

1996

## The UNCITRAL Legal Guide on International Countertrade Transactions: The Foundation for a New Era in Countertrade

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### Recommended Citation

James C. Nobles & Johannes Land, *The UNCITRAL Legal Guide on International Countertrade Transactions: The Foundation for a New Era in Countertrade*, 30 INT'L L. 739 (1996)  
<https://scholar.smu.edu/til/vol30/iss4/4>

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## The *UNCITRAL Legal Guide on International Countertrade Transactions*: The Foundation for a New Era in Countertrade?

Two basic schools of thought exist with respect to the role of countertrade in international business. The first is that countertrade is a complex, convoluted means of conducting business and should be avoided at all costs. The mere suggestion of countertrade as an element of a transaction is an omen. Proponents of this school of thought believe that countertrade is an antiquated relic in the post-Cold War era when countries can easily trade with hard currency. The opposing school subscribes to the belief that countertrade is, and will be, a part of international trade for the foreseeable future. These international businesspeople not only willingly make countertrade a part of their transactions, in some cases they actively seek out countertrade, using it as a marketing tool to help them promote and sell their products in an increasingly competitive world. This group, which includes some of the largest U.S. multinationals, constantly struggles in an ever-changing world for standard formats around which to build their transactions. It is for this group that the *UNCITRAL Legal Guide on International Countertrade Transactions*<sup>1</sup> (the *Guide*) was written.

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1. U.N. COMM'N ON INT'L TRADE LAW (UNCITRAL): LEGAL GUIDE ON INT'L COUNTERTRADE TRANSACTIONS, ch. II, ¶ 25, U.N. Doc. A/CN.9/SER.B/3, U.N. Sales No. E.93.V.7 (1993) (English version) [hereinafter *GUIDE*].

The *Guide*, issued by the United Nations Commission on International Trade Law (UNCITRAL) in 1993, provides a much-needed framework for international countertrade. The *Guide's* authors have taken a subject that can be very complex and have developed a methodical, logical approach to address the problems that arise in countertrade. Recognizing that the legal issues involved in countertrade are too varied to be addressed by simple form contracts, the *Guide* departs from the avenue taken by prior works that promote form contracts and standardized solutions to countertrade.<sup>2</sup> Rather, the *Guide* attempts to address the various legal issues in a systematic manner. The *Guide* is undoubtedly the most sophisticated analysis of the legal aspects of international countertrade published to date. Although some provisions of the *Guide* are difficult to follow because of the terminology it uses with respect to particular types of transactions, for the most part, the *Guide* provides clear, concise, and detailed guidance on countertrade transactions.

The *Guide* defines countertrade broadly as "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."<sup>3</sup> The *Guide* notes that *linkage* of transactions is the distinguishing feature of countertrade.<sup>4</sup> The *Guide* specifically includes offsets within its scope.<sup>5</sup> Because offsets are becoming increasingly important in sales of large industrial goods, such as power generation systems and military equipment, the inclusion of offsets greatly expands the *Guide's* applicability and relevance to multinational transactions.<sup>6</sup>

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2. U.N. CONFERENCE ON TRADE AND DEV. (UNCTAD): LEGAL GUIDE ON DRAWING UP CONTRACTS IN INT'L COUNTER-TRADE TRANSACTIONS, U.N. Doc. UNCTAD/ECDC/215 (1991) (English/Spanish version) [hereinafter UNCTAD Guide]; U.N. ECONOMIC COMM'N FOR EUROPE, INT'L BUY-BACK CONTRACTS, U.N. ECE/Trade/176, U.N. Sales No. E.90.II.E.35 (1991); U.N. ECONOMIC COMM'N FOR EUROPE, INT'L COUNTERPURCHASE CONTRACTS, U.N. ECE/Trade/169, U.N. Sales No. E.90.II.E.3 (1990); CLAUDE DUVAL ET AL., COUNTERTRADE: OFFSET CONTRACTS, ICC Dossiers, Pub. No. 440/7 (1989); U.S. DEP'T OF COMMERCE, INT'L COUNTERTRADE (1992).

3. GUIDE, *supra* note 1, ch. I, ¶ 1.

4. *Id.* "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. . . . [T]he Legal Guide deals only with transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction." *Id.*

5. *Id.* ch. 1, ¶ 17.

6. *Id.* In fact, the *Guide* provides a very good definition of offset that distinguishes between direct and indirect offset:

Transactions referred to in the Legal Guide as offsets normally involve the supply of goods of high value or technological sophistication and may include the transfer of technology and know-how, promotion of investments and facilitating access to a particular market. Two types of offset transactions may be distinguished. Under a "direct offset" the parties agree to supply to each other goods that are technologically or commercially related (e.g., component parts or products that are marketed together). A direct offset can contain features of a buy-back transaction (i.e., transfer of production equipment and technology, and purchase by the transferor of the resulting products). The difference between such a direct offset and a buy-back transaction is that in a

## I. The Framework of the *Guide*

The *Guide* recognizes that there are no “canned” solutions to countertrade, but rather the contract terms will and should vary from transaction to transaction. The *Guide* adopts a checklist or road map approach to international countertrade transactions. Instead of seeking to dictate a solution to specific problems (for example, pricing and linkage), the *Guide* illuminates the parameters of the issues that arise in these complex transactions. The *Guide*'s methodology is to circumscribe the numerous typical countertrade pitfalls and then provide a range of possible solutions to these pitfalls. In a building block fashion, the *Guide* begins with the real world assumption that countertrade transactions are usually based upon a contract for the supply of goods, with the countertrade aspects of the transactions then being constructed around the original contract.

