclusive mandate to purchase and resell the goods (paragraphs 38-40).

Sometimes the parties to the countertrade agreement agree that the party making purchases beyond what is required to liquidate its outstanding countertrade commitment will be allowed to have the excess fulfilment credit counted towards fulfilment of countertrade commitments that the purchaser or a third party may assume in the future (paragraph 8).

The party committed to supply goods (party "originally" committed to supply) sometimes designates a third party ("third-party supplier") to supply the goods (paragraphs 41-44). When the participation of a third-party supplier is envisaged, it is advisable for the countertrade agreement to address the selection of the third party and the consequences of the failure by the third party to make the agreed goods available. In some cases, the selection of the third-party supplier is left to the party committed to purchase goods (paragraphs 45 and 46). In other cases, the selection is left to the party originally committed to supply goods (paragraphs 47-52).

As distinct from the above, the chapter discusses three types of "multi-party" countertrade transactions: (a) a tripartite transaction that involves an exporter (who does not at any stage of the transaction assume a commitment to counter-import), an importer and a third-party counter-importer; (b) a tripartite transaction that involves an exporter, an importer (who does not at any stage of the transaction assume a commitment to counter-export) and a third-party counter-exporter; and (c) a four-party transaction in which the supply contract in one direction is concluded by one set of parties and the supply contract in the other direction is concluded by two other parties (paragraphs 53-58).

Chapter VIII. Payment

SUMMARY

Parties to a countertrade transaction may decide to link payments for the supply contracts in the two directions in such a way that the proceeds generated by the supply contract in one direction are to be used to pay for the supply contract in the other direction. This may allow the transfer of funds between the parties to be avoided or reduced (paragraphs 1-8).

Sometimes it is agreed that the shipment in a particular direction is to precede the shipment in the other direction in order to generate funds to pay for the counter-export. In such a case, sometimes referred to as "advance purchase", it may be agreed that the proceeds of the export contract are to be retained by the importer until payment under the subsequent counter-export contract becomes due (paragraphs 9-13). When in an advance-purchase situation the proceeds generated by the export contract are not to be left under the control of the importer, the parties may agree on the use of a "blocked account" or of "crossed letters of credit" (paragraphs 14-18). Under a blocked-account method, the proceeds generated by the export contract are deposited in an account at an agreed bank, and the release of the money, intended as payment for the counter-export goods, is subject to agreed conditions (paragraphs 19-30). When crossed letters of credit are to be used, the funds payable under a letter of credit opened by the importer in favour of the exporter ("export letter of credit") are blocked in order to be used to cover the letter of credit opened by the counter-importer in favour of the counter-exporter ("counter-export letter of credit") (paragraphs 31-37).

The parties may agree that their payment claims arising from the shipments made in the two directions are to be set off. If an imbalance arises in the values of the deliveries, it can be settled by delivery of additional goods or by payment of money. In order to facilitate the set-off of claims, in particular in the case of multiple shipments, the parties may wish to use a record-keeping mechanism which is referred to in the *Guide* as a "set-off account". A set-off account may be administered by the parties themselves or by a bank or banks (paragraphs 38-57).

Certain issues common to linked payment mechanisms (currency, designation of banks, interbank agreements, unused or excess funds, supplementary payments or deliveries, and bank charges) are discussed in paragraphs 58-65.

In the case of a "multi-party" countertrade transaction (i.e., "tripartite" or "four-party" countertrade, described in chapter VIII), it is often agreed that the proceeds of the supply contract between one pair of parties will be used to pay for the supply contract between a different pair of parties. In a tripartite transaction involving a third-party counter-importer, the importer, instead of transferring money to the exporter under the export contract, delivers (counter-exports) goods to the counter-importer and is considered to have discharged the payment obligation for the import up to the value of countertrade goods delivered to the counter-importer; the counter-importer, in turn, pays the exporter an

amount equivalent to the value of the goods received from the counter-exporter. Similarly, in a tripartite transaction involving a third-party counter-exporter, the importer transfers funds to the counter-exporter to pay for the shipment to the counter-importer, and the counter-importer (exporter) agrees that the payment claim under the export contract is discharged up to the value of the goods delivered to the counter-importer. In a four-party transaction, the exporter ships goods to the importer, and the importer, instead of paying the exporter, pays to the counter-exporter an amount equivalent to the value of the goods received from the exporter. The payment from the importer to the counter-exporter compensates the counter-exporter for the shipment to the counter-importer. The counter-importer pays to the exporter an amount equivalent to the value of the goods received from the counter-exporter (paragraphs 66-73).

