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Arbitration in East-West Trade†

Acceptability of Arbitration

Arbitration clauses are now standard practice in virtually all contracts between Western corporations and Eastern European foreign trade organizations. Parties on both sides routinely express a strong preference to submit future disputes to final decision by arbitrators rather than resorting to litigation in national courts of law.¹

Arbitration, as used in this discussion, may be defined as a voluntary agreement by both parties to a contract that any controversies or claims arising out of the contract, or in connection or relating to the contract, or any breach of it, will be settled by one or more arbitrators, rather than by litigation in the courts. Each party to such an agreement typically expects that the other party will comply with the decision of the arbitrator, and that, if it does not, the arbitration decision will be enforced in national courts having jurisdiction.

Western businessmen and lawyers have traditionally preferred arbitration in international trade disputes in order to avoid the uncertainties and complications associated with appearance in foreign courts. In the Western countries long-established institutions exist which have extensive experience in conducting arbitrations arising out of international trade. Such institutions include, for example, the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the Inter-American Arbitration Commission, the Italian Arbitration Association, the London Court of

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¹As used herein the word East refers to the Soviet Union and the eastern European countries joined with it in the Council for Mutual Economic Assistance (herein called the "COMECON" countries); the word West refers primarily to the United States and the countries of western Europe and also generally includes Japan and other capitalist countries. While China is not within the scope of this paper, many of the factors discussed herein relating to arbitration between trade entities of countries having different economic systems are also applicable to it.

Arbitration, the French Arbitration Association, the Japanese Commercial Arbitration Association and other arbitration organizations in various countries and specialized trades.²

Similarly, trade executives and legal specialists in East European countries have an established tradition of utilizing arbitration for resolving international trade disputes. This is true not only in dealings between socialist and capitalist countries, but is equally the practice in transactions between foreign trade organizations of the various socialist countries themselves. Also, as in the West, institutions exist which are broadly experienced in conducting foreign trade arbitrations. The Foreign Trade Arbitration Commission (FTAC) at the U.S.S.R. Chamber of Commerce is typical of such institutions and similar arbitration organizations are connected with the central chambers of commerce in each of the East European countries.

This general acceptance of arbitration is raised to the level of government policy in a number of international treaties and agreements. A recent example is the U.S.-U.S.S.R. Trade Agreement of 1972 which provides that:

Both governments encourage the adoption of arbitration for the settlement of disputes arising out of international commercial transactions concluded between natural and legal persons of the United States of America and foreign trade organizations of the Union of Soviet Socialist Republics. . . .³

Similar expressions of policy are included in the U.S.-Polish Trade Agreements of 1972.⁴

As a result, Western businessmen and lawyers will find that their counterparts in the socialist countries accept the concept of arbitration, expect to include an arbitration clause in virtually every trade contract, and are quite familiar with the processes of utilizing arbitration when disputes arise which the parties cannot themselves resolve. Any differences which may arise relate not to the acceptability of arbitration generally, but rather to particular questions such as the locale of the arbitration, the nationality and method of choosing the arbitrator, and the rules, if any, to be applied in conducting the arbitration.

Effectiveness of Arbitration

The effectiveness of arbitration as a means of providing a final and binding resolution of international commercial disputes depends on two principal

²For full listing see "International and National Institutions Acting in the Field of Arbitration" (Italian Arbitration Association, Rome, 1970).

³*Agreement Between the Government of the U.S.A. and the Government of the USSR Regarding Trade* (October 18, 1972), Article 7. Text appears at 67 U.S. DEPARTMENT OF STATE BULLETIN, no. 1743, pp. 595-597.

⁴The 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. Texts appear in "Fact Sheet, Joint American-Polish Trade Commission, November 4-8, 1972," issued by the office of the U.S. Secretary of Commerce, Washington, D.C.

factors: first, the willingness of the parties voluntarily to abide by the decision of arbitrators; and, secondly, the existence of a legal mechanism for court enforcement if a party fails to arbitrate or refuses to comply with an arbitration decision. Both of these factors exist in East-West trade and contribute to a healthy climate in which arbitration may reasonably be expected to be effective.

First, the long-standing acceptance of arbitration in both East and West has created an atmosphere in which the parties are used to arbitration, recognize it as an indispensable element of international trade, and expect to participate in arbitration when a dispute arises and to abide by the decisions of arbitrators.

Secondly, in those cases in which a party refuses to participate in arbitration or to comply with an arbitration award, local legal practices and international treaties exist for enforcement in the courts of both Western and Eastern countries. These legal sanctions have strong roots in virtually all of the nations involved in East-West trade. Thus, for example, in the United States the law strongly favors recognition and enforcement of domestic arbitration awards.⁵ This policy has been extended to foreign arbitration awards by application of the doctrine of comity and, in some situations, through bilateral treaties of Friendship, Navigation and Commerce.⁶

A similar development of basic legal principles favoring arbitration has taken place in the socialist countries. Thus, for example, a Soviet legal scholar describes Soviet policy favoring arbitration as follows:

... unilateral repudiation of an arbitration agreement . . . bars the disobedient party from having such disputes determined by an ordinary court. In affirming the binding effect of arbitration agreements the Fundaments of Civil Procedure of the U.S.S.R. and the Union Republics provide that "if the parties have entered into an agreement for submitting their dispute for settlement by an arbitral court," the judge of an ordinary court "shall refuse to accept the statement of claim" (art. 31) and the court itself (should the judge have accepted the statement of claim, without knowing, for example, of the existing arbitration agreement or when such agreement is made subsequent to filing the statement etc.) "shall terminate the proceedings" (art. 41).⁷

The individual national policies favoring recognition and enforcement of arbitration coalesced and found further expression in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York in 1958.⁸ The United States and most West European

⁵See *Prima Paint v. Flood & Conklin*, 388 United States Reports 395 (1967); see also G. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements U.N. Convention on the Recognition and Enforcement of Foreign Arbitrators Awards*, in *NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* (New York, 1971) (herein cited as *NEW STRATEGIES*); originally published in *SOUTHWESTERN UNIVERSITY LAW REVIEW*, vol. 3, no. 1.

⁶See Aksen, *supra* note 5. For citation of bilateral commercial treaties of the United States which contain provisions on arbitration see *NEW STRATEGIES*, *supra* note 5, Appendix B, at pp. 196-197.

⁷S. N. Lebedev, "Maritime Arbitration Commission—Organization and Procedure," *USSR Chamber of Commerce and Industry* (Moscow, 1972), p. 14.

