

International Countertrade – Rules and Practices

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Abstract

In modern international trade, companies use countertrade as a strategy to make transactions more flexible. This strategy allows the subjects involved to obtain, through reciprocal commitments, additional benefits that could not be obtained by means of conventional transaction (i.e. the purchase of goods at a specific price)

I. INTERNATIONAL COUNTERTRADE

1. International Countertrade and Conventional International Trade: Differential Features

In a commercial background and, especially, in international trade, the term “countertrade” stands for a trading method that differs from standard trading methods basically in its finality. The element that distinguishes countertrade operations is the undertaking of commitments, that usually have the function of creating an added value for the economy of the countries involved in the transaction, and that, in most cases, is a proof of co-operation between the parties. Therefore, we are not talking about a “pure” exchange of goods for price; the parties involved undertake additional (countertrade) commitments. These commitments can differ widely and can be determined by the parties’ negotiation power (see below). If we consider “condition” in a technical or legal sense, countertrade is not a conditioned method of trading, condition not being a characteristic element of the transaction, as the fulfilment of it does not depend on a future uncertain situation to happen.

Countertrade is not an altruistic or unselfish way of trading, nor it is a form of the so called “Fair Trade”. On the contrary, the lucrative purpose of the companies that use this method is unquestionable. Neither do we talk about trust-based contracts but about co-operation-based trade. It has been noted that countertrade is a way of trading that relies on hostage-based contracts, by which the firms can have a guarantee when assuming risks that are inherent to international trade. This way is particularly adapted to trading with developing countries, as it implies obligations for both parties (both get benefits from the fulfilment of the transaction)². The boom experienced by this method of trading in the 80s lead the American Department of Commerce to estimate that, in the year 2000, half of the international commercial relations would be countertrade. People that use this method, however, are less optimistic. It must be taken into account that most countertrade operation involve some secrecy, not only because they are part of the company’s strategy, but also due to the risk of violation the rules for fair competition (see below).

2. Functions of Countertrade in International Trade

Countertrade is not a completely “new” way of trading, although modern countertrade operation cannot be compared with old barter operations when money did not exist. Countertrade implies money and the technical concepts of “price” and “payment”. Practices have shown that compensation has taken different forms in international trade, depending on the needs of the companies that use this method- and has regularly been used to relaunch national economies. During the 70s and the 80s, two decades that were defined by a shortage of hard currency, countertrade was used to establish commercial relationship that otherwise could not have been carried out. The different modes of transactions, such as countertrade and clearing agreements between governments (together with clearing accounts) that aimed to reach a balance between the value of purchase and re-sales, became more popular during this period. The main purpose of these operations was to encourage or promote commerce.

In the present day, however, controlled economies have been substituted by deregulation and privatization in a global context of increasing competitiveness. With this background, importer countries tend to increase their productiveness and their marketing abilities as well as to decrease their budget deficit and public sector expenses. It is increasingly more usual, then, that the commitments the foreign exporter undertakes take the form of transfers of manufacturing experience or knowledge, creation of local employment and acquisition of new projects and investments for the exporter³. Finally, countertrade can be used to reduce or eliminate the negative consequences of the international loan system which governments of poor countries adhere to when importing basic products, that only leads to a progressive increase of their external debt.

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² A hostage-based contract can lead to a trust-based contract or to a more conventional kind of commercial exchange. See, Various Authors: “A Note on Countertrade: Contractual Uncertainty and Transaction Governance in Emerging Economies”, *Journal of International Business Studies*, 1999, Vol. 30, pgs. 189-202.

³ Cf. M. Rowe: Countertrade. 3rd ed., Euromoney Books, London, 1997, 20-21. For an analysis of the economic and market policy context in countertrade, specifically focussing on the Australian case, see P.W.Liesch: *Government Mandated Countertrade*, Avebury, England, 1991

Countertrade can also be used as an instrument that allows countries that have historically acted as lenders to retrieve their confidence in the credit capacity of debtor countries by means of the so called “credit collateralization”, which consists of using the counterpart goods as a secondary collateral measure. This economic theory is so called because both lender and debtor are indebted to each other, as counterpart goods are used to secure the initial import credit⁴.

II. COUNTERTRADE OPERATIONS

1. Countertrade Modalities

Classifying countertrade transactions is not a simple task, as they are business strategies that have been used in different moments of the past and with different purposes, always depending on the economic and political context of the poor country or countries involved. Since countertrade broke in international trade, it had taken many different forms. We can even talk about different generations of countertrade operation: those of the 60s, the 70s and the 80s. Another form should be added to these which is characteristic of the 90s, a decade in which offset and barter operations in agreements between governments played a key role. Three forms of countertrade operations are usually identified: commercial, industrial and financial. There are also several modalities of commercial countertrade operations: barter, clearing agreements between governments and the different kinds of parallel purchases⁵. The second modality usually implies buy-back agreements as well as offset agreements, which are also known as industrial co-operation agreements. These two forms are specifically included within industrial countertrade as they are frequently used with the purpose of exporting or importing technology. As an example of financial countertrade we find swap negotiations, which consist of the exchange of money so that the companies that perform it get better interests in financial markets⁶.

