

DRAFTING AN INTERNATIONAL BUY-BACK AGREEMENT

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Abstract. *In the buy-back agreement as a variety of generic countertrade transactions one party supplies a production facility (plant, mine, turn-key factory etc.), and the parties agree that the supplier will, in return, buy predetermined quantity of products resulting from the production facility. As an innominant contract in domestic legislation the buy-back is used in many countries as a good tool for increasing foreign investments and industrial development of the country economy. The complicated multicontractual structure of the entire arrangement, the question of interdependence of obligations from the primary and secondary contracts and the protection of the interests of domestic contractual party are the main reasons for studying the legal structure and technique for drafting buy-back contracts.*

INTRODUCTION

The buy-back agreement is a variety of the countertrade transactions phenomenon, which emerged in the postwar era when the world economy was segmented into groups of, developed, developing and centrally planned economies. Until the seventies, international trade and investments between centrally planned economies and the rest of the world were very limited and nonexistent. But flourishing of the countertrade transactions at the end of seventies and in the eighties promised new a climate in the world of international business transactions. Countertrade transactions between East and West marked the end of the world divided by the "Iron Curtain" and embraced 1/3 of all international transactions.

There is no much consensus between legal theory and practice as well as economic theory about the question – what is really countertrade? The field of countertrade contains plentiful terminology and an unsolved, often complicated typology. There are more then 40 terms which denote those transactions but broadly used terms are: compensatory contracts (agreements), linked contracts, tying agreements, barter, offset, counterpurchase contracts, etc. (Gegengeschaefte, contra-achat). Besides terminological incongruence there is no consensus about definitions of those transactions. One of the

difficulties in defining countertrade transactions exists in the fact that countertrade is a generic term which includes many different types of contracts. Business entities could not negotiate and conclude the countertrade contract as a general legal document; they can only conclude or draft some countertrade varieties such as counterpurchase, buy-back and offset.

Until UNCITRAL (United Nations Commission for International Trade Law) published the Legal Guide on International Countertrade Transactions¹ (drafted from professor Bonnell) in 1993 neither in legal theory nor in legal sources there were any uniform and widely accepted countertrade definitions or typology of those multicontractual transactions. The Legal Guide covers legal issues that may arise in area of countertrade transactions defining countertrade as: "...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 *Differentia specifics* of those arrangements independently of its observed varieties is the existence of a *contractual link* between the supply contracts in two directions. The first sale contract is conditioned and legally binds with the conclusion of the second contract in transaction. Without this essential element the countertrade could not exist in any form.

From the point of view of the paper's author, the countertrade is an emanation of the idea which emerged in business practice whose ratio is *the economic utilization of purchasing power*. In this way, the countertrade transactions are quite different from so-called compensation deals, whose first goal is set off (compensation) of two mutual obligations. Countertrade is therefore not an instrument of payment but a legally binding contract *per se*. It explains the existence of the legal link between two legally independent contracts, which are linked in a multicontractual countertrade transaction. So there is not equality between countertrade and compensation deals. Compensation could be in specified circumstances a possible method of payment in separate countertrade transaction, but not the goal of the whole multicontractual arrangement. Consequently, opposite to the predominant attitude in legal theory and even in Legal Guide, our opinion is that barter (as typical form of compensation deal) falls out of the scope of countertrade.

Nowadays countertrade is still *contractus innominatus* in international trade, governed only by autonomous sources of international trade law (usages which are widely accepted in business practice and usages codified by institutions such as UNIDROIT). There are not legal sources in national legislative, which governed those transactions, but in the last decade there is significant proliferation and evolution of those transactions. There are visible trends of a pro-active approach and orientation to countertrade (especially government mandated countertrade), not only from countries in transition but also even from industrially developed ones, such as Sweden, USA, Japan, Canada, Australia or Great Britain, whose treatment of countertrade was extremely negative.

¹ UNCITRAL Legal Guide on International Countertrade Transactions, A/CN.9/SER.B/3, New York, 1993

² Ibid, p.5.

THE BUY-BACK AGREEMENT AS A METHOD FOR FOREIGN INVESTMENT ATTRACTION

The buy-back refers to the transaction in which one party supplies a production facility (plant, mine, turn-key factory etc.), and the parties agree that the supplier will, in return, buy predetermined quantity of products resulting from the production facility. As it is mentioned in the UNCITRAL Legal Guide in the buy-back the supplier of the facility often provides technology and training and sometimes component parts or materials to be used in the production, whose elements connect the buy-back transaction with other legal instruments of the new *lex mercatoria* such as a franchising agreement or industrial cooperation agreement. In addition to those facts, there are different transactions, which are strongly divided by its different economic cause (consideration - from the point of view of the common law legal doctrine). The *causa* in a franchising agreement (*cur debetur*) is renting goodwill of economic powerful franchisor and simulation of legal identity of franchisor and franchisee. Even though industrial cooperation has many common features with the buy-back agreement, they merge as a separate transaction because the *causa* in industrial cooperation is production of common product and uniform market advance, but in the buy-back the *causa* is presented as the linking of two import and export contracts in one transaction through the buying of products manufactured in the previous delivered facility.

