

Aufsätze

Countertrade and the CISG

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A. Introduction

Countertrade has become a significant part of international commerce. It has been estimated that between 5 and 35% of total world trade involves countertrade.¹ However, despite this many of the legal consequences remain shrouded in mystery. This article will first address the different types of countertrade. Secondly it will deal with the importance of countertrade in international commerce. Finally we will address the legal rules which govern the relationship between the parties to a countertrade contract. This discussion will examine both domestic and international approaches leading to a uniform solution.

In general terms countertrade is a form of trade that involves the exchange of goods or services between two parties in lieu of monetary payment.

*“Countertrade transactions [...] 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.”*²

Within such there are different kinds of transactions. One of the most common types of countertrade is barter. Although a very old form of transaction it is far from an archaic legal instrument, rather it is a widely used contemporary phenomenon. Barter in a strict legal sense refers to a contract involving a two way exchange of goods where the supply of goods in one direction replaces the monetary payment of the supply of goods in the other direction.³

Barter has been used by governments and private entities alike. Up to the 1990s it was principally socialist and developing countries⁴ who engaged in barter as it was easier than a currency transaction. Today, it is especially China and the African states utilising barter at an intergovernmental level.

Allegedly a state owned Chinese enterprise has given Democratic Republic of Congo USD 9 billion of infrastructure projects – calculated as 2,400 miles of road, 2,000 miles of railway, 32 hospitals, 145 health centers and two universities.⁵ The Chinese enterprise in turn is said to receive 10 million tons of copper and 400,000 tons of cobalt.⁶ In the private sector Pepsi reportedly entered into a deal whereby it exchanged products for a small fleet of naval vessels – 17 submarines, a cruiser, a frigate and a destroyer.⁷

A second form is counterpurchase. This is a transaction whereby two parties of a purchase contract enter into an agreement to later conclude another sales contract in the

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¹ Rowe *Countertrade* (Euromoney Publications, London, 3rd ed., 1997) 3.

² UNCITRAL Legal Guide on International Countertrade Transactions (1992) 6, para. 1.

³ Rowe (see above fn. 1) 8.

⁴ Sumer/Chuah „Emerging Legal Challenges for Countertrade Techniques in International Trade“ 13(6) *International Trade & Regulation Journal* (2007) 111, 112.

⁵ <http://news.bbc.co.uk/2/hi/programmes/newsnight/7343060.stm> (last accessed 7 January 2009).

⁶ See „\$9 billion barter deal“, available at http://www.barternews.com/archive/04_15_08.htm (last accessed 7 January 2009).

⁷ <http://www.witiger.com/internationalbusiness/countertrade.htm> (last accessed 7 January 2009).

other direction.⁸ A fundamental feature of this type of transaction is that there are two or more legally distinct sales contracts. This is central to the purposes of our discussion.

In a buy-back transaction one party supplies a production facility and then agrees to subsequently buy products produced. This differs from a counterpurchase because the subsequent sale transaction may relate to any goods, in a buy-back scenario the goods are those produced. Buy-back transactions tend to be much longer term arrangements than barter or counterpurchase transactions.

A fourth type of countertrade transaction is an offset. Offsets usually involve the supply of goods of high value and technological sophistication. It also may include the transfer of technology and know-how. In a direct offset transaction the supplier agrees to incorporate materials, components or sub-assemblies which are procured from the importing country. In an indirect offset the purchaser requires the supplier to make counterpurchases in the procuring country. The counter export goods are not technologically related to the export goods. This is what distinguishes indirect offset from direct offset where the counter export goods are related and buy-back where the goods come from the production facility. Build Operate Transfer (BOT) arrangements are a variant of offset. Under a BOT a private investor is granted a concession to build a public sector facility and operate it on its own account for a number of years.

Finally, switch-trading is also sometimes considered a type of counter-trade, but it may be wiser to think of it as a special method of payment rather than a trading form. A switch trade occurs where a buyer does not actually pay for the goods it receives from the seller, rather it gives the seller a credit in a clearing account.⁹ The clearing account credit is sometimes offset against one held by the seller in favour of the buyer, but the arrangement is also regularly a triangular one involving otherwise non related parties.