2. Main Features of Countertrade Operations

The countertrade commitment is the characteristic element in a countertrade operation. Its importance in a specific transaction depends on the method chosen by the parties to carry it out. It can be a firm commitment or a best-efforts commitment. The latter only guarantees a good predisposition to reach an agreement. Failure to reach it is not considered a breach of the commitment. The content of the commitment differs widely: it can consist of a parallel purchase of some specific goods or services (offset). However, modern countertrade operations usually imply more complex commitments so that their fulfilment brings an added input for the importing country. In these cases, the commitment entails the building of factory, the launching of a product on to the international market, the installation of a telecommunication network, etc. The “countertrade ration” in another element of countertrade transactions, by which the parties establish the amount (percent) of the value of the operation, that will be offset through the undertaking of certain commitments. Both are typical elements of parallel purchases, which do not exist in modern offset operations. These operations are usually seen from an industrial co-operation point of view rather than as a consideration as a strict “return” for the initial import.

3. Subjects Implied in Countertrade

Countertrade is used by firms and Governments of countries all around the world. Capitalist and controlled-economy countries, developing and developed countries (DCs and DedCs hereinafter) take part in countertrade operations. When controlled-economy countries (such as the countries in the former socialist area) are implied in countertrade operations, the government or some government firms establish commercial relationships with private firms, mostly multinationals. Besides, countertrade operations in which several parties are involved can take place in a wide range of contexts. One of them occurs when trading houses (responsible for launching the counterpart goods on international markets) take part in the operation. They intervene in virtually every kind of parallel purchase, from the beginning (plurilateral operations, in which more than two parties take part), or at a latter stage. In either stage they receive a *disagio*, the amount of the commission plus the difference between the price of the counterpart goods and the lowest price they had been sold at in international markets, as they can be low quality products. The intervention of third in countertrade operations makes it even more difficult to classify them and define the legislation under which they are to be governed. This is not only due to the existence of more parties in the relation, but also to the different form of intervention that takes place whenever one of these agencies is implied.

⁴ See, Marin, Dalia, and Monika Schnitzer (1995): *Creating Creditworthiness Through Reciprocal Trade*, SFB 303, University of Bonn, Discussion Paper No. A-453.

⁵ It is important to clarify the difference between commercial and economic-financial countertrade, as the latter takes place in the balance of payments of companies that are in contact one they fulfilled a countertrade operation.

⁶ See, C. Rosell I Piedrafita: *Aspectos jurídicos del contrato internacional de Swap*, Barcelona, Bosch 1999; and, as a summary, N. Molina Jódar: “El swap en el comercio internacional”, *Derecho de los Negocios*, noviembre, 2001, pgs. 1-8.

Finally, financial firms also play a relatively important role in these operations, either as a consequence of the use of securities (such as documentary credits) or because of the granting of export credits or loans to the firms involved.

III. MAKING UP OF A COUNTERTRADE OPERATION

1. Relevance of the Parties Negotiation Power

One of the most important and complex stages of a countertrade transaction is the negotiation phase, during which various meetings take place between the parties, by which they put in common the interests that move them to perform the transaction. The final configuration of the operation is largely determined during this first stage, in which the negotiation power each party –which is determined by several factors- plays a key role. Among these factors, the greater negotiation power of one of the parties can be highlighted. This is usually related to the kind of firm. If the transaction takes place between a private firm and a DC state-controlled firm, then the latter tends to be in a weaker position if the compensation object is an indispensable good for the DC domestic economy. However, this position must not be measured strictly in terms of the (good or bad) economic position of the firms or countries involved, as it cannot be assumed that the DC government or the DC-state controlled firm are in a weaker position with regards to the other party.

This position can only be confirmed after the analysis of the circumstances surrounding the specific negotiation. We could consider the case of the oil-exporting countries as an example. These countries have a strong negotiation power that can even lead to affirm that they are in a stronger position to decide the negotiation conditions that are going to govern the specific transaction. The previously assumed identical negotiation power of the firms puts them under no obligation to accept specific contracts or clauses, as it happens in contracts of adhesion, etc. However, there is always a possibility that some clauses be imposed unilaterally if the greater negotiation power of one of the parties is considered to have a significant influence for the configuration of the specific operation. This would affect such aspects as the countertrade modality to be used, the kind of products that will be purchased in return, etc.⁷. Although the concept of economic public order tends to be of a national scope, some principles should be accepted in international trade or, at least, by the States involved. These principles should be taken into account by a mediator, a troubleshooter and an arbitrator, so there is no chance the arbitral award is not accepted in another country⁸.

2. Initial Phases and Their Documentation

A. Preparatory Documents and Letters of Intent

One of the most characteristic elements in countertrade operations is their complexity. The parties exchange various documents, letters, etc., that can cause the negotiation to take a long time. In international trade, letters of intent is the name given to the documents the parties exchange and in which they state their offers on the business each of them is interested in. At a first glance, these documents do not seem to have any legal relevance, as they are not binding for the parties. Nevertheless, its legal value is related to the way the letter is drawn up, as after this stage, it can be resembled as a pre-contract rather than a preliminary document. The term "letter of intent" is used by operators in international trade with so many meanings that it adds a certain difficulty to the evaluation of the commitments undertaken by means of the document. These letters can be used to confirm the seriousness with which negotiations are approached, as a framework agreement that allows to reach partial agreements or as contracts (partial contracts, as they lack certain mentions)⁹. In international trade, this variety of purposes with which a letter of intent can be drawn up may be the origin of certain ambiguities and contradictions which sometimes the parties involved in the transaction they consciously to introduce. In a strict legal sense, letters of intent are pre-contractual documents by which one of the parties (i.e., unilaterally) compromises to reach an agreement with the other. In certain circumstances they can be agreed by both parties.