Although the *Guide* addresses specific countertrade contractual provisions, it does not seek to impose certain forms for countertrade agreements. In fact, the *Guide* discourages standard forms based on the justified suspicion that when standard forms are suggested, the parties to a countertrade transaction will blindly fill in the blanks without due consideration of the unique legal aspects of their specific countertrade transaction. The *Guide*'s admonition against standard form contracts is also, perhaps, in recognition that prior attempts to develop standard form countertrade agreements have been, at best, only marginally successful.

Some countertrade practitioners suggest that modern countertrade has moved beyond the categories addressed in the *Guide* (for example, barter, buybacks, and offsets). While it is true that many countertrade transactions, particularly those involving offsets, do not fit within the outlined categories, the *Guide* is perhaps even more relevant in this environment since it is not a “how-to” manual. Virtually all of the specific issues addressed arise repeatedly in countertrade. Those in the countertrade community who have studied the *Guide* generally welcome its somewhat simplistic style of issue identification and resolution, particularly in view of the fact that their transactions are typically mired with complexity.

The *Guide* seeks to circumscribe the boundaries of various countertrade issues by focusing on legal issues. After identifying and explaining the issues, the *Guide* makes recommendations for addressing certain issues. The *Guide* provides three levels of guidance.<sup>7</sup> The highest level of recommendation is denoted by “should.”

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direct offset both parties commit themselves to purchase over a period of time goods from each other, whereas under a buy-back transaction the party that has supplied the production facility commits itself to purchase goods.

*Id.* Somewhat surprisingly, the *Guide* does not provide much real world guidance on dealing with the current issues in fulfilling offset obligations (e.g., rates of credit, multipliers, etc.). While offsets are the subject of much debate and controversy in developed countries, the *Guide* notes that it does not advocate a particular governmental policy on any aspect of countertrade; rather it is simply providing guidance for those traders who find themselves involved in countertrade. *Id.* ch. I, ¶ 10.

7. *Id.* Introduction, ¶ 11.

The intermediate level of recommendation is communicated by the words "advisable" or "desirable." At the lowest level, the *Guide* counsels the parties in terms of "may" or "might."<sup>8</sup> Other cautionary signals used frequently include "utmost caution" and "warning." Perhaps in recognition of the complexities of countertrade, the *Guide* adopts this counseling manner with respect to only a few of the many issues it discusses. The *Guide* would be a more effective tool if its authors had utilized this paternalistic approach more often.

One weakness of the *Guide* is its suggestion that parties can resolve all countertrade issues through negotiation. While in theory this proposition is true, in practice there are many obstacles to negotiated solutions. For example, laws of the various countries involved in the transaction may prevent certain negotiated solutions.<sup>9</sup> Similarly, some enterprises, such as state-owned companies, may be subject to severe restrictions on their operations that prevent them from agreeing to solutions that multinationals readily find acceptable. Finally, businesspeople in emerging markets, particularly those trained in communistic and socialistic economic systems, may not fully appreciate the impact of some of the suggested negotiated solutions to countertrade problems since the *Guide* promotes to a certain extent solutions that would typically be adopted by Western multinational companies.

The *Guide* does not have the force of law, and it is not written with the suggestion that it be adopted by countries as a Countertrade Code. To the contrary, the *Guide* contains little that could be implemented as binding law. Thus, the *Guide* can not be viewed as a "gap filler" to deal with issues unresolved by the negotiators.<sup>10</sup> Rather, the *Guide* seeks to complement existing government laws, including those specifically addressing countertrade. The *Guide* concedes that countertrade is a proper subject of governmental regulation, but does not advocate a specific governmental policy on countertrade except to the extent that it suggests that governments should promote countertrade as an effective tool for certain types of international trade.

The *Guide* focuses only on those legal aspects unique to countertrade. All countries have, of course, rules governing contractual issues, including those

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8. In using these cautionary signals, the *Guide* does not attempt to lay down or synthesize legal rules. Rather, it is focusing on the logical aspects of countertrade transactions. "It is *advisable* that the parties agree on the details of the linked payment mechanism in the countertrade agreement." *Id.* ch. VIII, ¶ 8 (emphasis added). "Sometimes the countertrade agreement leaves the determination of a contract term to one of the parties to a countertrade agreement. *Utmost caution* is *advisable* in agreeing on such a solution, which leaves the determination of the contract term to a person who has an interest in the outcome of the determination." *Id.* ch. III, ¶ 55 (emphasis added). "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 supply contracts)." *Id.* ch. IV, ¶ 1.

9. For example, under the laws of Bangladesh and Nepal, goods may not be exported unless the seller has received a confirmed letter of credit posted by the buyer.

10. *GUIDE*, *supra* note 1, Introduction, ¶ 7.

specific to international trade. Few legal systems regulate countertrade.<sup>11</sup> Those countries that do have rules governing countertrade rarely regulate the private law contractual aspects of countertrade. Thus, the basic premise of the *Guide* is to provide a framework within which these legal issues may be addressed.

The *Guide* is not drafted from a regional perspective. It does, however, advocate many of the positions that a large Western multinational company might be expected to take in countertrade transactions. In doing so, the *Guide*'s authors have been able to avoid dictating pro-Western, pro-developed country positions on countertrade issues. Instead, the *Guide* adopts methods that have facilitated successful countertrade transactions, as opposed to blindly recommending countertrade approaches that a multinational company would not pursue. On the other hand, the *Guide* cautions the parties that the legal systems of all countries are different, and each system may have its own rules that address many of the issues discussed in the *Guide*.

## II. Analysis of Key Chapters

The structure and methods of the *Guide* are best illustrated by a brief review of several of its chapters. These chapters are chosen because either they offer new insight into dealing with issues (countertrade commitment<sup>12</sup>) or they address the *essentialia negotii* (goods, pricing, payment<sup>13</sup>) of a countertrade transaction. Both are always of great importance.

