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GUARANTEE OF PAYMENT



FOR THE EXPORTER IN UZBEKISTAN

Study guide

**MINISTRY OF JUSTICE OF THE REPUBLIC OF UZBEKISTAN
TASHKENT STATE UNIVERSITY OF LAW**

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FOR THE EXPORTER IN
UZBEKISTAN**

STUDY GUIDE

Tashkent – 2018

The present publication of the study guide was recommended by the Ministry of Higher and Secondary Special Education of the Republic of Uzbekistan (The order of № 1000 on December 7, 2018 year).

UDC: 336.531 (075.8) (575.1)

Kamalov M. Guarantee of payment for the exporter in Uzbekistan. Study guide. –Tashkent: TSUL, 2018. – 64 p.

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The study guide has been prepared within the module of International Private Law and contains comparative, critical analysis of United Nations Convention on Contracts for the International Sale of Goods 1980 as well as legislation of the Republic of Uzbekistan as well as it provides for literature review of research works by a number of scientists in the relevant fields. The study guide includes abstract, introduction, 8 chapters, summary and references and bibliography.

The content of this paper will be useful for students who study law and economy as well as individuals who are involved in trade and logistics.

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INTRODUCTION

International trade plays a vital role in the economy of each individual state. Trade helps to satisfy the needs of the population and also stimulates the development of the country. International trade is the exchange of goods and services between countries.

Everyday a number of companies from different jurisdictions trade with each other and conclude thousands of contracts. Traders pursue smooth contract performance and with this purpose in mind draft contracts with a help of lawyers which tend to cover all the possible issues likely to happen in the process of performance of mutual obligations. At the same time, the terms of contract must be in line with the mandatory rules of national laws of the states of exporter and importer. Meanwhile, at the international level many years ago international community of traders and lawyers initiated an idea to unify the rules of international trade and to put them onto the universal document. As a result, in 1980 year United Nations adopted the Convention on Contracts for the International Sale of Goods 1980 (hereinafter referred to as CISG).

CISG became a true uniform international sales law. It has been ratified by 89 states that account for a significant proportion of world trade, making it one of the most successful international uniform laws. Palestine is the most recent state to ratify the Convention, having acceded to it on 29 December 2017 year.

The CISG allows exporters to avoid choice of law issues, as the CISG offers "accepted substantive rules on which contracting parties, courts, and arbitrators may rely"¹. Unless excluded by the express terms of a contract², the CISG is deemed to be incorporated into (and supplant) any otherwise applicable domestic law(s) with respect to a

¹ United States Department of Commerce, 'The U.N. Convention on Contracts for the International Sale of Goods' "Archived copy". *Archived from the original on May 5, 2007*. Retrieved April 2, 2007. at 22 December 2007.

² Standard clauses in English and in German (opt-in/opt-out): See Verweyen, Foerster, Toufar Handbuch des Internationalen Warenkaufs UN-Kaufrecht (CISG) 2. Auflage, 2008 pg. 64 (in English) and (in German)

transaction in goods between parties from different Contracting States¹.

The CISG has been regarded as a success for the UNCITRAL, as the Convention has been accepted by states from "every geographical region, every stage of economic development and every major legal, social and economic system"². Countries that have ratified the CISG are referred to within the treaty as "Contracting States". Of the uniform law conventions, the CISG has been described as having "the greatest influence on the law of worldwide trans-border commerce"³. It has been described as a great legislative achievement⁴, and the "most successful international document so far" in unified international sales law⁵, in part due to its flexibility in allowing Contracting States the option of taking exception to certain specified articles. This flexibility was instrumental in convincing states with disparate legal traditions to subscribe to an otherwise uniform code. While certain State parties to the CISG have lodged declarations⁶, the vast majority – 68 of the current 89 Contracting States – have chosen to accede to the Convention without any declaration.

Today it becomes obvious that the Republic of Uzbekistan will intensify international trade, since the government pays a lot of attention to the development of the republic's export potential.

Undoubtedly, entrepreneurs will sign contracts within the framework of which obligations to deliver goods to various states will be fulfilled. This in turn will be accompanied by disputes, the resolution of which will require the use of the provisions of CISG.

¹ This statement is only applicable for the US, The Czech Republic, and China, See Article 1,1B/95 Verweyen, Foerster, Toufar Handbuch des Internationalen Warenkaufs UN-Kaufrecht (CISG) 2. Auflage, 2008 pt. 21.2 pg 248 (in German)

² John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation (2000)' *Pace Review of the Convention on Contracts for the International Sale of Goods (CISG)*

³ Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *Victoria University of Wellington Law Review* 781.

⁴ Joseph Lookofsky, 'Loose Ends and Contorts in International Sales: Problems in the Harmonization of Private Law Rules' (1991) 39 *American Journal of Comparative Law* 403.

⁵ Bruno Zeller, *CISG and the Unification of International Trade Law* (1st ed, 2007) 94.

⁶ See list of signatories and their declarations at

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

The present paper examines the issue of guarantee of payment for the Uzbek exporters. In order to achieve the main purpose of this study, firstly we observed the remedies of the Uzbek exporters under the Vienna Convention on Contracts for International Sale of Goods 1980 (hereinafter referred to as CISG). Having identified the remedies of the domestic exporters under the said Convention the paper turned to the observation of the level of guarantee provided to Uzbek exporters under Civil Code of Uzbekistan (hereinafter referred to as UzCC). Accordingly, it led us to carry out a comparison of the corresponding provisions between CISG and UzCC. As the result, our research found out that the unpaid Uzbek exporters are provided with higher level of guarantee of payment under CISG rather than UzCC. Furthermore, we also examined the guarantee of payment under the letters of credit, demand guarantees and export insurance policy in the context of Uzbek law. It was clarified that the practice of application of the said forms of guarantees in Uzbekistan is not satisfactory in order to be a high guarantee of payment for the domestic exporters.

To achieve the above mentioned research goals we analyzed all relevant primary and secondary sources of law existing in the area of guarantee of payment applied in export contracts. Furthermore, our research was conducted on the basis of three methods. Accordingly, an analysis of the proposed study respectively applied the case study, the comparative law method and method of critical analysis.

In the following paragraphs national export analysis of the Republic of Uzbekistan, principle of “*pacta sunt servanda*” in the export contracts and its application in the legislation of Uzbekistan, application of rules CISG to the export and import contracts concluded by national exporters, right of the exporter to require a performance of the contract, passing property rights or risk to the parties of the contract, significance of the guilt in relation to the

remedies, comparative and critical analysis of Uzbek legislation and international conventions are analyzed thoroughly.

The conclusion has evidenced that a guarantee of payment for the domestic exporters in Uzbekistan is more than enough. However, the existing guarantees are not able to develop an overall export capacity of the country. The imbalance among the methods of payment used in export transactions has become as an obstacle in the way of foreign importers preventing them from free trade with Uzbekistan. Therefore, this work mostly examined the current situation in Uzbekistan and pointed out the discrepancies in Uzbek legislation, which have to be cancelled or modified in order to avoid a further decline in the Uzbek export.

1. National Export of Uzbekistan

A role of export trade is the most significant as investments in the development of state. Exports in Uzbekistan decreased to 1675.90 USD million in the third quarter of 2018 from 3709.70 USD million in the second quarter of 2018. Exports in Uzbekistan averaged 3776.26 USD million from 2000 until 2018, reaching an all time high of 14322.70 USD million in the fourth quarter of 2013 and a record low of 1386.80 USD million in the first quarter of 2006¹.

As a producer of oil, natural gas, and gold and as the second largest exporter of cotton, natural resources dominate the country's exports. Uzbekistan's other exports include machines and equipment, and food. Uzbekistan's main export partners are Russia, Turkey, China, Kazakhstan and Bangladesh².

Since independence, the government of the Republic of Uzbekistan has been pursuing a systematic policy to liberalize the trade regime of the republic. Most favoured nation (MFN) mode The Republic of Uzbekistan provides to 45 countries of the world in accordance with the concluded bilateral agreements on mutual cooperation.

Export licensing

The licensing of the export of goods (works, services) was cancelled from November 1, 1997, with the exception of specific goods (weapons and military equipment, special components for their production; precious metals, alloys, products from them, ores, concentrates, scrap and waste of precious metals, precious natural stones and products from them, waste, powders and a recuperator of precious metals stones, pearls and products from it, amber and products from it, uranium and other radioactive substances, products

¹ Available at: <https://tradingeconomics.com/uzbekistan/exports>

² Available at: <https://tradingeconomics.com/uzbekistan/exports>

from them, waste of radioactive substances, instruments and equipment using radioactive substances).

Legislation of the Republic of Uzbekistan provides a list of specific goods (works and services), the export and import of which is carried out with permits issued by authorized bodies of the Republic of Uzbekistan.

Export bans

Legislation of the Republic of Uzbekistan defines the list of goods and products whose export is prohibited. This list includes: grain: wheat, rye, barley, oats, rice, corn, buckwheat; bakery products, flour, cereals, livestock, poultry, meat and edible meat by-products, sugar, antiquities, representing significant artistic, historical, scientific or other cultural value, vegetable oils, leather raw materials, fur raw materials, including astrakhan, scrap and waste of non-ferrous metals, silkworm cocoons, suitable for unwinding, raw silk, silk waste.

Procedure for issuing export licenses

The procedure for licensing the export of the above specific goods is similar to the procedure for licensing imports.

Customs value of exported goods

The procedure for determining the customs value of goods exported from the customs territory of the Republic of Uzbekistan is established by the Cabinet of Ministers of the Republic of Uzbekistan.

The customs value of exported goods is determined based on the price actually paid or payable for the exported goods at the time of movement of goods through the customs border of the Republic of Uzbekistan selling it for export.

Value Added Tax on Exports

In accordance with Tax Code of the Republic of Uzbekistan, sales of goods (excluding cotton fiber and lint) for export in foreign currency are subject to value added tax at a zero rate.

Export excise tax

In accordance with Tax Code of the Republic of Uzbekistan, the sale of excisable goods for export is not subject to excise tax, with the exception of certain goods, the list of which is determined by the Cabinet of Ministers of the Republic of Uzbekistan.

Transit

The movement of goods across the territory of the Republic of Uzbekistan in transit mode is carried out on any routes and directions with the permission of the customs authority, except as required by law and international treaties of the Republic of Uzbekistan.