⁷ For a definition of a "weaker party" regarding the different "negotiation power" of the parties involved in a specific transaction (without considering the social or economic position, but only the general conditions imposed by one party to the other) and its control from the forum's public order point of view, see S. Alvarez González: *Condiciones generales en la contratación internacional*, La Ley, Madrid, 1992, pgs.38 and following.

⁸ In countertrade, the idea of public economic order is more useful than the approach to the mandatory norms, at least within the Private Law. The absence of mandatory in the contractual law (or its relatively significant role) gets balanced through the concept of public order. This avoids obtaining results that would be incompatible with concepts that are common to traders. See below for more details.

⁹ See. R.B. Lake & U. Draetta: *Letters of intent and Others Precontractual Documents. Comparative Analysis and Forms*, Second ed., Butterworths, USA. 1994, pg. 12 and following.

It is a common practice, however, that the parties use letters of intent at the negotiation stage as a means of defining their commitments rather than as texts with legal value¹⁰.

B. Other Documents

The complexity inherent in these operations makes the use of protocols (i.e. frame agreements) frequent. These agreements aim to set up the terms by which the negotiations will be governed. The legal value of these agreements (agreements to agree) will depend, however, on their content, as they can even be considered actual contracts (such as normative contracts) if they state the key elements of every reference contract or agreement which lack any binding power. Nevertheless, protocols, which are usually present in these operations, may be drawn up in different moments, and their content and legal relevance may also differ. When this protocol is elaborated at the beginning of the operation it is called "memorandum of understanding". This is a reference framework, in which parties set the steps they want to follow to perform a countertrade transaction. Basically, the aim of the protocol is the setting of the instructions to proceed.

However, in other cases, the protocol already contains the countertrade commitment. Often, these are cases in which the parties (and the DedC in particular) do not want the initial contract (purchase, supply or technology transfer contracts) to state that the fulfilment of the contract is conditioned on the fulfilment of a second contract to which the first one is linked. In such cases, the countertrade commitment is defined in the protocol, that becomes not only an "agreement to agree" or "frame agreement". Its legal value will depend on how it is drawn up; it can even be a pre-contract if it includes the basic elements of a contract (consent, legal consideration and object).

Finally, the protocol can also be drawn up at the end of the operation, once the two independent agreements between the parties have been reached. This is frequent in parallel purchases, in which the parties set the purchase and counter-purchase commitment they undertake in two separate, distinct documents. In these cases, the parties do not wish any of the documents to contain any reference to each other. Nonetheless, a final protocol is drawn up that aims to define the link between both agreements, which seem to be independent one from the other (see below).

3. Execution Phase

In international trade, it is difficult to pinpoint the exact moment in which a countertrade operation is born, as the parties begin the operation (through the exchange of documents and other material, etc.) even before setting the elements required according to the traditional Contract Law. The fulfilment of the transaction is not a key stage either, as the subjects involved often pact the possibility of getting an extended dead line to fulfil the agreement, which is not considered a breach. This is another feature of countertrade operations that shows the modifications suffered by Contract Law, which focuses on the contract formation and execution. This change has also affected the usual means by which dispute settlement is approached in international trade. More flexible ways of settling disputes are now more frequently used. Among these ways, we find mediation, conciliation and negotiation between parties, which add to the more traditional ways of arbitration and judicial means¹¹. These operations are carried out by firms and governments of distant places of the world, with totally different legal backgrounds, not only with regards to commercial relationships and regulations, but also in the use of dispute settlement. The main punishment in this kind of operations is the discredit that a firm might earn among the other firms if it fails to fulfil its commitments repeatedly.

IV. LAW REGIME IN COUNTERTRADE OPERATION

1. Structure of Countertrade Transactions

A. Co-operation as Part of the Consideration

It is proved that in modern international trade, the benefits obtained by the parties does not always come from the mere exchange of goods for money. Instead, they have to undertake certain additional obligations to obtain additional profits. In these business relations, which are different from the classic "pure exchange" ones, trust and co-operation duties are given further relevance¹².

¹⁰ See the work mentioned in note 9 for an approach to the letters of intent's legal value and the liabilities that can arise from them.

¹¹ For information on the change and evolution experienced by arbitration (its new role in a new culture of international arbitration, characterized by a more interactive approach that guarantees an actual communication between the parties that allows them to bring together their expectations), see, B.M. Cremades: "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration", *Conflicting Legal Cultures in Commercial Arbitration. Old Issues and New Trends*, S.N. Frommel & B.A.K. Rider (eds.), Kluwer Law International, The Hague, 1999, p.168.