### A. LINKAGE

As recognized by the *Guide*, linkage of cross-border commercial obligations that would ordinarily stand alone is the essence of countertrade.<sup>14</sup> Indeed, the *Guide* breaks new ground in its development of the linkage concept. The *Guide* observes that unlinked countertrade agreements "cannot be distinguished from

11. *Id.* ch. II, ¶ 28. "Generally, it is advisable to settle in the countertrade agreement issues that the parties consider relevant since national legislations are not likely to have rules on issues specific to countertrade." *Id.* Historically most Eastern European countries had laws addressing certain aspects of their countertrade with the former Soviet Union. Today, the aspect of countertrade that Western countries are most likely to regulate is offsets. This regulation is often indirect. For example, developed countries exporting defense equipment regulate offset requirements imposed by their foreign purchasers by placing conditions on credits extended to the purchasers.

12. See *infra* part II.B.

13. See *infra* part II.C-E.

14. See *supra* note 4. The importance of addressing the linkage issue is underscored by the German case of *LG Duisburg*, Urteil vom 12. Juni 1981, Az 15 O 215/80, *aff'd OLG Düsseldorf*, Urt. v. 1. Dezember 1982, Az 17 U 151/81, in which the lower court held, and the appellate court affirmed, that a countertrade party was obligated to fulfill the second stage of a countertrade transaction even when the underlying supply contract could not be fulfilled due to *force majeure*. A German company agreed to construct a continuous casting plant in Iran for the Iranian government. As payment, the German company entered into an agreement to take seven million tons of crude oil over a period of several years. The German company and a Belgian oil company then entered into a separate agreement pursuant to which the Belgian company would purchase the crude oil from the

straightforward independent transactions.<sup>15</sup> Thus, the *Guide* “advises” the parties to include the linkage issue<sup>16</sup> in their negotiations, reach agreement on the linkage issue, and then unambiguously reflect their agreement in the contract documents, regardless of the format which those contracts might take.<sup>17</sup> Several options for linking various components of a transaction are suggested.<sup>18</sup>

In discussing linkage, the *Guide* confuses the concept somewhat by interchanging terminology, thereby making it difficult to follow the discussion. For example, the *Guide* attempts to distinguish between a “link” and “linkage,” and “independence” and “interdependence” of obligations.<sup>19</sup> Although the *Guide* appears to distinguish independence and interdependence in the context of specific obligations of the parties, it is not consistent in its use of this terminology.

While the concepts of linkage and interdependence are central themes throughout the *Guide*, the most focused discussion of linkage and interdependence is in the context of remedies for failing to complete a countertrade transaction.<sup>20</sup> The *Guide* rejects outright the concept that all countertrade transactions should be interdependent by stressing that “in general terms . . . the extent of interdepen-

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German company at a discount, but this agreement was silent as to the relationship (i.e., the linkage) between it and the German company's underlying agreements with the Iranians. When the Iranian revolution occurred, the German company was released of its Iranian obligations, including its obligation to purchase the crude oil, due to *force majeure*. The German company then attempted to declare its agreement to sell the crude oil to the Belgian company at a discount null and void due to *force majeure*, citing the linkage of the crude oil and construction contracts. In support of its position, the German company cited the legal principal *clausula rebus sic stantibus* (under German law, *Wegfall der Geschäftsgrundlage*) for the proposition that the factual assumptions under which its crude oil sales contract with the Belgian company was entered into had changed; therefore, the contract should be void. The Belgian company sued the German company on the basis that since linkage was not specifically addressed in its contract, it was entitled to the benefit of its bargain—the discount. Both the lower court and appellate court found in favor of the Belgian company on the basis that the burden was on the German company to prove the interdependence of the contracts. Since its oil sales contract with the Belgian company was silent on this point, the Germany company was obligated to fulfill its contract with the Belgian company even though the original countertrade had disappeared due to *force majeure*.

15. *GUIDE*, *supra* note 1, ch. I, ¶ 1. The *Guide* then notes that it addresses only “transactions that express in a contractual form such a link between the contracts constituting the countertrade transaction.” *Id.*

16. The *Guide* also refers to the linkage issue as the “independence” or “interdependence” concept.

17. *Id.* ch. II, ¶ 18; *see also id.* ch. II, ¶¶ 10 & 19; *id.* ch. XII, ¶ 42.

18. *Id.* ch. II, ¶¶ 10, 17-19. For example, the *Guide* suggests that the parties can enter into countertrade agreements that are partially interdependent:

The parties may, for example, agree that the termination of the export contract permits the exporter to terminate the countertrade agreement, and that non-fulfillment of the countertrade commitment by the counter-importer entitles the counter-exporter to deduct an agreed amount as liquidated damages or penalty from payments due under the export contract.

*Id.* ch. II, ¶ 19.

19. *Cf. id.* ch. II, ¶¶ 17-19, addressing “independence” and “interdependence” with *id.* ch. II, ¶¶ 23, 33, 41, which discuss linkage.