As in countertrade involving two parties, blocked accounts and crossed letters of credit may be used in multi-party countertrade (paragraphs 74-77).

A. General remarks

1. The parties may decide that the payment obligation under the supply contract in one direction is to be liquidated independently of the payment obligation under the supply contract in the other direction. When payments are independent, the payment under each supply contract is made in a way that is used in trade generally, such as payment on open account, payment against documents, or letter of credit. Alternatively, the parties may decide to link payment so that the proceeds generated by the contract in one direction would be used to pay for the contract in the other direction, thus allowing the transfer of funds between the parties to be avoided or reduced. The chapter discusses only linked payment arrangements. It does not discuss independent payment arrangements since they do not raise issues specific to countertrade.
2. One reason the parties may have for linking payments is the possibility that it would be difficult for a party to effect payment in the agreed currency. Another reason may be to ensure that the proceeds generated by the shipment in one direction would be used to pay for the shipment in the other direction. Payment mechanisms designed to meet such needs include retention of funds by the importer (below, paragraphs 9-13), blocking of funds paid under the export contract through blocked accounts or crossed letters of credit to secure their availability to pay for the counter-export contract (below, paragraphs 14-37), and set-off of countervailing claims for payment (below, paragraphs 38-57).
3. An aspect of linked payment mechanisms to be considered is the financing costs that result from the fact that linked payment mechanisms immobilize the proceeds of shipments made by the parties. The longer the interval between the time the proceeds are generated by the contract in one direction and the time those proceeds are used to pay for the contract in the other direction, the greater the financing costs are likely to be.
4. A characteristic of linked payment mechanisms is the security they provide to the party who has received goods first in that the funds to pay for those goods are not placed at the disposal of the party who has supplied those goods but are reserved to pay for goods subsequently to be supplied in the other direction. This fact may

Chapter IX. Restrictions on resale of countertrade goods

SUMMARY

Sometimes the parties agree in the countertrade agreement or in a supply contract to restrictions on the resale of goods purchased pursuant to the countertrade commitment (paragraphs 1 and 2).

The parties should be aware that many legal systems contain mandatory rules on restrictive business practices, and the parties should ensure that a resale restriction they contemplate applying is not in contravention of those rules. Mandatory rules of this type may contain generally worded prohibitions against practices that unduly restrain competition and thereby put competitors or consumers at an unfair disadvantage or harm the national economy. Furthermore, there often exist specific prohibitions against particular types of restrictive business practices (e.g., against agreements setting a minimum price) (paragraph 3).

When a resale restriction is contemplated, it is advisable to be as specific as possible in the countertrade agreement as to the content of the restriction (paragraphs 4-7).

Parties to a countertrade transaction sometimes include in the countertrade agreement provisions that restrict the freedom of the supplier of countertrade goods to market the type of goods that are the subject-matter of the countertrade transaction (paragraph 8).

The countertrade agreement may provide that the party purchasing goods under the countertrade agreement is to inform the supplier as to certain aspects of the resale of the goods, such as the territory of resale, resale price, or packaging or marking of the goods (paragraphs 9 and 10).

Parties to a countertrade transaction sometimes agree on restrictions as to the territory where the party purchasing goods may resell those goods (paragraphs 11-16).

Sometimes countertrade agreements contain provisions concerning the minimum resale price of the goods. It should be noted that in many States, under mandatory rules relating to restrictive business practices, setting a minimum resale price is generally prohibited or permitted only in limited circumstances (paragraphs 17-20).

The countertrade agreement may contain requirements as to the type of packaging or marking to be used in reselling the goods. The parties should ensure that any packaging or marking requirements do not conflict with mandatory provisions at the place where the goods are to be resold (paragraphs 21 and 22).

When it is possible that the party committed to purchase goods will engage a third party to make the purchases, the supplier may be interested in the

observation by the third party of resale restrictions stipulated in the countertrade agreement (paragraphs 23 and 24).

Changes in the underlying commercial circumstances may make it appropriate to provide in the countertrade agreement for a review of agreed upon resale restrictions (paragraphs 25 and 26).