B. The Importance of Counter-trade

Whilst it may be difficult to precisely quantify the value of countertrade there can be no question of its importance.

During the serious economic crises of the 1920s and 1930s a first wave of countertrade transactions developed. In the 1960s countertrading was most common among former socialist countries in central and eastern Europe because of the problems associated with their non-convertible currencies. This was reinforced in the 1970s with the oil crisis of that time. However, in the 1980s with the decline of oil prices, so too, there was a decline in the popularity of countertrade transactions. Finally in the 1990s following the break up of the Soviet Union countertrade continued to decline, almost as if it was too closely associated with Socialism. In recent times however there has been a resurgence of countertrade especially in countries where it was not considered part of a rejected economic system. It is fashionable again.

Reference has already been made to the USD 9 billion deal between a Chinese state owned entity and the Democratic Republic of Congo, this is one of many deals from these two

regions. Reported statistics involving other regions of the world are equally if not more impressive. It has been suggested that the US Department of Commerce reported in 2004 that in the United States roughly 30% of all international trade involved counter trade.¹⁰ Finally in Islamic countries banks and traders are very interested in countertrade because of the proscription on interest and wagering in Islamic law.

C. National Solutions

As countertrade especially in the form of barter contracts is a very old legal concept there are rules on barter contracts in all domestic laws. Nowadays it is common that a barter contract is equated with a sales contract. Treating each party as a seller of the goods which it is to transfer and as a buyer of the ones it is to receive. This is especially true of civil law countries.¹¹ Their comprehensive civil codes give clear answers on which rules to apply. But it is also found in common law systems. In the US the Uniform Commercial Code (UCC) specifically states that price may be payable in money, goods, realty or otherwise.¹²

Traditionally in English statutory law pedantic distinctions were drawn between a sales contract and a barter contract. The latter was not considered as a sale and therefore fell outside the ambit of any legislation relating to the sale of goods in the narrow sense. In reality the differences were quite subtle. This reality was recognised by the Common Law which treated both forms of contract as the same in arguably the most important aspect: that of the non-conformity of the goods. However, it was not until the Supply of Goods and Services Act (1982) that implied conditions as to title, description, quality, fitness and sample which correspond to those in the

⁸ Economic Commission For Europe *International Counterpurchase Contracts* (United Nations Publishing, New York, 1990), 3.

⁹ Cohen „Give Me Equity or Give Me Debt: Avoiding a Latin American Debt Revolution“ *University of Pennsylvania Journal of International Business Law*, (1988) 89, 105, fn. 117.

¹⁰ Sumer / Chuah (see above fn. 4) 113.

¹¹ See for example § 480 BGB (Germany): Rules on sales are to be applied correspondingly. Art. 237, 238 OR (Switzerland): Rules on sales are to be applied correspondingly (Art. 237). In case the party receiving the goods is dispossessed because of defective title or the goods are returned because of defects, the party which has incurred loss may choose between damages or restitution of the goods traded (Art. 238). An interesting solution has been chosen by the ABGB (Austria). Arts. 1045-1054 govern barter, Arts. 1055-1089 govern sales. Some of the provisions on sales state that the rules on barter are to be applied correspondingly. These are the rules on passing of risk in Arts. 1048, 1049 and the use of the goods in Arts. 1050-1051 (see Art. 1064).

¹² See U. C. C. Sec. 2-304(1); Edwards „Into The Abyss: How Party Autonomy Supports Overreaching Through The Exercise Of Unequal Bargaining Power“ 36 *J. Marshall L. Rev.* (2003) 421, 441, fn. 153; *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 219 F.Supp.2d 600 (2002); *Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill. App.3d 1088, 1098 (4th Dist. 1989).

sale of goods legislation were introduced into contracts for barter.¹³

The other forms of countertrade above do not give rise to any particular legal difficulties in private law as although linked together they are distinct contracts. The sales and/or service contracts are sometimes under the umbrella of a master agreement, memorandum of understanding, framework contract or other such arrangements.