Customs clearance of special cargo during its transit is carried out in accordance with legislation by customs authorities upon presentation of a cargo customs declaration, permit for their transit, certificate of origin of special cargo and other documents required for customs clearance.

Legal framework

In the beginning of 90s an issue of export and import of the goods gained a special significance for the states emerged on the spot of the former Soviet hegemony. It was followed by adoption of the Law “On Foreign Economic Activity”¹ of 26 May 2000 and ratification of the Vienna Convention on Contracts for International Sale of Goods 1980 (hereinafter referred to as CIGS) of 27 November 1996². These measures made it possible for Uzbekistan to increase the volume of its annual exports potential.

In 2017 year over 200 international agreements were signed between the Republic of Uzbekistan and foreign partners in the field of trade and investments which overall amounts 60 billion USD³.

A growth of trade volumes of Uzbek state also raised an issue of creditworthiness and performance of payment obligations by foreign

¹ <http://www.lex.uz/docs/67345> – the national basis of normative-legal acts of the Republic of Uzbekistan.

² As of May 1, 2002, Available from: <http://www.osec.doc.gov/ogc/occic/cisg.htm>, Assessed [10 May 2003].

³ From the speech of Sh.Mirziyoev at a meeting on the activities of the Ministry of Foreign Affairs and the embassies of our country abroad // www.press-service.uz

partners towards national exporters. This posed a risk of an outflow of foreign currency resources and a big shortage in Uzbekistan.

In order to protect national exporters and prevent cases of non-payment the government undertook a series of measures. In particular, the government adopted strict laws which were originally supposed to provide a reliable guarantee for the domestic exporters.

However, this adversely affected the well-being of the domestic exporters. Consequently, it has been resulted in a sharp decline of overall volume of the Uzbek exports over time. The prime reason for such a reduction in export has been the requirement stipulated under the governmental acts as to the methods of payment used in the export contracts. Particularly, a major part of these acts have envisaged a predominant position to prepayment (advance payment) rather than the other forms of payment originally set forth in Civil Code of Uzbekistan of 26 December 1996 (hereinafter referred to as UzCC). It has been anticipated by the government that such measures would strengthen the guarantees of payment for the domestic exporters and at the same time prevents an outflow of foreign currency from Uzbekistan. Moreover, the government assumed that the issued Resolutions and Decrees could improve the state control over the domestic exporters.

In contrast to expectations of the government an implementation of these legal Acts in practice has made the Uzbek export for locally manufactured goods as non-competitive against other countries offering more favorable payment terms to foreign importers such as trade credits (e.g. 60, 90, 180). Therefore, Uzbekistan since 1998 has been able to export primarily the raw materials which are always in high demand among the foreign importers. However, it has to be said that export of raw materials is not profitable as the export of the manufactured goods, since raw materials do not contain an added value.

Starting from June 1st, 2017, entrepreneurs were entitled to export their self-produced goods (with the exception of fresh fruits and vegetables, grapes, melons and crops, as well as a number of commodities) with a total sum not exceeding 100 thousand USD and without advance payment, opening a letter of credit, issuing a bank guarantee, and without insuring the contract against political and commercial risks.

However, the requirement demanding payment during 90 days from the date of delivery of exported goods was left to be unchanged.

Distribution of capital holders among the residents of states:

Russian Federation –144 enterprises, the Republic of Turkey – 147, the PRC –137, the Republic of Kazakhstan – 91 and the Republic of Korea – 78.

Distribution of enterprises with foreign investments:

Industry – 364 units. (31.6%), trade – 307 units. (26.7%), construction – 108 units. (9.4%), agriculture, forestry and fisheries – 95 units. (8.3%) and other activities – 277 units. (23.1%).¹

It is also worth to note that over the past 6 years, Uzbekistan has improved its position in the World Bank Doing Business rating by more than 90 positions by reaching 74th place in the world.²

2. Principle of Pacta Sunt Servanda in the Export Contracts

Pacta sunt servanda is a latin term which means agreements must be kept. It is the principle in international law which says that international treaties should be upheld by all the signatories. The rule of pacta sunt servanda is based upon the principle of good faith. The basis of good faith indicates that a party to the treaty cannot invoke provisions of its domestic law as a justification for a failure to perform. The only limit to pacta sunt servanda is the peremptory

¹ <https://mft.uz/en/menu/tashqi-iqtisodiy-faoliyat-statistikasi> – the official statistics announced at the web site of the Ministry of Foreign Trade of the Republic of Uzbekistan.

² Available from: <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2018-Full-Report.pdf>

norms of general international law known as “jus cogens” which means compelling law¹.

In its most common sense, the principle refers to private contracts, stressing that contained clauses are law between the parties, and implies that nonfulfillment of respective obligations is a breach of the pact. In civil law jurisdictions this principle is related to the general principle of correct behavior in commercial practice – including the assumption of good faith – is a requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some systems even without any direct penalty incurred by any of the parties. However, common law jurisdictions usually do not have the principle of good faith in commercial contracts, therefore it is inappropriate to state that *pacta sunt servanda* includes the principle of good faith².

A similar principle can be found in contract law of many states of the world. Each agreement of a legal nature, domestic or international, whether it is an agreement between individuals or an agreement between states, implies that the parties acted with the intention to comply with its provisions when concluding the agreement. “*Pacta Sunt Servanda*” is a well established rule in international trade law.

If we look at this principle from perspective of private contracts we may say that it requires from the contractual parties an adequate performance of their due obligations. In relation to the contractual parties it means that the exporter must deliver the goods and tender the respective documents to the importer, whereas the importer has to take delivery of the goods and pay for them in accordance with the terms of the contract.³ In other words, the contractual parties are obliged to perform their mutual obligations in the way that complies with the

¹ <https://definitions.uslegal.com/p/pacta-sunt-servanda/>

² https://en.wikipedia.org/wiki/Pacta_sunt_servanda

³ Ibid., Part III , Section III, Ch. III Article53

terms of the contract, even though a performance becomes unfavorable or excessively difficult for one of the parties.¹ At the same time, it is worth stating that the contractual parties are not allowed to change the terms of the contract or terminate it unilaterally. However, the practice of international trade knows many cases when the exporters or the importers fail in performance their due obligations notwithstanding the expectations originally made under the respective contract. This is because there are two basic grounds:² 1. Subjective *i.e.* which wholly depends on the party in breach such as non-performance of payment obligation by virtue of insolvency or delay; and 2. Objective *i.e.* concerned with restrictions on the part of the state which prescribes severe restrictions on import or export of the goods.

As far as the exporter is concerned a breach of the principle of *Pacta Sunt Servanda* is mostly associated with a non-payment of the contractual price or refuses in taking a delivery made by the importer. This principle acquires a high significance when the exporter is unpaid as the result of the trade with the foreign importers because resale of the goods by exporter in unknown foreign market becomes a quite difficult task.

**UNIDROIT Principles of International Commercial Contracts with Official
Commentary [1994]**

Article 1.3

The binding character of a contractual agreement obviously presupposes that an agreement has actually been concluded by the parties and that the agreement reached is not affected by any ground of invalidity.

A corollary of the principle of *pacta sunt servanda* is that a contract may be modified or terminated whenever the parties so agree. Modification or termination without agreement are on the contrary the exception and can therefore be admitted only when in conformity with the terms of the contract or when expressly provided for in the Principles.

¹ This principle ensures the safety of the trade turnover. Kazimierska. A., 1999-2000 “The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods” [online] Available from <http://www.cisg.law.pace.edu/cisg/biblio/kazimierska.html>, Assessed [12 June 2003]

² Jarskiy A.2000 “Correlation of the remedies on breach of the international sale contract between CISG and the Law of the Republic of Byelorussia” Law and Democracy, State University of Byelorussia., [online] Available from: <http://zarsky.by.ru/Articles%20Andrey%20Zharsky.htm>, Assessed [12 June 2003]

The doctrine of *pacta sunt servanda* is linked together with the doctrine of freedom of contract. In ancient times, contracts were enforced in a harsh manner. When a debtor failed to perform his contractual obligations, he would become a slave of creditors, or would even be killed. In the Middle Ages, breach of contract was regarded as a religious offence that signified a major issue of conscience.

The three natural laws advocated by David Hume are: stability of private property; transfer of property only by consent; and *pacta sunt servanda*. At the same time, we need to admit that there is another point of view which says that 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 he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences¹.

In modern contract law, one significant principle that erodes the doctrine of *pacta sunt servanda* is the so-called *clausula rebus sic stantibus*, i.e. the doctrine of fundamental change of circumstances. The doctrine of fundamental change of circumstances refers to the situation where a contract, once validly established, is rendered incapable of performance by a party due to a unforeseen fundamental change in circumstances beyond his control that upsets the common basis for the transaction envisaged by the contract such that it becomes obviously unfair for that party to continue the contract.

Article 79(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) states:

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 he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

¹ Available at: <http://www.opentextbooks.org.hk/ditatopic>

3. Guarantee of payment for unpaid exporter under CISG

Having said that Uzbekistan ratified CISG and having identified that CISG is considered as the part of the Uzbek law, we will now turn to examination of the question whether CISG provides the respective guarantee for the unpaid Uzbek exporters. In particular, it is important for this study to identify a competence of the Uzbek courts to apply CISG in considering the cases with a non-payment of domestic exporters and also a sufficiency of the remedies under CISG to protect the right of the unpaid exporters.

Prior to entering into a further discussion of the remedies provided for the exporters under CISG, it is relevant at this stage to observe an issue of application of CISG by the Uzbek courts. Therefore, it has to be said that the contractual parties have a freedom of choice of applicable law to their contract.¹ Particularly, Article 1189 of UzCC provides that the parties are free in their choice of applicable law and respectively, they may choose the law of any country which governs the contract. It literally means that the contractual parties may choose the national law of a particular state or the Convention as the governing law of the contract.² Accordingly, it is required from the court to deliver the judgment on the basis of law expressly chosen by contractual parties.

Thus, a predominant position in regulation of the international trade contracts concluded since 1980 has been mainly occupied by CISG, since it has been often chosen as the governing law of the contract or constituted a part of the national law of the state governing the contract.

