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Dispute Resolution Procedures in East-West Trade

Introduction

Arbitration has for some years been recognized as a useful and effective device in East-West trade.¹ Moreover, recent developments have made arbitration an even more useful and effective procedure in East-West trade. These developments have included:

- The adoption by the United Nations of the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules).²
- The further emergence of Sweden as a locale for East-West arbitration; and
- The preparation by the American Arbitration Association and the USSR Chamber of Commerce and Industry of a model optional arbitration clause for use in United States-Soviet trade.³

A further recent development has been the growing recognition of the value of conciliation in East-West trade. Today, conciliation as well as arbitration is regarded as helpful in the resolution of trade disputes. This article will touch on each of these developments.

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¹Holtzmann, *Arbitration of East-West Trade Disputes* 17, in PEACEFUL RESOLUTION OF INTERNATIONAL ECONOMIC DISPUTES, SYMPOSIUM at the 1974 Annual Meeting of American Bar Association.

²U.N.Doc. E/77 (1977), *reprinted in* [1977] 2 Y.B. COM. ARB. 161-71 (International Council for Commercial Arbitration). The Rules were adopted by the United Nations Commission on International Trade Law, at its Ninth Session, April 28, 1976; The YEARBOOK COMMERCIAL ARBITRATION, in which several documents cited herein are to be found, is a publication of the International Council for Commercial Arbitration; copies may be secured in the United States from the American Arbitration Association, 140 West 51 Street, New York, N.Y. 10020.

³Optional Clause for Use in Contracts in United States of America-Union of Soviet Socialist Republics Trade-1977, *reprinted in* 16 INT'L LEGAL MATS. 445 (1977) and in [1978] 3 Y.B. COM. ARB. 301-03 (International Council for Commercial Arbitration).

Developments in Arbitration

Each of these recent developments has greatly affected the others. For example, the availability of the UNCITRAL Rules and increasing knowledge of Swedish arbitration law each made easier the task of preparing the Optional Clause. Conversely, the Optional Clause lent some prominence to the UNCITRAL Rules and drew attention to Sweden as an arbitration site.

The significance of these developments for East-West trade can best be assessed by first briefly reviewing the history of arbitration in trade with the countries of Eastern Europe and The People's Republic of China. In Eastern Europe, arbitration has for many years been accepted as the preferred method for resolving disputes in international trade, and arbitration clauses have routinely been included in international commercial contracts. The preference for arbitration of trade disputes, rather than recourse to national courts of law, is found not only in contracts between socialist and capitalist countries, but is the standard practice in trade between the foreign trade organizations of the various socialist countries themselves. Experience over a number of years demonstrates that the foreign trade organizations of socialist countries honor arbitration awards. This compliance is due not only to the domestic law of each of the countries which belong to the Council for Mutual Economic Assistance ("Comecon"),⁴ but also to the fact that they, as well as the United States, are signatories to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵

Each of the Comecon countries has long had a Foreign Trade Arbitration Commission (FTAC) and a Maritime Arbitration Commission (MAC) which conduct arbitration cases under their own procedural rules. For example, in the Soviet Union the FTAC was established at the USSR Chamber of Commerce and Industry (hereinafter the "USSR Chamber") as far back as 1932. The procedural rules of the FTAC's and MAC's of the various Comecon countries differ in some details, but all embody uniform principles expressed in the "Uniform Rules of Procedure for Arbitration Courts at the Chambers of Commerce of the CMEA [Comecon] Countries" adopted in 1974.⁶ Typically, each of the various FTAC and MAC Rules

⁴See, e.g., *Fundamentals of Civil Procedure of the U.S.S.R.* §§ 31, 41, translated in MARITIME ARBITRATION COMMISSION: ORGANIZATION AND PROCEDURE (S. N. Lebedev trans., Moscow, 1972), quoted in Holtzmann, *Arbitration in East-West Trade*, 9 INT'L LAW. 77, 79 (1975). See [1976] 1 Y.B. COM. ARB. 18 for a report on the law of arbitration in Bulgaria; [1976] 1 Y.B. COM. ARB. 30 for a report on the law of arbitration in Czechoslovakia; [1976] 1 Y.B. COM. ARB. 40 for a report on the law of arbitration in the German Democratic Republic; [1976] 1 Y.B. COM. ARB. 53 for a report on the law of arbitration in Hungary; [1976] 1 Y.B. COM. ARB. 64 for a report on the law of arbitration in Poland; [1976] 1 Y.B. COM. ARB. 77 for a report on the law of arbitration in Romania; and [1976] 1 Y.B. COM. ARB. 91 for a report on the law of arbitration in the Soviet Union. See also Holtzmann, *Settlement of Disputes: The Role of Arbitration in East-West Trade*, in EAST-WEST BUSINESS TRANSACTIONS (R. Starr ed. 1974).

⁵21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

⁶Reprinted in [1976] 1 Y.B. COM. ARB. 147-56 (International Council for Commercial Arbitration), with commentary by H. Strobach at 4-17.

provides for arbitration in its own country before arbitrators chosen from a panel established solely by the FTAC or MAC. While several of the FTAC and MAC Rules, including those in the Soviet Union, do not require that all arbitrators be citizens of the Comecon country whose trade is involved in the case, the practice thus far of the Soviet FTAC and MAC and most other Comecon arbitration organizations has been to appoint only arbitrators from their own countries, although such practice might change in the future.