A. General remarks

1. Sometimes the parties agree in the countertrade agreement or in a supply contract to restrictions on the resale of all or of a portion of the goods purchased pursuant to the countertrade commitment. The agreed restrictions may, for example, limit the territory where the purchaser may resell goods, set a minimum resale price, or prescribe packaging and marking of goods to be resold. Such restrictions may be applied to the resale of the goods within the country of the purchaser or to the re-export of the goods. A countertrade agreement or supply contract may contain a combination of different types of resale restrictions.
2. Resale restrictions of this type are not particular to countertrade transactions. However, such restrictions are dealt with in the *Legal Guide* because they may take on a special importance in countertrade. Resale restrictions may be part of the strategy of a supplier of countertrade goods or of a Government that has mandated countertrade when the purpose of requiring the countertrade commitment was to increase the volume of exports to a particular market or to develop new markets for the goods without affecting adversely existing markets for those goods.
3. The parties should be aware that many legal systems contain mandatory rules on restrictive business practices, and the parties should ensure that a resale restriction they contemplate applying is not in contravention of those rules. Such mandatory rules may be set forth in a statute and in various types of administrative regulations, and interpreted by judicial decisions. The mandatory rules of more than one country may apply. Mandatory rules of this type may contain generally worded prohibitions against practices that unduly restrain competition and thereby put competitors or consumers at an unfair disadvantage or harm the national economy. Furthermore, there often exist specific prohibitions against particular types of restrictive business practices. For example, many legal systems provide that agreements restricting the right of resale are prohibited or may be invalidated if the supplier imposing the restriction has a dominant market position, if the restriction has the effect of limiting access to markets or otherwise unduly restraining competition or if the restriction has or may have other adverse effects on trade or economic development. Agreements setting a minimum price are prohibited outright in some legal systems. In other legal systems, minimum price agreements are permitted only for certain types of goods (e.g., brand-name or luxury goods) or if specified conditions are met (e.g., the price-setting agreement is approved by the competent authority or it is shown that buyers have sufficient possibility to obtain the same or similar goods at prices not subject to a price-setting agreement).
4. In negotiating a restriction on the resale of countertrade goods it is useful to bear in mind that, depending on the commercial circumstances of the transaction, a restriction might lower the price that the countertrade party purchasing and reselling

Chapter X. Liquidated damages and penalty clauses

SUMMARY

Liquidated damages clauses and penalty clauses provide that a failure by a party to perform a specified obligation, or a failure to perform it on time, entitles the aggrieved party to receive from the party failing to perform a sum of money agreed upon at the time the parties establish their contractual relationship. The agreed sum may be intended to stimulate performance of the obligation, or to compensate for losses caused by the failure to perform, or to do both (paragraph 2).

The chapter focuses on liquidated damages and penalty clauses covering a failure to fulfil the countertrade commitment (paragraph 1). Such a failure may take the form of non-fulfilment or delayed fulfilment of the commitment (paragraphs 3 and 4). The clause may cover the purchaser's commitment to purchase goods or the supplier's commitment to make goods available, or both (paragraphs 5 and 6).

Many national laws have provisions on liquidated damages and penalty clauses. Those provisions include: a mandatory restriction in some legal systems that clauses fixing an agreed sum to stimulate performance are invalid and that the party subject to such a clause is liable, in the case of a failure to perform, only for the damages recoverable under the general law (paragraph 7); rules giving a power to the courts to reduce the amount of the agreed sum, or to award additional damages when the actual damage exceeds the agreed sum (paragraph 7); a rule that the agreed sum is not due if the party who failed to perform the obligation in question is not responsible for the failure (paragraph 8); other rules on the relationship between the recovery of the agreed sum and the recovery of damages (paragraph 12).

Liquidated damages or penalty clauses should be distinguished from clauses limiting the amount recoverable as damages, clauses providing alternative obligations and clauses establishing an obligation to liquidate through cash payments imbalances in the flow of trade in barter contracts or in transactions where countervailing payment claims are to be set off (paragraphs 9 and 10).

Where a party originally committed to purchase or to supply goods engages a third party to fulfil that commitment, but remains liable for the fulfilment of the countertrade commitment, it may be agreed that the third party is to pay liquidated damages or a penalty to the party originally committed in the event of a breach of the third party's commitment to purchase or to supply goods (paragraph 11).

An important question to consider in drafting the countertrade agreement is whether, by claiming the agreed sum, the beneficiary of the clause should be deemed to have forsaken fulfilment of the underlying obligation. Often the intention of the parties to countertrade transactions is that the beneficiary who chooses to claim the agreed sum is precluded from also claiming the fulfilment

of the countertrade commitment. Sometimes, the parties intend that an agreed sum is to be payable for delay in fulfilment of the commitment, in which case the countertrade commitment remains outstanding despite payment of that agreed sum. It is advisable that the parties specify the effect of payment in the countertrade agreement (paragraphs 13-16).