¹² As it has already been noted, countertrade's general characteristics are suffering changes as a consequence of the increasing influence of concepts such as reciprocity and mutual benefit. See C. Guyot: "Countertrade Contracts in International Business", *International Lawyer*, 1986, Vol. 20, No. 3, p.959

This modern contractual framework is a consequence of the changes introduced in the law as a result of the different point of view through which business relationships are analyzed nowadays. These relationships require the parties to undertake certain commitments to perform the transaction. Countertrade operations show better than any other international trade relationship that both parties intend to undertake commitments beyond the simple exchange of goods for money (see below). It can thus be stated that co-operation is part of the consideration, as is already provided in some European legislations, in which the term "multilateral contract" is used to refer to those contracts in which both parties obtain their respective benefits not from a mere exchange but from the establishment of an organized co-operation¹³.

B. Analysis of the structure given by the parties involved in the operation

The continuous adaptation of countertrade operations to the interests of the parties involved presents significant benefits for the parties, as it allows them to adopt the formula they consider more convenient (within the boundaries imposed by mandatory rules). At the same time, however, this adaptation makes it increasingly difficult to determine its legal regulation, as the analysis of its particular features and its preparation and negotiation become more complex. Operations can be designed in different ways by the parties, which will also lead to different classifications. Frequently, the purpose of the participating parties or governments is not just the purchase of a specific good or service, or the installation of a computer or telecommunications network. They also want the exporter to undertake some commitments aimed to generate an additional benefit to the importer's domestic economy (some examples are: building of an industrial plant, installation of a wide computer network, creation of a hotel chain or distribution of the importer country's traditional products in the international market).

For all these reasons, a countertrade operation can be set up in multiple ways. Firstly, several commitments can be undertaken by means of just one contractual relationship. It takes the form of one "core contract" followed by a multiplicity of independent society or contractual relationships that make up the operation as a whole. The first contract is a mixed contract with multiple considerations that includes the co-operation element. This structure is consciously used in offset operations which usually consist of a protocol which sets the procedure rules and a contract with the tasks and commitment undertaken by the parties.

Secondly, if the specific countertrade operation is organized in two documents, to which a protocol is added, we talk about a single but complex contractual structure. Depending on how independent are those two contracts, we can even consider them to be separated contracts, in which case we would talk about a plurality of contracts instead of a unity of contracts.

To reach this (i.e., to unlink these reciprocal relationships), a complex negotiation structure is usually followed in which a multiplicity of elements are used. This makes it difficult to consider the operation to have a single legal structure. In these cases, it is frequent to draw up three documents in three different phases. The first one is a "traditional" contract, with the usual references included in any standard contract and in which the parts, the objects, and the consideration are specified. The second document is a framework agreement or protocol whose contents may differ depending on the moment it was drawn up and the purpose of the parties which draw it up¹⁴. In these cases we talk about a complex negotiation structure, although the contract may still be a single contract with mixed consideration. It is necessary to note, however, that the existence of a unity or plurality of contracts depends basically on the specific agreements that the parties reach and the specific clauses included in the contract.

Nevertheless, the forum's public economic order can be the tool that allows us to analyze the link between the initial exportation and the countertrade commitment, especially in cases where such link is not specifically expressed (i.e., there are no clear clauses that define that link, because one of the parties –the one with greater negotiation power- did not wish to state it). If that be the case, it must be taken into account that the public economic order does not allow the parties to conceal the unitary purpose of the operation.

C. Countertrade Operations as Contract Sets

¹³ See L. Díez-Picazo & A. Gullón: *Instituciones de Derecho civil*, Vol. T/2, Madrid, Tecnos, 2nded., 1998, p. 28. This kind of contracts is expressly included in the Italian Civil Code of 1942, as it is in other codes influenced by this, such as the Portuguese Civil Code of 1966 and the Peruvian Civil Code of 1984.

¹⁴ If the protocol is drawn up after the celebration of the first contract and the countertrade contract it aims to establish the link between both, which are apparently independent. If it is drawn up at the beginning of the operation, it usually includes the countertrade commitment.

As it has already been noted, countertrade operations can take different forms with different legal transcendence, for the benefit of the parties. However, no matter if it is a complex contractual structure or a mixed contract, the operation as a whole produces multiple contracts which aim to fulfil countertrade commitments or obligations undertaken. They are executive contracts (subsequent contracts) whose consideration is taken from the core contracts. A complete countertrade operation can be the source for multiple types of contracts: contract groups, chains or networks, or associative contracts. It is therefore necessary to determine the responsibility limits accurately in certain cases, e.g., a breach of contract. Although these executive contracts are independent from the initial agreement, it is necessary to check if they also affect the parties in terms of responsibility for the breach of a purchase or payment commitment previously undertaken. It is therefore necessary to determine if the privity of contract principle is violated and if the exception of non-performance can be invoked in case any of the commitments included in the contracts is not observed.

The existence of several operation forms implies several different relations between contracts. It is therefore necessary to specify the responsibility limits to established between them. The analysis of countertrade transactions becomes harder when the operation is the origin of a contract network rather than a contract group, as contract networks, have no core". The links between the contracts that form them are less clear and appreciable. There is a connection between them, but that connection lacks a central point, as many autonomous aspects may exist¹⁵. Within this context, it is necessary to determine to which extent the contracts are linked and to which extent there is a chain of responsibility and the ineffectiveness of a contract may be transmitted to the others, as none of these effects is unlimited. The identification of the structure of the overall operation, which is set up by a multiplicity of contracts, that make the basic countertrade operation, has important legal consequences.