Years ago, foreign trade organizations of Comecon countries in dealing with corporations from the United States insisted upon arbitration under their own FTAC or MAC Rules, in other words, in their own countries and before arbitrators of their own nationality. Even today, the first suggestion made by a socialist foreign trade organization in negotiations with an American company may be to include an arbitration clause providing for arbitration before the organization's own FTAC or MAC.

Faced with an understandable reluctance by capitalist businessmen to agree to arbitration only in the Eastern country, socialist foreign trade organizations began to propose contract clauses calling for arbitration at the place of defendant. For example, arbitration would occur in Moscow under FTAC Rules if the Soviet party is the defendant and in New York under American Arbitration Association Rules if the American party is the defendant. This procedure is generally followed in trade between socialist countries and is often the second suggestion of socialist foreign trade organizations. However, it is usually not favored by American businessmen and lawyers for, while there is a general recognition that FTAC's and MAC's in the Comecon countries have been fair in their procedures and decisions,⁷ it is felt that arbitration in the place of the defendant has a number of disadvantages for both parties in East-West trade. First, the procedure tends to encourage legal and commercial maneuvering by a party attempting to put itself in the position of defendant, thereby forcing arbitration in its local forum. Secondly, it complicates, or duplicates, procedures when, as often occurs, there are counter-claims, so that in practical effect both parties are defendants. Moreover, many American lawyers prefer to write contracts knowing where any disputes will be arbitrated, for only with such knowledge can the contract be drafted in the light of procedural or other factors characteristic of that locale. While this aspect may not be as important when both parties are from countries having similar legal and economic systems, it takes on considerable practical significance in transactions which must cross the economic and legal gaps which are facts of life in East-West trade.

As a result of these problems, contracts began in the early 1970s to provide for arbitration of disputes in a third country, under rules other than

⁷See Starr, *A New Framework for Trade Between the United States and the Soviet Union*, 67 AM. J. INT'L L. 196 (1973); see also S. Pisar, COEXISTENCE AND COMMERCE 408 (1970); Holtzmann, *Arbitration in East-West Trade*, 9 INT'L LAW. 77, 90 (1975).

those of an organization of either party's country, by a sole arbitrator from a third country or by an arbitral tribunal chaired by a national of a third country. This practice is today accepted by trading organizations of all of the countries of Eastern Europe, although they may in negotiations indicate a preference for arbitration under the rules of their own FTAC or MAC or at the place of the defendant.

The trend toward third country arbitration was noted by a leading Soviet authority as early as 1972. Professor S. Bratus, then Chairman of the Soviet FTAC, wrote that "in most contracts signed by Soviet organizations with corporations and firms in capitalist countries, provision is made for settlement of disputes by neutral arbitration in a third country."⁸ Although the 1972 trade agreement between the United States and the Soviet Union has not become operative, its provisions recommending third country arbitration represent a pioneering expression of this concept at governmental levels.⁹ A similar provision appears in the trade agreement between the United States and Poland.¹⁰ The Helsinki Final Act, concurred in by the United States and all of the Comecon countries, not only recommends the use of commercial arbitration but goes on to say that "the High Representatives of the participating States . . . recommend to organizations, enterprises and firms in their countries . . . that the provisions on arbitration should . . . permit arbitration in a third country."¹¹ The United States-Hungarian Trade Agreement, approved by the Congress in 1978, also includes recommendations for third-country arbitration.¹²

The situation in the People's Republic of China has a number of clear similarities. While, as I will explain later, the Chinese usually resolve disputes by conciliation rather than arbitration, arbitration is not precluded and contracts typically contain arbitration clauses. China is not a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but foreign experience confirms that Chinese trading organizations abide by arbitration awards in accordance with the principle of honoring contracts. Chinese legal experts have stated that enforcement of arbitral

⁸S. Bratus, *Arbitration in International Economic Cooperation Towards Industrial, Scientific and Technical Development* (1972) (Report to Fourth International Arbitration Congress), reprinted in 27 *ARB. J.* 230, 239 (1972).

⁹Agreement between the Government of the USA and the Government of the USSR Regarding Trade (October 18, 1972), art. 7, reprinted in 67 *DEPT STATE BULL.* No. 1743, at 595-97.

¹⁰The U.S.-Polish agreements on arbitration are set forth in two letters exchanged between the U.S. Secretary of Commerce and the Polish Minister of Trade, both dated November 8, 1972; text appears in "Fact Sheet, Joint American-Polish Trade Commission, November 4-8, 1972," issued by U.S. Department of Commerce.

¹¹Final Act of the Conference on Security and Cooperation in Europe (August 1, 1975), reprinted in [1976] 1 *Y.B. COM. ARB.* at x (International Council for Commercial Arbitration).

¹²Agreement on Trade Relations Between the United States of America and the People's Republic of Hungary (entered into force July 7, 1978), Article VIII.

awards, both those made within and outside China, is mandated by the regulations which establish the system of foreign trade arbitration.¹³

The Chinese, too, have a FTAC and a MAC. The rules of these organizations are basically like those in effect in Eastern Europe. They require arbitration in China, before a panel of Chinese arbitrators. The Chinese seek arbitration under their own FTAC or MAC rules as a matter of first preference. When that is rejected by Western traders, their second preference is for arbitration in the place of the defendant. However, the Chinese have stated unequivocally that there is no legal or policy bar to agreement by Chinese trading organizations to conduct arbitration in a third country,¹⁴ and there are at least some reported examples of contracts with such provisions.

The increasing emphasis on third-country arbitration in all East-West trade, both with Comecon countries and with China, has led to an accelerated search for mutually-acceptable arbitration rules and places to arbitrate, rules and locations which are native to neither party. It is in this context that the UNCITRAL Rules are uniquely valuable and that the emergence of Sweden as a locale for East-West cases is particularly useful.