The amount of liquidated damages or a penalty may be expressed as an absolute amount or as a percentage of the value of the outstanding countertrade commitment (paragraph 17). When the clause covers delay, an agreed sum is often fixed by way of increments, a specified amount being due for a specified time unit of delay (paragraph 18). Considerations related to determining the appropriate amount of the agreed sum are discussed in paragraphs 19-23.

Issues related to obtaining the agreed sum that may be dealt with in the countertrade agreement include the following: a cut-off time for claiming the agreed sum (paragraph 24); payment of the agreed sum when the period for the fulfilment of the countertrade commitment is divided into subperiods (paragraph 25); a beneficiary's right to deduct the agreed sum from funds held by the beneficiary or a beneficiary's right to set off the claim to the agreed sum against a countervailing claim (paragraph 26); an independent guarantee to cover the obligation to pay the agreed sum (paragraph 27). The countertrade agreement may also address the possibility of terminating the countertrade commitment when the liquidated damages or penalty clause covers delay (paragraph 28), and the effect of the termination of the countertrade commitment on the obligation to pay the agreed sum (paragraph 29).

A. General remarks

1. This chapter focuses on liquidated damages and penalty clauses included in countertrade agreements to cover a failure to fulfil the countertrade commitment. The chapter does not address directly the use of liquidated damages or penalty clauses to support performance of supply contracts that form part of a countertrade transaction. Liquidated damages and penalty clauses are frequently used in sales contracts and other types of supply contracts, and the presence of such clauses in supply contracts that form part of a countertrade transaction does not raise issues specific to countertrade. Nevertheless, the discussion in this chapter of the general characteristics of liquidated damages and penalty clauses is relevant to the use of such clauses in supply contracts.

2. Liquidated damages clauses and penalty clauses provide that a failure by a party to perform a specified obligation, or a failure to perform it on time, entitles the aggrieved party to receive from the party failing to perform a sum of money agreed upon at the time the parties establish their contractual relationship. The agreed sum may be intended to stimulate performance of the obligation, or to compensate for losses caused by the failure to perform, or both.¹ Sometimes the parties agree that the obligation to pay liquidated damages or a penalty is to be secured by a guarantee (see below, paragraph 27).

¹Studies on the nature and operation of liquidated damages and penalty clauses in international contracts are contained in *Yearbook of the United Nations Commission on International Trade Law*, volume X: 1979, part two, I, C, and volume XII: 1981, part two, I, B, 1. The Uniform Rules on Contract Clauses for an Agreed Sum due upon Failure of Performance, hereinafter referred to as Uniform Rules (see annex), adopted by the Commission in 1983, may be used by parties in drawing up liquidated damages and penalty clauses.

Chapter XI. Security for performance

SUMMARY

The parties to a countertrade transaction may agree to use a guarantee to cover the fulfilment of the countertrade commitment. A guarantee may be used for the obligation to purchase goods, the obligation to supply goods, or both those obligations (paragraph 1).

A guarantee may be independent of, or accessory to, the underlying obligation. Under an independent guarantee, the guarantor is obligated to pay when the beneficiary of the guarantee presents to the guarantor a demand for payment and any additional documents required under the terms of the guarantee; such documents may be, for example, the beneficiary's statement that the party who procured the guarantee (the "principal") has breached the underlying obligation, the beneficiary's statement specifying the circumstances that constitute the breach, or a certificate or decision by a third person stating that the breach of the underlying obligation has occurred. The guarantor, in determining whether to pay, is not called upon to investigate whether the underlying obligation has in fact been breached, but is limited to verifying whether the demand for payment and the supporting documents conform to the requirements specified in the guarantee. Despite the independence of the guarantee from the underlying obligation, payment under the guarantee may exceptionally be refused, in particular when the payment claim is fraudulent (paragraph 3).

Under an accessory guarantee, the guarantor must, before paying a claim, ascertain whether the underlying obligation was breached, and the guarantor is normally entitled to invoke all the defences that the principal could invoke against the beneficiary (paragraph 4).

The discussion in the chapter is limited to independent guarantees, without thereby implying a preference for this type of guarantee. The discussion in the chapter applies not only to securities in the form of guarantees but also to securities in the form of stand-by letters of credit, which are the functional equivalent of independent guarantees (paragraphs 5 and 6).