In the evolution process of countertrade transaction the buy-back emerged in 1969 between an Austrian and a German metallurgical companies, on one side, and Soviet Union, on the other, where the Soviet contractor conditioned its pipeline import buy the supply (export) of predetermined quantity of natural gas. In 10 million dollar worth transaction of Siberian pipeline construction agreement, which represents a typical buy-back contract, the Soviet party committed itself to pay performed construction and delivered equipment with the delivery of 30 billion m³ of natural gas to the consortia of American, European and Japanese companies.³ Especially when countertrade is not a commonplace, people still tend to think that "*Levi's*" blue jeans marked with "Made in Hungary" are produced in the new Hungarian branch of famous American blue jeans company. But, indeed, it is an American-Hungary buy-back arrangement in which Levi Strauss Co delivered equipment and know-how for a blue jeans factory in Hungary, and in return committed itself to take 60% years production of Hungarian factory in the following years.⁴

In our country business practices as well as legal and economic theory, the buy-back has not been recognized as a significant method for the attraction of foreign investment. In that sense it could be useful to study Chinese countertrade methods whose goal in more than twenty years was foreign investment attraction in the form of buy-back due to import of the latest technological equipment, facilities and know-how. Buy-back is very adaptive in automobile industry as illustrated in the experiences of the "Asian Tigers" such as South Korea, Thailand and the Philippines. It is their pro-active and government mandated countertrade policy that established giants such as "Daewoo", "Samsung" etc.

³ Welt Leo, G.B. "Trade Without Money: Barter and Countertrade", Washington, New York, 1983, p.23

⁴ Guiot C "Countertrade- Recent Legal Developments and Comparative Study", *Revue de Droit des affaires internationales*, No 8, 1986.

The most significant characteristics of buy-back contracts are the multicontractual structure of the whole transaction and the direct linkage between object of import (industrial equipment) and subsequent products from export contract in opposite direction. It is a long-term contract whose period of effectiveness could be 5-20 years. Unlike other countertrade varieties (counterpurchase and offset) the buy-back contract contains some degree of uncertainty caused by the fact that the quality of the future products is a direct consequence of the performing the first contract in buy-back transaction. It is one of most important reasons why the contractual structure of the buy-back contract is more sophisticated and more complex from the same in other countertrade varieties. Equivalency of the mutual obligations of a contracting party is possible to achieve in detailed drafting of parties' obligations such as the clause on machinery and equipment, technical assistance, quality control and guarantees, description of products, quality, conformity and value, exempting impediments clause, liquidated damages, etc.

Using the possibilities of countertrade as a tool of industrial development could motivate a significant **consideration** of domestic enterprises (importers) to enter into buy-back agreement. The possibility of using the most advanced technology, equipment and know-how with the great involvement of the exporter in the project follows his prevalent interests to supply the most advanced technology. Thus, the buy-back agreement creates a certain degree of community of interests of both parties. Mutual obligations of the party are so linked and interdependent that fulfillment of each obligation is a direct "hostage" of fulfillment of counter-obligations. It could be freely said that the level of mutual interdependence of obligations in buy-back contract is directly connected with the contract performing.

MULTICONTRACTUAL STRUCTURE OF THE BUY-BACK AGREEMENT

The domestic legislation, like that of most other countries, provides no specific rules for buy-back contracts. As the Code of Obligation gives no rules for these transactions, they will be governed by the party autonomy and contractual freedom of principles as well as the general rules applicable to contracts, such as principle of good faith dealing (Art. 12 CoO), rules on the formation of the contract, offer and acceptance (Art. 26–44 CoO), precontractual liability (Art. 30 CoO - "culpa in contrahendo"), pre-contract (contract to contract) clauses (Art 45 CoO), product liability, protection of intellectual and industrial property rights and competition. Beside those general rules, there are some specific domestic rules applicable to the buy-back contracts stated in "The Law on the Foreign Trade Business"⁵ in Art. 18 which regulates so called "foreign compensation deals" that are governed by specific rules and particular license issued by the Ministry for Foreign Economic Affairs".⁶ In the new domestic draft of "The Law of the Foreign Trade" there are no specific rules applicable to buy-back.⁷ In addition to the critics of the actual

⁵ Official Gazette No46/92, 16/93,24/94,28/96,29/97,59/98,44/99,55/99,73/00 and 23/01

⁶ See "Regulation on foreign compensation deals" (Official Gazette No 51/92,61/94,86/94,30/97) which enacted license regime for barter and other transactions where "contracts on export of goods and services are to be paid with import of goods and services in the same value".