A. *The UNCITRAL Arbitration Rules*

The UNCITRAL Arbitration Rules were adopted by the United Nations Commission on International Trade Law in April, 1976 after several years of preparatory work, drafting and detailed debate. Following adoption of the Rules by the Commission, the General Assembly of the United Nations in December, 1976 unanimously adopted a resolution in which it "*Recommends* the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts."¹⁵ It is significant to note that the preamble to the resolution emphasizes that the General Assembly is "convinced" that the establishment of rules "that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations."¹⁶ Thus, the advantages of the UNCITRAL Rules in situations such as those which obtain in East-West trade have been recognized from the outset at the highest international levels.

¹³See Holtzmann, *Resolving Disputes in U.S.-China Trade*, in *LEGAL ASPECTS OF DOING BUSINESS IN CHINA* 115-16 (H. Holtzmann ed. 1976) citing Sections 10 and 11 of Decree of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (1954).

¹⁴*Id.* at 109-10.

¹⁵Resolution 31/98, 31 U.N. GAOR, Supp. (No. 39) 182, U.N. Doc. A/31/39 (1976); adopted December 15, 1976, 31 U.N. GAOR, Supp. (No. 17) 57, U.N. Doc. A/31/17 (1976).

¹⁶*Id.*

The unique characteristic of the UNCITRAL Rules is that they were drafted, debated and decided upon in an international forum. UNCITRAL is one of the constituent commissions of the United Nations. It is composed of thirty-six member nations, elected as representative of all regions and legal, economic and social systems. The United States and the Soviet Union are members and played active roles in developing the Rules. Several Comecon countries were also active as members or observers, including Hungary, the German Democratic Republic, Poland and Czechoslovakia. The Rules are thus a product of collaborative drafting by lawyers from the East and the West and are considered to be compatible with both capitalist and socialist legal practices and procedures. They are the first set of rules developed to provide an alternative to those drafted for use by a single institution or within a single region. Their particular usefulness in East-West trade is that a party who suggests use of the UNCITRAL Rules in an international transaction cannot be suspected of attempting to promote his own national interests and a party who accepts those Rules cannot be seen as having conceded anything to the other.

China is not a member of UNCITRAL and did not participate in preparing the Rules. However, China did not oppose the action of the General Assembly in recommending new Rules. Legal experts at the China Council for the Promotion of International Trade (CCPIT) have said that they are studying the Rules carefully but their conclusions as to their acceptability for use in trade with the United States is not yet known. It is not known whether any contracts in United States-China trade provide for arbitration under the Rules.

The principal function of UNCITRAL is to facilitate international commerce by harmonizing and unifying international trade law. In most of its projects, its work product is in the form of a convention, which, like any treaty, comes into force upon ratification. The UNCITRAL Rules are, however, quite different. They are not a convention or treaty. They are simply a model set of rules which are made available to businessmen throughout the world. They require no ratification by any government. They achieve legal force only to the extent that particular parties elect to include them by reference in their contracts and their legal effect is then not the force of a treaty or statute, but of a private contract. In this respect, the UNCITRAL Rules are comparable to other arbitration rules, such as those of the International Chamber of Commerce (ICC).

The Rules are the product of painstaking preparatory work and extensive consultation. The International Trade Law Branch of the United Nations provides full secretariat support to UNCITRAL, thus assuring that its work product meets high professional standards. In the development of the Rules, the secretariat, in addition to its own resources, had the services of Professor Pieter Sanders of the Netherlands who acted as Special Consultant, bringing to the project his vast experience in this field. The International Council for Commercial Arbitration (ICCA), which is the world

network of arbitration institutions, actively assisted in the preparation of the drafts which were reviewed and debated by the Commission. The American Arbitration Association (AAA) and members of the Arbitration Committees of the ABA Sections of Business, Banking and Corporation Law and International Law provided helpful guidance through the ICCA and the United States delegation at UNCITRAL. As a result, it is fair to say that the new Rules reflect extensive professional guidance and represent the most significant step forward to date in international arbitration rule-making.

The UNCITRAL Rules are in no sense revolutionary. They are built upon and evolve from experience with other institutional and regional rules. Lawyers who are familiar with other rules will not feel strange, uncomfortable or uncertain in using the UNCITRAL Rules. They will, however, note several improvements which are designed to make arbitration procedures in international cases more effective. These improvements include:

- Broad flexibility which permits a range of choices for the parties. These choices include flexibility to choose whether—and to what extent—the assistance of an arbitration institution is desired in conducting the case.¹⁷
- Sufficient controls so that arbitrators can prevent one party from resorting to procedural maneuvers for purpose of delay.¹⁸
- Effective procedures so that refusal of one party to participate will not delay or frustrate the proceeding.¹⁹
- Use of a list procedure (similar to the AAA system) for appointing arbitrators.²⁰
- A simplified two-stage system of pleadings which permits cases to be started quickly by a simple notice, with a more detailed statement of claim not being required until after the arbitrators have been appointed.²¹
- A series of interrelated procedures designed to permit the parties to know in advance of hearings what the contentions of the opposing party are and what documents and other evidence will be relied upon.²²
- A right to hearings for the purpose of presenting evidence and argument—a right not found in all other rules, many of which are influenced by practices in legal systems in which cases are presented largely by exchanges of documents.²³
- Sufficient flexibility to permit cross-examination of witnesses.²⁴

¹⁷GAOR, *supra* note 2, arts. 15(1), 38(c).