D. The position under the CISG

In relation to the practical importance of counter trade transactions in international trade the level of legal discussions has been minimal.¹⁴ As just noted with reference to domestic legal systems, cases where distinct contracts can be discerned do not pose major problems. The CISG applies to counterpurchase, buy-back and offset as they comprise two or more legally distinct contracts of sale.¹⁵

Barter is a more controversial topic. Some legal scholars opine that the CISG does not apply to barter because it is not a sale, namely an exchange of goods against money.¹⁶ They reach this position by referring to articles such as Article 1 which presupposes a sale of goods; Article 14(1) sentence 2 which states an offer is only an offer if it expressly or implicitly fixes or makes provision for determining the price, and finally Article 53 which obliges the buyer to pay the price for the goods.¹⁷ These authors also rely on the predecessor of the CISG – ULIS – which was understood as to not encompass barter.¹⁸ Under ULIS this position was well predicated because a proposal was made to specifically include barter but it did not find the necessary support.¹⁹ However interestingly mixed contracts both providing for money and goods were generally covered if the money part of the remuneration was not completely insignificant.²⁰ A British proposal to exclude mixed contracts was similarly not supported.²¹ It appears that these positions have been adopted with reference to the CISG without proper consideration of their current appropriateness.

In contrast there are other scholars who share the view that barter transactions may well be covered by the CISG.²² Honnold, perhaps inspired by a UCC perspective, questions why the price must be paid in money. As the convention does not state any restrictions as to the price and as the parties have the freedom to shape their own transactions to meet their needs, barter is included except where the parties choose to exclude the CISG under Article 6.²³ Both Bridge²⁴ and Maskow²⁵

Milan, 1987) Art. 53 note 2.5; Bridge *The International Sale of Goods* (Oxford University Press, Oxford, 2nd ed., 2007) para. 11.19.

- ¹⁶ See for instance Ferrari „CISG: Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing“ 15 J. L. & Com. (1995) 1, 53; Piltz *Internationales Kaufrecht* (C.H. Beck, Munich, 2nd ed., 2008) para. 2-22 et seq.; Karollus *UN-Kaufrecht* (Springer, Vienna, 1991) 26 et seq.; Reinhart *UN-Kaufrecht, Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf* (C.F. Müller, Heidelberg, 1991) Art. 1 para. 2; Hoyer in Hoyer/Posch (eds) *Das Einheitliche Wiener Kaufrecht, Neues Recht für den internationalen Warenkauf* (Orac, Vienna, 1992) 37; Herber/Czerwenka *Internationales Kaufrecht, Kommentar* (C.H. Beck, Munich, 1991) Art. 1 para. 5; Magnus in J. von Staudingers *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG)* (Seiler/Walter de Gruyter, Berlin, 15th ed., 2005) Art. 1 para. 29; Winship in Galston/Smit (eds) *International Sales, The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender, New York, 1984) para. 1-22; El-Saghir in Janssen/Meyer (eds) *CISG Methodology* (Sellier, Munich, 2009) 370. El-Saghir notes that the Egyptian Civil Code distinguishes between sales and barter, however his analysis omits article 485 of the Egyptian Civil Code which states that the provisions governing sale apply to barter/exchange as far as the nature of exchange allows.
- ¹⁷ See for instance Schlechtriem „Requirements of Application and Sphere of Applicability of the CISG“ 36 *Victoria University of Wellington Law Review* (2005) 781, 787 et seq.; Loewe *Internationales Kaufrecht* (Manz, Vienna, 1989) 26.
- ¹⁸ Von Caemmerer in Dölle (ed) *Kommentar zum Einheitlichen Kaufrecht*, (C.H. Beck, Munich, 1976) Art. 56 para. 6; Herber in Dölle (ed) Art. 1 para. 7; Graveson/Cohn/Graveson *The uniform laws on International Sales Act 1967* (Butterworth, London, 1968) 52.
- ¹⁹ Ministry of Justice of the Netherlands (ed) *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2-25 April 1964, Acts and Records of the Conference* (Government Printing Office, The Hague, 1966) Vol I: Records, 48.
- ²⁰ Herber in Dölle (ed) (see above fn. 18) Art. 1 para. 7; Piltz (see above fn. 16) para. 2-24; Magnus in Staudinger (see above fn. 16) Art. 1 para. 30; Karollus (see above fn. 16) 25; Herber/Czerwenka (see above fn. 16) Art. 1 para. 5; Hoyer in Hoyer/Posch (eds) (see above fn. 16); Loewe (see above fn. 17); Reinhart (see above fn. 16) Art. 1 para. 2.
- ²¹ Ministry of Justice of the Netherlands (ed) (see above fn. 19) Vol II: Documents, 266 (Doc/V/Prep/16), Vol I: Records, 32.
- ²² Although Ziegel appears to imply the CISG does not cover barter transactions, he nevertheless states „[...] the permissibility of a tribunal applying the CISG by analogy deserves further consideration [...]“ and as such he can be counted amongst this group. See Ziegel „The Scope of The Convention: Reaching Out To Article One and Beyond“ 25 J.L. & Com. (2005) 59, 60.
- ²³ Honnold/Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer, The Hague, 4th ed., 2009) Art. 2 para. 56.1. See also Diedrich „Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG“ 8 *Pace Int'l L. Rev.* (1996) 303, fn 33.
- ²⁴ Bridge (see above fn. 15) para. 11.19.
- ²⁵ Maskow in Bianca/Bonell (eds) (see above fn. 15) Art. 53 note 2.5.