20. *Id.* ch. XII, ¶¶ 37-61.

dence will depend on the circumstances and contractual provisions of each case."<sup>21</sup> The *Guide* also notes that there is virtually no legal authority on the concept of interdependence and, thus, advises the parties to specifically address the question of interdependence in their agreements.<sup>22</sup> The *Guide* then provides an in-depth analysis of interdependence in some problematic or conflicting situations in the completion of countertrade transactions, such as the failure to conclude a supply contract,<sup>23</sup> the termination of a supply contract,<sup>24</sup> the failure to pay,<sup>25</sup> and the failure to deliver goods.<sup>26</sup>

## B. THE COUNTERTRADE COMMITMENT

The *Guide* recognizes that one of the leading reasons that countertrade transactions are not consummated is due to the parties' failure to define their respective obligations with specificity. In keeping with its theme of providing a framework for successful countertrade transactions, the *Guide* repeatedly counsels countertraders to make their negotiated solutions as specific and detailed as possible. On the other hand, the *Guide* is pragmatic in that it recognizes that countertrade transactions can be successful even in those situations in which the parties are unable to reach agreement on all aspects of the arrangement from the outset.<sup>27</sup> As experienced countertraders appreciate, uncertainty is almost always present in a countertrade commitment. In fact, one of the primary tasks facing a successful countertrader is to define the commitments on all sides of the transaction with specificity. With this background, the *Guide*, in one of its strongest chapters, sets forth the requirements for successful countertrade commitments.

The *Guide* defines "countertrade commitment" as "the commitment of the parties to enter into a future contract or contracts."<sup>28</sup> Although the *Guide* generally

21. *Id.* ch. XII, ¶ 42.

22. *Id.* The German court decision discussed in note 14 *supra* is one of the few decisions on the issue of linkage of which the authors are aware. Also, in the authors' view, it is the best case illustrating the necessity of specifically dealing with linkage and interdependence issues in countertrade agreements.

23. *Id.* ch. XII, ¶¶ 43-48.

24. *Id.* ch. XII, ¶¶ 49-55.

25. *Id.* ch. XII, ¶¶ 56-60.

26. *Id.* ch. XII, ¶ 61.

27. *Id.* ch. III, ¶¶ 38-39.

28. *Id.* ch. I, ¶ 25. The *Guide* further circumscribes the nature of the countertrade commitment in relation to the countertrade agreement:

In many countertrade transactions the main purpose of the countertrade agreement is to set out the commitment of the parties to enter into the future contracts required to fulfill the objective of the transaction [the countertrade commitment]. . . . When the parties agree simultaneously on the terms governing the supply of all of the goods in both directions, the countertrade agreement would contain a stipulation expressing the link between the concluded contracts and possibly other stipulations, but would not contain a countertrade commitment.

*Id.* ch. I, ¶ 24.

favors binding supply contracts over countertrade commitments,<sup>29</sup> the *Guide* notes that a countertrade commitment may be used when the parties do not simultaneously conclude separate contracts for the entire supply of goods, services, or other things of value in both directions.<sup>30</sup>

Nonetheless, the *Guide* advises caution with respect to countertrade commitments, noting several points that it deems "advisable" with respect to commitments to future action or agreements.<sup>31</sup> In setting forth the considerations that the parties should take into account when deliberating the possibility of entering into a countertrade commitment, the *Guide* strongly encourages the parties to define the terms of future supply contracts with particularity.<sup>32</sup> Further, the parties should define at what stage a countertrade commitment will be deemed to be fulfilled, including the fulfillment period, the rate of fulfillment (fulfillment credits), and the mechanisms for confirming that commitments have been fulfilled (including timing issues).<sup>33</sup> The *Guide* also advises the parties to determine the impact, if any, of any nonconforming purchases upon the countertrade commitment.<sup>34</sup>

The *Guide* notes that under some legal systems contract terms and conditions left open by the parties may be "filled in" by commercial codes or be supplied by a tribunal called upon to adjudicate the transaction.<sup>35</sup> On the other hand, the *Guide* strongly cautions the parties against leaving open terms and conditions for agreement at a later date.<sup>36</sup> The *Guide* also dissuades the parties from letting third parties determine the terms and conditions unless those third parties are independent of the parties to the countertrade transaction and unless the nature and extent of this decision are defined by the parties in advance.<sup>37</sup> In one of the strongest positions taken by the *Guide*, it advises "utmost caution" in leaving a contract term for the later unilateral determination by one of the countertrade parties.<sup>38</sup>

29. *Id.* ch. II, ¶ 26.

30. *Id.* ch. II, ¶ 20, ch. III, ¶ 1.

31. The *Guide* first provides general guidance on commitments: "It is *advisable* that the parties include in the countertrade agreement, in as definite a manner as feasible, the terms of the future contract . . . or provide for means of subsequent determination of those terms." *Id.* ch. III, Introduction (emphasis added). The *Guide* provides cautionary advice on various aspects of commitments, including additionality, fulfillment periods, nonconforming purchases, and evidence accounts. GUIDE, supra note 1, Introduction.

32. *Id.* ch. III, ¶ 39.

33. *Id.* ch. III, ¶¶ 10-23, 34-37, 67-74.

34. *Id.* ch. III, ¶ 33.

35. *Id.* ch. III, ¶ 41.

36. *Id.* ch. III, ¶ 39.

37. *Id.* ch. III, ¶¶ 47-54.