¹ See P. Schlechtriem, & I. Schwenzer, in I. Schwenzer (Ed.), Schlechtriem & Schwenzer, Commentary on the Convention on the UN Convention on the International Sale of Goods (CISG), 3rd edn, Oxford University Press, Oxford, 2010, Introduction I.

² Rakhmankulov H. 1999 "Civil Law of Uzbekistan" Tashkent: Sharq p 63.

On the other hand, it has become a regular practice for the courts considering the cases coming from international trade contracts to decide whether the case is to be resolved on the ground of the provisions of CISG or national law of the state. It is mainly appropriate in relation to the cases when the contracts provide a national law of a particular state as the governing law of the contract. The position of the courts in such cases will be out of doubt if we refer to consideration of the following principles of international law:

1.international treaty is the part of the national legislation of the state as soon as it is ratified;

2.international agreements have a predominant position over the national legislation.

These principles being customary international law are fixed almost in national laws of any state. Particularly, Article 7 of the UzCC also states that: "...the courts are required to apply the provisions of the international agreements in cases when the distinctive rules than those of prescribed in national laws are provided by international conventions".

These principles have been applied by foreign courts in considering a range of the cases under CISG. In particular, International Court of Commercial Arbitration (hereinafter referred to as ICCA) Chamber of Commerce & Industry of the Russian Federation justified this theory in practice by considering one case. The case concerned with an action brought by the firm registered in a USA (the importer) against a Russian company (the exporter) on the basis of the contract for delivery of the goods under the FCA (INCOTERMS 1990).¹ The contract contained a clause stipulating Russian substantive law as the governing law of the contract. The

¹ International Court of Commercial Arbitration Chamber of Commerce & Industry of the Russian Federation; Case No. 054/1999(decision dated 24 January 2000) [online] Available from http://www.arbitrage.spb.ru/2_00/art05.htm Assessed [12 May 2003].

ICCA from its part took into consideration all the circumstances of the case and held the following judgement:

1. As far as the importer was the company set up in the USA and the exporter respectively was a Russian company, their relations had to be subjected to CISG, since both of the states were contracting to the CISG 1980. The ICCA came to such a conclusion on the basis of the paragraph (1) (a) of Article 1 of CISG, and also by taking into account the fact that the parties had not previously excluded an application of the convention from their contract according to Article 6 of CISG; and;

2. Therefore, ICCA by further application of Article 7 under CISG considered that the Russian civil legislation had to be applied as subsidiary to those issues not expressly settled in the CISG and accordingly the court applied the CISG.

A similar decision was delivered by the German court in the case involving a Finnish company that sold 3000 tons of electrolyte nickel cathodes to the German defendant for about 17 million US dollars and accordingly was not paid in proper way.¹ Considering the case which was concerned with a claim of exporter as to a non-payment by importer, the court applied the CISG on the same ground as in aforementioned case decided by the ICCA.

On the other hand, the arbitral tribunal in another case found that CISG was incorporated into Austrian legal system. Therefore, according to Article 1 (1) (b) the tribunal decided that the fact that the counter-party was not from the contracting state is immaterial in the dispute concerned with a failure of the Bulgarian importer to pay the Austrian exporter within the time period agreed in the sale contract.²

¹ Case No.134/German Court 1995, Oberlandesgericht Munchen; 7U5460/94 8 March 1995 [online] Available from <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/aa18205f>

² Case No. 104/1993 International Chamber of Commerce, International Court of Arbitration Arbitral award published in 1993, [online] Available from: <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/3797bc4>.

Accordingly, it could be said that the CISG predominates when international sale contracts expressly provide the national law of contracting state as the governing law of the contract or when the rules of private international law lead to the application of the law of a contracting state.¹ Thus, with a reference to Article 7 of UzCC and aforementioned cases the Uzbek judges are fully entitled to apply the provisions of CISG in considering the cases if only the Uzbek law or the law of other contracting state is the governing law of export or import contracts.

This fact is extremely important for the Uzbek judges, since there are certain provisions of CISG as to remedies which sharply differ in their legal nature from those provided under UzCC. This fact induces the Uzbek judges to pay a particular attention to the aforementioned principles in application of CISG. Otherwise, the judges may look at the issues provided by the Convention through legal lenses they have created within their own systems, thus “homeward trend” is likely to emerge as national courts resort to domestic law or rules of interpretation in application of the CISG.² Anyway, if the court takes into consideration the requirements of Article 1 and does not refer to its laws for clarification of the issues provided under CISG, misuse and misinterpretation of CISG will be avoided. Therefore, the national courts of Uzbekistan prior to application of CISG are required to identify whether the conditions of Article 1 are satisfied or not.

¹ Article 1 (a) (b), United Nations Convention on Contracts for the International Sales of Goods 1980

² Timothy N. Tuggey, 1986 “The 1980 United Nations Convention on Contracts for the International Sales of Goods: Will a Homeward Trend Emerge?”, [online] 21 Tex. Int’l L.J. 540, 542 Assessed [10 June 2003]

4. Right of the Exporter to Require a Performance of the Contract

Having considered an issue of application of CISG by the Uzbek courts to the contracts of sale, it is relevant at this stage to observe the remedies of an exporter against non-payment cases under CISG.

As the first step among the remedies available to the exporter, CISG stipulates a right of the exporter to require a performance of the contract by the importer. Particularly, Article 62 provides that “the exporter may require the importer to pay the price or take the delivery, unless he has resorted to a remedy which is inconsistent with this requirement.” The purpose of this Article is to help the creditor to obtain the actual subject matter of his bargain.¹ Article 62 promotes respect for the agreement and ensures an adequate compensation for the exporter, since in some cases damages may be inadequate because they are not able to compensate the certain expenses suffered by the innocent party.² It is worthy to note that the rationale under this Article is to assist the exporter to minimize his losses in full. Therefore, the right of the exporter provided in Article 62 is quite useful, especially when the exporter feels difficulty with the disposal of the goods in foreign country where the importer refuses to take a delivery.

On the other hand, we have to say that the exporter will not be entitled to require the performance from the importer according to Article 62 unless there is a valid contract with the certain terms. This rule was delivered in the judgment of the German court which

¹ Boghossian N. 2000 “A Comparative Study of Specific Performance Provisions in the Convention on Contracts for the International Sales of Goods” [online] Available from: <<http://www.cisg.law.pace.edu/cisg/biblio/boghossian.html>>; Assessed [15 May 2003]

² Kastely A. 1988 “The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention”. 64 Wash. L. Rev. 607, 609.

considered the case,¹ where the plaintiff a German glass manufacturer, agreed to manufacture and deliver 220.000 test-tubes to the Italian defendant. During the course of negotiations, the appropriate glass type was the point of discussion as different types were mentioned. The plaintiff finally delivered the test-tubes in Fiolax quality and demanded payment. The defendant refused to pay and alleged the better Duran quality. Accordingly, the court applied Articles 62 and 59 of CISG and found that the exporter had a right to claim the price, if only a contract was concluded, *i.e.* if there were a valid offer and acceptance. The court held that an acceptance of the plaintiff's offer was missing, since the exporter and the importer did not reach an agreement towards a specific glass quality. Consequently, the court held that the plaintiff could not demand payment, and the claim was dismissed.

Furthermore, due to Article 62 the exporter is not obliged in compulsory manner to require from the importer a performance of the contract. It mostly depends on his discretion whether to require a performance from the importer or not. If the exporter considers requiring a performance, he may present such a requirement to the importer irrespective of extension of a delay in non-payment.² To some extent, a decision of the exporter as to whether to require importer for a performance depends on the fundamental character of the committed breach, because the exporter in case of fundamental breach may directly resort to Article 63(1) (a) and avoid the contract. However, if the breach of the contract is not fundamental, execution of the right for a performance is considered as the most appropriate remedy for the exporter, since enforcement of performance eliminates the expenses and delay of seeking another importer which is very difficult for the exporter especially in an unknown country.

¹Case No.135 Court of Germany, 31 March 1995[online] Available from: <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/a776bf4>

² Volken, P. and Sarcevic, P. "International Sale of Goods, Dubrovnik Lectures" USA: Oceana Publications, Inc. 1986, pp 222-224.

On the other hand, it has to be said that a burden of proof of delay in payment always remains with the importer. Accordingly, if the importer is able to present any relevant evidence for justification his failure, he will be released from an obligation to pay the price. This rule was justified in the judgment of the Tribunal of Commercial Arbitration of Russian Federation in case which involved the contract concluded between the Russian and Italian companies. In that case the goods were delivered without any complaints on the part of the importer, but the importer did not pay the price for the delivered goods. Importer in his turn suggested postponing a payment because he had received the quality claims from his customers concerning the goods. However, at the same time, he did not present to the tribunal any evidence of such claims. Consequently, the Tribunal decided the case in favor of the exporter by reference to Article 62, since the importer did not present to the Tribunal any evidence which might have proven that he should have been released from an obligation to pay the contractual price.

It is also to be noted that an application of Article 62 is subject to the conditions provided under Article 28 which reads follows:

“if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention”.

Thus, in accordance with this Article, it is good for the exporter prior to require a performance from the importer to be aware whether the law of the court allows it to enter the judgment for specific performance in relation to the similar contracts. If only the court enters a judgment under its law in relation to the similar contracts the exporter should proceed. The exporter is required no to be contemplated in relation to the phrase “similar contracts”. This

phrase embraces all sale contracts, which are outside the scope of the CISG. However, it includes only domestic sale contracts and contracts between the parties from countries which have not subscribed to the CISG, but excludes the contracts listed in Article 2 of the CISG.¹ Thus, it is undoubtedly that the phrase “similar contracts” excludes the contracts of delivery or contracts of carriage. Therefore, even if the court enters a judgment in relation to these contracts the exporter cannot be granted with a judgment for a specific performance, because they are not contracts for sale. These contracts are intended to provide international legal protection, primarily against non-commercial risks. The establishment of clear, accessible and enforceable rules that improve the exporting climate and thereby strengthen trust between states is a kind of a stimulator of foreign investment.² Therefore, it is crucial for the exporter to consider the substantive law of the court in relation to only sale contracts.

It has been identified in the preceding section that the exporter is entitled to require a specific performance from the importer if only the requirements of Article 28 are satisfied and other remedies inconsistent with the requirement for specific performance are not invoked. On the other hand, it has been also mentioned that a fundamental breach of the contract induces the exporter to avoid the contract rather than to require the importer for specific performance. Therefore, in this section we will examine the second remedy of the exporter *i.e.* avoidance of the contract and consider its advantages for the exporter in relation to specific performance.