¹³ The Supply of Goods (Implied Terms) 1973 had already extended those implied terms into Hire-Purchase contracts.

¹⁴ However, at an early stage there was a thorough and detailed consideration of the issue by Lurger. See Lurger „Die Anwendung des Wiener UNCITRAL-Kaufrechtsübereinkommens 1980 auf den internationalen Taushvertrag und sonstige Gegengeschäfte“ *ZfRv* 6 1991, 415 et seq.

¹⁵ Schlechtriem in Schlechtriem/Schwenzer (eds) *Commentary on the UN Convention on the International Sale of Goods* (Oxford University Press, Oxford, 2nd ed., 2005) Art. 1 para. 18; Maskow in Bianca/Bonell (eds) *Commentary on the International Sales Law* (Giuffrè,

believe there is no reason to automatically exclude barter transactions from the application of the CISG. The latter author however suggests both interpretations are admissible and therefore advises parties to barter contracts to explicitly agree on the application of the CISG to avoid any misunderstandings.²⁶

Case law on this issue has been sparse. A 1989 CIETAC arbitration award applied the CISG to a barter contract.²⁷ In 2003 an arbitral tribunal in the Ukraine appeared prepared to apply the CISG to a barter transaction, had the matter not been time barred.²⁸ The time bar was founded on the United Nations Convention on the Limitation Period in the International Sale of Goods (1974/1980). The legal requirements for the application of this convention are exactly those of the CISG. In June 2004 a Russian tribunal also applied the CISG to a barter contract.²⁹ None of these arbitral awards appear to have felt the need to consider whether barter was excluded from the application of the CISG. However, in March 2004 another Russian arbitral tribunal had dismissed the application of the CISG to a barter transaction without further discussion on the sole basis that the transaction did not involve a price.³⁰ This short overview illustrates how important it is to discuss this issue more thoroughly as at present it is difficult to predict which law adjudication bodies will apply and why.

E. Solution

In our opinion there can be no question that barter contracts as well as the other forms of countertrade mentioned above fall within the scope of the CISG. This solution seems warranted on the following grounds.

