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INTERNATIONAL COUNTERTRADE

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

Report of the Secretary-General

Addendum

XII. SECURITY FOR PERFORMANCE

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*The draft chapter contained herein has been prepared by the Secretariat for consideration by the Commission as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Commission.

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A. General remarks

1. The legal guide focuses on guarantees (also referred to in practice as "bonds" or "indemnities") in a countertrade transaction supporting the countertrade commitment. Such a guarantee may support the obligation of the party committed to purchase countertrade goods, as well as the obligation of the party committed to supply goods. Sometimes a guarantee supports the countertrade commitment by way of securing payment under a liquidated damages or penalty clause covering the countertrade commitment. Guarantees particular to countertrade may also be used to support liquidation of imbalances in the flow of trade (paragraphs 38 to 45 below). Guarantees supporting the performance of individual supply contracts are not specifically addressed since they do not raise issues particular to countertrade.

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 the 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's obligation to pay does not depend on whether the obligated party (the "principal"), who procures the guarantee, has in fact breached the underlying obligation, but on whether the party to whom the obligation is owed (the "beneficiary") has complied with the payment conditions of the guarantee (for a discussion of payment conditions, see paragraphs 15 to 20 below). Upon meeting the payment conditions, the beneficiary receives prompt payment even if there is disagreement between the principal and the beneficiary as to whether the underlying obligation has been breached. It would be up to the principal, in an action for recovery of the amount paid, to prove that the obligation had not been breached. Despite the fact that a guarantor's obligation to pay may be independent from the underlying obligation, the right of the beneficiary to claim under the guarantee may under the law applicable to the guarantee be excluded in exceptional circumstances, in particular when the claim by the beneficiary is fraudulent.

4. Under an accessory guarantee, the guarantor must pay only when the principal is in fact in breach of the guaranteed obligation. Such accessory guarantees are referred to in national laws by terms such as "suretyship", "cautionnement", "garantía", and "Bürgschaft". The guarantor must, before paying a claim, ascertain whether the underlying obligation was breached in order to establish whether the claim is justified, and the guarantor is normally entitled to invoke all the defences that the principal could invoke against the beneficiary.

5. The discussion in the legal guide is limited to independent guarantees, without thereby implying a preference for this type of guarantee. Generally, independent guarantees are used to support obligations set out in the countertrade agreement. While principals tend to prefer accessory guarantees, beneficiaries are normally reluctant to accept such guarantees

because of the possible delays involved in obtaining payment. Moreover, guarantors, in particular banks, tend to prefer independent guarantees because they do not wish to investigate the performance of the underlying obligation. While the various legal regimes governing accessory guarantees are well established, independent guarantees, essentially a creation of banking and commercial practice, are not yet firmly established in all legal systems and there is no uniformity as regards the extent to which independent guarantees are recognized.

6. In some countries banks issue "stand-by letters of credit", which are the functional equivalent of independent guarantees. Accordingly, the discussion in the legal guide on guarantees for security for performance by the principal applies to stand-by letters of credit.

B. Guarantee provisions in countertrade agreement

7. When the parties decide to use a guarantee to support the countertrade commitment, they should include in the countertrade agreement certain basic provisions concerning the issuance and terms of the guarantee. The parties may also wish to consider appending to the countertrade agreement a form of a guarantee to be followed by the issuer in establishing the guarantee. In formulating the terms of the future guarantee in the countertrade agreement, the parties should be sure that the agreed formulation would be accepted by the guarantor.

8. Typically it is the party committed to purchase whose commitment is supported by a guarantee. In many cases this is because the primary objective of that party in agreeing to a countertrade commitment is to secure a sale, rather than to obtain goods from the other party. When the party committed to purchase goods has a particular interest in obtaining the goods, the supplier's commitment to conclude a contract for the supply of the agreed goods may be supported by a guarantee. In some cases, the countertrade agreement may require both the purchaser and the supplier to obtain guarantees to support their commitments. When the parties to the countertrade agreement foresee that a third person may assume the countertrade commitment, the parties may wish to consider whether the guarantee should be procured by the party originally committed to purchase or supply the goods or by the third person (see chapter VIII, "Participation of third persons").