⁸U.N. Doc. No. E/CONF. 26/9 Rev. 1, 6/10 (1958); U.N. Treaty Series, Vol. 330, No. 4739, p. 38 (1959); also reprinted in *NEW STRATEGIES*, *supra* note 5, pp. 8-16.

nations, other than Great Britain, are signatories to the U.N. Convention of 1958. Socialist states which are parties include not only the Soviet Union but also Bulgaria, Czechoslovakia, Hungary, Poland and Romania.⁹

The U.N. Convention requires each contracting country "to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration."¹⁰ The Convention provides that a signatory country may refuse to recognize or enforce a foreign arbitral award only if the party against whom the award is rendered bears the burden of proving such things as (a) the agreement to arbitrate was not valid under the law applicable to the contract, or (b) notice of the arbitration proceedings was not given or the party was otherwise prevented from presenting his case, or (c) the award falls outside the terms of the agreement to arbitrate, or (d) the arbitrators were not appointed in accordance with the agreement, or (e) the award has not yet become binding on the parties, or has been set aside or suspended.¹¹ None of these grounds for refusal are likely to provide serious problems concerning the enforceability of foreign arbitral awards in Eastern or Western European countries, provided contracts are properly written and arbitration procedures are carefully conducted.

In addition to the grounds for refusal to enforce a foreign award noted above, the U.N. Convention also provides that enforcement of an arbitral award may be refused in a signatory country if the courts of that country find that "(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."¹² The first of these grounds is unlikely to cause any major problems enforcing awards in socialist countries because the decisions of such institutions show that socialist practice recognizes that differences capable of settlement by arbitration include virtually all of the types of disputes which could be expected to arise under contracts between Western companies and socialist foreign trade organizations.¹³ On the other hand, the ground for refusal to enforce an arbitration award because the

⁹*Status of Multinational Treaties* (1971) U.N. Doc. SER. D/5, p. 393; see also *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, Volume II (1973) U.N. E.73.V.3.; also NEW STRATEGIES, *supra* note 5, p. 195.

¹⁰U.N. Convention, *supra* note 8, art. II, § 1.

¹¹*Id.*, art. V, § 1.

¹²*Id.*, art. V, § 2.

¹³See, for example, "Collected Arbitration Cases—Awards of The Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce," Part I, 1934-51; Part II, 1951-58; Part III, 1959-62; Part IV, 1963-65 (Moscow, 1972 and 1973). One category of disputes in East-West trade in which questions of arbitrability may arise is in the area of validity of patents. Another area in which questions of arbitrability may arise is when the dispute relates to matters which are subject to a special international convention such as the Convention Internationale Concernant le Transport des Voyageurs et des Bagages par Chemin de Fer.

enforcing country considers that to do so would be contrary to its public policy is a factor which must, at least at this time, be a basis for some concern by contracting parties in view of the differences in perception of proper public policy which exist on some matters between capitalist and socialist countries. However, this area of uncertainty as to public policy, which one commentator has called "unavoidable,"¹⁴ is inherent in any dispute settlement mechanism, be it judicial or arbitral. One can only hope that conflicting concepts of public policy will not intrude into the enforcement of arbitral decisions on commercial matters and that if such problems arise the courts of the country involved will recognize that the overriding public policy to be served is one which favors enforcement of commercial arbitration awards as a necessary element in maintaining vital international trade.¹⁵

Available Forms of Arbitration

Parties to contracts in East-West trade have a fairly broad, and sometimes quite bewildering, spectrum of choices in determining the form of arbitration to be used. Among the forms of arbitration which are available and being used as of January 1974 are:

- (a) Arbitration under the rules of the foreign trade arbitration commission at the central chamber of commerce of the socialist country involved.
- (b) Arbitration in the country of the defendant, using the rules of the local foreign trade arbitration commission if the socialist party is defendant, and when the capitalist party is defendant using the rules of an arbitration institution in the defendant's country.
- (c) Arbitration in a third country, under the Rules of Arbitration of the United Nations Economic Commission for Europe (ECE),¹⁶ as recommended in the U.S.-U.S.S.R.¹⁷ and the U.S.-Polish Trade Agreements.¹⁸
- (d) Arbitration in a third country under the rules of the International Chamber of Commerce or other rules. ICC arbitration is not used by Soviet foreign trade organizations but has been agreed to by trading organizations of some other COMECON countries.

¹⁴J. Haight, "Convention on the Recognition and Enforcement of Foreign Awards," U.S. Delegation Report, p. 68.

¹⁵Faced with just such a case, the United States Supreme Court recently held that the public policy favoring enforcement of an agreement to arbitrate contained in an international commercial contract outweighs the domestic policy expressed in the Federal Securities Acts granting to the courts exclusive jurisdiction of cases involving fraud in the sale of securities. The court held that "an agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the Federal courts. . . ." 42 U.S. L. WEEK 4911, 4915 (U.S. June 17, 1974).

¹⁶E/ECE/625/Rev. 1; E/ECE/Trade/81/Rev. 1; UN Sales No. E. 70; 11. E./Mim. 14.

¹⁷*Supra* note 3.

¹⁸*Supra* note 4.

(e) Arbitration in a third country with no specification of any rules at all.

In choosing from among those alternatives, there are a number of factors which should be weighed. These are: Where will be the locale of the arbitration proceeding? Who will be the arbitrators and how will they be appointed? and What will be the rules, if any, which will govern the arbitration?

Factors in Choosing Locale

In choosing locale, a principal factor is convenience in conducting an eventual arbitration proceeding. In this connection, one should consider the whereabouts of likely future witnesses and of machinery or products which arbitrators might wish to inspect. On the other hand, and quite significantly in cases involving East-West trade, the parties should also analyze existing facilities for conducting an arbitration proceeding, including availability of hearing rooms, interpreters, and bi-lingual stenographic assistance. Also to be studied are any possible problems which might be encountered in trying to communicate freely and rapidly by mail or telephone with home headquarters; the relative speed, ease and assurance of securing visas for entrance of counsel, witnesses, arbitrators and others involved in a case; and any potential difficulties in carrying exhibits or confidential business documents across borders. These conditions which vary from country to country, and which may change from time to time, should be borne in mind when drafting the arbitration clause. The U.S.-U.S.S.R. Trade Pact recommends that contracts provide that arbitrations take place in a country other than the Soviet Union or the United States.¹⁹

Another factor to be remembered when determining locale is that arbitrators will typically apply the law of the locale in deciding procedural questions which may arise in conducting the arbitration proceeding. Such procedural questions are likely to arise even when the parties specify that arbitration is to be conducted under particular rules, such as the ECE rules or the ICC rules, for there are often elements of procedure which are not fully covered by such rules. In cases in which the parties specify no rules at all, the range of procedural questions to be answered is, of course, far more extensive. It is also to be noted that, in the absence of specific contrary provisions in the contract, arbitrators in international practice will usually apply the procedural law of the locale even when the contract provides that the substantive law of another country is to govern the transaction. Accordingly, when choosing locale, parties should either be familiar and satisfied with the procedural law of the locale or should specify that some other procedural law is to govern. In the event that the procedural law of a country other than the locale is designated in the contract, it would be wise to check to be sure that the law of the locale so permits.