In Patrimonial Law, the different legal systems consider that contracts have a certain autonomy and unity and, in particular, some specific elements and consequences. Concepts such as the privity of contract and the possible transmission of the contract ineffectiveness are aimed at cases in which the existence of a unity of contracts can be confirmed. In Compared Law and, specifically, the French legal system, a responsibility notice is contemplated when dealing with contract groups¹⁶. In the Spanish legal system, the consequences arisen from the existence of different contractual structures are not widely recognized neither in the legal field (with the exception of direct action in the field of consumption), nor in the jurisprudence or in the doctrine fields.

2. Lack of Specific Regulation for Countertrade Transaction

There is no specific regulation that governs countertrade, neither at a local nor at an international level. In the first case, governments in some countries have used countertrade as a temporal strategy to re-launch their economies in times of recession or crisis. This is why countertrade has become compulsory under certain national governments (Colombia, Indonesia, Australia, etc.), as economic rules aimed to guide their economies. These regulations are contingent and usually modified when preferences or political orientations change. They do not usually include a complete regulation for these operations, nor do they offer an answer to many of the questions arising both at local and international levels. These mandatory rules are usually of an economic orientation and are aimed to guarantee the fulfilment of the country's economic, financial and foreign-matters measures. The following are examples of some of these rules: some countertrade operations need to be approved by the government; the importation of certain kind of goods can only be carried out by means of some specific countertrade transactions; countertrade is *the* only way to offer certain goods; goods obtained by countertrade have to meet certain origin requirements; evidence account can only be used under specific conditions; the acquisition of certain goods can only be carried away by meeting the countertrade commitment up to a specific extent; an authorization from the government has to be provided in order to link payment commitments that limit the payment in the country's currency; or, finally, that some specific financial conditions are required for the payment¹⁷.

¹⁵ For an application of the "contract network" theory to countertrade, see B. Fletcher: "Network Theory and Countertrade Transactions", *International Business Review*. 1996. Vol. 5, n^o 2, pgs. 167-189.

¹⁶ The French legal system distinguishes between contract groups, contract sets and contract chains. The first contract comprehends the other two. A contract group consists of two contracts which are linked by identical obligations. A contract chain consists of several contracts linked by the same object. Finally, a contract set consists of a plurality of finished contracts for the fulfilment of a global economic operation which are linked by an identical cause (that is, a common purpose). For information on these differences and their consequences will regards to the principle of relativity of contracts, see, M. Bacache-Gibelli: *La relativité des conventions et les groupes de contrats*, L.G.D.J., Paris, 1996, p. 3.

¹⁷ See, *Legal Guide...*, op. cit., p. 168, paragraph 32.

Legislation to regulate countertrade at an international level does not exist either. The *Legal Guide on International Countertrade Transactions* by the UNCITRAL (1993) is just a reference text which offers orientation for companies that decide to use countertrade¹⁸.

3. Applicability of Specific International Conventions

A. UNO Convention on the International Sale of Goods (Vienna, 11th April 1980)

The authors have made an effort to prove the applicability of this convention¹⁹ to countertrade operations and, in particular, to the different modalities of parallel purchases. However, "modern" operation modalities performed in international trade cannot be subject to classical contractual schemes. For this reason, this Convention does not offer an appropriate answer to the special aspects of these transactions, as it was drawn up with the purpose of solving those issues arising from standard (international) sales contracts. On these contracts, the parties undertake their respective commitments on the delivery of goods and the payment of the corresponding price. Neither the aim and purpose of a countertrade operation (from an economic point of view) nor its social function or the objectives the parties have tried to reach by its fulfilment can be analyzed as simple sell-and-purchase relationships. It is therefore reprehensible that some doctrines try to divide and classify countertrade operations with the aim or categorizing them into more popular (typical) categories within different national legal systems as they do not take into account the features and singularities of these operations²⁰. It is hence advisable to analyze the applicability of international conventions with regards to the functionality of countertrade operations and not in the opposite way, trying to artificially classify them according to the texts, as happens when the applicability of the Vienna Convention to countertrade is considered.

B. Applicability of the Regulation 593/2008/EU on the Law Applicable to Contractual Obligations (Rome I)

From the perspective of the European Private international Law, countries in the European Union are part of the Rome I Regulation on Law Applicable to Contractual Obligations²¹. The laws specified in the Regulation apply whether or not they are the laws of a contracting state (art. 2). It is a Regulation on international contracts in the wider sense of the term. As it is already known, this Regulation deals with dispute settlement rules, in which the private autonomy is the main element that determines the law applicable to the contract. Thus, contracts are governed by the law chosen by the parties (art 3). The main difficulty that arises from the application of this Convention to countertrade operations is to determine whether we deal with a single contract or a plurality of contracts. The usefulness of the Rome Convention to offer solutions to countertrade operations can be questioned due to a number of reasons that have to do with the dynamicity of such operations in countertrade. On one hand, it is important to note the frequency with which the parties settle disputes arising in countertrade by means of non-judicial proceedings (arbitration and other alternative ways of dispute settlement such as conciliation or mediation)²². It is therefore necessary to evaluate if those ways of settlement (the two latter in particular) are compatible with the application of this Regulation.