9. When the guarantee supports the principal's obligation under a liquidated damages or penalty clause, the question whether a payment under the guarantee would free the principal from liability for fulfilment of the countertrade commitment would be settled by the terms of the liquidated damages or penalty clause and the rules applicable to the clause (see chapter XI, "Liquidated damages and penalties", paragraphs ____ to ____). When the guarantee does not support a liquidated damages or penalty clause and the parties intend, as is sometimes the case, that payment under the guarantee would have the effect of freeing the principal from the countertrade commitment or from liability for any damages exceeding the amount paid under the guarantee, they should state their intention in the countertrade agreement. Without a provision to this effect, it cannot be assumed that payment under the guarantee would free the principal from the countertrade commitment or from liability for damages.

1. Choice of guarantor

10. The parties may wish to specify in the countertrade agreement a guarantor who would be acceptable to both parties. That would enable the beneficiary to be satisfied that the guarantee would be issued by a guarantor that had the necessary financial reserves and that was otherwise acceptable. The identification of the guarantor could be useful to both parties in that it would limit subsequent disagreements and enable the parties to know the cost of the guarantee at the outset.

11. If the guarantor is not identified at the time of the conclusion of the countertrade agreement, the parties may provide, for example, that the guarantor be a first class bank, be agreeable to the beneficiary or be an institution from the home country of one of the parties.

12. A beneficiary may wish to have the guarantee issued by an institution in its home country because enforcement of a claim for payment against such an institution could be easier than against a foreign institution. However, requiring the use of a local guarantor may be disadvantageous to the extent that the principal is prevented from using a guarantor with whom it has an established relationship and who may provide the same guarantee at a lower cost.

13. In some legal systems, mandatory rules applicable to the beneficiary provide that a guarantee may be accepted only if it is issued by a financial institution in the country or a financial institution authorized to issue guarantees involving payment in a foreign currency or if the selection of the guarantor is approved by the competent authority.

14. There have been instances where an undertaking to pay a sum of money, termed a "guarantee", supporting the countertrade commitment or the payment of related liquidated damages or penalties has been made by the party whose countertrade commitment is to be guaranteed. The effect of such a "guarantee" is that the party-guarantor promises to pay the other party under the terms of the guarantee without raising any defence that could not have been raised by a third-party guarantor, and that it is up to the party-guarantor to sue for reimbursement of the funds paid if it is claimed that the underlying obligation had not been breached. Such a guarantee might be acceptable to the beneficiary if the guarantee is independent from the underlying transaction and is issued by a trading party whose commercial integrity and financial adequacy are regarded by the beneficiary as being beyond doubt. However, it is not clear that such a guarantee gives the beneficiary legal rights in addition to those arising from the obligation being guaranteed.

2. Conditions for obtaining payment under the guarantee

15. The countertrade agreement should clearly set forth the conditions that have to be fulfilled in order for the guarantor to be obligated to pay, in particular, as to any documents that have to be submitted in support of a claim for payment. Disputes may arise from uncertainty as to whether the documents presented by the beneficiary conform to the terms of the guarantee.

16. The terms of an independent guarantee may provide that a demand for payment alone would suffice or that the demand would have to be accompanied by the beneficiary's statement concerning the breach. A general declaration to

that effect may be sufficient. Alternatively, the beneficiary may be required to state more details, such as the nature of the principal's breach, that the beneficiary is entitled to payment of the claimed amount and that the amount has not yet been paid. In addition to the demand for payment, the beneficiary may be required to present documents issued by a third person relating to the default by the principal, such as an arbitral award or court decision stating that the default has occurred. The guarantee may provide that the requirement of a third-person statement would be obviated if the principal makes an admission of default in writing. In all these cases, the guarantor merely ascertains whether the documents conform on their face to the requirements of the guarantee and is not to inquire into the underlying transaction. In particular, the guarantor is not to investigate whether the statements contained in a document are founded.

17. Sometimes the parties agree that the beneficiary must notify the principal of the intention to call the guarantee and that the claim cannot be made before the expiry of a specified period of time following the notice. The purpose of such a notice requirement is to provide an opportunity to the principal to cure a breach or to settle a disagreement. A corollary guarantee term would require the beneficiary to submit with the demand for payment documentary evidence that notice had been given to the principal.

18. Where the guarantee supports the payment obligation under a liquidated damages or penalty clause, the parties may wish to stipulate that among the payment conditions would be a requirement that the beneficiary provide a statement that payment under the liquidated damages or penalty clause is due.

19. In addition to documentary conditions, a guarantee will usually specify requirements that do not pertain to the performance of the underlying obligation. Such requirements, which do not involve the presentation of a document, most frequently concern the time period within which a claim can be made, the amount of the guarantee, and the office of the guarantor where the claim is to be submitted.