⁷ See , critics of the Draft of Foreign Trade Law as well as Opinion of the Chamber of Commerce of the Republic of Serbia on ekof.bg.ac.yu/savetovanja/1_poziv.html

legal rules applicable to countertrade, it is obvious that the propositions of the new foreign trade law failed the opportunity to frame countertrade transactions (and its variety in the form of a buy-back) as a useful method for balancing the foreign trade.

Missing domestic legal rules the drafter of the buy-back agreement should consider the solution proposed in the UNCITRAL Legal Guide on International Countertrade Transactions. Except for the pure barter or quasi-barter and so-called "merged contract", all "pure" countertrade transactions, including buy-back, are the multicontractual arrangements.⁸

The international buy-back agreement is corporate comprising the three major components: the two purchase contracts in opposite direction – represented in primary agreement and buy-back agreement and the third instrument called protocol or framework agreement. On the other side, if, at the time when buy-back is agreed on, it is possible for the parties to lay down the exact specifications of the buy-back products, and if there are not third parties involved, there is usually no reason why all the parties' rights and obligations could not be included in the same contract. It will be quite a rare case in business practice, and in this situation there is a concept of merged contract which assumes that two sales contract are united in one comprehensive contract. This contractual solution bears many immanent legal problems, such is the question of interdependence of obligation, where non-performing of an obligation from the contract in one direction might be invoked as a reason for suspending or refusing performance in the other direction.

In most cases parties use separate contracts for supplies in two directions, and in this case the rights and obligations under the primary contract are similar to those usually agreed upon in international contracts for the sale of equipment or technology. Beside this similarity, there is a special relationship between these contracts because of the direct connection between production facilities from the primary contract and subsequent purchase of products produced thereby.

Typically, the two sales agreements are negotiated and performed simultaneously. Many authors in the countertrade field suggest that prior to a discussion of the terms of any buy-back commitment, the exporter should insist that the sales and counterpurchase be evidenced by two separately enforceable agreements linked by a third agreement (protocol), rather than by a single contract. The reason is again in the fact of interdependence of obligations arising from single contract. This characteristic pitfall of every countertrade transaction is not so intensive in the structure of the buy-back agreement, because of its nature. The breach of the first sale agreement (primary contract) breaks the whole operation and the problem of interdependence of obligations from the separate sale agreement is not so attended.

⁸ UNCITRAL Legal Guide offers quite detailed solutions in drafting of countertrade contracts. Two solutions it proposed are "a single contract approach" and "a separate contract approach". The latter could be realized by three methods: a) the export contract and the countertrade agreement are concluded simultaneously, and the counter-export contract is concluded subsequently; b) the countertrade agreement is concluded prior to the conclusion of any definite supply contracts in either direction; and, c) the separate supply contracts for the shipment in each direction and the countertrade agreement establishing a relationship between them are concluded simultaneously. Legal Guide, Chapter II, p.15-16.

THE PROTOCOL (THE FRAME AGREEMENT, COUNTERTRADE AGREEMENT)

The Protocol usually does not content any specific terms or conditions of the buy-back transactions. The Protocol is the legal instrument that serves to create a general obligation of each party to enter into two agreements. By the Protocol the link is created between two contracts, but there is no consensus either in legal theory or in business practice about whether this instrument a legally binding contract or not. If its nature were of the legal character the link between two legally independent and separate contracts could be interpreted as a legal link. In that case, the contracts will be mutually connected in such a way that one contract conditions and links mutual rights and obligations.

It is obvious in the legal doctrine, especially in the articles of the common law lawyers (traditionally belonging to the countries which are ordinary parties supplying equipment and technology, and know-how), that those lawyers strongly advice any cross-references in the underlying agreement in order to avoid their merger. The strongest reason speaking on its behalf is that the banks financing the whole operation (through the guarantees or stand by letters of credit) are not willing to take a risk of extending credit to a purchaser whose ability to repay is dependent upon the expected income from the buy-back transaction.

THE PRIMARY CONTRACT

As this contract is the international contract for the sale of technology and equipment and transfer of know-how the drafter should consider some common list of clauses and major provisions.⁹

The conformity of the products with the requirements agreed in the buy-back contract depends, among other things, on the equipment/technology that is sold under the primary contract, on the manner in which the equipment and technology are transferred and used in the plant, and on the quality control policies and procedures that are instituted at the plant. That part of contract should be drafted extremely carefully.