On the other hand, additional problems arise from the analysis of the feasibility of the solutions to countertrade operations offered by the aforementioned Convention. These problems have to do with the fact that the convention states that each contract should be governed under the law chosen by the parties. The multiplicity of documents that are usually used to perform a countertrade operation makes it extraordinarily complicated to determine when a reference to a specific law means the choice of a law according to the Rome Regulation. Moreover, the right to appeal stated in the convention does not seem to be of much use either, as no legal system appointed will have specific rules for this kind of operations. This justifies the critics made to the convention for trying to "nationalize" the contract by looking for a national legislation to govern countertrade operations show that there is no regulation available that can be applied to provide appropriate solutions to these operations (see below)²³.

¹⁸ See, UNCITRAL: *Legal Guide on international countertrade Transactions*, United Nations, New York, 1993.

¹⁹ Instrument of accession signed on 17th July 1990 (Official Gazette of the Spanish State, BOE), n° 26 of 30th January 1991). Amendments of errors: Official Gazette of the Spanish State (BOE), n° 282 of 22th November 1996.

²⁰ Some authors have proposed that the transactions should be governed by the Obligations Law, assuming we deal with innominate contracts. See, K. Khiari: *Les contrats internationaux de compensation*, Institut québécois des hautes Études internationales, Québec, 1996, pgs. 2 and following

²¹ *Official Journal of the European Union*, 4.7.2000.

²² For an introductory approach to alternative dispute resolution, see, "Special Issue. Dispute Resolution: Civil Justice and its Alternatives", *Michigan Law Review*, Vol. 56, No 3

²³ See P. de Miguel Asensio: "Armonización normativa y régimen jurídico de los contratos mercantiles internacionales", *Diritto del commercio internazionale*, 1998, Vol. 12-4, pgs. 865 and following, for an analysis of the decreasingly important role that

4. Insufficiency of the Contract Governing Law and Increasing Importance of the Transnational Law (Lex Mercatoria)

The search for specific legislation to provide solutions to the issues arising in countertrade operations is useless, not only because there are no specific regulations in local legislations, but also because it would mean to "nationalize" commercial relationships arising "from", "for" and "within" the context of international trade. Nonetheless, the determination of the law applicable to countertrade transactions has lost the traditional "regulating" function that was given to the Applicable Law field by the classic theory of Private International Law, as its purpose is not to determine which law every aspect of the transaction will be governed by. The Applicable Law focuses more on the integration of the interest of the parties involved. It is compatible with flexibilization parameters (e.g., "taking into consideration") and can be applied only partially in combination with the general principles of international contracts²⁴. It can be stated that the election of the applicable law is secondary not only when the parties have not explicitly chosen it²⁵, but even when they have²⁶. Thus, traditional contractual principles or general principles in the contractual field become more important when it comes to offer solutions to these operations when compared to the rigorous application of the rules of a specific legal system.

The complexity inherent in the fulfilment of a countertrade operation can sometimes lead to the parties to choosing the law that is to be applied at a later stage or lead a party to assume that a certain law is going to be applied. In these cases, the appeal to the principles can help to solve potential disputes between the parties regarding this matter, which is absolutely transcendent to the development of the relationship²⁷. These principles can also be applied if the system chosen by the parties does not regulate the issues arising. It would be through principles of an actual international character created after the comparison between the different legal systems involved²⁸. To determine which principles are these, international documents on international contracts (e.g., Vienna Convention on the International Sale of Goods) and, in particular, UNIDROIT's principles of international Commercial Contracts, can be consulted. The latter are not compulsory, but the parties can explicitly in the contract that they are to be applied throughout the operation²⁹. Some of these principles are particularly useful to offer solutions to countertrade operations³⁰.

Finally, given the inherent international character of these operations neither the contracts nor the reasons the parties have to undertake their fulfilment are subject to significant local features. Differences existing in the contracts apply only to such aspects as the frequency of use of certain modes of operation or the complexity and accuracy of the contractual solutions adopted. For this reason, there are a number of practices that are frequently used in countertrade, and which are included in the clauses that are commonly part of contracts, standard clauses, etc., that make up the *lex mercatoria*, which has its origin in the practices of the operators involved in these operations³¹.

functions proper to the choosing of a legal system to govern the contract (giving it binding force, establishment of conditions and of the contract's mandatory framework, provision of criteria for its interpretation and of the default rules for aspects unforeseen by the parties) plays nowadays in international transactions.

²⁴ The "taking into consideration" of the legal systems of the countries that get in contact through a countertrade transaction can be an adapted solution to the present needs of international Law. "Taking into consideration" does not mean "applying" such legal systems, but proposing a co-ordinated solution to the case.

²⁵ This is the purpose of the Inter-American Convention on the Law Applicable to International Contracts signed at Mexico on March 1994. This Convention merges Proper Law provisions with Substantive Law concepts taken from UNIDROIT principles of Uniform Law, currently under preparation (art. 9.2). For an explanation of the advantages of the appeal to the principles of international contracts in international trade, see, F.K. Jünger: "The Inter-American convention on the Law Applicable to International Contracts: Some Highlights and Comparisons", *Am. Jour. Comp. Law*, 1994, pgs. 381 and following.