When a guarantee is to be used, the parties should include in the countertrade agreement provisions on questions such as: who is to procure the guarantee (paragraph 8); whether payment under the guarantee releases the principal from the countertrade commitment (paragraph 9); the identity of the guarantor or how a guarantor is to be chosen (paragraphs 10-16); the documents that the beneficiary would have to present for the guarantor to be obligated to pay (paragraphs 17-22); the amount of the guarantee and possibly a mechanism to reduce that amount as fulfilment of the countertrade commitment progresses (paragraphs 23-26); the point of time when the guarantee is to be issued (paragraphs 27-30); expiry of the guarantee (paragraphs 31-33); return of the guarantee instrument (paragraph 34); obligation to procure an extension of the guarantee as a result of an extension of the period for the fulfilment of the countertrade commitment (paragraphs 35 and 36); modification of the underlying commitment and modification of the guarantee (paragraphs 37-39).

In transactions in which goods shipped in the two directions are not to be paid in money, guarantees may be used to secure the liquidation through cash payment of a possible imbalance in the flow of trade (paragraphs 40-48).

A. General remarks

1. This chapter focuses on guarantees (also referred to in practice as “bonds” or “indemnities”) in a countertrade transaction supporting the countertrade commitment. Guarantees supporting the performance of individual supply contracts are not specifically addressed since they do not raise issues particular to countertrade. In a given countertrade transaction, guarantees may be used to support the obligation to purchase goods, the obligation to supply goods, or both these obligations. Sometimes a guarantee supports the countertrade commitment by way of securing payment under a liquidated damages or penalty clause covering the countertrade commitment. Guarantees may also be used to support liquidation of imbalances in the flow of trade (below, paragraphs 40-48).
2. Requiring guarantees may have the general advantage of preventing parties who are unreliable or who do not have sufficient financial resources from participating in the countertrade transaction. Guarantor institutions generally make careful inquiries about a party whose obligations they are asked to guarantee, and will normally provide guarantees only when they have reasonable ground for believing that the party can successfully perform the obligation. This may be of particular advantage to importers or exporters who are otherwise unable to determine whether a proposed counter-party is reliable.
3. Depending upon its terms, a guarantee may be independent of, or accessory to, the underlying obligation. Under an independent guarantee, the guarantor is obligated to pay when the party to whom the underlying obligation is owed (the “beneficiary”) presents to the guarantor the demand for payment and any additional documents required under the terms of the guarantee. A required document may be, for example, a beneficiary’s statement that the party who procures the guarantee (the “principal”) is in breach of the underlying obligation, a beneficiary’s statement specifying the circumstances that constitute the breach, or a certificate or decision by a third person or entity stating that a breach of the underlying obligation has occurred. The third person or entity, designated in the guarantee or in accordance with the guarantee, may be, for instance, an expert, a supervisory body, an arbitral tribunal or a court. An independent guarantee assures the beneficiary that, upon presenting the demand and any required documents, prompt payment will be made even if there remains disagreement between the principal and the beneficiary as to whether the underlying obligation has been breached. The guarantor, in determining whether to pay, is not called upon to investigate whether the underlying obligation has in fact been breached, but is limited to verifying whether the demand for payment and any supporting document confirm the requirements specified in the guarantee. (For further discussion of possible payment conditions, see below, paragraph 18.) If a dispute arises whether the principal is entitled to the recovery of the amount paid on the ground that the underlying obligation had not been breached, that dispute would be determined in a subsequent proceedings between the principal and the beneficiary. Even though the guarantor’s obligation to pay independent of the underlying obligation, the payment claim by the beneficiary under the guarantee

Chapter XII. Failure to complete countertrade transaction

SUMMARY

This chapter discusses remedies for non-fulfilment of the countertrade commitment (section B) and circumstances in which a party is exonerated from liability for a failure to fulfil the countertrade commitment (section C). Also discussed is the effect of a failure to conclude or perform a supply contract in one direction on the obligations of the parties to conclude or perform supply contracts in the other direction (section D). The discussion is set in the context of "firm" countertrade commitments (paragraphs 1-3).

It is advisable that countertrade agreements stipulate the remedies for a failure to fulfil the countertrade commitment since national laws generally do not contain rules specifically tailored to countertrade (paragraphs 4 and 5). Remedies to be considered are the release of a party from the countertrade commitment (paragraphs 6-10) or monetary compensation, in particular in the form of liquidated damages or a penalty (paragraphs 11 and 12).

During the period for the fulfilment of the countertrade commitment, events of a legal or physical nature may occur that impede, permanently or temporarily, a committed party from concluding an envisaged supply contract. The party who fails to fulfil its commitment due to such an impediment may, according to the applicable law or according to the provisions of the countertrade agreement, be granted additional time to fulfil the commitment or may be released altogether from the commitment. Impediments that give rise to such an exemption are referred to as "exempting impediments" (paragraph 13).