Thus, the exporter under CISG is entitled to avoid the contract. This remedy provided in Article 64(1) states the following:

¹ Walt S. 1991 “For Specific Performance under the United Nations Sales Convention”, 26 International Law Journal. p. 221.

² Хлестова И.О. Законодательство и международные договоры о защите иностранных инвестиций // Московский журнал международного права, 2014, №2. С.7.

a. if the importer fails to perform any of his obligations under the contract or the Convention and the failure amounts to a fundamental breach of contract; or

b. in case of non-payment or non-taking of the delivery by the importer, if he does not perform his obligations within an additional period of time fixed by a exporter's notice made in compliance with Article 63 of the Convention, or declares that he will not perform within the period so fixed.

Accordingly, a fundamental breach of the contract constitutes a central value for avoidance. It means that if the contract is not fundamentally breached, the exporter is not allowed to avoid the contract. The CISG stipulates that a breach in order to be the fundamental must detrimentally and substantially deprive the exporter of what he is entitled to expect under the sale contract. In other words, the interests of the exporter under the sale contract must be extremely important for him like the whole essence of the contract, which deprivation amounts to the nullification of the contract. In export contracts a typical breach is a delay in payment.¹ However, a mere non-performance within a time limit will constitute a fundamental breach only in rare instances.² Thus, if there is a delay in payment on the part of importer we are not authorized to consider it as a fundamental breach unless the contract terms stipulates otherwise.

In one case decided by Court of Appeal of France³ which involved a French jeans manufacturer (exporter) and US importer, the exporter had specified that the purchased jeans were to be sent to South America and Africa. However, it became apparent during the second delivery that jeans had been shipped to Spain. Consequently,

¹ Bianca, C.M. and Bonell M.J. 1980 "Commentary on the International Sales Law 1980 Vienna Sales Convention" Milan, Dott A. Giuffrè Editore. pp. 435-475.

² Sevon L. 1986 "Obligations of the Importer Under the UN Convention on Contracts for the International Sales of Goods, in International Sale of Goods"- Dubrovnik Lectures, Petar Sarcevic & Paul Volken editions., pp.76-82.

³ Case No.154 S.A.R.L. Bri Production "Bonaventure" v. Socit., Pan Africa Export. Court of Appeal France (Commercial Division) [1995] UNILEX, D. 95-1. [online] Available from: <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/608c80a>.

the exporter refused to maintain further trade relationships and applied to the court. The court in turn invoked Article 8(1) of CISG in order to conclude that the US company had not respected the order of the French company, namely to know the destination of the goods. Thus, the court considered an attitude of the US importer as a fundamental breach of contract within the meaning of Article 25 CISG. The court also held that the exporter could declare the contract as void under Article 64(1).

However, in most of the cases the courts hold a different approach. Particularly, Arbitration in Russian Federation considered the case where a contract was concluded between a Swiss exporter (claimant) and a Russian importer (respondent) for the supply of chocolate confectionery products for a specified sum of money. The contract included a clause stipulating preliminary payment for the first two instalments of the goods delivered by two vans. A time limit for delivery of the goods was one week after receipt of the bank guarantee. Consequently, the exporter delivered the first of the two instalments on the ground of the importer's written statement regarding guaranteed payment of goods. The importer accepted the delivery of the goods, however failed to pay for those goods. When explaining its position, he mentioned the fact that the exporter had breached the contract by dispatching the goods before the importer had transmitted the banker's guarantee. The importer considered that such an infringement should be regarded as a fundamental breach of the contract. In addition, the importer stated that a non-payment by him was due to its subcontractors' refusal to accept previously ordered goods owing to the changed economic situation in the country. By considering this dispute the tribunal noted that under Article 53 of CISG one of the main obligations of the importer is to pay the price established for the goods. The tribunal further clarified that as far as the importer had accepted a delivery of the goods, violation by the

exporter of the terms specified for dispatch of the goods (delivery in the absence of a banker's guarantee) could not be considered as sufficient ground for discharging the importer from its payment obligation. Thus, it was held by the Tribunal that such a violation could not be deemed as the fundamental breach of contract in the sense of Article 27 CISG. Similarly, the tribunal in other case found that a failure by the importer to open the irrevocable and divisible letter of credit which is provided in the contract constitutes an ordinary breach of contract and not the fundamental breach despite the additional period of time allowed by the exporter.¹ However, Professor Hellner considers that the exporter should always be allowed to declare the contract avoided as soon as the importer does not open a credit within a fixed time.² Analysing the facts given above in the light of the provisions of Article 27, it can be concluded that it is often a difficult task for the exporter to decide whether a breach of the contract by its nature is fundamental or ordinary. Although in some cases the contract attaches a fundamental importance to the certain terms. Particularly, the contract may specifically prescribe a certain date for payment and accordingly which breach will be treated as the fundamental breach.³

Due to CISG, if the exporter is not confident in a question whether a breach of the contract is fundamental or not, he is advised to fix an additional time to avoid the contract.⁴ At the same time, Article 63(1) states that an additional time fixed by the exporter has to be of a reasonable length which gives a fair opportunity to the importer to perform his obligations. Moreover, the exporter by virtue of the paragraph (2) of Article 63 is required to give an appropriate notice to

¹ Case No. 7197/International Chamber of Commerce, International Court of Arbitration Arbitral award. [online] Available from: <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/3797bc4>

² Volken, P., Sarcevic, P. 1986: p.353.

³ Case No.93/3275 Court of Appeal of France, S.A.R.L. BRI Production "Bonaventure" v Societe PanAfrican Export, [online] Available from: <http://cisgw3.law.pace.edu/cases/950222f1.html>; Assessed [May 15 2003] where the party's breach of the contract in respect of the final destination of the goods was considered by the Court a fundamental breach of contract under CISG Article 25.

⁴ Kazimierska, A. 1999-2000: p.36.

the importer prior to avoidance of the contract where he has to show an additional period of time fixed for importer.¹ Such a notice is known as *Nachfrist* which is normally formulated by the exporter in the following manner: “...we set an additional period of time for payment by importer until May 31”.² Thus, the exporter is not allowed automatically to avoid the contract unless the contract terms otherwise provide. In case of a non-payment by the importer, the exporter himself should decide how long he is ready to wait for a payment.³ This is the advantage of lack of strict prescription of the period during which the right to avoidance must be exercised. Even one day may be considered as a sufficient and reasonable time for *Nachfrist* period.⁴ As an example: the exporter may fix one day as *Nachfrist* when the goods are perishable by their nature, because longer period may substantially deprive the exporter from those interests associated with the respective contract. At the same time, it is worthy to note that the exporter is not allowed to speculate at the cost of the importer. The exporter has to make up his mind within a reasonable time, at least at the inquiry of the importer.⁵ For instance: It is not allowed for the exporter to fix a *Nachfrist* period and wait for the convenient time when the price for the goods falls down (an estimation of the damage is the difference between the contractual price and the market price at the time of avoidance) and then to avoid the contract.

Thus, *Nachfrist* period allows the exporter to avoid the contract in cases when there is a non-payment on the part of the importer even

¹Article 63(1), CISG.

Case No.5 U 15/93 Frankfurt German Court; where the Court held that the importer had not validly declared the contract avoided for late delivery as he had not fixed an additional period of time for performance by the exporter (the importer was found not to have given evidence of fixing such an additional period of time) [online] Available from: <http://cisgw3.law.pace.edu/cases/950222f1.html> > Assessed [May 15 2003].

² Treitel G. 1989 “Remedies for breach of contract: a comparative account”, Oxford University Press:, p.327.

Ziegel J., Samson Claude. ,1981 “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods/ Comments to Article 64., [online] Available from: <http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html> >, Assessed [15 May 2003].

³ Kazimierska. A, p. 25

⁴ Sevon L. 1986: pp. 224-5.

⁵ Enderlein & Maskow 1992 “International Sales Law United Nations Convention on Contracts for the International Sale of Goods Convention on Limitation Period in the International Sale of Goods” USA: Oceana Publications p.243.

after the expiration of the given time. However, *Nachfrist* is not to be treated as final and accordingly the exporter should not warn the importer about an avoidance of the contract if *Nachfrist* is expired.¹ It is mostly because the exporter may decide to extend *Nachfrist* period by virtue of the circumstances coming from particular case or equally the importer himself may ask the importer for the extension. It means that a final decision always remains on discretion of the exporter.²

On the other hand, Article 63(2) further provides that:

“....unless the exporter has received notice from the importer that he will not perform within the period so fixed, the exporter may not, during that period, resort to any remedy for breach of contract. However, the exporter is not deprived thereby of any right he may have to claim damages for delay in performance”.

The prime goal of this paragraph is a due protection of the importer against all possible abuses on the part of the exporter as to remedies. Thus, the exporter may due to the said Article require neither for a specific performance nor avoidance of the contract during the fixed *Nachfrist* period. To some extent this Article is a good guarantee for the importer, however it is unfavourable to the exporter, since the exporter is not allowed to use his remedies to full extent during the fixed time even though the circumstances of the case change substantially.

As an example: A (the exporter) enters into the contract with B (the importer) for sale of 5000 tons of cotton and properly performs the delivery, but B delays in payment of contractual price. As a result, the exporter fixes an additional time for the sake of avoiding the contract, instead of requiring for a specific performance. Owing to this reason, the exporter is required to wait for an expiration of an

¹ Enderlein F., Maskow D., 1992 “International Sales Law” Oceana Publications: [online] Available from: <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>, Di Palma M. 1999 “*Nachfrist* under National Law, the CISG and the UNIDROIT and European Principles: A Comparison”, International Contract Adviser (Kluwer), Vol.5, No.1: [online] Available from: <http://www.cisg.law.pace.edu/cisg/biblio/DiPalma.html>, Assessed [15 July 2003].

² Sevon L. 1986: pp. 224-225.

additional time and subsequently he is not allowed to demand for a payment of the price or to avoid the contract during the fixed additional time. This allows us to say that a right to require a specific performance and the right to set an additional period of time for a performance are basically variants of the right to obtain performance between which the exporter can choose from outset.¹

However, at the same time the exporter is not deprived from any right in relation to damages notwithstanding the fact that he is restrained from resorting to other remedies.