38. *Id.* ch. III, ¶ 55. "Utmost caution is advisable in agreeing on such a solution, which leaves the determination of the contract term to a person who has an interest in the outcome of the determination." *Id.*

### C. THE GOODS

One of the major issues in most countertrade transactions is the quantity, quality, and nature of the goods offered in one or more stages of the transaction. The *Guide*<sup>39</sup> addresses many of the issues involved in the supply of goods, noting that these issues are one of the major reasons countertrade transactions fail. Although the *Guide* addresses goods from a general perspective, its focus is on goods supplied in a counterimport transaction. The *Guide* also recognizes that countertrade today involves not only goods, but also services, technology, and investment.<sup>40</sup>

Consistent with its teaching in other areas, the *Guide* advises the parties to conduct due diligence<sup>41</sup> with respect to all aspects of the goods,<sup>42</sup> including their availability,<sup>43</sup> the quantities<sup>44</sup> that can realistically be made available during the relevant periods, and their quality.<sup>45</sup> One of the primary due diligence areas is governmental regulation of items available for countertrade,<sup>46</sup> including the possible requirement for the counterimporter (the original exporter) to obtain import licenses for the goods sold to the counterimporter.<sup>47</sup>

Countertrade goods are often set forth in lists. The *Guide* addresses many common issues involved with the use of lists,<sup>48</sup> including the frequently encountered problem of the listed goods being "unavailable." In the case of unavailable goods, the *Guide* suggests two alternatives.<sup>49</sup> First, to the extent that the listed goods are "unavailable," the purchaser's countertrade commitment could be reduced.<sup>50</sup> Second, the supplier could be liable for liquidated damages<sup>51</sup> if the listed goods cannot be made available.<sup>52</sup> At the same time, the *Guide* suggests that the purchaser be required to designate within a defined period those goods which it will purchase from the list and provide its specifications with respect to those products.<sup>53</sup>

One of the major hindrances to countertrade is the perception among certain companies that only goods of an inferior quality are available for countertrade.

39. *Id.* ch. V.

40. *Id.* ch. V, ¶ 1; Services: ch. V, ¶ 15; Technology: ch. V, ¶¶ 16-23; Investment: ch. V, ¶¶ 24-26.

41. "Precision as to type, quality and quantity increases the likelihood that the intended supply contract will be concluded." *Id.* ch. V, ¶ 2.

42. *Id.*

43. *Id.* ch. V, ¶ 3.

44. *Id.* ch. V, ¶¶ 2, 36-42.

45. *Id.* ch. V, ¶¶ 2, 27-35.

46. *Id.* ch. V, ¶¶ 3-6.

47. *Id.* ch. V, ¶ 5.

48. *Id.* ch. V, ¶¶ 7-14.

49. *Id.* ch. V, ¶ 10.

50. *Id.* ch. V, ¶ 10; ch. XII, ¶ 7.

51. This depends upon the approach permitted by controlling law.

52. *GUIDE*, *supra* note 1, ch. V, ¶ 10.

53. *Id.* ch. V, ¶ 12.

Furthermore, exporters are concerned that if they enter into a countertrade transaction under these circumstances, they will have little or no control over the quality of goods they will receive. The *Guide* seeks to deal with this problem by advising countertrade parties to address quality issues<sup>54</sup> at the outset by adopting commercially recognized quality standards<sup>55</sup> and cautioning the parties that the goods may be subject to many different types of commercial standards. The *Guide* also alerts the parties that the countertraded goods may be subject to mandatory regulations or customs of trade usage that prescribe minimum quality standards. Of course, standards may differ depending upon the market.<sup>56</sup> Thus, the *Guide* recommends that the parties be specific as to the quality standard by linking it to a particular country or market.<sup>57</sup>

Once quality standards are set, the goods must be tested to ensure that the standards are met. In an effort to remove the quality control barrier to countertrade, the *Guide* strongly recommends inspection of the countertrade goods before the conclusion of the original supply contract (“pre-contractual quality control”) so that the exporter will be assured that the countertrade goods meet its quality criteria.<sup>58</sup>

Several issues that arise in the inspection procedures are discussed, including the question of what weight will be given to the inspector’s findings.<sup>59</sup> For example, the inspection report conceivably could directly affect the contractual relationship of parties entering into a supply contract and countertrade agreement. Thus, if the inspection reveals that the goods conform to the agreed criteria, the supply contract and the countertrade agreement could become legally binding.

The *Guide* also identifies several issues commonly encountered in specifying quantities of goods.<sup>60</sup> For example, if the amount of the goods required to be purchased is determined by reference to a set monetary amount and the price of the goods changes, the required quantity changes accordingly.<sup>61</sup> A similar issue arises when a counterimporter is required to purchase a specific monetary amount of goods from a list of goods available for countertrade. If some of those goods are unavailable, the counterimporter may find itself required to purchase goods that it did not originally intend to purchase. The *Guide* suggests that this common problem might be addressed by setting maximum and minimum levels of the listed goods that a party would be required to purchase from a predetermined list.<sup>62</sup>

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54. *Id.* ch. V, ¶¶ 27-35.

55. *Id.* ch. V, ¶¶ 29-31.

56. *Id.* ch. V, ¶ 45.

57. *Id.* ch. V, ¶ 29.

58. *Id.* ch. V, ¶¶ 32-35.

59. *Id.* ch. V, ¶ 35.

60. *Id.* ch. V, ¶¶ 36-42.

61. *Id.* ch. V, ¶ 36.

62. *Id.* ch. V, ¶ 8.

## D. PRICING

Pricing is the "weak point" in countertrade transactions.<sup>63</sup> The reasons are numerous and include the failure or inability of the parties to identify the countertrade goods from the outset, and the length of time between the execution of the countertrade agreement and the fulfillment of that agreement.<sup>64</sup> The *Guide* recognizes these practical pricing problems,<sup>65</sup> but cautions the parties to "specify in the countertrade agreement the price of the goods that will be the subject-matter of the future supply contract"<sup>66</sup> or at least to "provide a method according to which the price will be determined at the time the supply contract is to be concluded."<sup>67</sup> Further, the *Guide* cautions parties to a barter transaction to include pricing of the goods in the barter exchange in order to address trade imbalances as well as other trade issues.<sup>68</sup>

As with other cautionary advice offered by the *Guide*, much of the pricing counseling is directed at the neophyte countertrader. Seasoned countertraders know the importance of pricing in the transactions and realize the many intricacies of pricing issues. Nonetheless, even the experienced countertrader can benefit from reviewing the pricing chapter from time to time, since the pricing issues vary greatly from deal to deal. In this regard, the *Guide* provides an excellent overview of pricing issues that may, or perhaps should, arise in negotiations.