Many national laws contain provisions concerning exempting impediments. However, since those provisions may lead to results that are incompatible with the needs of a given transaction, the parties may wish to include in the countertrade agreement a clause specifying the legal consequences of an exempting impediment (paragraphs 14-18) and a clause defining exempting impediments (paragraphs 19-34). The countertrade agreement may also contain a requirement that the party invoking an exempting impediment must give written notice of the impediment to the other party (paragraphs 35 and 36).

Since in a countertrade transaction the conclusion of a supply contract in one direction is conditioned upon the conclusion of a supply contract in the other direction, the question may arise whether a failure to conclude or perform a contract in one direction should have an effect on the obligation to conclude or perform a contract in the other direction. National laws normally do not provide a specific answer to the question of interdependence of obligations in countertrade transactions. Therefore, in order to avoid uncertainty or disagreement, the parties may wish to include in the countertrade agreement clauses indicating the extent of interdependence of obligations (paragraphs 37-42). Such clauses may address in particular the implications of the following problems in the completion of countertrade transactions: failure to conclude a

supply contract as stipulated in the countertrade agreement (paragraphs 43-48), termination of a supply contract (paragraphs 49-55), failure to meet a payment obligation under a supply contract (paragraphs 56-60) and failure to deliver goods under a supply contract (paragraph 61).

A. General remarks

1. This chapter discusses remedies for non-fulfilment of the countertrade commitment (section B). It also discusses circumstances in which a party would be exonerated from liability for a failure to fulfil the countertrade commitment (section C). A further issue discussed in the present chapter is the effect of a failure to fulfil the countertrade commitment or of the failure to perform a supply contract in one direction on the obligations of the parties to conclude or perform supply contracts in the other direction (section D). Not discussed are remedies for non-performance under a supply contract concluded pursuant to the countertrade agreement, since such remedies are of a type available under contract law generally and do not raise issues specific to countertrade.

2. The discussion in this chapter is set in the context of “firm” countertrade commitments, i.e., commitments in which a party undertakes to actually conclude a supply contract in accordance with the terms stipulated in the countertrade commitment. As noted in chapter III, paragraph 2, the *Legal Guide* does not focus on countertrade commitments containing a lower degree of commitment (e.g., “best efforts” or “serious intention” types of commitment), under which the undertaking is limited to an obligation to negotiate in good faith without promising that a contract will actually be entered into.

3. Failure by a party to fulfil its obligations under the countertrade transaction could have serious repercussions for the other party. The repercussions may be, for example, that a prospective supplier will not earn convertible funds planned to be used for the purchase of other goods, that a prospective supplier will be hampered in carrying out its plan to introduce countertrade goods into new markets, or that a prospective purchaser will not receive goods to be resold in order to pay for goods shipped in the other direction.

4. It is advisable that the countertrade agreement stipulate the remedies for a failure to fulfil the countertrade commitment. National laws generally do not contain rules specifically tailored to countertrade, and general rules applicable to contractual obligations may not provide satisfactory answers when problems occur in fulfilling the countertrade commitment. The remedies that the parties might wish to address in the countertrade agreement include release from the countertrade commitment and liquidated damages or a penalty (see below, paragraphs 6-12). It is also advisable that the countertrade agreement define the circumstances in which a party would be exonerated from liability for a failure to fulfil the countertrade commitment (see below, paragraphs 13-36).

5. The remedies for non-fulfilment of the countertrade commitment that the parties decide to include in a countertrade agreement may not be appropriate in every circumstance. Therefore, while a party has the right to insist upon the remedies set forth in the countertrade agreement, the parties may find it desirable to negotiate in

Chapter XIII. Choice of law

SUMMARY

The chapter focuses on the choice by the parties to a countertrade transaction of the law applicable to the countertrade agreement, the supply contracts in the two directions, and the contract by which a party committed to fulfil a countertrade commitment engages a third party to fulfil that commitment. The chapter considers also the question whether the countertrade agreement and the contracts forming part of the transaction should be made subject to a single national law or to different national laws (paragraph 1).

Under the rules of private international law (in some legal systems referred to as "conflict-of-laws" or "choice-of-law" rules) of most jurisdictions, the parties are permitted to choose by agreement the applicable law, though under some of those laws there are restrictions on that choice. If the parties do not choose the applicable law, the applicable law is determined by the application of rules of private international law (paragraph 2). By choosing the applicable law, the parties do not make a choice as to jurisdiction (paragraph 3). Whatever the chosen law, particular aspects of the countertrade transaction may be affected by mandatory rules (paragraphs 4 and 30-33). The extent to which the parties may designate issues to be governed by the chosen law may be limited (paragraph 5). The possible applicability of the United Nations Sales Convention to a countertrade transaction is discussed in paragraph 6.