¹⁹*Supra* note 3, art. 7, § 1(b).

A further legal factor to be considered in determining locale is the applicability of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. That Convention includes a provision that any country, in ratifying the Convention, may declare that "it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State."²⁰ The United States, the Soviet Union and other COMECON countries which have ratified the Convention, have done so subject to such a declaration of reciprocity. Since the U.N. Convention clause refers to awards made "in the territory of another Contracting State," it is necessary that the locale of an arbitration be in a contracting state in order to insure applicability of the U.N. Convention in the various countries which ratified subject to a declaration of reciprocity. It is for this reason that the U.S.-U.S.S.R. Trade Pact recommends that the parties specify as the place of arbitration a country that is a party to the U.N. Convention.²¹ Sweden, Switzerland and France, which are often the locale specified for East-West trade arbitrations, all meet this requirement, as they have all ratified the U.N. Convention. Inasmuch as Article 37 of the ECE Rules permits arbitration awards to be rendered in a country other than the locale of the proceedings, parties operating under those rules should also be sure that the award is actually rendered in a country which is a party to the U.N. Convention.

In choosing between various possible locales for the arbitration, one should not confuse the geography of the place of hearing and the nationality of the arbitrator. For the locale can, if mutually desired, be in the country of one of the parties while the arbitrator can at the same time be a national of a third country. This, in fact, is typical of international arbitrations conducted in the United States under the rules of the American Arbitration Association, which provide that in such cases, "The neutral arbitrator shall, upon the request of either of the parties be appointed from among the nationals of a country other than that of any of the parties."²² A similar provision is found in the ICC Rules.²³

Factors in Choosing Arbitrators

The first factor which most parties consider in choosing arbitrators in international trade cases is the nationality of the arbitrators. Western parties typically prefer that the sole or third arbitrator (sometimes called the "umpire") be a national of a country other than the countries of the parties. As noted above, this preference finds traditional expression in both the ICC and the AAA

²⁰U.N. Convention, *supra* note 8, art. I, § 3.

²¹*Supra* note 3, art. 7, § 1(b).

²²"Commercial Arbitration Rules of the American Arbitration Association" (as amended November 1, 1973), § 15.

²³"Rules of Conciliation and Arbitration of the International Chamber of Commerce" (June 1, 1965), art. 7, ¶ 3.

rules.²⁴ In contrast, most socialist countries prefer a system of arbitration in which the arbitrators are all members of the roster of their own country's foreign trade arbitration institution, which in the U.S.S.R. and many other COMECON countries are, as a result of rule or practice, usually composed of nationals of the country involved.

While the socialist countries prefer arbitration before their own arbitration institutions as a matter of first choice, all will accept contracts calling for third-country arbitration. Professor S. Bratus, the distinguished Chairman of the U.S.S.R. Foreign Trade Arbitration Commission, writing even before the signing of the 1972 U.S.-U.S.S.R. Trade Agreement, confirmed the practice that "In most contracts signed by Soviet organizations with corporations and firms in capitalist countries provision is made for the settlement of disputes by neutral arbitration in a third country."²⁵ Such provisions are recommended in both the U.S.-U.S.S.R. and the U.S.-Polish Trade Agreements.²⁶

Arbitration clauses in contracts in East-West trade typically call either for the parties to agree on one arbitrator or for each party to appoint an arbitrator, and for those two to attempt to agree upon the third arbitrator. It therefore becomes necessary to provide for an appointing authority to name the sole arbitrator or the third arbitrator in the event that the parties or the two-party appointed arbitrators are unable to reach agreement. Appointing authorities are usually arbitration institutions, chambers of commerce, or distinguished individuals in third countries, such as presidents of chambers of commerce or high court judges.

In choosing an appointing authority it is important to know the practices which the authority follows in making appointments and whether the authority is guided by rules or regular procedures. Thus, for example, under rules of the Soviet Foreign Trade Arbitration Commission, arbitrators can be named only from among the fifteen members of the Commission, all of whom are Soviet citizens.²⁷ However, in some other COMECON countries, such as the German Democratic Republic and Poland, when the parties designate the arbitration commission at the central chamber of commerce as appointing authority, but do not specify that the rules of that commission will apply, the arbitration

²⁴*Supra* notes 21 and 22.

²⁵S. Bratus, "Arbitration and International Economic Cooperation Towards Industrial, Scientific and Technical Development," report to Fourth International Congress on Arbitration in Moscow October, 1972 (herein called Moscow Congress); reprinted in *THE ARBITRATION JOURNAL*, vol. 27, no. 4 (December, 1972), p. 239.

²⁶*Supra* notes 3 and 4.

²⁷The fifteen-member commission was created by "Decree of The Central Executive Committee and The Council of the People's Commissars of the U.S.S.R. on The Foreign Trade Arbitration Commission at The USSR Chamber of Commerce," June 17, 1932 (Collection of Laws of the USSR, 1932, no. 48, s. 281). The requirement that arbitrators be appointed from among members of the commission appears in "Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce" (as amended August 12, 1967), §§ 6-10.

commission feels free to choose the arbitrator from its own national panel, from a third-country panel or without regard to any panel. Under ICC rules, third-country arbitrators are appointed by an international group, based on nominations of the ICC national committee of the country from which the arbitrator comes.²⁸ The AAA, under its rules, names third-country neutrals from the extensive, open-ended lists of arbitrators which it maintains.²⁹ Arbitration institutions make it their business to identify potential arbitrators long before cases arise and thus have ample time to consider each individual's qualifications and areas of specialization. In contrast, when the parties have the president of a chamber of commerce or other distinguished individual as the appointing authority, there are typically no rules to govern the method by which that individual will make the choice of arbitrator, no formal panels, little staff support, and no readily available past record to which parties can refer. Instead, the choice of arbitrator will largely be made based on the personal circle of acquaintances of the individual appointing authority, with whatever staff support his institution may be able to provide.

In drafting arbitration clauses, it should be borne in mind that a clause designating an appointing authority does just that and nothing more. Thus, for example, a clause designating the President of the Stockholm Chamber of Commerce simply provides power for that individual to name a third arbitrator. Such a clause does not bring into play the arbitration rules of the Stockholm Chamber of Commerce, nor does it provide for the rendering of any administrative services by the chamber. In contrast, reference in a contract to arbitration under the rules of such an institution as the ICC, the AAA or the Soviet FTAC provides not only an appointing authority, but also establishes the rules which will govern the appointment of the arbitrator as well as other aspects of the arbitration proceeding and calls into operation the administrative facilities of the arbitration institution.