Having said that the exporter is not deprived from the damages during *Nachfrist* period, identified that Article 63 (2) under CISG provides the respective legal grounds for the exporter to claim his damages. Article stipulated that: ‘...the exporter is not deprived thereby of any right he may have to claim damages for delay in performance’. It literally means that the damages being a separate remedy for the exporter do not depend on other remedies. In other words, if the exporter requires the importer for a specific performance or fix *Nachfrist* period, thereby he is not deprived from damages according to the said Article.

At the same time a question concerned with the amount of damages may arise. The answer this question is given in Article 74:

“Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.”

Due to Article 74, an actual loss suffered by the exporter as a result of the breach is ascertained prior to granting damages.

¹ Enderlein, F., Maskow, D. 1992: Comments to Article 64.

Therefore, it is important to take into account the fact that the damages cover not only the prime loss suffered by the exporter but also the loss of profit. The prime purpose is an achievement of equality between entire loss and the damages. However, in order to achieve this goal, the amount of actual loss has to be evidenced by the exporter in the court. Otherwise he cannot demand for the damages.

This rule was delivered in judgement of the Tribunal of ICCA of the Russian Federation in the case involved the exporter who performed the contract in accordance with its terms and conditions. The importer in his turn neither presented any claims with regard to the goods nor paid the price of those goods. Consequently, the exporter requested the importer to pay for the goods along with the compensation for the loss sustained by him as a result of the breach of contract by the importer. This loss included the cost of storage of the goods at the port of loading on account of the delay of the ship which was to be provided by the importer. Accordingly, the exporter presented to the tribunal the bills it had paid for the storage. The Tribunal decided in favor of the exporter and ordered the importer to pay the price of the goods as well as damages due to Article 74 of CISG.¹

The next requirement is a confidence of the exporter in relation to quality of the goods delivered and their conformity with the contractual terms prior to demanding the compensation for damages. In one case the importer refused to pay the price to the exporter by arguing that the delivered wine was not of merchantable quality since it contained 9% water and therefore the wine was seized and destroyed by German authorities. Consequently, the defendant stated that he had been charged with the costs for these measures. The defendant set off these costs against the plaintiff's claim. The court held that the defendant could set off his damages against the purchase

¹ Case No. 375/93 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce [online] Available from: <http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca004c583d/d79811r>.

price as a result of the breach of the contract by the exporter. At the same time, the court found that the defendant had not lost his right to rely on the non-conformity of the wine even though the defendant did not examine the wine for water after delivery.¹

It is also worth mentioning at this stage that there may be cases when the parties expressly provide in the contract for a payment of penalty if there is a failure in performance of payment. In such a case we may doubt as to whether the amount of damage provided by CISG should exceed an amount of the penalty agreed by both of the parties or not. The same question had arisen in the case decided by Arbitration of the Russian Federation. Accordingly, it was held that a clause in the contract stipulating a payment of penalty is an exclusive by its nature and does not provide for payment of damages in excess of the sum due in accordance with such a clause.² Thus, if there is a clause in the contract stipulating the certain sum as a penalty for non-performance, the exporter cannot resort to the damages under CISG which provide for higher sum. Therefore, the exporter is required to take into consideration all possible losses associated with a breach prior to fixing a penalty. However, the court of Switzerland in one case held that the plaintiff could even ask for higher damages than those provided under the applicable law of the contract if only he can prove that the exporter is paid in higher rate of interest under CISG³.

Thus, an amount of the damages and a right to them mostly depends on the circumstances of each particular case.

Based on the above analysis it may be concluded that the exporter is respectively protected under the provisions of CISG. However, the Uzbek judges must be guided by Article 7 of UzCC in order to avoid the risk of misuse and misunderstandings in application

¹Case No. 170 Court of Germany [online] Available from:

<http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/c60190d>.

² Case No. 251/93 Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce, 23.11.1994 [online] Available from: <http://www.unilex.info/case.cfm?pid=1&do=case&id=250&step=Abstract>;

³Case No.195/Court of Switzerland, [online] Available from:

<http://www2.gov.si/uncitral/clout.nsf/70dd6f602c1773bec12566ca005c864d/216fa73>.

of CISG. In general, the unpaid exporters may wish to choose any remedy which is more likely to cover his losses to higher extent. Accordingly, the exporters may require a specific performance by the importer or avoid the contract if there is a fundamental breach of the contract. Moreover, the exporters are fully entitled to the damages if only they are able to prove their losses.

The following chapter will examine the distinctive features between CISG and UzCC which are extremely important to be considered in delivering the judgment under CISG by Uzbek courts.

5. Distinction of remedies under CISG and UzCC

Having concluded that the exporter is respectively protected under CISG and having identified that CISG was ratified by Uzbekistan, we will now compare the distinctive features between remedial provisions of CISG and UzCC. It is thought that the identification of the distinctive features existing between these legal documents enhance a proficiency of the Uzbek judges in application of the CISG provisions as to remedies.

Prior to entering into a further discussion on the distinctive features of the remedies provided under the CISG and UzCC, it is appropriate at this stage to note that the CISG contains no provisions on passing of the property. Instead of that, the CISG provides the provisions on passing of the risk. The main reason for that is the difference between the domestic rules on passing of property and its integration into the national legal systems. Mostly for these reasons, no unification could be achieved in this field.¹ On the other hand, the national legislation of the countries both of common and civil law jurisdiction stipulates that an innocent party may resort to the remedies if only the proprietary rights for the goods have passed to the

¹Ziegel S. 1981 "Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods":[online] Available from: <http://www.cisg.law.pace.edu/cisg/text/ziegel61.html> Assessed [10 June 2003]

importer. Bearing this feature of the CISG in mind we will examine the rest of the distinctive features below.

In the preceding chapter we have identified that the exporters are sufficiently guaranteed under CISG by virtue of the remedies provided therein. Particularly, it has already been said that under Article 61(1) of CISG the exporters may immediately resort to the remedies provided thereof, if only a mere fact of the breach is present. In other words, if the importer fails to perform any of his obligations under the sale contract, the exporter may automatically exercise his rights to remedies provided both in Articles 62 to 65 and Articles 74 to 77. At the first sight, the legal grounds for invoking the remedies under CISG seem the same as those provided in UzCC. However, a further analysis of Articles 61 to 65 will clearly evidences that the CISG excludes the concept of “guilt” from its content as one of the main grounds for invoking the remedies. It literally means that the exporter is entitled to remedies regardless of the guilt on the part of the importer. The judgement of the German court in the case involving the German exporter of ten electronic ear devices and Italian importer precisely illustrated this rule. In that case, the exporter demanded for a breach of contract by the Italian importer because of his failure in taking delivery, despite of an additional time. The court was not concerned with a question whether or not a failure by the importer is a direct consequence of his inaction that is to say a result of his guilt. Therefore, the court held on the basis of Articles 61(1) (b) and 74-77 CISG that the importer had to pay damages to the exporter for a failure in taking delivery of the goods, even though there was no guilt on the part of the importer.

However, a concept of guilt occupies a different position under UzCC. As far as the exporter is concerned the Uzbek law emphasizes a compulsory character for the guilt on the part of the importer in order to entitle the former to remedies. It means that the exporter

losses his right to require a performance or avoid the contract against the importer if there is no guilt on his part. Particularly, Article 333 reads as follows:

“the party in breach is responsible for a non-performance or improper performance of contractual obligations if only there is guilt on his part”.

Furthermore, Article 333 further continues by stating that: “...the party in breach will be recognized as innocent if he is able to prove that all measures have been taken by him to perform the contractual obligations in proper way”. Thus, the said Article imposes an obligation on importer in order to discharge him from a liability to prove the fact that all measures have been properly undertaken and accordingly there is no guilt on his part at all. At the same time, the innocent party holds a burden of proof to the contrary.

On the other hand, Article 333 in the second paragraph provides that: “a person acting in the course of business and who does not perform his due obligations in proper way will be responsible unless that person can prove that the non-performance on his part occurred as the result of the *force majeure* circumstances”. As we can see, in this part of Article 333 the central position is occupied by a person who is acting in the course of business. Accordingly, this person is not liable if only there are *force-majeur* circumstances and it is properly proved by him that a breach is a direct consequence of such circumstances. Otherwise, the said person will be liable.

Having observed two parts of Article 333 this paper has identified the first part is more flexible for the importer, since it enables him to show that all possible measures have been taken, whereas the second part mostly depends on the *force-majeur* circumstances which are strictly prescribed under UzCC.¹ Therefore, the position of the importer who seeks to discharge a liability is more

¹ The possible measures may vary in each separate case. Therefore, it is more flexible to importer.

difficult in later case. However, it has to be said that a lack of financial resources is excluded from the scope of the *force-majeur* circumstances provided in Article 333. Therefore, the importer is not allowed to avoid the responsibility by declaring that his failure occurred by virtue of the lack of financial resources.

That being said, it may be concluded that CISG does not provide the guilt as the compulsory legal ground for the remedies. However, UzCC holds a different approach. Therefore, a protection of a payment for the exporter is better provided under CISG since he is authorized to invoke the remedies provided thereof without proving guilt of the importer. The Uzbek judges by virtue of this reason are not obliged to look at guilt of the importer in delivering judgment for a payment due to the exporter.

Having concluded that CISG does not provide the guilt as the compulsory element for invoking the remedies, the paper has identified that the exporter may resort to any remedy in presence of a mere breach on the part of the importer. In this section we will observe the distinction between legal grounds for avoidance.

Thus, as we have already mentioned Article 64 under CISG provides the exporter with a right to declare the contract as avoided in case of the fundamental breach. Article does not provide any additional requirements for the exporter more than the fact of fundamental breach. Therefore, the exporter is unilaterally allowed to avoid the contract if the necessary legal grounds stipulated in Article are present.

The recent case decided by French Court concerning French exporter, who concluded the contract for sale of goods with the importer from the US, may serve as a legal ground for aforementioned statement. In that case, the terms of the contract specified that the jeans purchased were to be sent to South America and Africa. The exporter had repeatedly and insistently demanded a proof of the

destination of the goods sold. However, it became apparent during the second delivery that they had been shipped to Spain. The exporter subsequently, refused to maintain the trade relationship. The Court of Appeal, in its turn, invoked Article 64(1) and justified the actions of the exporter, since a breach of the importer was amounted to fundamental breach. As a result, the court ordered to the US Company (the exporter) to pay damages amounting to 10.000 French francs.