Several options for determining price are critiqued.<sup>69</sup> One common solution is to refer to published or commonly recognized markets or indices. The *Guide* discusses several considerations the parties should evaluate before tying the price to these mechanisms. These considerations include the need to define specific exchanges or markets to which the price is tied as well as the need to include averaging mechanisms to adjust for price fluctuations over the term of the transaction.<sup>70</sup> Another solution is to tie the price to the price offered by a competitor.<sup>71</sup> Again, the *Guide* notes the pitfalls of using this option and suggests alternatives to using competitor pricing as a reference.<sup>72</sup>

63. FRIEDRICH NIGGEMANN, GESTALTUNGSFORMEN UND RECHTSFRAGEN BEI GEGENGESCHAFTEN, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 1987, at 169, 175.

64. See also *id.*

65. *GUIDE*, *supra* note 1, ch. VI.

66. *Id.* ch. VI, ¶ 1.

67. *Id.*

68. *Id.* ch. VI, ¶ 3.

69. *Id.* ch. VI, ¶¶ 11-27, 45-47. Of course, price cannot be determined in a vacuum. The *Guide*, in reviewing the option of tying pricing to competitor pricing, notes that:

It is therefore *advisable* to stipulate that the standard should take into account only prices for shipments that are comparable in quantity, *quality*, delivery, and payment conditions to the future supply contract, or that amounts should be added to or subtracted from the competitor's price in order to compensate for differences.

*Id.* ch. VI, ¶ 16 (emphasis added).

70. *Id.* ch. VI, ¶ 13.

71. *Id.* ch. VI, ¶¶ 15-18.

72. *Id.*

Another commonly used pricing method addressed by the *Guide* is a “most favored customer clause.”<sup>73</sup> The *Guide* suggests several different ways in which parties might incorporate a most favored customer clause into the countertrade agreement.<sup>74</sup> The *Guide* notes, for example, that the parties “may wish to indicate the means to be used to identify the most-favored customer,”<sup>75</sup> to “specify the date as of which the most-favored-customer price is to be determined,”<sup>76</sup> and to detail “any specially discounted prices (preferential prices) offered by the supplier to certain customers that should not be taken into account.”<sup>77</sup>

While the *Guide* discourages the parties from agreeing to agree on a price in the future,<sup>78</sup> it does set forth the parameters they might consider in adopting this pricing option. Examples given by the *Guide* include specifying a range within which the negotiated price must fall<sup>79</sup> as well as an agreement that the negotiated price meet certain standards as “competitive,” “reasonable,” or “world market”;<sup>80</sup> however, following its teaching that the parties must be specific and detailed in their agreements, the *Guide* suggests that the parties define these terms.<sup>81</sup> In one of its strongest positions on countertrade issues, the *Guide* understandably counsels that a countertrade party should exercise “utmost caution” in allowing price to be determined by the other countertrade party.<sup>82</sup>

Consistent with its teaching of identifying countertrade solutions, the *Guide* addresses the need to adjust the pricing of countertrade goods in long-term contracts.<sup>83</sup> The solution that it favors is to tie the price of the countertrade goods to an index.<sup>84</sup> All pricing issues are not, however, so simple that an adjustment in an index will solve the problem, particularly if the issue arises out of currency fluctuations. Thus, the *Guide* suggests the possibility of including a currency clause in the countertrade agreement to tie pricing into currency fluctuations.<sup>85</sup> Because currency issues are complex, this limited discussion<sup>86</sup> may leave the

73. *Id.* ch. VI, ¶ 19. The “most favored customer clause” is often also referred to as a “most favored nation clause.”

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The “most favored customer” pricing must, of course, be relevant to the countertrade goods in terms of quantity, quality, delivery, and payment conditions. *Id.* ch. VI, ¶¶ 16, 19; *cf.* *id.* ch. III, ¶ 55.

78. *Id.* ch. III, ¶ 58; *id.* ch. VI, ¶ 21.

79. *Id.* ch. VI, ¶ 22.

80. *Id.* ch. VI, ¶ 24.

81. *Id.* ch. VI, ¶¶ 15, 19, 21, 24.

82. *Id.* ch. VI, ¶ 27: “Utmost caution is advisable in [allowing the price to be determined by a countertrade party] since it leaves the determination of the price to a person who is interested in the outcome of the determination. In many legal systems an agreement of this type is not enforceable.”

83. *Id.* ch. VI, ¶¶ 39-52.

84. *Id.* ch. VI, ¶¶ 45-47. “In formulating an index clause, it is advisable to use an algebraic formula to determine how changes in the specified indices are to be reflected in the price.” *Id.* ch. VI, ¶ 45.

85. *Id.* ch. VI, ¶¶ 48-50.

86. The *Guide* deals with this issue in just three short paragraphs. *Id.*

parties unaware of all of the nuances and possibilities that could result from currency fluctuations in countertrade transactions.

## E. PAYMENT

The *Guide* focuses the discussion of payment<sup>87</sup> on linking payments in a countertrade transaction so that both parties obtain the benefit of their bargain. As the *Guide* recognizes, linkage is the central issue of all countertrade transactions, and the linking of payment is one of the strongest means to reach a linkage between the different contracts. The *Guide* notes that payment linkage may be driven by two issues. First, linked payments may be used where one of the parties may encounter difficulty in paying in the agreed currency.<sup>88</sup> Second, linked payments are used as security devices to secure other stages of countertrade transactions.<sup>89</sup> Following its theme of exactitude, the *Guide* stresses the need to “agree on the details of the linked payment mechanism in the countertrade agreement.”<sup>90</sup> The *Guide* then critiques alternatives to achieving payment linkage including: (a) retention of funds by the importer; (b) blocking of funds; and (c) use of set-off accounts. Each of these alternatives is briefly reviewed to give the reader a flavor of the *Guide*’s recommended framework for resolving these payment issues.