¹⁸*Id.* arts. 15(1), 18(1), 19(1), 23.

¹⁹*Id.* arts. 7(2), 28(2), 28(3).

²⁰*Id.* arts. 6(3), 7(3).

²¹*Id.* arts. 3, 18.

²²*Id.* arts. 18, 19, 22, 24(2), 25(2).

²³*Id.* art. 15(2).

²⁴*Id.* art. 25(4).

An interesting innovation in the Rules is the provision that arbitrators shall in all cases decide "in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."²⁵ Other rules, such as the Rules of the International Chamber of Commerce (ICC), provide that the arbitrators shall "take into account" both the contract and trade usages, thus putting both on the same footing.²⁶ Professor Sanders, in his most helpful commentary on the Rules, points out that under the UNCITRAL Rules "decisions must be made 'in accordance with' the contract, whilst trade usages must 'be taken into account.' This distinction . . . underlines the importance of the contract . . . If the contract is clear, trade usages cannot justify deviation from it. The contract comes first."²⁷

In emphasizing the UNCITRAL Rules, I do so because they are a significant recent development, not because they are the only rules available for use in trade between the United States and Comecon countries. The ICC Rules have broad use in United States trade with a number of Comecon countries, notably Romania, Hungary and Poland. However, the ICC Rules generally have not been accepted by Soviet foreign trade organizations.

When using the UNCITRAL Rules, it is highly desirable for the parties to name in the arbitration clause an appointing authority who will appoint the sole arbitrator, or chairman, if the parties are unable to do so. In case the parties do not name an appointing authority in their contract and cannot agree on appointment of arbitrators, the Rules provide that an appointing authority will be named by the Secretary General of the Permanent Court of Arbitration at The Hague. While this is a necessary element in the rules in order to prevent stalemate, the procedure is time-consuming and can be avoided by the parties if they can find a mutually acceptable appointing authority. In East-West trade that is not always an easy task. In such circumstances, the emergence of Sweden, and particularly the Stockholm Chamber of Commerce, as an arbitration center acceptable to both East and West has been a highly useful development.

B. Sweden as a Place for East-West Arbitration

In speaking of "the emergence" of Sweden as a place for arbitration, I do not mean to imply that arbitration is something new to our Swedish colleagues. Arbitration has deep roots in Sweden. There were, indeed, statutory provisions recognizing arbitration in one of the provincial codes com-

²⁵*Id.* art. 33(3).

²⁶Rules of Conciliation and Arbitration of the International Chamber of Commerce, art. 13(5) (effective June 1, 1975); *see also* Arbitration Rules of the Economic Commission for Europe, U.N. Doc. E/ECE/625/Rev. 1, art. 38 (1966).

²⁷Sanders, *Commentary on UNCITRAL Arbitration Rules*, [1977] 2 Y.B. COM. ARB. 211-12 (International Council for Commercial Arbitration).

piled in the 14th Century; the first Swedish Arbitration Act became law in 1887.²⁸ This long history provides a firm and reliable foundation for current developments.

As trade between the United States and the Soviet Union accelerated in the early 1970s, Sweden frequently appeared in contracts as the place at which any arbitration would be conducted. However, American lawyers were unfamiliar with arbitration law and practice in Sweden since there were no sources of information available here—there was not even an accurate English translation of the Swedish Arbitration Act.

These circumstances led the American Arbitration Association to consider approaching the Stockholm Chamber of Commerce to seek the information needed by American lawyers and businessmen. However, we realized that if we alone sought such information from the Stockholm Chamber, our efforts might be perceived by our Soviet colleagues as a project to gain know-how by which Americans could beat Russians in Swedish arbitration. That could prove embarrassing to Sweden and compromise its acceptability as a forum. We therefore first approached the USSR Chamber of Commerce and Industry and suggested that together we ask the Stockholm Chamber to assist us in a joint study. The study, conducted by a group of legal experts convened by the Stockholm Chamber, began in 1973 and initially addressed itself to answering a comprehensive series of questions on Swedish arbitration law and practice which had been jointly compiled by the AAA and the USSR Chamber.

The quality and authoritative character of the study can be measured by the distinction of the Swedish participants. The honorary chairman was the late Justice Sture Petren, then a justice of the International Court of Justice. The chairman was Justice Nils Mangerd, of the Court of Appeal. The presiding judge of the court of first instance in Stockholm which hears matters relating to arbitration was also a member of the group. Other members included two distinguished law professors and seven leading lawyers, including Dr. Gillis Wetter, an active practitioner and the Solicitor Royal.

The results of the joint study have been compiled under Dr. Wetter's direction into a book, entitled *Arbitration in Sweden*, which was published in English by the Stockholm Chamber of Commerce in 1977.²⁹ It contains authoritative commentary on Swedish arbitration law and practice and translations of the relevant statutes. Copies of this extraordinarily useful book are available in the United States through the American Arbitration Association.

²⁸See ARBITRATION IN SWEDEN 4, (Stockholm Chamber of Commerce, 1977).

²⁹*Id. supra* note 28. See Wetter, *Sweden as a Location of International Arbitration Proceedings*, in PRIVATE INVESTORS ABROAD-PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 223-53 (Southwestern Legal Foundation, 1977); see also Holmback & Mangard, *National Report on Sweden*, [1978] 3 Y.B. COM. ARB. 161-80.