However, if we refer to UzCC to find out the position of Uzbek law in relation to avoidance, we will face with Article 382 which states the following:

“[a]n avoidance or modification of the contract is not possible unilaterally. It is only allowed on the ground of the respective agreement between the contractual parties. However, the contract may also be avoided on demand of one of the parties pursuant to the judgment of the court only if:

1. There is a fundamental breach by contrary party; and
2. In other cases, provided with other laws or contract itself.”

Accordingly, Article 382 does not allow the exporter to avoid the contract unilaterally even if there is a fundamental breach by the importer. On the other hand, the Uzbek law allows the exporter to avoid the contract if only he comes to an agreement with the importer prior to the breach of the contract. If the parties cannot come to an agreement than the exporter is required to apply to the court for the judgment if only a breach is fundamental.

As an example: The contract of sale is concluded between the exporter and the importer for the sale of 5000 tons of cotton. The contract provided as the form of payment for the letter of credit that has to be opened within one week after conclusion of the contract. The parties in their contract stipulate a provision which reads as follows: “...the exporter may treat the contract as avoided and terminate a further performance if the importer fails to open a letter of credit by

due date”. Consequently, the importer fails to open a letter of credit and the exporter did not ship the cotton and avoided the contract.

The facts of this case precisely show that the exporter is fully authorised to avoid the contract by virtue of the express agreement done by the parties. Accordingly, the requirements of Article 382 of UzCC are fully satisfied in this case.

On the other hand, Article 382 continues by stating that the contract may also be avoided by the judgement of the court on demand of the exporter if there is a fundamental breach.¹ However, as we have already said in the preceding chapter, it is a quite difficult task for the exporter to prove and for the court to recognize that a committed breach is the fundamental by its nature. This problem was resolved under CISG by *Nachfrist* period. However, UzCC does not provide *Nachfrist* period. In particular, Article 244 under UzCC states that:

“[i]n no case an additional time for performance of the obligations is allowed, unless the terms of the contract or other laws provide other provisions.”

Therefore, the exporter under the Uzbek law is mostly on the discretion of the court which in turn decides whether the committed breach is the fundamental or ordinary.

Moreover, it depends on the contract terms, since if the contract terms provide for an additional time the exporter will be allowed to set up such a period. In most of the cases the exporters prescribe in their contract such a provision.²

As an example: The contractual parties may prescribe an additional time “...30 days after the due date of the performance”. In this case, if the importer does not pay prior to expiration of an additional period, the exporter is entitled to avoid the contract.

¹ Article 382 (1) Civil Code of Uzbekistan <http://www.lex.uz/>

² Rahmankulov H. 1999 p.234.

Having identified the specific features of the legal grounds for avoidance under CISG and UzCC, the proposed scientific work will now examine the distinction between the effects of the avoidance on the exporter.

As far as the exporter is concerned the second paragraph of Article 81 under CISG provokes more controversy in relation to UzCC than other paragraphs contained thereof. It is mostly because Article 81 (2) of CISG stipulates the following:

“A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract”.

Thus, Article allows the exporter to claim restitution of whatever delivered by him prior to avoidance of the contract.

A good illustration of this rule was provided in the recent case decided by the German Court which involved the (plaintiff) who was an Egyptian businessman and the (the defendant) German company trading in used printing machines. In that case the parties agreed upon two shipments, the first included six machines and the second three machines respectively. The contract terms obliged the importer (the plaintiff) to pay the considerable part of the contract price before the first shipment, which he did. However, the first shipment contained only three machines. After having demanded shipment of the missing machines several times, the plaintiff with respect to the last three machines fixed an additional period of two weeks for delivery. The defendant did not deliver within that period, subsequently the plaintiff declared the contract as avoided. As the result the plaintiff demanded compensation for its loss as well as repayment of the sum by which the advance payment exceeded the price of the three delivered machines. The court held that the plaintiff's repayment claim to be justified according to article 81(2) CISG.

However, if this case were decided under Uzbek law, the judgment of the court would be the different, since Article 385 under UzCC stipulates that:

“[t]he contractual party is not entitled to demand restitution from the counter-party of whatever the first party has supplied or paid under the contract prior to its avoidance unless other terms are provided with an agreement “

As an example: Where the contract terms oblige the exporter to deliver the goods by two instalments. The exporter delivers the goods in the first instalment and the importer pays the price. However, the second instalment after being delivered still remains unpaid, which in turn induces the exporter to avoid the contract because of the fundamental breach. The exporter will demand for restitution for its loss under the second instalment. However, it has to be pointed out that as far as the Uzbek law is concerned the exporter is not entitled to demand restitution from the importer in relation to the second instalment, unless the exporter reaches an agreement with the importer.

Accordingly, UzCC holds an unfavorable regime for the exporters because in case of a non-payment they are not adequately compensated. Accordingly, CISG guarantees the rights and interests of the unpaid exporter in higher level than under UzCC.

The present chapter has identified the basic distinctions existing between the corresponding provisions of CISG and UzCC with regards to remedies. In particular, it has been identified that under CISG the exporter is not to prove the importer's guilt, whereas UzCC in obligatory form provides for this requirement. Moreover, we have examined the legal grounds for avoidance and its effects on the unpaid exporter. A comparative analysis of the remedies has assisted us in conclusion that the provisions of CISG are more favorable as far as the unpaid Uzbek exporter is concerned. Therefore, it is supposed that

the guarantee of payment for the domestic exporters would be higher if the Uzbek judges took into consideration all aforementioned distinctive features.

The following chapter will examine whether the letter of credit is an adequate instrument for guaranteeing payment for the exporters in Uzbekistan.

6. Application of letters of credit in Uzbekistan

Having discussed a right of unpaid Uzbek exporter to remedies in the preceding chapters this work has identified that the guarantee of payment are not provided at the same level under UzCC and CISG. In this chapter our study will concern with the guarantee of payment provided for the Uzbek exporters under the letter of credit. Being one of the most popular methods of payment the letter of credit leaves a quite insufficient possibility of a non-payment for the exporters. Therefore, it is considered as a beneficial to both of exporters and also importers since both of the parties are secured in high level. However, the letter of credit has not been widely practiced in Uzbekistan since 1998. As the result domestic exporters have not benefited from the advantages provided under the letter of credit. The main reason thereof has been the Resolutions and Decrees adopted by Cabinet of Ministers of Uzbekistan prescribing other forms of payment for the domestic exporters rather than the letter of credit.

In the present chapter this paper will observe the level of a guarantee of payment under the letter of credit provided for the Uzbek exporters. Afterwards, the present paper will discuss the existing obstacles under the Uzbek law preventing the domestic exporters from the application of the letter of credit. That being said it has to be determined whether the domestic exporters are in benefit from insufficient application of letters of credit or not.

It has originally been intended by the Uzbek banks to develop the credit operations for the sake of promoting an expansion of the Uzbek export. Since the time of establishment of the National Bank of foreign-economic activity, Uzbekistan has closely been engaged in the development of the letters of credit as a prominent form of financing of trade.¹ Accordingly, the National Bank proceeded many export and import contracts widely applying the Uniform Customs and Practice for Documentary Credits (2007) (hereinafter referred as to UCP 600) and the respective Articles of UzCC as to the letter of credits. A sufficient level of the guarantee of a payment for the exporters under letters of credit was the reason for that end.

A high level of the guarantee under the letter of credit was mainly explained by virtue of the fact that an obligation of the importer to make a payment automatically transforms to the bank. Although it is important for this study to remind that the prime purpose of letter of credit is a payment by bank against the documents conforming to the instructions of the importer. Particularly, UCP 600 provides that: “any arrangement, whereby a bank acting at the request and on the instructions of a customer or on its own behalf, is to make a payment to or to the order of the third party or is to accept and pay bills of exchange drawn by the beneficiary against stipulated document(s), provided that the terms and conditions of the credit are complied with”.² Therefore, it is more likely that the exporter will be able to obtain a payment in any case unless the bank becomes an insolvent, but this risk can be covered under an insurance policy issued to exporter against a risk of non-honouring of letter of credit. Naturally, exporters prefer a payment by cash to the letter of credit, however it is contrary to the interests of the importer because it poses more risks than the letter of credit. Therefore, the letter of credit has

¹ National Bank for Foreign Economic Activity of the Republic of Uzbekistan/ Financing Export and Import/ The Letters of Credit and Guarantees: Available from: <http://eng.nbu.com/services/corporate/akredit.php>

² ICC Uniform Customs and Practice for Documentary Credits Article 2

been considered as more acceptable and beneficial to interests of either contractual party.

Owing to the said benefits of the letter of credit, both of the banks and importers in Uzbekistan have widely applied it in export as well as import transactions until recently. The government issued a range of the Regulations and Decrees to regulate an activity of the domestic exporters.

At the same time in 2017 the government reformed and liberalized monetary policy of the state which is supposed to bring more modern means of payment which also secure the rights of exporters.

Having identified the benefits of the letter of credit for the exporters in the preceding section, it has been said that the domestic exporters of Uzbekistan do not benefit from them by virtue of the Regulations and Decrees issued by the government. Thus, the government of Uzbekistan on 15 April 1999 issued the Resolution #174 “On the export sale of goods through commodity and raw materials exchanges for freely convertible currency”, 10 October 1997 the Decree # UP-1871 “On Additional Measures to Encourage the Export of Goods”, 31 March 1998 the Resolution # 365 “On additional measures on liberalization of foreign trade activity in Republic of Uzbekistan”; 15 December 2017 the Decree # UP-5286 “On additional measures for promoting export and ensuring the competitiveness of domestic goods in external markets”, 25 May 2017 the Decree # UP-5057 “On measures to further promote exports and ensure the competitiveness of domestic goods in foreign markets”. All the mentioned legal acts contain the provision prescribing that:

Starting from June 1st, 2017, entrepreneurs were entitled to export their self-produced goods (with the exception of fresh fruits and vegetables, grapes, melons and crops, as well as a number of commodities) with a total sum not exceeding 100 thousand USD and

without advance payment, opening a letter of credit, issuing a bank guarantee, and without insuring the contract against political and commercial risks.

