

I. INTERNATIONAL TRADE CONTRACTS

A. Report of the Secretary-General: barter or exchange in international trade (A/CN.9/159)*

INTRODUCTION

1. The report of the Secretary-General on the programme of work of the Commission submitted to the eleventh session of the Commission contained a short discussion of the subject of international barter and exchange.¹ It was there pointed out that legal systems approach the contract of barter or exchange in different ways. In some legal systems the contract of barter is treated as though it were a sale of goods, whereas in other legal systems the rules in respect of barter are completely separate from those of sale.

2. It was also pointed out that the law relating to barter or exchange transactions is relatively undeveloped, apparently because such transactions are not frequent on the domestic level. However, it was suggested that there was some evidence that barter or exchange transactions were becoming more frequent in the international sector. It was therefore suggested that the Commission retain provisionally the contract of international barter or exchange in its programme of work and request further study by the Secretariat. The Commission adopted this suggestion.² This report is submitted in response to the Commission's request for a further study.

BARTER AND BARTER-LIKE TRANSACTIONS

1. Barter

3. The inquiries made by the Secretariat during the past year indicate that, while certain barter-like transactions have become a regular feature of international trade, the conclusion of a true barter contract in which the parties exchange goods for goods remains as rare an event in international trade as it is in domestic trade. Therefore, the Commission may wish to conclude that it would not be useful to undertake the unification of the law relating to barter in the strict legal sense of the term.

2. Barter-like transactions

Economic nature of the transaction

4. A barter-like transaction exists whenever the parties exchange goods, services or other items of economic

value with the intention that no more than a minimum amount of money ultimately be transferred from one party to the other. The emphasis lies on the underlying economic exchange and not on the legal form in which that exchange takes place. In particular, it is not important whether the barter-like transaction involves only one contract or more than one contract.

5. However, a barter-like transaction which involves only one contract will often be of such a nature that it would fall within some definite rubric of the law. For example, if the exchange of a new piece of machinery for a used piece of machinery plus a sum of money is not considered by the legal system to be a barter, it will undoubtedly be considered to be a sale of machinery in which a portion of the purchase price is paid in kind.

6. Of greater economic significance are the more complex barter-like transactions. Payment for the construction of a plant or a mine may be made in whole or in part by delivery of all or of a portion of the production of the plant or mine. Royalties for a licence of a patent or other industrial property may take the form of goods produced under the licence. A seller of goods may agree that as part of the transaction he will purchase other goods from his co-contractant or from a third party designated by his co-contractant.

7. Barter-like transactions may be initiated by either of the two sides to the transaction. The furnisher of the plant or mine or the licensor of the industrial property may enter into the transaction to secure a source of supply. The party acquiring the plant, mine or licence may wish to be assured of a market for the goods to be produced. An acquiring party which insists that the furnishing party purchase unrelated goods from it or from some third party may be attempting to reduce the monetary cost of the acquisition, or to earn the necessary foreign exchange.

8. The goal to be achieved by creating a barter-like transaction will determine many important terms in the final agreement or set of agreements. However, these motives are not significant for analysing the legal nature of the transaction.

Legal nature of the transaction

9. In considering the legal nature of the transaction, it is important to note that barter-like transactions in international trade tend to be complex and to involve several separate agreements. Each of the agreements would deal with a separate aspect of the total transaction. For example, a patent licence in which the licensor agrees to take in payment a certain quantity of goods

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¹ A/CN.9/149/Add.2 (Yearbook . . . 1979, part two, IV, A, annex II).

² Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 69 (Yearbook . . . 1978, part one, II, A).

produced under the licence would normally involve at least two separate contracts: a patent licence and a contract to purchase goods. Typically, each of the two contracts would value the asset being transferred in monetary terms. The licensee-seller would agree to pay as royalties for the licence either a certain sum of money or at a certain rate. Conversely, the licensor-buyer would agree to pay a certain sum or to pay at a certain rate for the goods. The parties may or may not intend that the sum total to be paid by each would be equal in amount. In either case they would often agree that no money would change hands to the extent that the obligations could be set off against one another.

10. In such a pattern, the two or more contracts are, for the most part, ordinary contracts of licence, or of sale, or of construction with the usual terms to be found in such contracts. There are, however, at least two sets of provisions which differ from those to be found in the ordinary contract in order to effectuate the barter-like nature of the transaction. These are the payment terms and the remedies for non-performance.

Payment terms

11. The payment terms must reflect the intention that a minimum amount of money will actually change hands. The easiest way for this to come about is for the party who performs first to extend credit to the other party with an eventual reduction or elimination of the credit through later performance by the other party. Many other formulas can be imagined which might be better suited to the particular requirements of the individual transactions. Therefore, the means by which the payment provisions in the several contracts would be linked together would have to be a matter of negotiation between the parties.

Remedies

12. In principle, each of the parties has the right to exercise all of the remedies for breach of contract which would normally be available for breach of the type of contract in question. Among the remedies which are normally available when one party fails to perform his obligations under a contract is that the other party has a right to refuse to perform his obligations under the contract. One application of this rule is to be found in article 54 of the draft Convention on Contracts for the International Sale of Goods which provides that the seller of goods may make payment of the price a condition for handing over the goods or the documents which control the goods.³

³ *Ibid.*, para. 28.

13. Article 54 is a relatively easy application of the general rule because the justification for the seller's refusal to hand over the goods or the documents is the failure of the buyer to pay the price at the time of delivery.

14. When the failure to perform involves a more complex obligation than the obligation to pay the price, it is often difficult to decide whether the failure to perform was sufficiently serious to justify non-performance by the other party or whether the other party should be required to resort to other remedies.⁴ It is particularly difficult when the non-performance has not as yet occurred, but because of a serious deterioration in that party's ability to perform or in his creditworthiness or because of his conduct in preparing to perform or in actually performing the contract there are good grounds to conclude that he will not perform a substantial part of his obligation.⁵

15. The problem is even more difficult when the reciprocal obligations are as complex as the construction of a plant on the one hand, and delivery of goods over a long period of time on the other. Nevertheless, the parties will often wish to set out the conditions under which the failure to perform by one party will justify a suspension or termination of the obligation to perform by the other.

CONCLUSION

16. It can be seen that barter-like transactions in international trade are often very complex and, in so being, depart substantially from the simple model of the classical barter contract. Analytically these transactions do not constitute a single legal category. Instead, they are composed of several agreements which may be of the same legal character (e.g. reciprocal sales of goods) or may be of different legal types (e.g. a patent licence and a contract for the sale of goods).

17. Since barter-like transactions are composed of a number of different types of legal instruments, it does not appear that it would be useful to attempt to construct a single unified legal structure for them.

18. However, the Commission, in the context of its future work on international contract practices, may wish to consider whether consideration should be given to the preparation of standard clauses dealing with payment or with the right of one party to refuse performance because of the non-performance of the other party.

⁴ Cf. the draft Convention on Contracts for the International Sale of Goods, articles 45 (1) (a) and 60 (1) (a), which provide that the contract can be avoided if there has been a fundamental breach of contract.

⁵ *Ibid.*, article 62.