The joint study confirmed that Sweden has the basic characteristics desirable in a country chosen as the locale for conducting international commercial arbitration proceedings. These include the following:

- Conveniently available written material on Swedish arbitration law and practice, including reliable translations of all relevant statutes. The book *Arbitration in Sweden* provides American lawyers with more comprehensive information than is available in English as to any other country, with the possible exception of England.
- A law (the Swedish Arbitration Act) which permits and encourages modern international commercial arbitration. Swedish law:
 - (i) permits flexibility for parties to choose whatever arbitration procedures they consider best suited to their particular transaction.³⁰ (The Act was amended, effective June 30, 1976, to exclude in international cases certain provisions which, as the joint study indicated, were inconvenient in conducting cases involving parties from outside Sweden.)³¹
 - (ii) permits parties to agree that the law of another country shall govern the substance of a dispute arbitrated in Sweden.³²
 - (iii) appears to be largely compatible with the UNCITRAL and the ICC Rules. This is important because such rules are, in legal effect, merely contracts and the parties cannot by contract derogate from mandatory rules of law in effect at the place where the arbitration is conducted.³³
 - (iv) contains no provisions which restrict the conduct of a case according to the UNCITRAL or ICC Rules. The Rules of the Stockholm Chamber of Commerce have recently been modernized,³⁴ although it is my personal opinion that they are less comprehensive than the UNCITRAL Rules.
 - (v) does not unduly limit the issues which can be submitted to arbitration. The law states that "any question in the nature of a civil matter" is arbitrable.³⁵ This is important because the scope of what is arbitrable is governed by the laws of the place where the arbitration is held, and such laws vary widely. In the opinion of the Swedish experts who conducted the joint study, contracts may give arbitrators power to fill "gaps" which may occur under long-term contracts when unpredictable changes take place in economic, technical or political conditions and the parties are deadlocked over how to cope with the problem.³⁶ The existence of the power to fill "gaps" in

³⁰ARBITRATION IN SWEDEN, *supra* note 28, at 9-15, 192-201.

³¹Swedish Arbitration Act of 1929, §§ 9, 18, amended July 1, 1976, translated in ARBITRATION IN SWEDEN, *supra* note 28, at 195, 198.

³²ARBITRATION IN SWEDEN, *supra* note 28, at 47-49.

³³See, e.g., UNCITRAL Arbitration Rules, *supra* note 2, art. 1(2).

³⁴ARBITRATION IN SWEDEN, *supra* note 28, at 8-9, 184-91.

³⁵*Id.* at 32-36; Swedish Arbitration Act of 1929, § 1.

³⁶ARBITRATION IN SWEDEN, *supra* note 28, at 34-36.

cases where all parties agree that the arbitrator should do so is particularly valuable in the increasing number of long-term East-West transactions involving investment, joint ventures, or industrial and technical development.

- (vi) does not require that arbitrators be Swedish.³⁷ The Stockholm Chamber of Commerce is an experienced appointing authority and is available to serve in that capacity under the UNCITRAL Rules. It will appoint either Swedish or foreign arbitrators. If Swedish arbitrators are desired, there is an experienced cadre from among whom to choose.
- (vii) does not require the Swedish courts to intrude unduly in arbitration. The grounds for appeal are reasonably limited and courts do not exercise hindering control over arbitration proceedings.³⁸ In these respects, Sweden is preferable to Switzerland, where judges can second guess arbitrators on a wide variety of grounds,³⁹ and to Great Britain, where, until recently under the "stated case" procedure, judges retained the power to decide questions of law and exercise other extensive controls, although that situation has now largely been corrected by the Arbitration Act of 1979.⁴⁰
- Sweden is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is highly important because the United States and certain of the Comecon countries have ratified the Convention subject to a reservation that they will only enforce awards made in the territory of another State which has acceded to the Convention.⁴¹ Sweden's accession to the Convention permits arbitral awards made there to be enforced in all other countries which have acceded.
- The Stockholm Chamber of Commerce is available to provide administrative and secretariat services in cases under its own rules, the UNCITRAL Rules or the ICC Rules.⁴² This can be a great convenience to parties in East-West cases.
- The practical facilities needed to conduct complex cases are found in Stockholm. Hearing rooms, interpreters and multilingual stenographic

³⁷*Id.* at 64-67.

³⁸*Id.* at 145-67.

³⁹*See, e.g.,* Swiss Intercantonal Arbitration Convention, art. 36(f) (Editions Payout, Lausanne 1974); *see also* Briner, *Switzerland*, [1978] 3 Y.B. COM. ARB. 201 (International Council for Commercial Arbitration).

⁴⁰*See, e.g.,* A. WALTON, *RUSSEL ON ARBITRATION* 243-65 (London, 1970); Kerr, *The English Courts and Arbitration*, in 1 INTERNATIONAL COMMERCIAL ARBITRATION 214-26 (Schmitthoff, ed., 1974-75); Gill, *United Kingdom*, [1977] 2 Y.B. COM. ARB. 107 (International Council for Commercial Arbitration); Arbitration Act of 1979, C. 42.

⁴¹Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions, List of Signatories, Ratifications, Accessions, etc. (as of December 31, 1976), U.N. Doc. ST/LEG/Ser.D/10, at 523.

⁴²ARBITRATION IN SWEDEN, *supra* note 28, at 8.

facilities are available. No problems appear to exist in Sweden with respect to obtaining visas, transporting confidential documents, maintaining privacy or freely communicating abroad by telephone, telegraph or mail. These are much needed conditions, not always found at other places where an arbitration might be conducted.