After clauses about **contracting parties, recitals, acknowledgment of obligation to purchase equipment/technology**, the primary contract should draft particularly carefully the clauses about the **description of machinery and equipment**. Clear description of machinery and equipment and respective performance requirements thereof should also be provided as well as delivery of technical documentation necessary for their proper use. Thus the primary agreement should specify the documents and stipulate how they will be handed over to the original buyer. It is recommended to provide clauses about **installation, commissioning, test runs and acceptance** of machinery and equipment. The primary contract should set out the **quality guarantee** (material and workmanship guarantee) and **performance guarantee** (technological guarantee) of the machinery and equipment.

⁹ The article of American lawyer Thomas Mc Way "Countertrade and Barter: Alternative Trade Financing by Third Nations" International Law Journal, 1986,p.217-220 , contents the most comprehensive list of the buy-back clauses.

Beside the sale of machinery and equipment, the buy-back transaction often includes a grant of license to use the original seller's patent rights and/or know-how relating to the manufacture of products. So, the **patent, know-how and technical assistance clauses** are a significant part of the primary agreement. Those clauses embrace **scope of license, disclosure clauses**, in which parties agree on the manner (handing over specifications, drawings, computer diskettes, etc.) in which the original seller to the original buyer will disclose the technical information. The **technical assistance clauses** marked the buy-back agreements with the possibility that the original seller could arrange for his own personnel to visit the plant to assist the original buyer in undertaking the manufacture and sale of the products and/or train the buyer personnel in this respect.

For ensuring that the products are of the agreed specification, performance and quality, the parties could institute appropriate **quality control** procedure. Other provisions, which could be appropriate in the primary agreement, are **the guarantee of the products** especially in situation when products will be sold to the third parties under the trademark of the original seller.

It is recommended to the parties to devote special attention to negotiating the following clauses: **price, terms of payment, method of payment** (set off, crossed letter of credits, evidence accounts or blocked payments), terms and other details regarding **delivery, packing, shipping, insurance, right to inspect, right to neutral surveyor, determination of settlement of claims, penalties or liquidated damages** (in the event of late delivery, delivery of non conforming goods), **force majored, arbitration clause** and **choice of law clauses (applicable law)**.

THE SECONDARY – BUY-BACK AGREEMENT

Unlike other forms of countertrade, the buy-back contract comprises specific provisions which ensure future supplies of goods or services product in facility, delivered in the primary contract. The buy-back contract ensures total protection of the mutual interests of the contracting parties, because only in the case of duly performance of the obligation derived from the primary agreement (delivery of the facility in agreed condition) it could be possible to perform obligation from the secondary contract (purchase and delivery of the goods or services produced form the facility.) Thus, beside provisions on **parties** and **recitals**, the secondary contract comprises the **buy-back requirement clauses**, as well as **mutual commitments** of the contracting party –original seller – **buy-back purchaser** to purchase, on agreed terms, predetermined products, and an equally clear commitment by the buy-back seller to sell said products. As the buy-back agreement is a long-term transaction, it comprises by its nature the clauses about the **time period** needed for fulfillment buy-back commitment. Ten years or more are not uncommon for the performance of buy-back commitment.

The specification of **the buy-back product** including **definition, availability** of the acceptable goods or services, **quality, quantity** and **assortment** of products as well as **quality control** clauses is the most significant term denoting buy-back commitment. The buy-back contract should contain a provision defining the **value of the buy-back commitment**, i.e. the value for which the buy-back purchaser will purchase the products within the framework of the buy-back contract. This amount could be equal to, or lower

or higher than, the price of the equipment/technology sold under the primary contract. The relation between these two values is commonly called "**buy-back ratio**". In setting of price and terms of payment clauses if the buy-back purchaser will select goods the "pricing formula" is more appropriate than the firm price. In order to ensure that the buy-back purchaser or his assignees will not undersell in the agreed territory due to the fact the buy-back seller grants more advantageous conditions to other purchasers, the parties may wish to agree in the buy-back contract that the buy-back purchaser and his assignees shall be granted the **most favored purchase** conditions with regard to the buy-back products. In this case the relevant anti-dumping, cartel or competition law clauses should be affected. The terms of payment should provide the currency in which the buy-back products shall be quoted and paid for.

Between the most important clauses is the **assignment clause**, which enables the purchaser to assign his right and obligations, either entirely or partly to a third party. The third party participation is the relevant question in the buy-back contract, so, in this case, it is a multicontractual transaction since its being a multiparty one. **Terms of delivery, time schedules for performance, right to inspect and monitoring the performance, evidence accounts clauses**, ensure the interest of the party to accept delivery in conformity with the agreed terms.

Liquidated damages and escape clauses could in case of non-performance or delivery of non-conforming products relieve the responsible party of the liability to damages. The party **penalty clauses** together with the **clauses on relief of liability** will relieve the party that has failed to perform contractual obligations. In the case of the first party penalties, the most common are the penalties from 10 – 20% of the value of the buy-backed goods or the unfulfilled portion of the second agreement. The second party penalties will be payable in the case of failure to perform the seller's obligations such as non-delivery of the buy-back products, tendering of inferior goods, late and non-conforming delivery etc.