I. Barter not necessarily excluded

It is conceded that the primary concern of the CISG is a sales contract in the formal literal sense. Articles 53 et seq explicitly speak of the buyer's obligation to *pay the price*.³¹ Article 78 appears to reinforce this interpretation by stating the duty to pay interest if a party is in arrears of an obligation to pay the price or any other (monetary) sum. However, we argue that there is no justification for „price“ to be limited to money, particularly in the context of an international convention. Price may be simply understood as a means of evaluating the equivalence of the two obligations.

The consequences of a literal interpretation of the CISG, which excludes barter, must be compared to the equivalent interpretation in domestic laws. As has been noted above domestic laws may well maintain a formal literal distinction as they ensure both are treated in the same manner at the end of the day. There is not necessarily the same consequence in an international context. Thus, in the end a barter falls under a totally different system than a counter purchase between the same parties on practically the same terms.³² The policy arguments that lead to equal treatment of barter and sales in domestic law should also prevail at an international level.

Furthermore, any distinction that relies solely on the notion of whether there has been an agreement upon the contract price in money terms is unnecessarily formalistic. For example arguing that a contract of sale exists when the buyer has an option to pay the purchase price in goods,³³ but that a straight barter will not be regarded as a sale is unconvincing. In both situations the parties at the time of contracting contemplate the buyer providing goods as remuneration. There are no logical grounds for the distinction between the two. Nor are there any logical grounds to distinguish between barter and the other forms of countertrade such as counterpurchase, buy-back and offset.

II. Consequences if the CISG does not apply

If one were to exclude barter contracts from the sphere of application of the CISG, this would necessarily mean that reference would be had to the otherwise applicable domestic law. Consequently it would be this law that would have to decide which set of rules applied to an international barter. There are two possible consequences. Although it is conceivable that a domestic court relying on the equal treatment policy of barter and sales as it is laid down in almost all domestic laws would apply the principles of the CISG, it is more probable than not that the court would apply domestic law solutions. Once the contract is within the scope of domestic law it is likely to remain there, and thus the provisions of the domestic sales law will be applied to an international barter contract. This will definitely not result in a uniform approach and may easily lead to unpredictable results.

²⁶ Maskow in Bianca/Bonell (eds) (see above fn. 15) Art. 53 note 2.5.

²⁷ China International Economic & Trade Arbitration Commission (CIETAC), 13 June 1989, CISG-online 865.

²⁸ Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, 10 October 2003, CISG-online 1268.

²⁹ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 17 June 2004, CISG-online 1240.

³⁰ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 9 March 2004, CISG-online 1184.

³¹ There are other articles that also use the word „price“. Article 14(1) sentence 2 is of particular note.

³² Lurger (see above fn. 14) 418.

³³ Von Caemmerer in Dölle (ed) *Kommentar zum Einheitlichen Kaufrecht* (see above fn. 18) Art. 56 para. 6; Sealy in Guest (ed.) *Benjamin's Sale of Goods* (Sweet & Maxwell, London, 7th ed., 2006) para. 1-038.

III. Open questions

Even if one comes to the conclusion that the CISG applies to barter contracts there may still be some questions open for discussion. The first relates to Article 14(1) sentence 2 and its requirement to either the contract “expressly or implicitly fixes or makes provision for determining [...] the price.” If the parties provide for the reciprocal duty to deliver goods is that enough for the purposes of this provision?

Article 14(1) sentence 2 seeks to ensure that the value of the reciprocal duty can be determined. This happens in any barter contract. The parties themselves may place a certain value on their respective delivery obligations. They may do this overtly by mutual obligations to secure the transaction by letters of credit. These by definition must have a monetary value. But such explicit evaluations are unnecessary; the mere fact that the parties have agreed on the delivery of goods means the reciprocal duty can be ascertained. This is the gist of the Article 14 requirement. As a consequence there would be no need to refer to Article 55 in a barter transaction scenario at all.

Under domestic sales law, especially civil law countries, the remedy of price reduction in the barter context is often discussed.³⁴ However, under the CISG this question is of much less importance than under domestic sales law where damages depend on fault.