However, the requirement demanding payment during 90 days from the date of delivery of exported goods was left to be unchanged.

However, before 2017 year the situation was totally different and demanded the following:

[the] exporter implements 100 per cent prepayment for every lot of goods under actual transactions within terms stipulated in a contract.

At the same time another provision states that:

[the] amount of prepayment is defined by an agreement between the parties; it is to be not less than 15 per cent of value of the contract.

Thus, the foreign importer is obliged to make a prepayment (or advance payment) of 15 per cent to 100 per cent of the value of the contract depending on the type of the transaction to Uzbek exporter prior to actual delivery of the goods.¹At the same time, the said documents oblige the domestic exporters to submit to custom subdivisions a copy of payment document confirming a payment. Otherwise, Uzbek exporter cannot export the goods from the country.

Due to aforementioned requirements under Uzbek legislation, it has to be said that a prepayment has occupied a predominant position over the other forms of payment originally prescribed in UzCC. Particularly, this requirement has restricted a wide application of the letter of credit by the Uzbek exporters. However, one may ask a fair question why the Uzbek government bodies and domestic exporters execute the requirements of the Regulations and Decrees providing the said obligations when the provisions of UzCC do not stipulate these requirements.

¹ Resolution of the Cabinet of Ministers on procedure for sale, acquisition and export of goods(work, services) under contracts concluded on exchange and fair tenders, dated April 15, 1999 No.174, Resolution of the Cabinet of Ministers on procedure for export sale of goods through commodity and raw materials exchanges for freely convertible currency, dated April 15, 1999 No.174 Available from: <http://www.uzexport.com/eng/main.cfm> Assessed [30 June 2002]

Furthermore, whether this practice established in Uzbekistan jeopardizes the existing legal hierarchy among the legal acts provided in the Law “On Normative Acts” of 24 December 2012. The answer these questions are uncertain, but to some extent this practice is motivated on the ground of contemplated system of the existing laws adopted in the country. Therefore, the government regularly issues the new Regulations and Decrees to control a new established situation and subsequently it replaces the laws. Mostly for this reason the governmental institutions and the domestic exporters themselves have behaved to refer to the subordinate legislation by ignoring the provisions of the UzCC. Furthermore, as far as the anecdotal evidence from private conversations with the specialist of Uzbek-Invest Export Insurance Company suggest that export of locally manufactured goods has been mainly conducted on the basis of prepayment terms rather than payment by other methods.

Accordingly, the established practice in Uzbekistan as to prepayment has restricted a choice of the domestic exporters in relation to more suitable payment method *i.e.* the letter of credits. On the other hand, it has become quite a difficult problem for the Uzbek exporters to find the foreign importers who would be ready to buy the locally manufactured goods on prepayment terms. Due to the mentioned facts, the Uzbek economy and the domestic exporters have suffered the sufficient damages.

However, the government has often practiced to waive from a prepayment in export contracts when the certain categories of priority goods have been exported.¹ It mostly concerned the contracts for export of locally produced fruits and vegetables.² It is worthy to state that this practice in turn has jeopardized the principle of equality of domestic economic subjects under the Uzbek law.

¹ Aripov, D. “Small business in Uzbekistan: main reasons of failure and success” MSc thesis. SEMS

² *ibid.*

Furthermore, as far as the Uzbek exporters are concerned the Uzbek legislation has prescribed an obligation to sell in obligatory form 50 percent of foreign currency they received from the export.¹ The main problem is that, the domestic exporters could only sell their money funds in Central bank rate which is twice lower than real rate existing in curb market. However, if the exporters would like to buy the dollars in order to proceed with a further trade, the banks have refused to sell them the foreign currency in Central bank rate. Therefore, the exporters have been obliged to buy the foreign currency from curb market. As the result, the exporters have suffered an additional damage.

Taking into consideration the aforementioned discrepancies of the subordinate legislation, it can be concluded that notwithstanding the requirements under the Regulations and Decrees, the letter of credit is considered as more acceptable and beneficial for both of the domestic exporters and the foreign importers in the existing conditions of Uzbekistan. Even if the application of letters of credit is more expensive, despite of it presents more competitive payment terms than a prepayment. Moreover, the letter of credit allows the Uzbek exporters to attract more importers since importers are mostly interested in the credit terms. Accordingly, this scientific work may suggest modifying or cancelling a prepayment requirement from the scope of the documents. However, whether it is easy to be done in Uzbekistan at this stage of development?

7. Demand guarantees under Uzbek law

In the preceding chapter the proposed paper has identified that the letter of credit is more acceptable and favorable form of the

¹ Law of the Republic of Uzbekistan No. 69 “On Foreign Currency Regulation” of 25 May 2000.
Law of the republic of Uzbekistan No.841 “On Regulation of Business Activity of Economic Subjects of Uzbekistan” of 7 May 1993.

guarantee for the contractual parties. However, it has been also said that this kind of guarantee is not widely used in Uzbekistan by virtue of the reasons contained in national legislation. In this chapter the paper will examine the documentary credit as alternative form of the guarantee provided to the Uzbek exporters. This form of the guarantee is beneficial for the exporters, but it is not always favorable for the importers who are in bad financial position and desire to obtain the demand guarantee. This chapter of our study will seek to examine whether the demand guarantee provides the respective protection against a non-payment for the Uzbek exporters, moreover whether the application of demand guarantees is better and preferable for the domestic exporters of Uzbekistan rather than the letter of credit and prepayment (advance payment).

Prior to discussing the guarantee of payment under the demand guarantees, it has to be reminded that a demand guarantee is an abstract payment undertaking, that is to say a promise of payment, which though intended to preserve the beneficiary from loss in connection with the underlying transaction, is detached from the underlying contract between principal and beneficiary and is in form a primary undertaking between guarantor and beneficiary which becomes binding solely by virtue of its issue.¹ Thus, the sole purpose of the demand guarantee is to hold the beneficiary harmless up to the agreed maximum. Therefore, the condition on which the bank is obliged to pay for the exporters is usually the first demand. Particularly, Article 299 of UzCC states that: [a] guarantor under the guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the

¹ Goode R.,1992 “Guide to the ICC Uniform Rules for Demand Guarantees” Paris, International Chamber of Commerce p.14.

terms of the guarantee. It means that the exporters will be compensated as soon as they submit a demand in written form.¹

Accordingly, the exporter under Uzbek law is required to submit a demand in written form along with the documents stipulated in guarantee in order to be compensated under the guarantee. However, Article 305 of UzCC implies on the exporter an additional obligation to show expressly in his written form the nature of the breach committed by the counter party. This is an extremely important for the importers because it discourages fraudulent calls by the exporters. As an example: Exporter concludes the sale contract for 10million dollars which is accompanied by demand guarantee for 10% which constitutes 1 million respectively. Thus, if the importer fails to perform any of his obligations, the exporter cannot demand an entire amount of money under the guarantee according to Article 305.

On the other hand, the provisions of Uniform Rules for Demand Guarantees (hereinafter referred to as Rules) do not stipulate the requirement for the exporter to show the nature of the breach. Accordingly, due to Rules the exporters can call the entire amount of the guarantee on the ground of a mere written statement notwithstanding the fact that actual suffered damage is estimated for fewer amount. By virtue of aforementioned requirements, the legal position of the exporters as to guarantee is better than under the Uzbek law which obliges the exporters to show the nature of the breach.

On the other hand, most of the cases concerning of the demand guarantees have evidenced that the exporters usually makes an unfair demand under the guarantee which is wholly unjustified as far as the underlying contract of sale is concerned.² The banks are entitled to refuse in payment for the exporters in such a case. However, the banks rarely establish a pure case of fraud. A mere suspicion of fraud in turn

¹ Article 305 of UzCC

² Jack R. 2001 p Jack, R. "The law and Practice of Documentary Credits including Standby Credits and Demand Guarantees", London: Butterworths 2nd ed. 1993 pp. 375.

is inadequate.¹ Therefore, it is a quite difficult task to identify whether the exporters make a fair or unfair demand under the guarantee. Autonomous nature of demand guarantees and their irrevocable character are the reasons for that end.² Moreover, the banks themselves are not obliged to prove the fact that a payment under the guarantee was on the basis of a fair demand. However, if the bank knows that the demand under which a payment has already been made is fraudulent and it is respectively proved by the principal, the court may grant an injunction to prevent a payment for the exporters.

Thus, in the light of the sale contract the demand guarantee is a sufficient protection for the Uzbek exporters against a non-performance by the importer.

Having considered the guarantee of payment under the demand guarantee and having identified that the exporters are always in the benefit from its application, the paper will now turn to the issue whether the application of demand guarantee is beneficial for the national exporters of Uzbekistan than the letter of credits or prepayment.

Thus, as our scientific work has identified the demand guarantee is able to provide the respective protection for the domestic exporters only if the requirements of Article 305 are satisfied in proper way *i.e.* exporters have to show in his demand form expressly the nature of the breach committed by the counter party. However, as far as the foreign importers are concerned, the credit presents the best method of payment, but the letter of credit is not widely applied in Uzbekistan as the form of payment in export transactions by virtue of the Resolutions and Decrees issued by the government. Mostly therefore the Uzbek exporters usually require from foreign importers either a prepayment or demand guarantees. The importers in turn are not

¹ D'arcy L. 2000 p.224 D'Arcy, L., Murray, C., Cleave, B. "Schmithoof's Export Trade: The Law and Practice of International Trade", London: Sweet&Maxwell, London 2000 pp.224-230.

² Articles 2-5 of URDG

willing to submit the demand guarantee or make a prepayment. Basically, there are two reasons for that the first is a high risk associated with these forms of guarantee, the second is bad financial position of the importers, since it is difficult to make a prepayment to exporters prior to resale of the goods. Moreover, in case of the demand guarantee, the banks usually require for the deposit by the importers prior to issuance of the guarantee. However, if the importer is Mega company with a sufficient money funds, the banks will provide demand guarantee, but if it will be the small or medium exporter this task will become complicated.