The most significant are the clauses about **termination of primary contract or implementing (buy-back) contract**. Since the manufacture of products is possible only in the event that the equipment/technology is successfully transferred and accepted, in the case that this does not happen, and the primary contract is therefore terminated, there is no basis for the implementation of the buy-back contract, either. This is a direct consequence of mutual interdependence of obligations derived from two contracts because of economic dependence of contracts. An extremely difficult question in the buy-back theory and practice is the consequence of termination of the second (implementing) contract and legal destiny of the primary contract in the case of termination of the second one. It depends on party autonomy, and some arbitral decisions confirm interdependence in this case, too. **Marketing restrictions, force majored clauses as well as dispute settlement, arbitration and choice of law clauses** mark the final terms of the buy-back agreements.

Good knowledge of the legal structure and the technique of drafting and conclusion of the buy-back contract are the warranty for the success of the future transaction.

Buy-back Contract

Between

Alpha _____ (*indicate legal form of party*)
of 1, Alpha Street, 001000 Alphatown, Alphaland (hereinafter "Alpha").

and

Beta _____ (*indicate legal form of party*)
of 1, Beta Street, 00100 Betatown, Betaland (hereinafter "Beta").

Whereas

Under a Primary Contract dated _____ 20__ (hereinafter the "Primary Contract")¹ and the Technical Assistance Contract dated _____ 20__ (hereinafter the "Technical assistance contract")/ Alpha has sold to Beta, and Beta has purchased from Alpha, under the terms and conditions set forth in the primary contract/and the technical assistance contract/the machinery/and/equipment/and/patents/know-how/and/technical assistance/ specified therein (hereinafter "the equipment/technology"), to manufacture _____ (hereinafter "the products") in Betaland.

By the buy-back, and under the terms and conditions set forth in this contract, Beta agrees to sell to Alpha, and Alpha agrees to purchase from Beta, products as specified herein.

Now, therefore, the parties to this contract agree as follows:

Article 1

The buy-back Commitment

1.1 Alpha hereby agrees to buy (or cause the purchase) from Beta, under the terms and conditions set forth in this contract, products manufactured by Beta using the equipment/technology sold by Alpha, and take delivery of the said products.

1.2 Beta hereby agrees to sell to Alpha (or to his assignee (as defined below in Article 6), under the terms and conditions set forth in this Contract, such Products, and to accept the purchase by Alpha of such Products as buy-back within the framework of this Contract.

Article 2

The Products

2.1. The assortment of products to be sold and purchased under this contract is agreed upon by the parties in accordance with the provision of Article 10 below.

2.2 Beta hereby warrants that sufficient products of the agreed assortment will be available at the times specified in article 10 of this contract.

Article 3

Conformity of the Products

3.1. The products to be delivered shall correspond to the specifications and quality agreed upon in the primary contract, and must be of the quantity and assortment required by the individual purchase contracts (hereinafter "implementing contract(s)") to be concluded within the framework of this contract between Beta/or his assignee (as defined below in article 6) /in his capacity of seller of the products (hereinafter "the implementing seller"), and Alpha/or his assignee (as defined below in Article 6) / in his capacity of buyer of the products (hereinafter "the implementing buyer").

3.2 The products must be contained or packaged in the manner required by the respective implementing contract.

¹ The words, or group of word, separated by strokes are alternative formulations. Delete the one(s) not applicable.

Article 4

Total Value of the Buy-back Commitment

4.1. During the term of this Contract Alpha shall purchase from Beta Products for the value of/

(A)² _____³

(B) not less than _____ per cent (_____ %) of the total _____⁴ price of the primary contract as specified in Article X of the contract/plus not than _____ per cent (_____ %) of the total price of the technical assistance invoiced in accordance with Article X of the technical assistance contract.

4.2. The value of each of the implementing contracts to be applied against Alpha's buy-back commitment under this contract shall be _____⁴ value of the respective implementing contract.

4.3. The value of each of the implementing contracts, if invoiced in a currency other than the currency in which Alpha's buy-back commitment is set forth here above, shall be applied against Alpha's commitment at the exchange rate quoted by the central bank of _____⁵ at the date of the invoice issued in respect of such implementing contract.

Article 5

The Price of Products

5.1. (A) The prices of the Products offered under this Contract shall correspond to/

(A.1)⁶ The price generally charged at the time of the conclusion of the respective implementing contract for such products under comparable circumstances in the trade concerned.⁷

(A.2)⁶ The fair/average/market value of the products in the territory (as defined below in pare. 7.1) under competitive terms of delivery and payment.