20. It is advisable that the countertrade agreement, in addition to setting out the agreement of the parties as to the guarantee, provide that the beneficiary is entitled to claim under the guarantee only if there is in fact a failure to fulfil the commitment. Such a provision might facilitate recovery by the principal of losses suffered in the event a claim has been paid without there having been a breach of the underlying obligation.

3. Amount of guarantee and reduction of amount

21. The parties should agree on the amount of the guarantee, as well as the currency in which it is to be denominated and payable. The amount of the guarantee is expressed as a specified amount or as a percentage of the value of the outstanding commitment. If the guarantee is supporting payment under a liquidated damages or penalty clause, the guarantee clause in the countertrade agreement may call for payment of the entire amount of the liquidated damages or penalty or a portion thereof. The liquidated damages or penalty may itself be a certain percentage of the unfulfilled countertrade commitment.

22. In determining the amount of the guarantee, or of the liquidated damages or penalty covered by the guarantee, the parties would take into account factors such as the extent of the losses expected to be suffered in

the event of non-fulfilment and the risk of failure to fulfil, as well as the limits which guarantors would usually observe in respect of similar contracts. Another factor may be the ease with which payment of a claim under the guarantee can be obtained. In this respect, the beneficiary generally has a trade-off to make. The closer the terms of the guarantee approach that of a simple demand guarantee and the easier it will be to obtain payment, the less willing the principal will be for the guarantee to cover a high percentage of the countertrade commitment. On the other hand, if the documentary conditions are more difficult to meet when the principal has not breached the commitment (e.g., when an arbitral or court decision must be presented), the principal may be willing to agree on a higher amount for the guarantee.

23. The parties may wish to include in the terms of the guarantee a mechanism to reduce the amount of the guarantee as fulfilment of the countertrade commitment progresses. Reduction of the guarantee amount would have the advantage of reducing the exposure under the guarantee and possibly the cost of the guarantee. If the guarantee secures payment of liquidated damages or a penalty, the provisions on the reduction of the guarantee should be consistent with any reduction mechanism for the sum of the liquidated damages or penalty.

24. It is advisable that the reduction mechanism operate on the basis of the presentation to the guarantor of specified documents evidencing fulfilment of the countertrade commitment, without the guarantor being obligated to verify the degree to which the countertrade commitment has been fulfilled. These documents may include shipping documents, copies of supply contracts, purchase orders, letters of release or other documents recording fulfilment. The parties may also find it useful to stipulate the issuer of the documents and the party responsible for forwarding them to the guarantor. Where the fulfilment period is divided into subperiods, the parties may wish to provide that the guarantee will be reduced by the amount allocated for each subperiod and not claimed within the agreed period of time.

4. Time of providing guarantee

(a) At entry into force of countertrade agreement or shortly thereafter

25. The parties are advised to agree on the point of time when the guarantee is to be issued. It may be agreed, for example, that the guarantee should be issued to the beneficiary when the countertrade agreement enters into force or shortly thereafter (e.g., thirty days after entry into force of the countertrade agreement). The parties may obtain assurance that the guarantee would be procured at the agreed time by providing that the countertrade agreement would not enter into force without procurement of the guarantee or that the principal would be deemed to have breached the countertrade commitment if the guarantee was not procured within the agreed period of time.

26. When a contract in one direction (export contract) is concluded together with the countertrade agreement, the parties could agree that the issuance of a guarantee supporting fulfilment of the countertrade commitment is a condition for the entry into force of the export contract. Such a provision would assure the importer of not being bound under the export contract before issuance of a guarantee to support the countertrade commitment.

(b) Later in fulfilment period

27. The parties may agree that the guarantee does not have to be procured until a certain date later in the fulfilment period provided that at that time fulfilment of the commitment has not been completed. The agreed date may be, for example, three months before the end of the fulfilment period or three months before the end of each yearly segment of a multi-year fulfilment schedule. This approach has the advantage that the amount of the guarantee could be calculated as a percentage of the then outstanding countertrade commitment. By making the amount of the guarantee dependent on the outstanding balance rather than on the entire countertrade commitment and by limiting the length of time during which a guarantee is in effect, the extent of exposure under the guarantee as well as the cost of the guarantee are likely to be reduced.

28. Since such an approach exposes the beneficiary to the risk that the guarantee will not be procured, the parties may wish to agree on the beneficiary's rights in the event the guarantee is not procured as agreed. It may be agreed that the beneficiary would be permitted to regard the countertrade commitment as breached and to claim payment under a liquidated damages or penalty clause. Furthermore, it might be agreed that the beneficiary would be entitled to deduct the amount of the liquidated damages or penalty from any amounts becoming due under the export contract after the failure to procure the guarantee.