- Finally, it is important that parties be well advised concerning aspects of local laws of the place of arbitration which govern the proceedings. One of the advantages of arbitrating in Sweden is that there are highly qualified multilingual Swedish lawyers available to counsel foreign clients on Swedish law related to international arbitration.

Because of these favorable characteristics, many contracts in United States-Soviet trade designate Sweden as the place of arbitration and the Stockholm Chamber as the appointing authority. Less use of Sweden is made in trade with other Comecon countries, although I have in recent months heard of contracts between United States corporations and Comecon countries which provide for arbitration in Stockholm under the UNCITRAL Rules. This may be a growing trend. The Chinese have told us that they are carefully studying Swedish arbitration law and practice. A delegation from the China Council for the Promotion of International Trade has visited the arbitration facilities of the Stockholm Chamber, and the director of the Stockholm Chamber has visited Peking for purposes of discussions on arbitration.

C. Arbitration Clause for Optional Use in United States-Soviet Trade

At the same time that representatives of the AAA and the USSR Chamber of Commerce and Industry began their joint study of Swedish arbitration law, they also began a discussion of the advisability of preparing a model clause for arbitration in Sweden which could be made available to parties from both countries for use on an optional basis. It was felt that such a clause would facilitate United States-Soviet trade.

As the discussions continued over a four-year period, it became apparent that in addition to a model clause it would be necessary to establish arrangements with the Stockholm Chamber of Commerce to act as an appointing authority and to provide administrative services. This led to tripartite discussions between representatives of the American, Soviet and Swedish arbitration organizations.

Finally, in January 1977, the USSR Chamber of Commerce and Industry, the AAA and the Stockholm Chamber of Commerce joined in announcing the availability of a model arbitration clause which provides for arbitration to take place in Sweden under the UNCITRAL Rules, with the Stockholm Chamber having the authority to appoint the presiding arbitrator from a

panel which has been jointly established by the USSR Chamber and the AAA.⁴³

The AAA and the USSR Chamber exchanged letters declaring that each organization views the new model clause "as being acceptable for inclusion in contracts" in trade between the two countries. At the same time, it was emphasized that the model clause is optional and that parties from both countries are free to utilize the clause, or such other form of arbitration as they may mutually prefer and agree best suits their particular needs.

The model clause provides that there shall be three arbitrators in each case. Each party is to appoint one arbitrator. If the respondent does not within fifteen days appoint an arbitrator, that arbitrator will be designated by the USSR Chamber, when the respondent is a Soviet organization, or by the AAA, when the respondent is an American corporation. If either the USSR Chamber or the AAA fails to perform this function promptly, the Stockholm Chamber is to do so.

The two arbitrators thus appointed are to choose a third arbitrator who will act as presiding arbitrator. If they do not agree on the presiding arbitrator within thirty days, the model clause provides that the presiding arbitrator will be appointed by the Stockholm Chamber from a panel of eighteen lawyers and judges who have been jointly agreed to by the AAA and the USSR Chamber. The panel, at present, includes six persons from Sweden, six from Eastern European countries (not including the USSR) and six from Western countries (not including the United States). The model clause provides that the Stockholm Chamber will submit a list containing all eighteen names on the panel to each party. Each party may then delete any persons to whom it objects, but not more than one-half of the names on the list, and may number the remaining names on the list in the order of its preference. The Stockholm Chamber will then appoint the arbitrators from among those whose names were not deleted, taking into account the order of preference indicated by the parties. If the persons remaining on the list after deletion of names by the parties are unwilling or unable to act as presiding arbitrator, the Stockholm Chamber will appoint a person from outside the panel who is not a national of either the United States or the Soviet Union.

This panel procedure permits an American party to delete the names of all six persons from Eastern European countries plus up to three Swedes

⁴³The description of the optional model clause in this portion of the report reproduces in part material in the article *Arbitration Clause for Optional Use in USA-USSR Trade*, [1978] 3 Y.B. COM. ARB. 299-301. That article states that it is based upon information furnished to the General Editor by S. Lebedev (USSR) and H. M. Holtzmann (USA). The author acknowledges with thanks the contribution of Prof. Lebedev to that article and thanks Prof. Sanders, General Editor of the Yearbook, for permission to include that material in this report. The full text of the clause appears in [1978] 3 Y.B. COM. ARB. 301-03 (International Council for Commercial Arbitration).

and permits a Soviet party to delete the names of all six persons from the Western countries plus up to three Swedes. Were this to occur, the presiding arbitrator would be chosen from among the remaining Swedish persons on the panel. In my personal opinion, it should not be assumed that this will occur in all cases. The non-Swedish members of the panel—both Eastern and Western—are well-known and highly respected. I can well imagine cases in which a Soviet party will choose not to delete one or more Westerners who have special qualifications and experience. Conversely, in my opinion, American parties might well consider in appropriate cases not deleting one or more of the Eastern panel members. In any event, distinguished Swedish arbitrators are available on the panel to act as a back-up.

In addition to acting as appointing authority for arbitrators, the Stockholm Chamber has agreed to furnish secretariat services, physical facilities and similar assistance when requested to do so in cases conducted under the model clause.

The model clause includes an unique and practical provision concerning the language of the arbitration. It states that the parties will use their best efforts to agree on a single language for the arbitration proceedings in order to save time and reduce costs. If the parties cannot agree on a single language, then the pleadings, the oral hearings and the award will be in both Russian and English, but other documents and exhibits will be translated only if required by ruling of the arbitrators.

Persons who desire to use the model clause may reproduce it in full in their contracts, or may incorporate it therein by reference using an Abbreviated Form which has also been prepared.