(A.3)⁶ The prices of competing products, of essentially similar specifications and quality standards than those of the products, in the territory (as defined below in pare 7.1.) under competitive terms of delivery and payment.

(A.4)⁶ The quotation of the product at the _____ exchange on the date when the respective implementing contract is concluded.

5.1. (B) The prices of the products shall be agreed upon from case-to-case by respective implementing seller and implementing buyer of the products.

5.1. (C) Alpha/and the assignee(s)/shall be granted most-favored-customer conditions in the territory with regard to the products.

5.2. The prices of the products shall be quoted and paid for in _____.⁹

² When alternative formulations comprise entire clauses, sentences, or half-sentences, the various alternatives are indicated with capital letters (A), (B), etc.

³ Indicate ammount and currency.

⁴ Insert their relevant term of delivery, e.g. FOB, CIF, etc.

⁵ Indicate name of the country

⁶ A-1 to A-4 are alternative formulations of 5.1(A).

⁷ This alternative is based on Article 55 of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

⁹ Indicate currency.

Article 6

Assignment

6.1. (A) Alpha shall be entitled to assign its buy-back undertaking under this Contract, either as a whole, or any part of it, to any other entity /without the express written consent of Beta/.¹⁰

Such consent shall not be unreasonably withheld

6.1. (B). Alpha may assign the whole, or a part, of its buy-back undertaking under this contract, to any third party.

6.2. In the event that Alpha (hereinafter "the assignor") shall assign any part of its buy-back commitment under this contract to a third party (hereinafter "the assignee")/

(A) All rights and obligations of the assignor under this contract with regard to the assigned part shall terminate at the time when the assignment contract between the assignor and the assignee becomes effective, and the respective rights and obligations shall be vested in the said assignee; provided that in the said agreement the assignee assumes all the obligations of the assignor agreed upon in this contract with regard to the part so assigned.

(B) The assignor shall remain responsible, /jointly/jointly and severally/with the assignee, for the fulfillment of all of its obligations agreed upon this contract.

6.3. Alpha agrees to include in its agreement with any assignee appropriate provisions whereby the assignee commits itself to be bound by this contract with regard to the assigned part of the buy-back commitment, as if this contract had originally been executed by the assignee. In consideration for the said commitment, Beta agrees to be bound by this contract against the respective assignee, with regard to the assigned part of the buy-back commitment, as if this contract had originally been executed with the assignee.

6.4. In the event that a party shall assigns any part of its buy-back obligations under this contract to an assignee, it must give notice to the other party of the assignment. If the notice is not received by the other party within a reasonable time after the assignment, the party will be liable for the damages resulting from such non-receipt.

Article 7

Re-sale of the Products

7.1 Alpha/or its assignee(s)/shall have the right to re-sell the products in the territory agreed upon below in paragraph 7.2 (hereinafter "the territory").

7.2 (A) The territory shall include all countries in the world.

7.2 (B) The territory shall include the countries set forth in appendix with respect to each of the products or product groups mentioned therein.

(C) Alphaland

7.3 The products shall not be re-sold outside the territory without the written consent of Beta.¹¹

7.4 It is agreed by the parties hereto that the restrictions set forth in paragraphs 7.2. and 7.3. above shall be construed as undertakings from the part of Alpha/or the Assignee/to refrain from actively putting the products in the market outside the territory.^{11 12}

¹⁰ Replace "Beta" with the name of the appropriate Government body in Betaland, when applicable.

¹¹ Not applicable if alternative A is chosen.

¹² Should be included if Alphaland or any of the countries listed in Appendix are member countries of the European Union (EU)

Article 8

Reference

Each implementing contract as may be entered into by a party or its Assignee/in accordance with the terms of this contract, must explicitly refer to this contract and state that the said implementing contract is made in fulfillment hereof. The parties agree to include in their agreements with any assignee appropriate provisions to that effect.

Article 9

Terms of Delivery

Unless otherwise agreed in the individual implementing contracts, the terms of delivery of the products will be _____⁴.

Article 10

Time Schedules for Performance

10.1. Deliveries of the products by Beta will commence _____ /days/months/ after the completion of the performance test and acceptance of the equipment/technology under the primary contract/and the technical assistance contract.

10.2. It is presently estimated that the buy-back commitment agreed upon in Article 4 above would be fulfilled according to the following schedule:

Years	Value
20 _____	_____
20 _____	_____
20 _____	_____
Etc.	Total _____

10.3 Actual quantities and assortments of products to be delivered will be negotiated and agreed upon in the individual implementing contracts to be concluded not later than _____ days/months/before the beginning of each year /quarter/month with regard to the said/year/quarter/month.

