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UNITED NATIONS COMMISSION  
ON INTERNATIONAL TRADE LAW  
Twenty-third session  
New York, 25 June - 6 July 1990

INTERNATIONAL COUNTERTRADE

Draft legal guide on drawing up contracts in  
international countertrade transactions: sample chapters

Report of the Secretary-General

1. The Commission, at its nineteenth session (1986), in the context of its discussion of a note by the Secretariat entitled "Future work in the area of the new international economic order" (A/CN.9/277), considered its future work on the topic of countertrade. There was considerable support in the Commission for undertaking work on the topic, and the Secretariat was requested to prepare a preliminary study on the subject. 1/
2. At its twenty-first session (1988), the Commission had before it a report entitled "Preliminary study of legal issues in international countertrade" (A/CN.9/302). The Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up countertrade contracts. In order for the Commission to decide what further action might be taken, the Commission requested the Secretariat to prepare for the twenty-second session of the Commission a draft outline of such a legal guide. 2/
3. At its twenty-second session (1989), the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322). It was decided that such a legal guide should be prepared by the Commission, and the Secretariat was requested to prepare for the next session of the Commission draft chapters of the legal guide. 3/

1/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

2/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 32-35.

3/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 245-249.

4. Addenda 1 to 7 to the present document contain an outline of chapter I and sample draft chapters II to VI, IX and XII of the draft legal guide. During the preparation of the draft chapters, including preliminary drafts of chapters that are not contained in addenda to this report, the Secretariat found it desirable to modify the titles, structure and the sequential order of certain chapters, as the chapters were originally set out in document A/CN.9/322 ("Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts").

5. In preparing the draft chapters the Secretariat has taken into account a broad range of relevant documents, contracts, books and articles. In addition, the Secretariat has benefitted from the comments of an expert group which met at Vienna from 12 to 15 December 1989.

6. The proposed revised structure of the legal guide is as follows:

I. INTRODUCTION TO LEGAL GUIDE. An outline of the chapter is contained in addendum 1 to the present report.

II. SCOPE AND TERMINOLOGY OF LEGAL GUIDE. The draft chapter is contained in addendum 1 to the present report.

III. CONTRACTING APPROACH. The draft chapter is contained in addendum 2 to the present report.

IV. GENERAL REMARKS ON DRAFTING. The draft chapter is contained in addendum 3 to the present report.

V. TYPE, QUALITY AND QUANTITY OF GOODS. The draft chapter is contained in addendum 4 to the present report.

VI. PRICING OF GOODS. The draft chapter is contained in addendum 5 to the present report.

VII. FULFILMENT OF COUNTERTRADE COMMITMENT. The Secretariat intends to deal in the draft chapter with the time period for fulfilment of the countertrade commitment (length, commencement and extension of the fulfilment period) and with the division of the fulfilment period into subperiods. Furthermore, it is intended to address contractual mechanisms for monitoring and recording fulfilment of the countertrade commitment.

VIII. PARTICIPATION OF THIRD PERSONS. The Secretariat intends to deal in this chapter with issues to be addressed in the countertrade agreement if it is envisaged that a third person may be engaged to purchase goods required to be purchased in order to fulfil the countertrade commitment. The chapter would also address the contractual relationship between the party committed to purchase goods and the third person, and the relationship between the third person and the supplier of the goods. In addition, the chapter would discuss cases in which a third person is engaged to supply goods within the framework of the countertrade agreement.

IX. PAYMENT. The draft chapter is contained in addendum 6 to the present report.

X. RESTRICTIONS ON RESALE OF GOODS. The Secretariat intends that the legal guide discuss possible clauses in the countertrade agreement concerning various types of territorial restrictions on the resale of goods purchased in a countertrade transaction as well as restrictions concerning terms of resale.

XI. LIQUIDATED DAMAGES AND PENALTIES. This chapter would discuss various issues related to the use of liquidated damages or penalty clauses to support the countertrade commitment. These issues include the parties that may be made subject to such a clause, the effect of payment of the agreed sum, the amount of the agreed sum and obtaining the agreed sum.

XII. SECURITY FOR PERFORMANCE. The draft chapter is contained in addendum 7 to the present report.

XIII. INTERDEPENDENCE OF OBLIGATIONS. It is intended that this chapter will discuss the extent to which a difficulty occurring in one segment of the transaction may have an effect on the other segment of the transaction.

XIV. CHOICE OF LAW.

XV. SETTLEMENT OF DISPUTES. The methods of settling disputes to be dealt with in the legal guide include negotiation, conciliation, arbitration and judicial proceedings. The legal guide would also address co-ordination between the dispute settlement clauses in the discrete contracts involved in a countertrade transaction. In addition the legal guide would discuss clauses to be used when more than two parties involved in a countertrade transaction wish to be joined in one dispute settlement proceeding.

7. The Commission may wish to note that the proposed time-table for the Commission's session, as set out in the provisional agenda (A/CN.9/327), provides that the first five days of the session would be devoted to a discussion of the subject of countertrade. It is suggested that the Commission use this period for an in-depth discussion of the draft legal guide. The Commission may wish to discuss the structure of the legal guide, as set out above in paragraph 6, and take up chapters I to VI, IX and XII (addenda 1-7 to the present report). The Commission may wish to consider the concept of the chapters, whether they cover the relevant issues, whether the statements made appropriately take into account the needs of countertrade practice and whether advice given is appropriate.

8. The Commission may wish to consider, on the basis of its discussion of the draft chapters and of the schedule of meetings of the Commission and its Working Groups during the remainder of 1990 and in 1991, the future procedure that should be followed in the preparation of the legal guide.