When considering arbitration provisions, a choice must be made between having a single arbitrator or having a panel of three. Some Western lawyers argue strongly for a single arbitrator in most international cases, largely on the ground that the difficulties of coordinating the available time of three prominent men often result in extended delays and that one arbitrator can more effectively and quickly conduct and complete the arbitration. Those who favor three arbitrators follow the old adage that "there is safety in numbers" and also point out that party-appointed arbitrators are usually fellow-nationals of the parties and can bring differing cultural perspectives to bear on the problem. Reflecting the existence of these varied viewpoints, most rules, whether they be those of the U.S.S.R. FTAC, the ICC or the ECE, provide the opportunity for

²⁸ICC Rules, *supra* note 22, arts. 6 and 7.

²⁹AAA Rules, *supra* note 21, §§ 5, 12 and 14.

parties to choose to have either one arbitrator or three. The difference between the Eastern and Western practice is that under the Soviet FTAC rules, for example, one arbitrator is permitted only in "exceptional cases,"³⁰ whereas under ICC rules, if the parties fail to agree on the number of arbitrators, one is the usual number and, three are appointed only if the dispute "appears important enough to warrant the appointment of three arbitrators."³¹ A similar situation exists under the AAA rules.³² The present author generally favors three arbitrators in all but very small East-West trade disputes because the party-appointed arbitrators can bring to the arbitral deliberations insights into local viewpoints and customs which may be most helpful to the neutral arbitrator in properly resolving disputes growing out of widely different social, economic and legal systems.

A final point should be noted in connection with the choice of arbitrators. Whereas many Western lawyers, particularly Americans, are used to accepting engineers and other technical specialists as arbitrators in disputes which are primarily technical,³³ Soviet and other COMECON practice favors appointing only lawyers as arbitrators in virtually all cases. Describing the Soviet viewpoint, Professor Bratus has said:

The main consideration in favor of this attitude, which was expressed in the report of the Soviet representative and supported by several speakers from socialist and capitalist countries, was as follows: Any technical conclusions and calculations in support or refutation of proper or improper carrying-out of work undertaken should be given a legal assessment, because they deal with facts confirming, altering or waiving the rights and obligations of the parties.³⁴

Accordingly, Western parties should expect that their socialist counterparts will urge that arbitration tribunals consist only of legally-trained arbitrators.

Factors Concerning Rules

The first issue to be considered by parties in connection with the choice of rules to govern arbitration proceedings is the threshold question of whether they feel the need for any rules at all. On the one hand there is the combined experience of established arbitration institutions in both the East and West that procedural rules not only facilitate the conduct of an arbitration, but also help insure fairness and remove from the area of controversy a variety of potential conflicts which could otherwise exacerbate the relations of the parties. On the other hand, there continue to be optimists who feel that somehow, without

³⁰FTAC Rules, *supra* note 26, § 10.

³¹ICC Rules, *supra* note 22, art. 7, § 2.

³²AAA Rules, *supra* note 21, § 16.

³³*See, for example*, R. Coulson, "The Architect-Engineer Goes to Arbitration" (American Arbitration Association, 1970), p. 6. *See also* S. Stern, "Arbitrating Disputes in Major Construction Projects," p. 5, report to Moscow Congress, *supra* note 24.

³⁴S. Bratus, *The Fourth International Congress on Arbitration*, FOREIGN TRADE, no. 4, (Moscow, 1973), p. 48.

rules, the parties to an international case can manage to meet in a hotel room with one or more arbitrators and conduct their arbitration simply and effectively.

In situations in which the agreement to arbitrate makes no reference to rules, arbitrators will normally apply the procedural law of the locale, which may be found in an arbitration law, in procedural legislation, or in both. However, such laws are typically quite general and do not contain many of the specific procedural guidelines found in the rules of most arbitration institutions.

Whether an arbitration can proceed smoothly without rules, once the locale has been specified and the arbitrators appointed, depends in large part on the procedural skills of the particular arbitrators, the extent to which the parties are prepared to cooperate on resolving procedural points as contrasted with the extent to which one party might desire to delay or frustrate the proceeding, and a certain amount of luck as to whether or not difficult procedural problems arise. If all goes well, "homemade," "hotel room" arbitration may be quite satisfactory. But when difficulties arise, experience indicates that parties are well-served by the existence of sound procedural rules to guide themselves and the arbitrators.

It is in recognition of these practical considerations, that the central chambers of commerce of the COMECON countries, as well as various arbitration institutions in the West, have all developed quite detailed procedural rules. Those rules typically cover such areas as institution of proceedings; presentation of answer and counterclaims; appointment of arbitrators, challenges to arbitrators and substitution of arbitrators in event of death or other incapacity; provisions for *ex parte* hearings and decisions if one party fails to appear after notice; provisions as to the right to be represented by counsel; guides as to transcripts, oaths, costs, fees, language, and experts; general procedures at hearings, including questions of who may be present and representation by counsel; rules relating to awards, including whether or not arbitrators must state reasons in detail and whether or not awards will be published or kept confidential. Although differences exist between the rules of Eastern and Western arbitration institutions with respect to locale and nationality of arbitrators, there are large areas of similarity as to most other basic procedures. Donald B. Straus, President of the Research Institute of the AAA, and a recognized authority on rules, has said that, "An impartial reading of all these rules of procedure, with few exceptions, reveals that they differ very little in any essential qualities."³⁵ The mere listing of the topics covered by typical arbitration rules should give pause to any lawyer about to embark on a complex international contract in East-West trade without benefit of recourse to established institutional arbitration rules in the event a dispute arises.

³⁵D.B. Straus, *Interim Observations on Arbitration Arrangements in Soviet-American Trade*, THE ARBITRATION JOURNAL, vol. 28, no. 2 (June, 1973), p. 108.

A further advantage afforded by the rules of most arbitration institutions is that they provide for various administrative services to be performed for the parties by the institution. Such services include secretariat and other facilitating functions which experience demonstrates are often helpful to the parties. The availability of such administrative services assures fairness and provides a buffer between contesting parties in handling necessary "housekeeping" details of the arbitration. This is particularly valuable in conducting arbitrations in East-West trade in view of the fact that the parties often approach even simple procedural details with different cultural perspectives and the experienced staffs of arbitration institutions can fulfill an important function in explaining and expediting the procedures. Few arbitrators have the time, experience or desire to cope with such administrative details themselves. It is worth noting that in some COMECON countries such as the German Democratic Republic and Poland, the staff of the arbitration commission at the central chamber of commerce will, when the parties so agree, provide secretariat services and other assistance even in cases when the contract does not call for the application of the commission's own rules.

Choosing the Form of Arbitration

In choosing the particular form of arbitration to be included in a contract, parties will wish to consider the various factors relating to locale, choice of arbitrator, and rules discussed above. In this connection it may also be helpful to review the practices followed by parties who have been negotiating contracts.

