

Random Observations about Arbitration and East-West Investment

I would like to talk about the International Center for Settlement of Investment Disputes, several of the more exciting efforts at drafting arbitration rules, which are currently in progress and, finally, I would like to mention in detail the point Dan Stein raised concerning a checklist of issues to be considered in drafting an arbitration clause.

First, I will mention something which I think is a too little known autonomous, international institution that has been established under the auspices of the World Bank, for the sole purpose of providing a forum for the settlement of investment disputes. It is the International Center for the Settlement of Investment Disputes, ICSID. ICSID's jurisdiction extends to legal disputes arising directly out of an investment transaction between a state or state agency or subdivision of a state which has signed the convention establishing ICSID, and a national—natural person or corporation or juridical person—of another signatory state to this convention. So far as I know there has never been a definitive ruling whether a state trading corporation is a state agency. I think that it would be, and it appears that the ICSID would also treat it as such. One major problem, however, is that Yugoslavia is the only Eastern European country that has both signed and ratified the ICSID convention. Romania signed the convention on September 6, 1974, but has not ratified it.

I would now like to discuss two other multinational efforts to provide assistance in the settlement of disputes, including investment disputes. The first such effort is the arbitration rules of the United Nations Economic Commission for Europe; these are the so-called "ECE" rules. They were promulgated in 1966 and were designed, primarily, for use in the settlement of disputes between Eastern and Western Europeans. One of the attributes of the ECE is that it is a UN organization to which the European countries on both sides of the Iron Curtain belong, thus its arbitration rules belong to neither a capitalist nor socialist organization.

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The ECE rules are mentioned in our ill-fated trade agreement with the Soviet Union, and are mentioned as an alternative form of arbitration in the U.S.-Poland Trade Agreement. I am not aware of how many disputes have actually been settled under these rules, I do know that many experts regard them as incomplete and that the American Arbitration Association and others have been working to solve this problem.

I now turn to the UNCITRAL rules. UNCITRAL is the United Nations Commission on International Trade Arbitration Laws, which is also currently in the process of promulgating rules. For those who seek a broadly based set of rules not tied to one country or one system, the UN and UNCITRAL is even more acceptable than the ECE.

Although the UNCITRAL rules have gone through several drafts, there is nothing unique about them. If you look at the Soviet Arbitration rules, the Chinese Arbitration rules or the American Arbitration Association's rules, they are all talking about the same kinds of issues. The attractiveness of the UNCITRAL rules is not their content; it is that they are broad based rules and there is a certain inherent acceptability to rules promulgated by that kind of an organization.

I would now like to abruptly shift and address the drafting of an arbitration clause. There are other ways of reaching arbitration, but generally an arbitration clause is your starting point. I would say that every or almost every East-West trade investment contract has an arbitration clause. Arbitration clauses are widely accepted by the Soviets and Eastern Europeans. However, we all need to do a lot of thinking about what goes into them.

Here is a list of questions—there could be more—that need to be answered by the attorney drafting an arbitration clause. Where is an arbitration going to take place? Who will be the arbitrators? How many of them will there be? How will the arbitrators be appointed? What procedural rules, if any, will govern the arbitration? What law will the arbitrators apply?

All of the following discussion presupposes that you can reach agreement on the issue raised. For example, for an American company, American Arbitration Association arbitration is very desirable. It is convenient and readily available but the Soviet Union and other Eastern European countries are simply not going to agree to the use of the AAA.

Let us examine in more detail some of the questions previously mentioned. first, location: finding a suitable location is, in large measure, a question of logistics. You must have a location where there are hearing rooms, interpreters, bi-lingual stenographers, a secure means of communicating with the home office, and easily obtainable entrance visas for counsel, witnesses and arbitrators. Moreover, choice of location can sometimes involve a choice of procedural law, because, if everything else is silent, the procedural law of the place where

the arbitration is taking place may be applied.

Another point to note concerning location is that both the U.S.-U.S.S.R. Trade Agreement and the U.S.-Polish Trade Agreement suggest the arbitrations be held in a third country.