The legal teams which prepared the model clause consisted of A. P. Belov and S. N. Lebedev for the USSR Chamber and Howard M. Holtzmann and Gerald Aksen for the AAA. Justice Nils Mangard was chairman of the Swedish legal group. A. I. Golovkin, Vice-Chairman of the USSR Chamber, Donald B. Straus, President of the AAA Research Institute, and Sven Swarting, Managing Director of the Stockholm Chamber, participated in the discussions leading to the model clause.

The importance of the new model clause was emphasized in statements made by the USSR Chamber and the AAA at the ceremonies marking the announcement of the new arrangements. The Soviet statement said:

The Optional Clause which we have jointly prepared is a good example of mutual co-operation. The purpose of our two organizations has been to contribute to the development of trade between the Soviet Union and the United States by facilitating the negotiation of contracts and by strengthening legal safeguards, although we recognized throughout our discussions that the prospects of this trade depend on many factors. It should be noted that our common efforts have been inspired by the Final Act signed in Helsinki in 1975 by the USSR, the USA and many other countries, which includes provisions encouraging wider use of arbitration for the settlement of disputes in international commerce.⁴⁴

⁴⁴*Id.* at 301.

The AAA statement also expressed satisfaction with the results achieved, saying:

International trade is an important building block in the structure of world peace. It is indispensable to trade that there be effective arbitration procedures to resolve any disputes which may arise. The arrangements established today make available to corporations in US-USSR trade a fair, neutral and effective arbitration procedure and will greatly assist them in preparing contracts.⁴⁵

Since the establishment of the new arrangements, it is understood that the model clause has been used quite widely—but not universally—in United States-Soviet trade contracts. Although both the AAA and the USSR Chamber have publicized the clause, not all corporations and enterprises in both countries are as yet aware of it and fully informed of its value. At a 1978 meeting of the Legal Committee of the US-USSR Trade Council, it was reported that Soviet foreign trade organizations have generally welcomed the clause and that it provides a means for avoiding negotiating impasses on this subject. It was reported, for example, that the Soviet foreign trade organization which deals with copyrights now regularly uses the model clause in its contracts with American parties. It was explained that this is not because the clause is more appropriate to copyright contracts than to other transactions, but simply because the business in copyrights is relatively new and the trade organization is not hindered, as are some others, by old forms and habits. Although the model clause has been used in numerous contracts, no disputes have yet been referred to arbitration pursuant to it.

The exchange of letters between the AAA and the USSR Chamber provides for an annual review by the parties of the joint panel and the operation of the clause. The first such review was held in September, 1978 at a meeting at The Hague and the panel was continued without change. Both sides look forward to increasing use of the clause.

Developments in Conciliation

Recent developments indicate a rising interest in the use of conciliation to resolve disputes in East-West trade.

Within the past three years, conciliation arrangements have been established by joint economic councils which seek to facilitate business relations between United States corporations and enterprises in Bulgaria, Hungary, Poland and Romania.⁴⁶ These joint economic councils are non-governmental and each consists of American business executives who do business with a particular country and their counterparts from foreign trade enterprises in that country. Each of these four economic councils has established a set of Conciliation Rules. These Rules have some significant

⁴⁵*Id.*

⁴⁶The texts of these rules are available at the Eastman Library of the American Arbitration Association, 140 West 51 Street, New York, N.Y.

differences, but they share generally similar purposes. The US-USSR Trade Council has not adopted conciliation rules, but at a recent meeting of its Legal Committee the matter was discussed and it is expected to be explored at future meetings.

Typically, the Conciliation Rules with Eastern European countries call for establishment of a list of about ten conciliators, half appointed by the United States members of the joint economic council and half by the members from the socialist countries. When disputes arise in trade between the two countries, either party can apply to an administrator in its own country to institute conciliation proceedings. The administrator in the United States is the American Arbitration Association and abroad is the chamber of commerce of the socialist country. The administrator receiving a request initiates a process for informing the other party — the mechanics of notice varying somewhat in the several Rules. The other party may then accept or reject conciliation. If conciliation is rejected, the process ends. If conciliation is accepted, two conciliators are appointed, typically one from each country, the detailed procedures for appointment differing under the several Rules. The parties then submit written statements of their positions and meetings with the conciliators are contemplated.

The various Rules then posit different functions for the conciliators. The United States-Polish Rules provide that "[T]he role of the conciliators in any dispute shall be to assist the parties to reach a mutually acceptable solution to their dispute in an amicable manner with the guidance and assistance of the conciliators." This seems to indicate a flexible, relatively informal procedure which implicitly permits the conciliators to make a joint recommendation to the parties, but does not require one. In contrast, the Hungarian and Romanian Rules contemplate a more formalistic procedure in which, after receiving written submissions and holding hearings, the two conciliators submit a written recommendation to the parties, if the conciliators can agree upon such a recommendation. The parties are then free to accept or reject the recommendation. The unwritten premise is that the conciliation effort is to be abandoned if the conciliators cannot agree among themselves, but that is not expressly stated in any of the Rules. All of the Rules contemplate that if the conciliation fails within a stated period, ranging from 60 to 120 days in the different Rules, the parties may then move on to arbitration, if their contracts contain arbitration clauses, or otherwise may litigate in the courts.