No central source of information exists concerning the content of arbitration clauses in various East-West commercial contracts. However, an effort to collect arbitration clauses in East-West contracts entered into by American corporations since the signing of the U.S.-U.S.S.R. Trade Agreement has been undertaken by the American Arbitration Association, in cooperation with the Bureau of East-West Trade of the United States Department of Commerce and with the aid of a number of lawyers who have been engaged in negotiating such contracts. While the experience of Americans may not be entirely similar to that of other Western traders, and while this compilation may not be complete, it is the best source of data available and is believed to be representative of practices during the period between October, 1972 and January, 1974.³⁶

A total of fourteen agreements between American corporations and Soviet foreign trade organizations have been analyzed by the AAA Research Institute. Of these, ten provide for arbitration in Stockholm, with the President of the

³⁶*Id.*; see also D.B. Strauss, "Additional Remarks," paper presented at Conference on Legal Problems of Soviet-U.S.A. Trade, sponsored by Carnegie Endowment for Peace and American Society for International Law in New York, January 1974 (herein called Carnegie-ASIL Conference). The papers presented at the Conference are expected to be published by the ASIL.

Stockholm Chamber of Commerce designated as the appointing authority and with no rules of procedure specified. Three of the fourteen agreements provide for arbitration in Moscow with the arbitrators to be appointed and the proceeding conducted under FTAC Rules. One of the agreements calls for arbitration in Paris, with the arbitrators to be appointed by the Board of the Assembly of the Presidents of the Chamber of Commerce and Industry in Paris, and the proceedings to be conducted under the ECE Rules.

A somewhat different pattern has developed for arbitration arrangements between U.S. corporations and trading organizations in other COMECON countries. The AAA Research Institute reports on eight arbitration clauses in recent contracts involving Poland. Of these, five specify arbitration under ECE Rules, with the locale of two in Zurich, and one each in London, Basle and Geneva; one provides for ICC Rules in Zurich; and two call for arbitration in Zurich under the "laws of Switzerland." Two recent contracts involving Romania provide for arbitration under ICC Rules in Paris. One recent contract with a Hungarian trading organization specifies ICC Rules in Zurich.

In considering the various forms of arbitration available to parties in East-West trade, it must be emphasized that there are a number of developing changes in international arrangements which may affect arbitration in this area. Accordingly, parties would be well advised to check for the latest available information before considering the actual drafting of arbitration clauses.³⁷

Arbitration Commissions in COMECON Countries

Historically, foreign trade organizations of the Soviet Union and other COMECON countries in negotiating contracts with Western corporations have proposed arbitration under the rules of the foreign trade arbitration institution established at the central chamber of commerce of the socialist country. The Soviet Foreign Trade Arbitration Commission and the Soviet Maritime Arbitration Commission, both at the U.S.S.R. Chamber of Commerce, are generally representative of such institutions.

In arbitrations conducted by the Soviet FTAC, for example, the proceedings take place in the U.S.S.R., the arbitrators must be chosen from a panel of fifteen members, all of whom are Soviet citizens, and the rules of the FTAC are applied. Aside from the provision relating to locale and choice of arbitrators, the rules are along lines similar to those of Western arbitration organizations and afford the basic requisites for procedural due process.³⁸

³⁷For example, the U.S. Department of Commerce recommends the American Arbitration Association "as a source of information and assistance regarding alternative arbitration provisions which the negotiating parties may select for their contracts," *EAST-WEST TRADE* (U.S. Department of Commerce, April 1973).

³⁸FTAC Rules, *supra* note 26. For description of FTAC procedures see E. Leff, *The Foreign Trade Arbitration Commission of the U.S.S.R. and the U.S.A.*, in *NEW STRATEGIES*, *supra* note 5, p. 143

The individuals who head the arbitration institutions in the Soviet Union and other COMECON countries, and those who are members of their panels of arbitrators, are typically distinguished lawyers with substantial expertise in international trade law.

The reaction of Western corporations to accepting contract clauses providing for arbitration before the foreign trade arbitration commissions of COMECON countries is summed up by an experienced American lawyer who has said, "Although most knowledgeable observers give the FTAC high marks for its overall record of accomplishment, foreign companies are often reluctant to have their trade disputes with Soviet foreign trading organizations resolved by the FTAC."³⁹ The reason for this reluctance is probably not due to dislike of the procedural rules of the socialist arbitration institutions or to distrust of the individuals who comprise their panels of arbitrators. Rather, the preference is based on factors relating to convenience of locale described above and also to the strong Western tradition that in all international trade cases the neutral arbitrators should be nationals of countries other than those of the parties.

Arbitration in the Country of the Defendant

In a move toward establishing a more balanced mechanism for international commercial arbitration, the socialist countries often advocate contract clauses which provide for arbitration in the country of the defendant under the rules of an arbitration institution in the defendant's country. This mechanism is regularly followed in transactions between the foreign trading organizations of the COMECON countries themselves. It has also been adopted in some East-West transactions, and, notably, is the form established in agreements between the Japanese Commercial Arbitration Association and the chambers of commerce of each of the COMECON countries, beginning in 1956. Similar agreements exist as to trade between India and the various COMECON countries.

Professor Bratus has commented on this arbitration mechanism from his vantage point as a leading Soviet arbitration expert:

Both sides [in agreeing to arbitrate in the country of the defendant] act in the spirit of mutual trust and base themselves on the principle of equality and equal interest in a just settlement of disputes. Here mutual trust is expressed in the fact that both sides

et seq.; originally published in *THE ARBITRATION JOURNAL*, vol. 24, no. 1 (1969); also, *NEW STRATEGIES*, Appendix C, pp. 246-252.

³⁹R. Starr, *A New Legal Framework For Trade Between the United States and the Soviet Union: The 1972 U.S.-U.S.S.R. Trade Agreement*, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 67, no. 1 (January, 1973), p. 176. S. Pisar notes in *COEXISTENCE AND COMMERCE* (1970), p. 408, that, "Those nominated by the various communist Chambers of Commerce to serve as arbitrators are in general persons of considerable achievement and high professional and social standing. One cannot lightly assume that such individuals are devoid of intuitive feelings for justice and fair play . . . To foster contractual discipline at home and confidence abroad, the tribunals may indeed,

rule out the possibility of calling on so-called neutral arbitration, feeling that since each of the sides could be either the respondent or the plaintiff the settlement of a dispute by local arbitration would be unbiased and founded on an accurate interpretation of the contract and on the norms of the applicable law.⁴⁰

One reason often cited by Western lawyers in opposition to arbitration in the country of the defendant is that, if the socialist trading organization fails to perform, it would be necessary to arbitrate under the rules of the socialist country, a procedure which, as noted above, is not generally favored by capitalist corporations. Moreover, many Western lawyers fear that this arrangement would lead to situations in which parties would maneuver artificially in an attempt to be in the position of defendant when proceedings commenced.