5. Duration of guarantee

(a) Expiry date

29. It is advisable for the parties to agree in the countertrade agreement on the length of time the guarantee is to remain in force. One possible approach would be to provide for an open-ended guarantee that would terminate only when fulfilment of the commitment is deemed to be achieved or the committed party is otherwise released from the commitment (see chapter VII, "Fulfilment of countertrade commitment", paragraphs ____ to ____). Another approach would be to provide a fixed expiry date. It should be noted that most guarantors may be willing to issue guarantees only if the expiry date is fixed. Furthermore, the Uniform Customs and Practice for Documentary Credits (1983 Revision, Publication No. 400 of the International Chamber of Commerce), under which stand-by letters of credit may be issued, calls, in its article 46, for the stipulation of an expiry date for presentation of documents.

30. It is advisable that the expiry date of the guarantee fall after the end of the period for the fulfilment of the countertrade commitment. A period of time between expiry of the fulfilment period and expiry of the guarantee (e.g., thirty days) would allow the beneficiary to await the conclusion of supply contracts until the close of the fulfilment period without foregoing the possibility of claiming payment under the guarantee. Furthermore, the beneficiary, at its discretion, would be able to allow minor delays attributable to the principal in the fulfilment of the countertrade commitment without foregoing the possibility of claiming payment under the guarantee. At the same time, a relatively short interval would allow the liability of the guarantor to be resolved relatively soon after the alleged non-fulfilment of the countertrade commitment has taken place. The parties may also wish to apply such an approach in relation to guarantees covering subperiods of a fulfilment period.

31. If the security takes the form of a stand-by letter of credit, it should state expressly that it is irrevocable. The need for such a statement arises because article 7(c) of the Uniform Customs and Practice for Documentary Credits (1983 Revision, Publication No. 400 of the International Chamber of Commerce), which will often be applicable, provides that a credit is deemed to be revocable in the absence of an express indication that it is irrevocable.

(b) Return of guarantee instrument

32. In some legal systems a guarantee may remain in force even after the expiry date if the guarantee instrument is not returned by the beneficiary. The countertrade agreement should therefore obligate the beneficiary to return the guarantee promptly upon fulfilment of the guaranteed obligation. However, the obligation to return the guarantee should be drafted so as not to imply that if the guarantee is not returned it remains in force even after the expiry date.

(c) Extension

33. For various reasons, the time period for fulfilment of the countertrade commitment may be extended and as a result continue beyond the expiry date of the guarantee (see chapter VII, "Fulfilment of countertrade commitment", paragraphs ____ to ____, concerning extension of the fulfilment period). The countertrade agreement might provide that, if the fulfilment period is extended, the principal would be obligated to arrange within a reasonable period of time a corresponding extension of the guarantee. Alternatively, the guarantee might provide for an automatic extension to cover any extension of the underlying fulfilment period agreed to by the parties. However, such a provision might not be acceptable to a guarantor who does not wish to be bound by a guarantee whose duration depends on an agreement to which the guarantor is not a party.

34. With respect to the cost of extending the period of validity of the guarantee, the parties may wish to agree that the party responsible for the extension of the fulfilment period will be obligated to bear the costs of the extension of the guarantee period.

6. Modification or termination of countertrade agreement

35. In legal systems that recognize the agreement of the parties to establish an independent guarantee, an independent guarantee would remain in effect as stipulated regardless of changes in the underlying commitment. If the change in the underlying contract affects the possibility to obtain the documents in support of the payment claim under the independent guarantee, it should be ensured that the change in the underlying contract be reflected by a corresponding modification of the guarantee terms.

36. Under some legal systems that do not fully recognize an independent guarantee, an alteration of the underlying commitment may result in the release of the guarantor; under other such systems, the guarantee may be deemed to cover only the commitment of the principal existing at the date of issuance of the guarantee. With a view to avoiding undesired consequences, the parties may provide that the guarantee would remain in force despite modifications of the countertrade agreement.

37. The modification of the countertrade agreement may extend the liability of the principal beyond the amount of the guarantee. The parties may wish to provide in the countertrade agreement that in those cases the principal would be obligated to ensure that the amount of the guarantee would be modified accordingly.