The Conciliation Rules with the Eastern European countries are too recent for much experience to have accumulated with respect to them. A few cases are understood to have arisen, in most of which the parties reached a settlement by themselves after one side had initiated a conciliation proceeding. The availability of conciliation as a spur to mutual agreement may be one of the major advantages of the process. Initiation of an arbitration often has the same effect but the advantage of initiating conciliation is that

it is less costly and may be perceived as a more friendly and less drastic step than filing a claim in arbitration.

Turning now to the People's Republic of China, we find much greater emphasis upon conciliation than upon arbitration. Although, as noted earlier in this report, the Chinese do not preclude arbitration, they much prefer conciliation. Information supplied by them during discussions with representatives of the AAA indicate that in recent years over 90 percent of all disputes in foreign trade have been resolved by conciliation without need of recourse to arbitration. Utilizing conciliation to resolve disputes has a long history within China. The process, which has ancient roots, continues to be carried on extensively, both domestically and internationally, with procedures which have been modified to conform to the socialist goals and community structure of today's China.⁴⁷

Recognizing the strong Chinese preference for conciliation, representatives of the American Arbitration Association, acting as consultants to the National Council for United States-China Trade, carried on extensive discussions with the Legal Affairs Department of the China Council for the Promotion of International Trade (CCPIT) with a view to establishing procedures for conciliation of disputes which might arise in trade between the two countries. This resulted in the announcement in October 1976 of arrangements between the two organizations for joint conciliation of disputes with the assistance of an American conciliator to be appointed by the AAA and a Chinese conciliator to be designated by the FTAC at the CCPIT.⁴⁸ American companies having disputes are invited to seek AAA help in initiating conciliation and Chinese trading organizations have also been informed by the CCPIT of the availability of the joint service.

No formal agreement has been entered into with the CCPIT and no written rules have been established. Rather, the AAA and the CCPIT are proceeding on a pragmatic basis, developing mutual experience and refining procedures in the light of what is learned in conducting actual cases.

The first, and thus far the only, case of conciliation in United States-China trade arose in 1977. After several months in which the parties exchanged written statements to clarify the issues and evidence, face-to-face meetings between the parties were held in October, 1977 with the assistance of an American conciliator and a Chinese conciliator. The procedure in the conciliation included a mutual study of the facts, followed by extensive analysis to assist each party to more objectively understand the other's positions and to help each party assess its own strengths and weaknesses. Consistent with conciliation practices in both the United States and China, the conciliators were expected to make recommendations for solution only

⁴⁷*Op. cit.*, fn. at pp. 87, 96-104.

⁴⁸American Arbitration Association, "U.S.-China Trade Advance by Conciliation—American Arbitration Association Offers Service in Business Disputes," News Release, Oct. 15, 1976.

if requested by both parties and any such recommendations were recognized as nonbinding. The conciliation came to a successful conclusion when, after ten days of meetings, the parties were able to reach agreement upon the terms of a friendly settlement of the dispute. Although the first conciliation was conducted in Peking, future cases may be held either in China, the United States, or another other mutually agreed location.⁴⁹

The representatives of the AAA, Donald Straus and I attended the conciliation in Peking as observers and to assist in the joint administration of the case with the FTAC. The AAA and CCPIT have begun to review the experience of the first case with the aim of learning from it how to refine procedures for future cases. The AAA and the CCPIT are also continuing to explore methods of arbitration to be used in cases in which conciliation does not result in settlement, including arbitration in a mutually acceptable third country.

Looking broadly at the conciliation arrangements for American trade with Eastern Europe and China, a number of questions arise concerning the functions of the conciliators, and the working methods and procedures to be followed in initiating and conducting a conciliation. Questions also arise with respect to the relationship between conciliation and arbitration. For example, in what circumstances and for how long does an agreement to conciliate bar or postpone arbitration? If conciliation is not successful, to what extent can information related to the conciliation be used as evidence in a subsequent arbitration? How can contracts best be written so that conciliation shall take place first and will be followed by arbitration if the conciliation fails? These questions are ignored in some conciliation arrangements and treated in various ways in others.

Substantial help in answering these questions is expected from work which UNCITRAL has undertaken. The Commission decided in June, 1978 to include conciliation as a priority subject on its work program and requested the Secretariat to make studies preparatory to consideration of the matter by the Commission.⁵⁰ The proposal on conciliation was initiated by the United States delegation and, as stated in the report which was adopted by UNCITRAL, it received "wide support."⁵¹ The United States Government views UNCITRAL's work on conciliation as a major contribution to dispute resolution and looks forward to the results of the studies with great interest.

⁴⁹American Arbitration Association, AAA Reports Successful Conclusion of First Joint Conciliation in U.S.-China Trade, News Release, October 28, 1977.

⁵⁰Report of the United Nations Commission on International Trade Law on the work of its Eleventh Session, 30 May-16 June 1978, 31 U.N. G.A.O.R., Supp. (No. 17) U.N. Doc. A/33/17 ch. IV, ¶¶ 53, 67 (1978).

⁵¹*Id.* at ¶ 53.

Conclusion

Let me conclude by predicting that arbitration will continue to be a helpful adjunct to East-West trade and that actual experience under the UNCITRAL Rules in Sweden and with the United States-Soviet Optional Clause will bear out my optimism. My prediction is that the UNCITRAL Rules will receive wider use and that optional model clauses will be developed for use in trade with socialist countries in addition to the Soviet Union. Sweden will continue to be an attractive locale for East-West cases, but other mutually acceptable places may emerge.

Conciliation will grow and its procedures will be refined. Experimentation with modern methods of dispute resolution is likely and is to be encouraged. The work of UNICITRAL in this area should help to improve the practice of conciliation and to accelerate its use.

The future is bright.