Another point to be noted is that, despite an apparent balance, there is actually a lack of equal reciprocity in arrangements which provide for arbitration under the rules of the socialist arbitration institutions when the socialist trade organization is defendant and under the rules of the ICC or the AAA when the Western corporation is defendant.⁴¹ This is because, as discussed above, many socialist arbitration institutions appoint only arbitrators of their own nationality whereas the ICC and AAA Rules provide for third-country arbitrators in international cases.⁴²

Arbitration in a Third Country Under ECE Rules

The United Nations Economic Commission for Europe adopted Rules of Arbitration in 1966.⁴³ The rules were in large measure designed in order to facilitate arbitration of disputes arising from commercial transactions between trading entities in Eastern and Western Europe. Creation of the rules followed and was pursuant to the European Convention on International Commercial Arbitration of 1961.⁴⁴ The rules are, however, basically independent of the Convention. The fact that a country is a signatory to the Convention does not obligate businesses of that country to use the ECE Rules. Also, the fact that a country is not a signatory to the Convention does not bar traders of that country from using the rules. The ECE Rules, like the ICC Rules and other institutional rules, are available for any parties anywhere who may desire to include reference to them in their commercial contracts.

be leaning backward to be harsh with their own." See also R. Coulson, *Arbitration in U.S.-U.S.S.R. Trade Disputes*, NEW YORK LAW JOURNAL, November 13, 1972, p. 1.

⁴⁰S. Bratus, *supra* note 24, p. 236.

⁴¹See, for example, alternate Rider to General Condition of Order of Amtorg Trading Corporation, which acts as agent in the U.S. for various Soviet foreign trade organizations.

⁴²*Supra* notes 21 and 22.

⁴³*Supra* note 15. The ECE rules are described and analyzed in E. Cohn, *The Rules of Arbitration of The United Nations Economic Commission for Europe*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, Vol. 16 (October, 1967) p. 946 *et seq.*

⁴⁴E/ECE/423: E/ECE Trade 48: U.N. Treaty Series Vol. 484, No. 7041 (1963-64), p. 364. For description and reprint of text of Convention see D. Sarre, *European Commercial Arbitration*, JOURNAL OF BUSINESS LAW (1961), p. 352 *et seq.*

An unfavorable characteristic of the ECE Rules is that they are more general in language and less comprehensive in scope than the rules of many arbitration institutions. A recent informal study by the Research Institute of the AAA done in consultation with about fifty lawyers for corporations engaged in East-West trade indicates that almost half of the ECE Rules could benefit from supplementary language in order to amplify or clarify them or to eliminate ambiguities. Moreover, the ECE Rules have a further disadvantage in that they do not include a structure for administration and, except for functions of the appointing authority in selecting the arbitrator, all other secretariat and "housekeeping" functions are left to be performed by the arbitrators or the parties.

A final point should be noted by parties who desire to refer in contracts to ECE Rules. It is important to designate an appointing authority in the contract. The mechanisms of the ECE Rules which come into play when the parties refer to the rules but fail to designate an appointing authority are cumbersome, generally untested and may prove unsuitable in actual practice. In this connection it is noteworthy that the U.S.-U.S.S.R. and the U.S.-Polish Trade Agreements both recommend that parties who elect to use the ECE Rules should in their contracts name an appointing authority in a country other than the countries of the parties.⁴⁵

Arbitration in a Third Country Under ICC or Other Rules

The International Chamber of Commerce with headquarters in Paris has for many years maintained rules and administered commercial arbitration proceedings in many parts of the world. Its rules are comprehensive, its procedures are highly developed and its administrative staff is broadly experienced.⁴⁶ As noted above, ICC rules provide for appointment of third-country arbitrators.⁴⁷

The foreign trading organizations of the Soviet Union have not generally agreed to arbitration under ICC Rules. However, a number of other COMECON countries, particularly those with closer historic and cultural ties to France, do regularly agree to ICC arbitration. Notably, the U.S.-Polish Trade Agreement recommends ICC arbitration as an alternate to the ECE Rules.⁴⁸

There is also the possibility of arbitration in a third country using institutional rules other than the ICC Rules, such as rules of the Stockholm Chamber of Commerce. However, there is little current evidence of parties

⁴⁵*Supra* note 3, art. 7, § 1(a); *supra* note 4, ¶ 1(b).

⁴⁶*Supra* note 22. See F. Eisenmann, *Arbitration Under the FCC Rules*. THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol. 15 (1966), p. 726 *et seq.* See, also, E. Choen, *The Rules of Arbitration of the ICC*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol. 14 (1965), pp. 132 *et seq.*

⁴⁷*Supra* note 22.

⁴⁸*Supra* note 4, ¶ 1(a).

electing to include such provisions in East-West trade agreements. For example, from 1962 through 1972 the Stockholm Chamber administered only thirteen cases under its rules, and of those only two involved COMECON countries—the U.S.S.R. and Poland. The predominant practice in East-West trade relating to Sweden appears to be designate that country as the locale, and to provide for the President of the Stockholm Chamber to be appointing authority, but not to include reference to the Stockholm Chamber Rules. Similar practices seem to be followed when Switzerland is designated as the locale and when a Swiss appointing authority is designated.

Further alternatives for arbitration in a third country under established rules would become possible if success is achieved in developing new rules through the efforts of the U.N. Commission on International Trade Law and as a result of discussions between the U.S. and Soviet arbitration institutions. These projects, which hold great promise for the future, are described below under the sub-heading "Possible Future Developments."

Arbitration in a Third Country with No Rules Specified

A substantial number of contracts in East-West trade provide for arbitration in a third country without any reference to institutional rules. Thus, for example, the largest number of reported recent contracts between American firms and Soviet foreign trading organizations provide for arbitration in Stockholm, with the President of the Chamber of Commerce of Stockholm to appoint the arbitrators if the parties fail to do so by mutual agreement. Typically, such contracts include provisions for initiating arbitration by registered mail notice in which the initiating party names his arbitrator. The opposite party then has a specified period, ranging in various contracts from 14 to 60 days, in which to reply and name an arbitrator. If the respondent does not reply, then an arbitrator is to be appointed for him by the President of the Stockholm Chamber. The two arbitrators must then mutually agree on a third arbitrator, and, if they fail to do so within contractually established time limits, the third arbitrator is to be appointed by the President of the Stockholm Chamber. However, there is no reference to the method by which, or the source from which, the president of the Stockholm Chamber of Commerce will choose the third arbitrator. Although the intent is apparent, the language of some typical contracts does not even clearly require that the third arbitrator be a national of a third country.⁴⁹ In practice, the president of the Stockholm Chamber has, when called upon, named a Swedish lawyer as the third arbitrator in almost all cases. Such contracts specify that the arbitrators' award shall be decided by majority vote.