10.4. When actual quantities and assortments are agreed upon, Alpha's remaining buy-back commitment /and/ Alpha's own needs for products/and/prevailing market conditions in the territory for the various assortments of the products/will be taken into consideration. It is agreed, however, that, until the total buy-back commitment has been fulfilled, the value of products to be sold by Beta and bought by Alpha each calendar year will be at least _____ / and not more than _____ /.

Article 11

Lack of Conformity

11.1. Alpha must examine the products delivered to him within as short a period as is practicable in the circumstances.

11.2 Alpha loses the right to rely on a lack of conformity of the products if it does not give notice to Beta specifying the nature of the lack of conformity within _____¹³ after it has discovered or ought to have discovered it.

11.3. Further rights and obligations of the parties with regard to the lack of conformity of the products will be governed.

(A) by the provision of the law applicable to this contract.

¹³ Indicate time period.

(B) by the provision of the guarantee conditions attached to this contract as Appendix (), and by the provisions of the law applicable to this contract.

Article 12

Payment of the Products

12.1. The Products shall be paid for in the currency agreed upon in paragraph 5.2. above, and in the manner set forth in a paragraph 12.2. below.

12.2 Each delivery of the products shall be paid against the original documents set forth in paragraph 12.3. below/

(A) through direct bank transfer to the bank account in Betaland of the implementing seller of the respective products.

(B) through an irrevocable and transferable letter of credit, at/owing partial and trans-shipments, to be opened in the amount of the respective implementing contract at the latest _____ days after the signing of the said contract, in the respective implementing seller's favor, such letter of credit to be valid for a period of _____ days/weeks/months after the agreed date of delivery of the respective products.

12.3. The/products/letter of credit/shall be payable against the following documents.

- _____ .
- _____ .
- _____ .

12.4. The implementing Buyer shall bear all exchange and bank charges as well as any other costs, /including the confirmation charges of Letters of Credit/but excluding the charges of the Bank in Betaland/for transferring the funds to the implementing Seller's account.

Article 13

Monitoring the Performance

13.1. Both Alpha and Beta shall keep records on all implementing contracts concluded within the framework of this contract. Each such record (hereinafter "the evidence account") shall be in the form set fort in appendix () to this contract.

13.2. The evidence accounts maintained by Alpha and Beta shall be compared and agreed by the parties through exchanges of letters on a quarterly basis during the term of this contract, the first occasion being no later than _____ / _____ / 20_____ .

13.3. Alpha and Beta hereby agree that the evidence accounts compared and agreed in accordance with paragraph 13.2. above, shall constitute final and conclusive evidence as to performance of their obligations under this contract.

Article 14

Liability

14.1. In the event that Alpha's buy-back commitment, agreed upon in this contract, has not been fully performed by the date mentioned in paragraph 10.5 above, Alpha shall, upon written demand by Beta remit to Beta as agreed and liquidated damages _____ per cent _____ % of the value of the products yet to be purchased under paragraph 4.1. Hereof.

14.2. Notwithstanding the provisions of paragraph 14.1 above, Alpha shall not be obligated to make any payment mentioned therein insofar as the lack of performance of Alpha's buy-back commitments due to the failure of the implementing seller to deliver

products of the quality, price or cumulative value specified in Articles 3, 5 and 10, respectively, of this contract.

14.3. If the lack of performance of Alpha's buy-back commitment is due to the reasons set forth in paragraph 14.2, Beta shall, upon written demand by Alpha, remit to Alpha as agreed and liquidated damages _____ per cent (_____ %) of the value of the products yet to be purchased under paragraph 4.1.

14.4. As guarantee for the due performance of its obligations under this article 14 Alpha shall issue to Beta a bank guarantee, acceptable to Beta, for the sum of _____³. The bank guarantee shall be essentially of the form and contents as set forth in Appendix () attached to this contract.

14.5. As guarantee for the due performance of its obligations under this article 14 Beta shall issue to Alpha a bank guarantee, acceptable to Alpha, for the sum of _____³. The bank guarantee shall be essentially of the form and contents as set forth in Appendix () attached to this contract.

14.6. The payment by the respective party of the agreed and liquidated damages, set forth in paragraphs 14.1. and 14.3. above, shall be in full and final settlement of all claims that the other party may have against the first party arising out of or in connection with the breach by the first party of his obligations under this contract.

Article 15

Relief¹⁴

15.1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that it could not reasonably be expected to take the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences.

15.2. Exemption under Article 15 shall be available to the affected party for the period during which the impediment prevents it from fulfilling his obligations under this contract. If the effect of the impediment lasts for more than _____¹³ months, each party shall be entitled to terminate this contract upon written notice to the other, and neither party shall be liable to the other for any expenses or losses thereby incurred.