### 1. *Retention of Funds by Importer*

Under the retention of funds approach, the importer purchases goods from the exporter in advance of the fulfillment of a counterexport agreement in order to generate funds to pay for the counterexporter goods. Typically the importer retains the funds from the sale (possibly in a special account) to cover the cost of the export goods. This type of transaction is commonly referred to as an “advance purchase.”<sup>91</sup>

In an advance purchase transaction, the importer typically retains the funds until they are sufficient to pay for the goods that the importer desires to sell to the exporter (often plant and equipment). As the *Guide* correctly points out, “[a] consideration as to the acceptability of such an arrangement would be the exporter’s confidence that the importer will hold the funds in accordance with the countertrade agreement.”<sup>92</sup> Since the funds remain within the importer’s control, exporters do not favor this solution because the funds may become

87. *Id.* ch. VIII.

88. *Id.* ch. VIII, ¶ 2. This could occur, for example, due to central bank regulations in one of the countries involved in the transaction, or, in the absence of central bank regulation, there is simply a shortage of hard currency in the country.

89. *Id.* ch. VIII, ¶¶ 2, 4.

90. *Id.* ch. VIII, ¶ 8.

91. *Id.* ch. VIII, ¶¶ 9-13.

92. *Id.* ch. VIII, ¶ 10.

subject to claims of the importer's creditors as well as claims of third parties.<sup>93</sup> Nevertheless, if the importer and exporter agree to hold the funds in a special account, they must agree upon the terms and conditions (that is, the timing) of the release of the funds.

## 2. *Blocking of Funds*

The *Guide* discusses blocking of funds<sup>94</sup> in accordance with the method of using blocked accounts<sup>95</sup> and crossed letters of credit.<sup>96</sup> Both methods permit the importer to retain possession of the counterexport goods until the funds are secured. The *Guide* generally identifies the issues that the parties should consider in using a blocked account, including the question of whether an account of special legal status, such as a trust account or *compte fiduciaire*, should be used.<sup>97</sup> Also strongly encouraged is the use of a block account agreement.<sup>98</sup>

In using the crossed letters of credit technique, the exporter (which ships goods to pay for the counterexport contract) opens an export letter of credit to pay for the export contract. The export letter of credit then serves as a basis for opening a counterexport letter of credit to pay for the counterexport stage of the transaction. The *Guide* advises the parties to address several issues concerning the letters of credit, including the designation of the participating banks,<sup>99</sup> the instructions to be given to the banks for issuance of the letters of credit<sup>100</sup> and application of proceeds,<sup>101</sup> and the documents required to be presented to obtain payment.<sup>102</sup> As is common throughout, the *Guide* fails to note the costs involved in implementing a particular structure (in this case, the letter of credit costs). Similarly, it fails to note the circumstances under which the use of letters of credit might be required (as opposed to other more easily financeable solutions). For example, a Western buyer might be required to post a letter of credit in a countertrade transaction

93. *Id.* ch. VIII, ¶¶ 10-13

94. *Id.* ch. VIII, ¶¶ 14-37.

95. *Id.* ch. VIII, ¶¶ 19-30. The blocked account, escrow account, or trust account approach is a favorite of seasoned countertraders. This approach is the means by which the Export-Import Bank of the United States has agreed to finance U.S.-manufactured oil and gas exploration, development, and production equipment in the amount of US\$2 billion for Russian companies under the Oil and Gas Framework Agreement entered into on July 6, 1993, with the Russian Ministry of Fuel and Energy, the Russian Ministry of Finance, and the Russian Central Bank. Perhaps as a testament to the difficulty of countertrade, the Oil and Gas Framework Agreement has yet to be fully implemented.

96. *Id.* ch. VIII, ¶¶ 31-37.

97. *Id.* ch. VIII, ¶ 19.

98. *Id.* ch. VIII, ¶¶ 21-30. Anyone who has been involved in negotiating a blocked account agreement with an international financial institution will realize that the *Guide* makes this approach appear much more simple than it is in practice.

99. *Id.* ch. VIII, ¶¶ 31, 59.

100. *Id.* ch. VIII, ¶¶ 34-36.

101. *Id.* ch. VIII, ¶ 36.

102. *Id.* ch. VIII, ¶ 34.

with certain developing countries that require the use of letters of credit in export transactions as a means of exchange control.<sup>103</sup>

### 3. *Set-Off Account*

The *Guide*<sup>104</sup> contrasts a set-off account<sup>105</sup> with a blocked account by noting that a set-off account is a record-keeping mechanism although it may be administered by a bank.<sup>106</sup> Perhaps as a testament to the wide use of set-off and similar accounts in the Cold War trade era, the *Guide*'s discussion of set-off accounts is fairly comprehensive; however, it does not discuss the relationship of set-off to intercountry clearing accounts or to evidence accounts. The *Guide* notes that numerous national laws govern the use of set-off accounts and that contracts establishing the accounts are referred to by a variety of names including the *compte courant*, *cuenta corriente*, and *Kontokorrent*.<sup>107</sup>

The *Guide* points out that the basic premise of a set-off account is that payments are not actually made, but instead are set off against each other.<sup>108</sup> The *Guide* cautions the parties that they should consider any controlling laws<sup>109</sup> regarding set-off as well as other issues, including the timing of entries into the set-off account,<sup>110</sup> the imposition of balance limits,<sup>111</sup> and the liquidation of the accounts.<sup>112</sup>

## III. Using the *Guide*

The *Guide* can facilitate countertrade transactions only if it is used by countertraders. Users must, however, keep certain matters in mind.