⁴⁹For example, see *supra* note 40.

It is to be noted that such contracts do not bring into play the arbitration rules of the Stockholm Chamber. Whatever procedural guidelines are to be applied must be found in the quite broad provisions of the Swedish Act on Arbitrators. Moreover, such contracts do not provide for any administration services to be rendered by the Stockholm Chamber of Commerce, other than the services of its President in appointing arbitrators.

The recent contracts providing for arbitration in Stockholm represent a substantial step forward in extending the principle of third-country arbitration in East-West trade. However, lacking rules and administration, they fall short of providing the best possible mechanism for arbitration.

Possible Future Developments

Recent informal discussions between Soviet and American arbitration experts led to a consensus that it would be helpful for arbitration experts of the U.S.S.R. Chamber of Commerce to confer with representatives of the AAA with a view toward developing augmented rules and model arbitration clauses which might be made available on an optional basis to parties engaged in U.S.-Soviet trade. It was also the consensus that it would be helpful to try to develop mutually agreeable lists of arbitrators to guide appointing authorities in third countries when cases arise.⁵⁰ Such efforts would be consistent with the provisions of the U.S.-U.S.S.R. Trade Agreement which invite parties to develop "forms of arbitration which they mutually prefer and agree best suits their particular needs."⁵¹ It is, of course, premature to predict whether such joint efforts will be fruitful, or when they might be concluded. However, if they are successful they would not only improve arbitration in U.S.-Soviet trade, but would also provide a valuable model for other international trade.

A second development on the horizon is a U.N. project which the United Nations Commission on International Trade and Law (UNCITRAL) has recently undertaken to develop a new set of suggested arbitration rules.⁵² This project, now in the early drafting stages, is being undertaken in collaboration with the new worldwide network of international arbitration organizations, originally known as the International Organizing Committee and to be known as the International Committee for Commercial Arbitration.⁵³ Representatives of the

⁵⁰See papers presented by S. Lebedev (U.S.S.R.) and D. B. Strauss (U.S.A.) at Carnegie-ASIL Conference, *supra*, note 35.

⁵¹*Supra* note 3, art. 7, § 1(b).

⁵²This project is described in report of UNCITRAL on the work at its sixth session, April, 1973 in GENERAL ASSEMBLY OFFICIAL RECORDS: TWENTY-EIGHTH SESSION, SUPPLEMENT No. 17 (A/9017), para. 85.

⁵³For description of organization and activities of the new worldwide network of arbitration organizations, see H. M. Holtzmann, *Achievements of the Fourth International Congress on Arbitration: A Report From Moscow*, THE ARBITRATION JOURNAL, vol. 27, no. 4 (December 1972), pp. 214-218; see, also, in same issue the text of *Resolutions of Moscow Congress*, at pp. 225-229.

COMECON countries are closely engaged in this project as are Western arbitration institutions and representatives of other regions. It is reasonable to expect that the results of this project will be applicable and helpful to East-West trade.

Governing Law

International commercial contracts typically contain clauses designating the particular law which the arbitrators are to follow in interpreting the contract. In East-West transactions which provide for third-country arbitration the parties have usually agreed to apply either internationally-accepted principles of conflict of laws or third-country governing law. In the event the parties fail to specify a governing law in their contract it is hard to predict whether arbitrators will apply the substantive law of the locale, or the conflicts law of the locale, or will apply some other law which they decide to be the proper law under the rule of conflicts which they consider appropriate.

The survey made by the AAA Research Institute of recent contracts in U.S.-U.S.S.R. trade provides an interesting cross-section of current practice.⁵⁴ The governing law provisions seen in a number of such recent contracts include clauses referring to:

- "The laws of Sweden"
- "Principles of conflict of laws of the country where the arbitration is to be held and additionally the arbitrators have the right to utilize the customs of world trade."
- "Swedish Material Law"
- "Principles of Conflict of Laws"
- "Conflict laws of Sweden"
- "Substantive Contract Law of Sweden"

In addition some clauses have been seen in East-West contracts which refer to the Swiss Federal Code of Obligations.

Parties who are considering specifying governing law would do well to distinguish between contract law and conflicts law. Failure to note that distinction could lead to unanticipated results. Thus, for example, the conflicts law of Sweden may in certain cases provide that the law of the place where a contract is made shall govern the interpretation of the contract. A Western party signing a contract in Moscow with a Soviet party might provide for arbitration "under the law of Sweden" intending that Swedish contract law would apply to interpretation of the contract. However, arbitrators might well interpret the phrase "under the law of Sweden" to mean the conflicts law of

⁵⁴*Supra* notes 34 and 35.

Sweden, in which event Soviet contract law would be applied to interpret the contract because it was signed in the Soviet Union. To avoid such an unintended result, some lawyers provide specifically that "Swedish contract law" will govern. Similarly, in order to avoid application of a variety of different Swiss federal and cantonal laws, including laws of conflicts, some lawyers find it appropriate to refer in the arbitration clause specifically to the "Swiss Federal Code of Obligations."

Also, it is advisable to distinguish between procedural and substantive law in any case in which the parties wish to avoid application of the procedural law of the locale of the arbitration. For, unless this is done, arbitrators will typically interpret a clause providing that the law of a named country other than the locale will govern the contract to mean only that the substantive law of the named country will govern. Accordingly, in such a case the arbitrators may apply the procedural law of the locale to cases in which no arbitration rules are specified in the contract, or if procedural questions arise which are not covered in the rules specified in the contract.⁵⁵

Another point to consider in drafting the governing law clause is whether the parties desire to restrict the powers of the arbitrators to the narrow confines of applicable law, or whether they prefer to authorize the arbitrators to have powers to act equitably *ex aequo et bono*, or as *amiables compositeurs*. Such broader powers to act in equity do not authorize the arbitrators to "rewrite" the parties' contracts, but rather provide leeway to render forms of justice which might otherwise not be permitted within the narrow confines of law, particularly under civil law systems which often stress doctrines of strict code interpretation. In some East-West trade transactions it has been considered helpful to empower the arbitrators to act as *amiables compositeurs*.⁵⁶ In order to avoid ambiguities which might otherwise arise under European practice, parties who desire to authorize arbitrators to act *ex aequo et bono*, as *amiables compositeurs*, should specifically include such a provision in their contracts and should also be sure that the law of the locale permits that type of arbitration.

⁵⁵See, also, discussion hereinabove under sub-heading "Factors in Choosing Locale."