The method of appointing an arbitrator is worthy of discussion. If you have a sole arbitrator, you do not have to worry about his appointment since the contract must specify a mechanism for appointing him. Contracts which require three arbitrators typically say they will appoint one, I will appoint one, and our two party-appointed arbitrators will jointly appoint a third. Not surprisingly, the party-appointed arbitrators occasionally cannot agree on the third arbitrator. Then if you do not have a mechanism for appointing the third arbitrator, you have a problem. One safety device which can be included in the agreement is a provision which designates an appointing authority in case the party-appointed arbitrators fail to agree. These appointing authorities can be an arbitration institution, a chamber of commerce or a distinguished third country individual.

In selecting an appointing authority, the mechanism which will be employed in picking the arbitrator should be considered. For example, if you choose the Soviet Foreign Trade Arbitration Commission, they must, according to their rules, select a member of the Commission who, of course, is a Soviet citizen. On the other hand, use of the American Arbitration Association or the ICC, will result in slightly different procedures, with selection from a list of distinguished neutral arbitrators. In any event, some thought should be given to who is going to select the arbitrator. In many contracts, the Soviets have accepted the President of the Stockholm Chamber of Commerce or the Stockholm Chamber itself. The United States trade agreements, again, in keeping with the third country idea, suggest the use of third country appointing authorities.

An important distinction between choosing arbitration rules and merely selecting an appointing authority is that the former generally includes a mechanism for appointing arbitrators when the party-appointed arbitrators cannot agree, while selecting an appointing authority does not automatically include selection of the rules of his organization.

Before reaching the issue of which arbitration rules to employ, there still is the threshold question of whether the arbitration clause will specify any rules. Dan Stein mentioned that often the rules are not specified. Perhaps this reflects the experience, for example, of American companies who have had negotiations with the Chinese. The Chinese used to insist on having Chinese rules, and Chinese arbitrators. Since that is all to which the Chinese would agree, some companies felt that it was better to leave the agreements silent and face the question later about which rules to follow. Unfortunately, although this solves the problem temporarily, it may lead to more serious problems in the future. Spec-

ifying the rules avoids all the arguments over such questions as which papers are filed where and who receives copies, and other details.

The next question is which rules should be applied. The Trade Agreement with the Soviet Union suggests ECE rules. There are also International Chamber of Commerce rules and the rules of the American Arbitration Association, but the Soviets have never, to my knowledge, accepted either the AAA or ICC rules in an arbitration clause. The Romanians, on the other hand, favor the ICC rules and the new U.S.-Romanian Trade Agreement suggests the use of ICC rules. The Poles have signed contracts, and entered into a Trade Agreement specifying either ECE or ICC rules. In any event, you have a multitude of choices and soon the UNCITRAL rules will be added to the list.

Next, let me mention governing law. Some contracts do not have any governing law clauses, while others specify what law will govern. What do these clauses mean? What does "Soviet law" mean? What does "New York law" mean? Do they mean the substantive law of the place they specify, the conflict of law rules of the place, or the procedural law? If the application of substantive law is intended, the contract should state substantive law or material law (which is the term used by the Soviets). Sometimes someone will specify "Swedish law," thinking they are going to get Swedish contract law, which is neutral and acceptable to the parties; but the arbitrators say, "Well, Swedish law includes Swedish conflict of law rules, the place of performance is in the Soviet Union, the contract was signed in the Soviet Union, and so we will, under our Swedish conflict of law rules, apply Soviet contract law." You say, "That is not what we anticipated," but it is too late.

Where an arbitration takes place in a third country which is unrelated to the parties or the transaction and there is no choice of law by the parties, the uncertainty as to what substantive and procedural law will be applied is great.

The final question is, are you going to use any law at all? Since the aim of an arbitration can be said to be to work something out which is equitable, you may wish to specify that the arbitrators will apply equitable principles. Equity plays a major part in United States jurisprudence, but European systems of law, which are generally based on codes, do not necessarily include equity. If you want your arbitrators to apply equitable principles, the arbitration clause should state that the arbitrators may act *amiables compositeurs*, or *ex aequo et bono*.

I have been able to discuss only some very basic issues relating to arbitration clauses. I hope it has been a useful checklist. My primary concern is to suggest that there is more to arbitration than just having an arbitration clause. The other point I wanted to re-emphasize is the desirability of having an arbitration clause. When an arbitration clause is included, you at least do not have to worry about how you are going to have a dispute settled. This is true for all contracts, including East-West trade investment contracts.