In order to avoid uncertainty as to what law applies, it is desirable for the parties to choose expressly the applicable law to govern the countertrade agreement and the supply contracts (paragraphs 8-11). The extent to which the parties are allowed to choose the applicable law is determined by the rules of private international law. Under some systems of private international law, the autonomy of parties is limited, and they are permitted to choose only a national law that has some connection with the contract (the "nexus" rule). Under most systems of private international law, parties are permitted to choose the applicable law without those restrictions (paragraph 12).

When choosing the applicable law, it is in general advisable to choose the law of a particular country (paragraphs 13-18). Parties may wish to take the following factors into consideration in choosing the applicable law: the parties' knowledge of, or possibility of gaining knowledge of, the law; the capability of the law to settle in an appropriate manner the legal issues arising from the contractual relationship; the extent to which the law contains mandatory rules that would prevent the parties from settling by agreement certain questions that arise in their contractual relationship (paragraph 19). Further issues the parties may wish to bear in mind are possible changes legislated in the law chosen by the parties (paragraph 20); approach to the drafting of the choice-of-law clause (paragraph 21); separateness of the choice-of-law clause from the rest of the contract (paragraph 22); applicability of the chosen law to the prescription of rights (limitations of actions) (paragraph 23); advisability of designating the applicable law not only for the countertrade agreement but also for the future supply contracts (paragraph 24).

In choosing the applicable law, the parties may wish to consider whether the countertrade agreement and the supply contracts should be made subject to a single national law or to different national laws (paragraphs 25-29).

A. General remarks

1. This chapter focuses on the choice by the parties to the countertrade transaction of the law applicable to the countertrade agreement, the supply contracts in the two directions, and the contract by which a party committed to fulfil a countertrade commitment engages a third party to fulfil that commitment (section B). The chapter considers also the question whether the countertrade agreement and the contracts forming part of the transaction should be made subject to a single national law or to different national laws (section C). This chapter does not discuss the law applicable to other related arrangements in which a person who is not a party to the countertrade transaction is involved. Such other arrangements may include a guarantee supporting fulfilment of a countertrade commitment, an agreement between counter-trade parties and their banks concerning linked payment arrangements, and an interbank agreement between banks involved in carrying out payment arrangements. Certain aspects of the law applicable to such arrangements are discussed in chapter XI, "Security for performance", paragraphs 3, 5 and 13, and chapter VIII, "Payment", paragraphs 6, 10, 19, 21, 22, 27 and 40.
2. Under the rules of private international law (in some legal systems referred to as "conflict-of-laws" or "choice-of-law" rules) of most jurisdictions, the parties are permitted to choose the applicable law by agreement. Under some laws there are, however, certain restrictions on that choice. If the parties do not choose the applicable law, the rules of private international law of the forum will determine which law governs the legal relationship.
3. It should be noted that by choosing the applicable law the parties are not making a choice as to jurisdiction for settlement of any disputes. Issues relating to jurisdiction are discussed in chapter XIV, "Settlement of disputes".
4. Whatever be the law applicable to the countertrade agreement or the supply contracts, particular aspects of the countertrade transaction may be affected by mandatory legal rules of an administrative or other public nature in force in the countries of the parties or in the country where their obligations are to be performed. Those mandatory legal rules may regulate certain matters in the public interest, for example, international transfers of funds, the types of goods that may be traded in countertrade transactions, and restrictive business practices (see below, section D).
5. In addition, the extent to which the parties may designate particular issues to be governed by the chosen law may be limited. For example, most States do not allow freedom of choice with respect to the question of transfer of ownership of goods or disposition of funds held in a bank. The question of which State's procedural law is to govern arbitral or judicial proceedings for the settlement of disputes arising in connection with the countertrade transaction is discussed in chapter XIV, "Settlement of disputes".

Chapter XIV. Settlement of disputes

SUMMARY

It is advisable that the parties agree on the method by which future disputes arising out of the countertrade agreement and the related supply contracts would be settled. Dispute-settlement methods include negotiation, conciliation, arbitration and judicial proceedings (paragraphs 1-6). In some States, restrictions exist as to the freedom of a State agency to conclude an arbitration agreement or to agree to the jurisdiction of a court of a foreign State (paragraph 7).