C. Guarantee for imbalance in trade

38. The parties may agree that goods will be shipped in exchange for goods and that the shipments in each direction will not be paid for in money. This type of transaction may be based on a barter contract (see chapter III, "Contracting approach", paragraphs ___ to ___) or on the setoff of countervailing claims for payment (see chapter IX, "Payment", paragraphs ____ to ____). In such cases a supplier runs the risk that the value of its shipments may exceed the value of goods received from the other party and that this surplus is not liquidated, either by supplies of goods or through payment in money. In order to address this risk, the parties may use guarantees to secure liquidation of an imbalance that may develop in the flow of trade.

39. The amount of the guarantee should be linked to the amount of the imbalance in the flow of trade, with an upper limit. This upper limit for the guarantee could be set at the level of imbalance permitted under the countertrade transaction. It may be agreed that the amount that could be claimed under the guarantee would cover less than the full extent of the imbalance (e.g., 80 percent). The purpose of such an approach would be to discourage the calling of the guarantee except as a last resort. A beneficiary who cannot recover the full amount of the imbalance by calling the guarantee would have a greater incentive to achieve the agreed balance in the flow of trade through ordering goods from the other party.

1. Guarantee for shipment in one direction

40. Where a particular sequence of shipments in the two directions is stipulated, the countertrade agreement may provide that the party scheduled to receive goods first must provide a guarantee supporting the obligation to ship goods in return. This guarantee would cover the risk taken by the party that ships first that the return shipment fails to take place by the agreed date or is not of the agreed value or quantity. When the first shipment is to take place in stages, it may be agreed that with each partial shipment a separate guarantee is to be provided corresponding to the value of that shipment; alternatively, the guarantor may agree to increase the amount of the guarantee upon the presentation of documents evidencing additional shipments.

41. With respect to the timing of the issuance of the guarantee, the countertrade agreement may provide that the guarantee is to be handed over to the beneficiary in exchange for the shipping documents relating to the first delivery. Such a procedure would safeguard against the possibility that the party scheduled to ship first obtains the guarantee but fails to ship. In order to ensure that the beneficiary of the guarantee (the party that has shipped first) would not be in a position to claim payment under the guarantee once the principal (the party shipping second) has fulfilled its obligation to ship goods, the countertrade parties may agree that the beneficiary of the guarantee would obtain documents of title to the second shipment only upon surrender of the guarantee instrument.

42. Guarantees may be used in a similar fashion in multi-party countertrade transactions. When the parties link deliveries in such a fashion that the importer, in exchange for goods received from the exporter, ships goods to a third-party counter-importer, the third-party counter-importer pays the exporter (see chapter IX, "Payment", paragraphs ____ to ____). The guarantee, provided by the importer, would support the obligation to counter-export after receiving the export goods. When the exporter is to be paid by the counter-importer upon shipment of the export goods, the counter-importer would be the beneficiary of the guarantee. Such a guarantee would cover the risk taken by the counter-importer in paying the exporter prior to receiving goods from the counter-exporter. When, however, the counter-importer is to pay the exporter only upon receipt of the counter-export goods, the exporter would be the beneficiary of the guarantee. Such a guarantee would cover the risk that the exporter, having shipped goods, failed to be paid by the counter-importer because the counter-export did not take place.

43. A similar guarantee may be used when the exporter, instead of being paid by the importer, receives goods from a third-party counter-exporter, who in turn is paid by the importer (see chapter IX, "Payment", paragraphs ____ to ____). In this case, it may be agreed that the exporter would be given a guarantee covering the risk that, having shipped first, the exporter failed to be compensated by a shipment of goods from the counter-exporter.

44. A guarantee may be employed in a similar fashion when both the counter-importer and the counter-exporter are separate parties from the exporter and the importer (see chapter IX, "Payment", paragraphs ____ to ____). It may be agreed that the importer must provide a guarantee to the exporter to support the importer's obligation to pay the price of the export goods. When the exporter is to receive payment from the counter-importer upon shipment of the export goods, the beneficiary would be the counter-importer. This would protect the counter-importer against the risk of paying the exporter without receiving goods from the counter-exporter. When, however, the counter-importer is to pay the exporter only upon shipment of the counter-export goods, the beneficiary of the guarantee would be the exporter. This would protect the exporter against the risk of shipping goods without being paid.

2. Mutual guarantees

45. When the parties agree to exchange goods for goods, they may do so without stipulating a particular sequence in which the shipments in the two directions should take place. This is particularly likely when multiple shipments in each direction are envisaged. In such situations, both parties encounter the risk of an imbalance in the flow of trade which needs to be redressed either through the shipment of goods or through the payment of a sum of money. To address this risk, it may be agreed that each party is to provide a guarantee to secure liquidation of an imbalance in favour of the other party.