15.3. The party that fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the other party does not receive the notice within a reasonable time after the party that fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

15.4. A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Article 16

The effect of the Termination of the Primary Contract of the Implementing Contracts

16.1. In the event that the primary contract should subsequently be terminated without the equipment/technology having been transferred and accepted, this contract shall become automatically null and void and with no effect.

¹⁴ This Article 14 is based on Articles 79 and 80 of the United Nations Convention on Contracts for the International Sale of Goods 1980.

16.2. For the purpose of this contract, Alpha's buy-back commitment, agreed upon herein, or a respective part thereof, as the case may be, /

(A) Shall be deemed fulfilled even if any implementing contract should later be terminated /through no fault on the part of Alpha/for whatever reason. /

(B) Shall not be deemed fulfilled insofar as any implementing contract should later be terminated, irrespective of the grounds for which the implementing contract was terminated. In this case Alpha shall be obligated to conclude (a) fresh implementing contract(s) corresponding to the value of the terminated implementing contract(s) such fresh implementing contracts to be then carried out in accordance with the provisions of this contract.

Article 17

Prior Commitments, Effective Date, Amendments, and Governing Language

17.1. Except as otherwise expressly provided in this contract, this contract supersedes and invalidates all other commitments or representations, which may have been made by Alpha and Beta either orally or in writing prior to the date of signature of this contract.

17.2. This contract shall come into effect only/upon the entering into force of the primary contract/and/upon the signing of this contract by both parties/and/upon the approval of this contract by the competent authorities and/or. Financial institutions/in Betaland/and/or/Alphaland. Beta shall immediately notify Alpha/and/Alpha shall immediately notify Beta/by cable or telex of such approval, and the date of /such notification/the latest of such notifications/shall be date on which this contract comes into effect. Unless the approvals are obtained within _____ / days/month/form the signing of this contract, it shall be considered null and void and with no effect.

17.3. Amendments to this contract will be effective only if they are made in writing and signed by legally authorized representatives of the parties/, and if approved by the competent authorities/and/or/financial institutions in/Betaland/and/Alphaland.

17.4. The _____¹⁵ text of this Contract is the governing text.

Article 18

Applicable Law

18.1. Contract shall for all purposes be governed by, and construed in accordance with, the law of _____.¹⁶

Article 19

Settlement Disputes

19.1. All disputes or differences which may arise between parties out of or in connection with this Contract, and which cannot be settled amicably shall be subject to arbitration by _____¹⁷ arbitrator(s) under the rules _____.¹⁸

19.2. The award of the arbitrator(s) shall be final and binding on the parties.

19.3. The arbitration proceedings shall be conducted in the _____¹⁵n language.

19.4. The place of arbitration shall be _____.¹⁹

¹⁵ Indicate language.

¹⁶ Indicate country.

¹⁷ Indicate number of arbitrators.

¹⁸ Indicate applicable rules.

¹⁹ Indicate place and country.

_____,
Alpha
By _____

_____ 20 ____
Beta
By _____

REFERENCES

1. Welt Leo, G.B. "Trade Without Money: Barter and Countertrade", Washington, New York, 1983.
2. UNCITRAL Legal Guide on International Countertrade Transactions, A/CN.9/SER.B/3, New York, 1993.
3. Guiot C "Countertrade- Recent Legal Developments and Comparative Study", Revue de Droit des affaires internationales, No 8, 1986.
4. Thomas Mc Way "Countertrade and Barter: Alternative Trade Financing by Third Nations" International Law Journal, 1986.
5. Milenkovic-Kerkovic T. "Legal Aspects and Legal Nature of International Countertrade Contracts", doctoral thesis, Belgrade, 2003.

ZAKLJUČIVANJE MEDJUNARODNOG BUY-BACK SPORAZUMA**Tamara Milenković Kerković**

Medjunarodni buy-back sporazumi predstavljaju varijetet generičnog kontratrgovinskog posla (countertrade) kojim se ostvaruje ekonomsko iskorišćavanje kupovne moći, i gde se isporučilac proizvodnih kapaciteta, postrojenja, opreme i tehnologije iz prvog ugovora obavezuje da u drugom ugovoru u određenom vremenskom periodu kupuje proizvode nastale radom tog postrojenja. Ovaj ugovorni varijetet omogućio je mnogim zemljama poput Kine, Tajlanda ili Južne Koreje da podignu nivo stranih ulaganja u domaću privredu kao i da ovaj posao iskoriste kao metod industrijskog razvoja i obezbedjenja najnovije tehnologije. Multiugovorna forma ovog pravnog instrumenta, kao i pitanje medjuzavisnosti obaveza koje iz odvojenih ugovora nastaju, kao i potreba za zaštitom interesa domaćeg partnera samo su najvažniji od mnogih razloga koji nameću potrebu izučavanja ugovorne strukture kao i tehnike pravljenja nacrtu i zaključivanja medjunarodnog buy-back sporazuma.