²⁶ It has been noted that, in international trade "new" contracts, the choice of an applicable law has an almost superfluous importance. The key element is the drawing and set up of a contract that proves satisfactory for the parties and that, as far as possible, deems self-sufficient. See, G. Horsmans & M. Verwilghen: "Stabilité et évolution du contrat économique international", *Le contrat économique international. Stabilité et évolution*, Bmnelles, Paris, 1975, pgs. 451-473.

²⁷ For more information on this function of the principles, see J.M. Abascal Zamora: "Los principios sobre los contratos comerciales internacionales de Unidroit", *Derecho de los Negocios*, 1997, pgs. 16-17.

²⁸ See E.Gaillard: "Use of General Principles of International Law in International Long-Term Contracts", *International Business Law*, 1999, pgs. 214-224.

²⁹ For information on the specific principles applicable to long-term contracts see, E. Gaillard (Ed.): *Transnational Rules in International Commercial Arbitration*, ICC Publication, Paris, 1993, reprinted in 1995

³⁰ For an analysis of these principles, see M.J. Bonell: "UNIDROIT Principles: A Significant Recognition by a United States District Court", *Uniform Law Review*, 1999, Vol. 4, pgs. 651 and following; A.I. Rosett: "The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Contracts", *International Journal of Comparative Law*, 1998, Vol. 46, pgs. 347 and following

³¹ Some specialists have determined that those practices exist in countertrade. See B. Lurger: *Handbuch der internationalen Tausch- und*

These practices, which are part of the *lex mercatoria*, are defined in several Guides designed by national and international organizations, as well as in contract and form models designed by the international Chamber of Commerce, the European Commission of the UN. However, the different interests existing in each specific negotiation make it not advisable to use contract models. Thus, practices can also differ.

5. Incidence of Economic Political Rules

The existence of compulsory political rules is of high importance in this field, as governments show interest in the control of this kind of trade that can be a tool to boost the economy during recessive cycles (see the Australian case). These are usually governmental rules that determine the conditions in which countertrade can be used or that impose this kind of trade if the transaction exceeds a determined volume. Their application ground is independent from both the contract-governing law -in case the parties have chosen it- and the place of performance, as they automatically apply to every countertrade operation performed within their scope of application. Countertrade transactions are also affected by other intervention rules typical of international countertrade, such as change control rules. There are three different categories of mandatory rules that affect countertrade contracts and have different consequences and scopes. First, there are mandatory rules that belong to the Contract Law. Examples on these are the rules that make the contract null and void if the object is not specified or cannot be specified within the boundaries established in the juridical business, which determine the deadlines for some actions to be performed (severance and other similar actions that affect the private field). Secondly, mandatory rules belonging to the Public Law (those affecting change control, import and export authorization. etc.); and, finally, those that impose countertrade.

Countertrade operations are particularly affected by the latter, especially in what concerns the developing of such transactions (authorization to perform a transaction, amount of counterpart goods, countertrade ratio, deposit claim, etc.). As they affect different aspects of the operation they have not a single legal consideration and cannot therefore be taken as a unity. It can be stated that, within international trade, the concept of mandatory rule has a public content or dimension rather than a contractual one (i.e., these rules do not come from nor belong to the Contract Law). As the contract governing Law has a secondary role for the choice of the legal system for the counter transaction, the approach to the mandatory nature of the rules that belong to the contractual rule. (i.e., the instrument that establishes the need of applying such provisions) change. Thus, the interest is focused almost exclusively not on the mandatory rules (that belong to the patrimonial aspect of the transaction) but on the economic rules, that belong to the economic Public Law.

"Traditional" mandatory rules (that affect Private Law) have a relative significance in countertrade as a consequence of the little relevance that the designation of a Law to govern a transaction has in this field. Besides, this is supported by the fact that disputes that arise in these cases are not settled using legal or arbitration proceedings. The different degree of mandatory nature of each countertrade transaction (with regards to the rules belonging to the contractual status) also makes third countries' mandatory rules to play a different role, whose influence is justified as a consequence of the mandatory nature that affects the agreed terms. This does not apply to Public Law rules. Once again, it is necessary to allow for a more detailed analysis of the rules that impose countertrade. The main mandatory rules that apply to countertrade are, therefore, those that affect import controls, authorizations, etc. (which, furthermore, have their own application rules).

V. CLAUSES COMMONLY USED IN COUNTERTRADE TRANSACTIONS

1. Transfer to Third Parties

It is frequent that the indirect participation of several subjects are needed for the fulfilment of a countertrade operation. In the case of an indirect participation of any subject, a clause is added to transfer the countertrade commitment to a third party designated by the parties at a later stage. This clause is usually added when the participation of a trading house to launch the counterpart goods on international markets is foreseeable or when the firm that is going to provide the counterpart goods is not the same firm that took part in the fulfilment of the countertrade operation. Thus, one or both parties that initially reached the agreement can designate a third party to undertake their part of the contract without the need of a new consent.

