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Introductory Remarks Concerning Arbitration in East-West Business

In all contracts, especially long-term industrial cooperation agreements, the best approach is to try to cover all contingencies in the contract itself. As several of our speakers have mentioned, the Eastern Europeans and the Soviets have a reputation for very detailed and voluminous contracts. I have seen one with a Soviet foreign trade organization that ran over 500 pages, with technical appendices. Despite such detailed contracts, however, it may be impossible to foresee all of the potential areas of dispute which might arise during the implementation of long-term agreements.

In this connection, Howard Holtzman will identify arbitration as a way of filling in gaps in long-term cooperation contracts.

Before introducing Howard Holtzman and Ben Fishburne, I would like to make some general comments about East-West trade arbitration. Arbitration of international commercial disputes has long been favored, both by Westerners and by the Socialist countries themselves. Since the Eastern Europeans and the Soviets use mandatory arbitration to solve most of their domestic commercial disputes, it is not surprising that they feel comfortable with the concept of arbitration as the exclusive means for dispute resolution in foreign trade.

Early in the development of their foreign trade structure, the Soviets established special arbitration tribunals to handle foreign trade disputes, namely, the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission. They are attached to U.S.S.R. Chamber of Commerce and Industry. The Eastern Europeans have followed suit in establishing their own foreign trade arbitration tribunals. In most cases they are also under the auspices of their respective national chambers of commerce, each with its own areas of jurisdiction and procedural rules.

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For many years, the Eastern Europeans and the Soviets insisted that all arbitration in foreign trade take place in their own home tribunals, and in fact, over the years, the Soviet and other foreign trade arbitration tribunals have established a good record for fairness and impartiality in their decisions, with several notable exceptions, such as the Soviet-Israeli oil dispute decided by the Moscow Foreign Trade Arbitration Commission. Still, there has always been some reluctance on the part of Westerners to agree to arbitrate in the home tribunal of one of the disputants. Thus we have seen the development and the acceptance of third country arbitration as the norm in East-West contracts.

For its part, the United States government has attempted to assist in this development. For example, in the U.S.-Soviet Trade Agreement of 1972, which has never entered into force, there is a provision "encouraging" third country arbitration. The U.S.-Polish trade accords of 1972, which are contained in several exchanges of letters between the Secretary of Commerce and the Polish Minister of Trade, contain a similar recommendation. The latest example of this is the U.S.-Romanian Trade Agreement, which was submitted to Congress in April, 1975, for approval. The agreement suggests the resolution of commercial disputes, again, through third country arbitration.

In the arbitration clause of an East-West contract, there are several issues that can and should be addressed. These include the locale for arbitration, method of selection of arbitrators, procedural rules, choice of governing law, and the language to be used in the conduct of the arbitration. I don't want to go into detail on these issues at this particular point. For a discussion of this subject in East-West trade in general, see Howard Holtzman's fine article in *The International Lawyer* of January, 1975. For the U.S.S.R. in particular, you may refer to the chapter on arbitration in the ABA book entitled by Robert Starr, *Business Transactions with the U.S.S.R.*

It is interesting, however, to note a few of the peculiarities and preferences of some of the Eastern countries in regard to these elements or issues of the arbitration clause. For example, as regards location, the Soviets are extremely partial to Stockholm. In the last six months, however, I have seen several clauses in U.S.-Soviet contracts calling for arbitration in Switzerland, either in Geneva or Berne. On the other hand, the Romanians seem to favor Paris as a site of arbitration, probably because of their traditional cultural ties with France.

Take another factor, the choice of procedural rules. The U.S.-Soviet Trade Agreement which I mentioned recommended the Economic Commission for Europe (ECE) procedural rules, but in practice, most of the contracts which call for arbitration in Stockholm don't specify any procedural rules at all. In such a case the arbitrators presumably would apply the Swedish Arbitration Act of 1929, which is normally applied to domestic arbitrations in Sweden. In no case

of which I am aware have the Soviets agreed to specification of the International Chamber of Commerce (ICC) rules. This is a reflection, I think, of the Soviets' general feeling of aversion to the International Chamber. You can contrast the Soviet approach with the U.S.-Polish accords, which call for either the ECE or the ICC rules, and the latest U.S.-Romanian Trade Agreement, which recommends only the ICC rules.

I raise these issues only to emphasize the point that there are distinctions between the practices and preferences of the various Eastern countries, and a foreknowledge of these preferences may make your negotiating task that much easier. Again, flexibility on your part may be called for.

At this point I would like to mention the work of the American Arbitration Association in investigating the possibility of the standardization of arbitration clauses in East-West contracts. The American Arbitration Association has formed a committee to study this question, and it is currently negotiating with the U.S.S.R. Chamber of Commerce and Industry for an agreement on a recommended arbitration clause for use in U.S.-Soviet trade. Similar discussions have been undertaken with Polish representatives. I myself have reservations as to the desirability of such an agreement, since I feel that it might lock all United States companies into the recommended clause. A "recommendation" by the U.S.S.R. Chamber of Commerce to the foreign trade organizations may be taken as more binding on them than a recommendation would be to United States companies from the American Arbitration Association. In any event, I think that the American Arbitration Association would be interested in your reaction to such agreements and how you feel about these questions.

I would like to say just a word about resolution of disputes without recourse to arbitration. During yesterday's session Mr. Pope mentioned the desirability of tying the obligations of the parties together in the contract itself in such a way to encourage the peaceful resolution of disputes in the interest of both parties. This is certainly sound advice, but it may not always be possible.

Lastly, when a dispute does arise, American companies and attorneys should know that the United States government, through the Departments of Commerce and State and through the United States embassies in the U.S.S.R. and Eastern Europe, is willing to offer its good offices to try to resolve the problem. In several cases within the last several years potential disputes have been resolved through this approach, without the need to resort to arbitration. If the problem is more serious, it may, in addition, be taken up on a government-to-government basis, through the instrumentality of one of the joint commercial commissions which we have established with many of the Eastern countries.