Usually, the most satisfactory method of settling a dispute is through amicable settlement by negotiation between the parties (paragraphs 8-11).

If the parties fail to settle a dispute through negotiation, they may wish to attempt to do so through conciliation before resorting to arbitral or judicial proceedings. The object of conciliation is to achieve an amicable settlement of the dispute with the assistance of a neutral conciliator. If the parties provide for conciliation, they may settle relevant procedural issues by agreeing on a set of conciliation rules such as the UNCITRAL Conciliation Rules (see annex) (paragraphs 12-15).

There are various reasons why arbitration is frequently used for settling disputes arising in countertrade transactions (paragraphs 16 and 17). In general, arbitral proceedings may be conducted only if the parties agree thereto. Since it may be more difficult to reach an agreement to arbitrate after a dispute has arisen, it is advisable to enter into an arbitration agreement at the outset of the countertrade transaction (paragraphs 18-23). The parties are able to select the type of arbitration that best suits their needs (paragraphs 24-26).

The arbitral proceedings will normally be governed by the procedural law of the State where the proceedings take place. It is advisable for the parties to agree on a set of arbitration rules to govern arbitral proceedings under their agreement. When the parties choose to have their arbitrations administered by an institution, the institution may require the parties to use the rules of that institution (paragraphs 27-29). Some arbitration rules contain a model arbitration clause that invites the parties to settle in the arbitration clause matters such as the involvement of an appointing authority and the number of arbitrators (paragraphs 30-34), the place of arbitration (paragraphs 35-39) and the language or languages to be used in the arbitral proceedings (paragraphs 40 and 41).

Disputes that are not settled through negotiation or conciliation can be settled, if the parties do not opt for arbitration, in judicial proceedings. Courts of one or more States may be competent to decide a given dispute. Parties may agree on a jurisdiction clause under which the parties are obligated to submit disputes to a specified court (paragraphs 42-45).

Countertrade transactions often involve several contracts, in addition to the countertrade agreement. In such multi-contract transactions, the parties may

wish to consider whether it would be desirable to agree on a single body for the settlement of all disputes that may arise in the transaction, i.e., the same conciliator, arbitral tribunal or court (paragraphs 46-49).

Disputes may arise in a countertrade transaction that involve or affect not only the exporter and the importer, but other parties as well, in particular third persons engaged in the transaction as purchasers and suppliers of countertrade goods. In such multi-party disputes, it may be desirable to settle all related issues in the same dispute settlement proceedings (paragraphs 50-53).

A. General remarks

1. Disputes may arise in a countertrade transaction with respect to the countertrade agreement, and with respect to the supply contracts concluded pursuant to the countertrade agreement. It is advisable that the parties agree on the manner in which any future disputes arising out of the countertrade agreement and the related supply contracts are to be settled.

2. In general, it is desirable for the parties initially to attempt to settle their disputes through negotiation (section B). If negotiation is not successful, the parties might wish to refer their dispute to an independent conciliator, who is to make recommendations to the parties on how to settle the dispute (section C). If those methods of dispute settlement fail, there are basically two methods available of obtaining a binding decision: arbitration and judicial proceedings. Arbitration is a process by which parties refer disputes that might arise between them, or that have already arisen, for decision by an arbitral tribunal composed of one or more persons (arbitrators) selected by them (section D). Arbitral proceedings may be initiated only on the basis of an arbitration agreement. In general, the parties are obligated to accept the decision of the arbitral tribunal (arbitral award) as final and binding. The arbitral award is usually enforceable in a manner similar to a court decision. In the absence of an arbitration agreement, disputes between the parties will have to be settled in judicial proceedings (section E).

3. This chapter does not deal with procedures agreed upon by the parties for determining terms of a supply contract that have been left open in the countertrade agreement. Such methods include procedures to be observed by the parties in negotiating supply contract terms, standards and guidelines to be used in setting the terms, designation of a third person to determine a contract term, or authorizing one of the parties to determine a contract term within agreed parameters. Such methods are discussed generally in chapter III, "Countertrade commitment", paragraphs 38-60, and with respect to specific types of contract terms in chapter V, "Type, quality and quantity of goods", paragraphs 28, 29, 37 and 42, and chapter VI, "Pricing of goods", paragraphs 11-47.

4. The implementation of a countertrade transaction usually includes ongoing discussions between the parties that may permit many problems and misunderstandings to be resolved without recourse to dispute settlement proceedings. If such discussions result in an amendment of the countertrade agreement or of a supply contract, it is advisable to express the agreement in writing (see chapter IV, "General remarks on drafting", paragraphs 3-5).