### A. HOW TO APPLY THE *GUIDE*

The *Guide* is not a "how to" manual or road map of countertrade. Those looking to learn countertrade from the *Guide* will face a hopeless task. To the contrary, the *Guide* is more in the nature of a reference tool to be read and re-read by the practitioner in the progressive development of countertrade skills. Even seasoned countertrade experts find something in the *Guide* of use to them, particularly as they put together countertrade transactions new to them.

103. See note 9 *supra*.

104. *GUIDE*, *supra* note 1, ch. VIII, ¶¶ 38-57.

105. *Id.* ch. VIII, ¶¶ 39-40.

106. Sometimes also referred to as set-off account, compensation account, settlement account, or trade account. See *id.* ch. VIII, ¶ 39.

107. *Id.* ch. VIII, ¶ 43.

108. *Id.* ch. VIII, ¶ 38.

109. *Id.* ch. VIII, ¶¶ 38, 40, 43.

110. *Id.* ch. VIII, ¶ 46.

111. *Id.* ch. VIII, ¶ 53.

112. *Id.* ch. VIII, ¶ 56.

The *Guide* is a facilitator. It seeks to help countertrade parties structure successful deals by identifying the issues commonly encountered in countertrade transactions. The *Guide* provides various answers to countertrade issues, and it attempts to assist the parties in resolving the multitude of issues through negotiated solutions that are incorporated into the countertrade agreements. For some issues, the *Guide* counsels the parties on those alternatives that are not viable. On the other hand, the *Guide* does not seek to provide solutions to all issues. In many situations, the countertrade parties will realize the *Guide* has only hinted at the real issues, leaving the parties not only to articulate the issues, but also to find the solutions.

The *Guide*'s underlying premise is that no country regulates the entire universe of issues that arise in countertrade transactions.<sup>113</sup> Further, even the courts and authorities of those countries that attempt to regulate countertrade do not have much guidance available to them on how to resolve the various issues that may arise. Thus, the *Guide* adopts a self-help method of strongly suggesting to the parties that they reach negotiated solutions to these issues. Through negotiated solutions, the parties can lower the total risks of a transaction.

The *Guide* stresses a theme of reasonableness in transactions. Often countertrade transactions fail because the parties refuse to take reasonable and realistic positions with respect to issues unique to countertrade. The *Guide* explains most of the major issues in traditional countertrade transactions and defines various approaches the parties may take with respect to those issues. The *Guide* perhaps naively suggests that if the issues are defined, reasonable countertrade parties should be able to reach agreement on reasonable solutions.

The *Guide* may serve as precedent to the extent that it cautions the parties against taking certain positions on countertrade issues and instead suggests specific solutions to issues commonly encountered. Thus, the *Guide* may legitimize positions taken by the parties in a countertrade transaction. Further, the *Guide*'s emphasis on straightforward, clear-cut agreements should also aid the parties in structuring transactions.

Perhaps to the surprise of some, the *Guide* does not, and will not, have the force of law, nor can the parties incorporate the *Guide* into their agreements by reference. It is simply a document that attempts to provide the parties with legal guidelines in a difficult and complex area. To the extent that the parties wish to adopt a solution suggested in the *Guide*, they must ensure that the agreements are clearly written to reflect that approach.

As the *Guide* repeatedly points out, each deal is different and requires an independent analysis of most of the issues addressed in the *Guide*. The *Guide* stresses that a solution that works in one transaction will not necessarily work in the next transaction.<sup>114</sup>

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113. *Id.* ch. XII, ¶ 4.

114. *Id.* ch. I, ¶¶ 4-6.

## B. WHAT DOES THE FUTURE HOLD?

Although as the Cold War was coming to an end many countertraders predicted the demise of countertrade, it is far from dead.<sup>115</sup> If the countertrade community uses the *Guide*, it will gain a stature that one hopes will encourage the *Guide's* authors as well as UNCITRAL to continue its development. To date, the response has been, at best, mediocre.

While the *Guide* is the most significant work in recent years in the countertrade area, it is not the definitive resource on countertrade. Indeed, due to the nature of the countertrade business, including the secretive nature of many of its practitioners and their view that the structure of their successful deals is proprietary information, it is highly questionable whether definitive countertrade guidelines will ever be written. In the meantime, we are left with a very good resource that should be further developed.

The *Guide's* relevance in the real world could be enhanced in several ways. The *Guide*, for example, could be further developed and expanded into a uniform code of countertrade similar to the U.S. Uniform Commercial Code. Alternatively, UNCITRAL could first focus on expanding its countertrade definitions. Finally, UNCITRAL could consider expanding the *Guide* to cover areas that the current *Guide* addresses in a somewhat cursory fashion: project finance, offsets, and countertrade involving services and intangibles such as knowhow and technology.

## IV. Conclusion

The *Guide* is a substantial undertaking that reflects the significant thought and study that went into its development. It is well reasoned and provides valuable advice for resolving many key issues involved in countertrade. Virtually everyone involved in countertrade can learn from the *Guide*, and the countertrade community should use it as a means of facilitating their transactions. For if countertraders re-examine their standard forms and past approaches to countertrade in light of the *Guide's* teachings, they will undoubtedly see fruitful new approaches to agreement.

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115. Chrystia Freeland, *Russian Companies Strike Barter Deals*, FIN. TIMES, Nov. 22, 1995, at 1.