Demand guarantees and prepayment are provided as the basic forms of payment which guarantee a payment for the domestic exporters under the Regulation and Decrees of the Cabinet of Ministers of Uzbekistan. In the former exporters deal with the importers' bank which follows the instructions of importer, whereas in later exporters directly deal with the importers themselves. Moreover, a payment of the part or whole value of the contract is done in advance. It undoubtedly makes the exporters more confident in importers' credibility. Therefore, the Uzbek exporter will always try to require from importers to make a prepayment or demand guarantee in order to guarantee a payment in the highest level. But, these two methods of guarantees pose the difficulties for the foreign importers who trade with Uzbekistan. Therefore, in most of the cases the importers refuse to buy the goods from Uzbekistan and instead buy from other countries which offer the exporters more flexible forms of payment such a letter of credit.

In the present chapter the role of the demand guarantees in guaranteeing a payment for the exporter under Uzbek laws was described. Particularly, it has been identified that demand guarantee is more convenient form of guarantee of payment in present conditions of Uzbekistan. However, as far as the small and medium foreign

importers are concerned the demand guarantees are not always convenient. Therefore, it has been concluded that application of the letters of credit in Uzbekistan would be more advantageous for both the exporters and also importers.

8. Export credit insurance

Having considered a legal status of letters of credit and demand guarantees in guaranteeing of payment for the domestic exporters, this paper will now move to the discussion of export insurance policy in guaranteeing the risk of non-payment under Uzbek law. In the present chapter, we will make an analysis of the export insurance policy.

Export credit insurance protects an exporter of products and services against the risk of non-payment by a foreign buyer. In other words, Export credit insurance significantly reduces the payment risks associated with doing business internationally by giving the exporter conditional assurance that payment will be made if the foreign buyer is unable to pay. Simply put, exporters can protect their foreign receivables against a variety of risks that could result in non-payment by foreign buyers. Export credit insurance generally covers commercial risks (such as insolvency of the buyer, bankruptcy, or protracted defaults/slow payment) and certain political risks (such as war, terrorism, riots, and revolution) that could result in non-payment. Export credit insurance also covers currency inconvertibility, expropriation, and changes in import or export regulations. Export credit insurance is offered either on a single-buyer basis or on a portfolio multi-buyer basis for short-term (up to one year) and medium-term (one to five years) repayment periods¹.

Export insurance was born at the end of the nineteenth century, but it was mostly developed in Western Europe between the First and

¹ Available at: <https://www.export.gov/article?id=Trade-Finance-Guide-Chapter-9-Export-Credit-Insurance>

Second World Wars. Several companies were founded in many countries. Some of them also managed the political risks of export on behalf of their state.

Following the privatisation of the short-term side of the UK's Export Credits Guarantee Department in 1991, a concentration of the trade credit insurance market took place and three groups now account for over 85% of the global credit insurance market. These main players focused on Western Europe, but rapidly expanded towards Eastern Europe, Asia and the Americas.

Many variations of trade credit insurance have evolved ranging from coverage that can be cancelled or reduced at an insurer's discretion, to coverage that cannot be cancelled or reduced by the insurer during the policy period. Other programs may allow the policy holder to act as the underwriter.

Export credit insurance (ECI) protects an exporter of products and services against the risk of non-payment by a foreign buyer.

Key Points

- ECI allows exporters to offer competitive open account terms to foreign buyers while minimizing the risk of non-payment.
- Even creditworthy buyers could default on payment due to circumstances beyond their control.
- With reduced non-payment risk, exporters can increase export sales, establish market share in emerging and developing countries, and compete more vigorously in the global market.
- When foreign accounts receivable are insured, lenders are more willing to increase the exporter's borrowing capacity and offer more attractive financing terms.
- ECI does not cover physical loss or damage to the goods shipped to the buyer, or any of the risks for which coverage is available through marine, fire, casualty or other forms of insurance.

The government of Uzbekistan in 1998 adopted the Decree 167 which has been focused on insurance of national exporters. Primarily, the said Decree was designed to guarantee a payment for the domestic exporters of Uzbekistan in export activity. Thus, the Decree 167 has been construed as the protective shield for the exporters against both commercial and also political risks.¹ At the same time, the Decree has not been restricted with an insurance of credit of exporters but also included the credit of importers.

An overall observation of the provisions under the said Decree evidences that insurance policy basically is subject to two requirements. The first is requirement for exporter who has to be the resident of Uzbekistan in order to be insured under the Decree 167 and the second requirement as to the goods which have to be originated from Uzbekistan.² Accordingly, the contracts which do not satisfy to the said requirements are not subject to the export insurance under the Decree.

In 2014 the government of the Republic of Uzbekistan abolished some requirement of Decree 167 and cancelled the obligations on submission of documents necessary for insurance coverage.

Prior to that time exporter was informing the importer about the submission of a counter guarantee issued by the foreign government or first rated bank and a duplicate of bank statement evidencing a prepayment of 15 percent of value of the contract. Afterwards, the exporters used to collect and submit a written statement along with all the rest of the documents to authorized bank and at the same time to insurance company which in turn inspects these documents in detail. After the inspection, the insurance company used to reach a decision as to whether to issue an export insurance policy or not. If the

¹ Uzbekinvest National Export-Import Insurance Company, [online] Available from: <http://www.unic.gov.uz/index-e.html> Assessed [20 July 2003]

² Available from: <http://www.lex.uz/docs/818014> the national basis of normative-legal acts of the Republic of Uzbekistan.

insurance company comes to a decision to issue an export insurance policy then the exporter and the foreign importer conclude the export contract. In case of conclusion of the export contract, the foreign importer used to submit to exporter or directly to insurance company a counter guarantee on behalf of either government of importer's country or first rated foreign bank. At the same time, the commercial bank which also accepted the respective documents concluded the credit contract with exporter. It used to follow with automatic assignment of all demand rights from the exporter to the insurance company where the exporter pays a premium. Afterwards, the exporter used to deliver the goods to importer who in turn paid the price against delivery. At the end of insurance process the exporter was required to pay off a debt to empowered commercial bank which gave him a credit.

However, if the covered risk under the policy occurred, the exporter or the respective competent bank immediately had to inform the insurance company. In such a case, the insurance company automatically subrogated to all rights and remedies of the assured. As the result the insurance company studies a claim of the insured and reaches a decision as to whether to indemnify or reject in indemnity of exporter. The decision of the insurance company mostly depends on its discretion. If insurance company decides to indemnify the exporter, subsequently the guarantor of importer (i.e. the foreign government or first rated bank) or foreign importer himself must reimburse insurance company.

Being considered in the preceding chapter a prepayment has been recognized as the best guarantee of a payment for the exporters. Accordingly, the exporter who holds a receipt of the bank evidencing a prepayment of 15 percent or whole value of the contract has been already regarded as well-guaranteed. However, the Decree 167 used to provide for a prepayment as prime requirement for issuance of the

insurance policy. Considering this requirement of the Decree 167 we came to the conclusion that exporter is actually insured two times. Although it is not logically correct to insure the exporter two or more times, anyway the Decree prescribes for that. Respectively, this requirement of the Decree 167 nullified the significance of the insurance policy provided therein. On the other hand, even if exporter was interested in guarantee under insurance policy, it is a quite difficult task for him to find importer who is ready to make a prepayment of 15 percent to whole value of the contract prior to resale.

The second requirement of Decree 167 used to oblige the exporter to provide a counter guarantee to insurance company. Particularly, the Decree specified that exporter must submit a counter guarantee issued by the foreign government of importer or first-rated bank. This requirement was more difficult than the previous one, since it is not always possible for the importer to obtain the guarantee of either his government or first rated bank even if the importer possess a sufficient money funds. Moreover, an issuance of a counter guarantee mostly depended on discretion of the said institutions. First-rated banks and the foreign governments usually issue a counter guarantees for the state owned companies engaged in foreign-economic activity or Mega companies with a sufficient capital funds. If we consider the fact that Uzbekistan produces primarily the goods which are in need not only of mega companies, but also small and medium business representatives, we may conceive for ourselves an approximate extent of the damages suffered by economy of Uzbekistan by virtue of the said requirement. On the other hand, if the importer could manage to obtain a counter guarantee of foreign government or first-rated bank, it means that he may fully ignore an involvement of insurance company because a counter guarantee of the said institutions already

provides him with a sufficient protection. Consequently, there will be no further necessity in the second phase of protection.

Moreover, an overall analysis of the provisions of the Decree 167 evidences that they were very prescriptive and compulsorily. The Decree prohibited any flexibility in relation to insurance companies themselves. In fact the Decree 167 was amended but even though it must go further so that to give insurance companies more flexibility in enabling them to develop their own procedures. It is more likely that the companies themselves decide whether an insurance cover will be granted to any particular exporter with regard to a particular contract with a particular foreign exporter on the ground of their own financial analysis of the exporters and the foreign importers as well as the history of their trade relations.

Owing to aforementioned negative features of the Decree 167, the insurance of the export contracts have been conducted very badly. It resulted in decline of overall number of the export contracts concluded annually. Owing to the said requirements, Uzbek exporters have been partially deprived from an opportunity to export of locally produced goods abroad, because the exporting goods have to be insured in mandatory manner under the Decree 167.

Based on the analysis contained in the present chapter the following may be concluded. The Decree 167 adopted by the government of Uzbekistan in 1998 was primarily aimed at strengthening the guarantee of a payment for the Uzbek exporters. However, the Decree 167 prescribed severe requirements for the domestic exporters which actually imply twice insurance. These requirements negatively reflected mostly on small and medium exporters. Mostly therefore, the Decree 167 has not gained the success among the domestic exporters.

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Note: All aforementioned cases available from the following website: <http://www.2.gov.si/clout.nsf/>, Assessed [20 May 2003]

MANSURKHON KAMALOV

**GUARANTEE OF PAYMENT FOR THE EXPORTER IN
UZBEKISTAN**

STUDY GUIDE

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Ўзбекистонда экспорт қилувчилар учун тўлов кафолати.
Ўқув қўлланма (инглиз тилида)

Мухаррир: Н.Ниязова, А.Содиков
Техник муҳаррир: А.Юлдашев

Босишга рухсат этилди: 12.12.2018 й. Бичими 60x84 1/16
Офсет қоғози. Ризограф усулда. Times гарнитураси.
Шартли босма табағи 4,5. Нашр ҳисоб табағи 2,8.
Адади 100 нусхада. Буюртма: № 24/12-1.

«RELIABLE PRINT» МЧЖ босмахонасида чоп этилди
Тошкент ш. Чорсу майдони, 3-А уй.