2. Linkage Clause

In the case of parallel purchases where the main importer comes from a country with controlled economy (in which several public organizations are responsible for the production and selling of the counterpart goods are present). The exporter can request that the goods are purchased by certain bodies different from those with which the contracts has been signed. This guarantee is known as linkage, and it allows the exporter to increase the variety of acquirable products³².

3. Penalty Clause

According to UNCITRAL, the main aim of the penalty clause is to allow the main exporter to get released from the counterpart commitment through the payment of an agreed amount, thus breaking the link existing between related agreements or relationships. Although both parties are interested in the proper fulfilment of the operation in which they are implied, this clause can provide an appropriate tool in case any of them has got involved in the relationship, but does not wish to perform the countertrade commitment³³. However, this point of view involves some problems and issues. Firstly, the payment of the amount agreed by this clause as indemnization might not release the party from its commitment. Secondly, the aim of such clause in countertrade is not to provide the exporter with a way to break the commitment in bad faith, but just as a solution for those cases in which the breach is not carried out in bad faith. Therefore, the use of this clause with different purposes with only be a source of problem and distortions that will affect the interest of both parties³⁴.

4. Review Clauses

The long period of time over which some countertrade operations are performed makes it advisable to include clauses that allow future changes. E.g., these may be due to the modification in the prices of the goods sold or to difficulties in the fulfilment of the contract that may arise more than ten years from the formalization of the agreement. Because of this, although it is frequent to avoid the settling of a fixed price for the goods in countertrade agreements (e.g., by a reference to their corresponding value in the market at the proper time, etc.). The inclusion of a price-review clause is advisable³⁵. It is also advisable to include a hardship clause, as the lapse of time passed can complicate the fulfilment of the agreements in the conditions initially agreed. It must be taken into account that this clause *is* not an act-of-God clause. In case of an act of God, the fulfilment of the agreement is deemed impossible. This clause's only purpose is to modify some of the initially agreed conditions, as the fulfilment of these in the precise moment the commitments included in the contract have to be performed becomes quite difficult³⁶.

5. Other Clauses

It is also frequent that the DC asks for the inclusion of a clause to limit the re-export of counterpart goods. According to this clause, the other contracting part commits not to re-export counterpart goods in certain markets so the DC does not lose the advantages obtained in those countries, in which the products the counterpart consists of are exchanged for money. Counterpart goods DCs are usually more interested in those traditional of the DC country, which, at the same time, are not difficult for the latter to sell in the international market. The purpose of this clause is twofold: protecting the DCs markets, in which they usually sell their traditional products and, at the same time, allowing the performance of countertrade agreements with other countries. These agreements involve the abovementioned products as well as others whose trade is more complex, as they are not traditional. The use of other clauses as a consequence of the long period of time needed to perform a countertrade operation is also frequent. This long time, which is linked to unpredictable events that may occur during such time, can lead to a non-performance of the compensation obligation due to an act of God, an accidental event or other causes related to unforeseeable, unavoidable circumstances. For this reason, it is advisable to include a "hold harmless clause" (particularly in the protocol, if applicable), that defines the potential impediments and their legal consequences in the context of the operation.

³² See C. Piñero Iñiguez & F. L. Ras: *Intercambio compensado. Countertrade. Teoría, práctica y estrategia. Una nueva opción en el comercio internacional*, McGraw Hill, Madrid, 1993, p. 32.

³³ See UNCITRAL: *Legal Guide on International Countertrade Transactions*, United Nations, New York, 1993, pgs. 144 and following

³⁴ See the cases of Romania and China. The regulations in these countries expressly establish that although the penalty clause includes a sanction, this does not mean that the defaulting party gets released from the obligation to indemnify the other one, nor that the latter has no right to claim the compulsory performance of the agreement. See, K. Khiari: *op. cit.*, 1996, pgs. 143 and following.

³⁵ For the different types of price-review clauses used in countertrade, see K. Khiari: *op. cit.*, p. 153.

³⁶ See K. Khiari: *op. cit.*, pgs. 153 and following in detail.

Among these circumstances are those of a legal nature, such as modifications in the importing country regulations or the existence of a prohibition to import or export certain goods. The circumstances can also be of a natural origin, like an accident, etc. UNCITRAL's Guide calls them "exempting impediments"³⁷. The lack of uniformity about the definition of "impediment" in legal systems makes it advisable for the parties to include a definition of their own -and the corresponding consequences- in the protocol. For this purpose, they can refer to article 79 of the Vienna Convention on the International Sale of Goods (11th April 1980)³⁸.

The long period of time needed to perform a countertrade operation makes it advisable to establish certain deadlines. There are occasions in which the exporting country may wish to include a clause that allows him not to perform the countertrade commitment if the counterpart goods are not available at the time agreed. A clause similar to the following may be added: "*should the product list of the foreign commercial organization (...) be not available for supply (...), the buyer will be released from its countertrade commitment*". In this case, there would not be a breach of the negotiation in bad faith. This clause would be a tool to overcome potential technical or economic problems the importer country may face to supply the goods³⁹.

³⁷ See, *Legal Guide...*, *op. cit.*, p. 146.

³⁸ *ibid.*, p. 147, paragraph 17.

³⁹ See. O.E.C.D.: *East-West Trade: Recent Development in Countertrade*, Paris, 1981, p.55.