Finally, one might question what happens if one party's performance is delayed. Can the other party rely on Article 78 and claim interest because in the barter setting every party is both a seller and buyer? This question should be answered in the negative. In a barter contract parties should primarily be treated as sellers in respect of obligations and buyers in respect of rights and remedies.³⁵ Thus, the injured party should be restricted to making a damages claim as buyer under Articles 74, 75 or 76.

F. Conclusion

This short piece has introduced an as yet largely unexplored but extremely important aspect of the CISG. The question of whether barter is within the scope of the CISG has been asked since its inception, but a thorough and reasoned answer has not been received. The question appears to have been too quickly dismissed with arguments of form over substance – arguments which use technical interpretation, rather than a careful consideration of merits and benefits. An international convention is a living document; it must evolve with the needs of the international community it serves.

³⁴ Lurger (see above fn. 14) 426 et seq.

³⁵ See for instance Art. 237(2) OR (Switzerland), Art. 521(2) Civil Code (Georgia); Art 538 (2) Civil Code (Belarus); Art 6.432(2) Civil Code (Lithuania); Art. 585 Civil Code (Yemeni).

Vertragsmäßigkeit der Ware bei Divergenz öffentlich-rechtlicher Vorgaben

Eine Untersuchung unter besonderer Berücksichtigung der Systematik des Art. 35 CISG

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I. Einleitung

Unterschiede in nationalen Rechtsordnungen bedeuten Hindernisse für den grenzüberschreitenden Warenverkehr, die Geltung des UN-Kaufrechts (CISG) hingegen soll Rechtssicherheit schaffen.¹ Für eine vertragsschließende Partei kann der Vorteil der Geltung des CISG allerdings gemindert werden, wenn sie trotz Anwendbarkeit des CISG öffentlich-rechtliche Vorgaben beachten muss, die von den Vorschriften in ihrem Heimatland abweichen. Öffentlich-rechtliche Vorgaben,² die für Waren und Produkte bestimmte Eigenschaften vorschreiben (Stichworte: Produktsicherheit und Lebensmittelrecht),³ divergieren zum Teil von Rechtsordnung zu Rechtsordnung. Zur Vertragsmäßigkeit der Ware gehört es, dass dem Wiederverkauf bzw. der Verwendung nicht öffentlich-rechtliche Vorschriften entgegenstehen,⁴ freilich unter der Voraussetzung, dass die Vereinbarkeit mit jenen Vorgaben zur geschuldeten Leistung gehört. Im länderübergreifenden Rechtsverkehr stellt sich die Frage, nach welchen Standards

sich die Mangelfreiheit der Ware richtet, wenn die Anforderungen insoweit nicht vertraglich festgelegt wurden: nach den Vorgaben des Verkäuferstaats, des Käuferstaats oder, wenn

¹ Zu der Akzeptanz des CISG als vereinheitlichtes Recht siehe Magnus, ZEuP 2006, 96, 98; zu der Bedeutung des UN-Kaufrechts und den Vorteilen siehe Piltz, Internationales Kaufrecht, 2. Aufl. 2008, Rn. 1-26 ff.; zu aktuellen Entwicklungen siehe Magnus, ZEuP 2008, 318 ff. und Piltz, NJW 2009, 2258 ff.

² So die Formulierung des BGH; siehe BGHZ 129, 75, 81 = NJW 1995, 2099, 2100.

³ Schlechtriem, IPRax 2001, 161.

⁴ BGH NJW-RR 2005, 1218, 1219 = IHR 2005, 158, 159 m. Anm. Piltz = RIW 2005, 547, 548 = EuLF 2005, I-148 m. Anm. Sauthoff; Saenger, in: Bamberger/Roth, BGB, Bd. 1, 2. Aufl. 2007, Art. 35 CISG Rn. 5, 6a; Magnus, ZEuP 2006, 96, 115. Da es vor allem um die Handelbarkeit der Produkte geht, kommt es nicht darauf an, ob die öffentlich-rechtlichen Vorgaben wirksam, anfechtbar oder nichtig sind; Schlechtriem, IPRax 1996, 12, 13.