⁵⁶For example, the General Conditions for supplying plants and imported machinery developed by the UN Economic Commission for Europe permit granting arbitrators the power to act as *amiables compositeurs*, as described by I. Rucareanu (Rumania) in "Arbitration and Contracts Concerning Projects of Industrial Installations, Supply and Mountings," pp. 7-8, report to Moscow Congress, *supra* note 24. It is understood that arbitrators are also granted power to act as *amiables compositeurs* in disputes arising under the arrangements for Soviet-French scientific and technical cooperation which are described in report by M. Boguslavsky (U.S.S.R.) on "Inventive Activities and Scientific, Technical and Economic Cooperation of the USSR with other Countries," presented at symposium on "Inventive Activities and Technical Progress" (Moscow, July, 1969).

New Uses for Arbitration in Contracts for Industrial, Scientific and Technical Development

In recent years trade between the COMECON countries and the West has become increasingly concerned with new types of business arrangements which are quite different from the relatively simple import-export transactions which traditionally constituted the major part of international trade. These newer transactions involve many more complex legal and engineering aspects than traditional import-export dealings and often require long periods of time to complete. For example, some of these transactions require a contractor to design and build an entire factory on a "turnkey" basis. Other arrangements may require the party which is acquiring the factory to perform part of the work, such as erecting the building in which the factory will be installed, or supplying certain materials and components. A number of the more complex arrangements contemplate even greater cooperation and provide for joint research, and for the exchange of goods, services and know-how between the parties on a continuing, long-term basis. As Professor Bratus has pointed out, the contractual arrangements relating to such projects have "outgrown the framework of traditional sales transactions."⁵⁷

There are a number of new uses for arbitration which are uniquely helpful in these newer forms of contractual arrangements which are not generally applicable to traditional forms of sales contracts. For unlike most import-export transactions in which arbitration is generally involved only after goods are delivered or the time for performance is passed, in contracts involving industrial, scientific and technical development, arbitration is valuable at a number of earlier stages.

Arbitration to Solve Unpredictable Problems

In long-term arrangements for industrial or technological collaboration, arbitration is a valuable way to resolve disputes which may arise during the performance of the contract due to changes in technological, economic or political conditions which the parties could not predict when the contract was initially entered into. The very essence of many such contracts is that the two parties to the contract are agreeing to embark together on a journey into the unknown. The parties to such contracts have a general idea of what they hope to accomplish, but they cannot be sure how long the task will take, precisely how much it will cost, and exactly what unexpected problems or changes in conditions may occur in the future.

The problem is further complicated by the fact that industrial and technical

⁵⁷*Supra* note 24, at p. 230:

projects generally require many years of effort and the parties to such contracts must therefore consider not only the uncertainties in their own program but also many types of unpredictable external changes which may occur during the long life of their contract. For example, technical advances made by others may cause the project on which the parties are working to become obsolete even before it is finished. Other unpredictable events which may occur include changing political or economic climate and shifts in competitive conditions. Such events may require changes in price, royalty rates or other contractual terms.

Often even the most imaginative lawyer and the most far-sighted executive cannot predict all of the things which may happen during the long life of an industrial, scientific or technical contract. It is at this point that a knowledge of the usefulness of arbitration is of vital importance. Because arbitration—and only arbitration—can bridge the gap between the precise statement of contractual rights and responsibilities required in a legal contract and the unpredictability which is an inescapable element in much industrial, scientific and technical development. A properly written arbitration clause can provide that when unpredictable changes arise during the life of a contract, the parties will attempt first to agree on fair ways to solve the problem and, if they are unable to do so, the matter will then be submitted to arbitration.⁵⁸

In the event parties desire to use arbitration for such broad purposes they should include specific contract provisions to that effect, including indication that the arbitrators are authorized to exercise powers acting *ex aequo et bono*, or as *amiables compositeurs*. Otherwise, arbitrators who are used to dealing in more legalistic terms may decline to decide the issue.

Finally, the provision for arbitration in such situations is important not only because it supplies an indispensable mechanism for solving future deadlock but, just as importantly, because the existence of arbitration is a strong incentive to the parties to avoid deadlock by reaching mutual agreement when problems arise.

⁵⁸E. Minoli, in his Report on General Theme to the Moscow Congress, *supra* note 24, wrote that arbitration "may be used to settle in the future certain points in the contract where the information in possession of the parties at a given time is sufficient to make a precise agreement . . . [and] arbitration is sometimes the only way of breaking a deadlock when it is practically impossible to lay down precise and detailed contractual rules" (p. 8). See also H. M. Holtzmann, "Arbitration and Contracts Concerned with Scientific Research and Technical Work," paper presented at Moscow Congress.

Three papers on this subject were included in symposium presented at the Annual Meeting of the American Bar Association in San Francisco in 1972 on the topic of "Arbitration Clauses—Valuable Methods for Solving Business Problems Arising in Long-Term Business Arrangements." These papers which appear in *THE BUSINESS LAWYER*, vol. 28, no. 2 (January, 1973) at p. 585 *et seq.* are: H. M. Holtzmann, *An Overview*; A. D. Angel, *The Use of Arbitration Clauses as a Means for the Resolution of Impasses Arising in the Negotiation of, and During the Life of Long-Term Contractual Relationships*; G. Aksén, *Legal Considerations in Using Arbitration Clauses to Resolve Future Problems*.

Arbitration in Technical or Engineering Disputes

The disputes which arise under industrial and technical contracts in many cases result from engineering or technological difficulties. Typically, such disputes involve first the question of whether or not there has been a failure to comply with the technological or engineering requirements of the contract, and, if so, who is to blame for it and what action must be taken to correct it.⁵⁹

Clearly, the resolution of such disputes requires answers to technical or engineering questions which can only be given by qualified experts. Moreover, when disputes occur there are many advantages in having the technical or engineering questions answered by qualified experts as soon as possible. For example, it may be necessary to resolve a dispute at a preliminary stage of construction before work can proceed on later stages of the project.⁶⁰

For these reasons some contracts for engineering and construction work in East-West trade provide for experts to decide technical disputes while work under the contract is still in progress. Such early intervention by technical experts raises a number of important questions for lawyers who write contracts and arbitrators who rule upon them. These questions result from the fact that contracts which provide for early intervention of experts to decide technical disputes also typically contain an arbitration clause. In such circumstances, the primary questions which arise concerning the relationship between technical experts and arbitrators include:

- (1) What disputes should be referred to technical experts and what should be referred only to the arbitrators?
- (2) Are decisions of technical experts final, or are they subject to review and revision by the arbitrators?

As to the first question, lawyers who write contracts for early intervention of technical experts to decide technological or engineering disputes should define as precisely as possible the disputes in which there is to be recourse to technical

⁵⁹L. Kopelmanas in a report to the Moscow Congress, *supra* note 24, on "Arbitration and the Technical Verification of Satisfactory Performance of International Contracts in Industry," observed "It is probably not an exaggeration to say that the technical aspect predominates in all differences which can arise between the parties on the subject of proper performance of the contract" (p. 3). For this reason Section II of the Resolutions adopted at the Moscow Congress expressly recognized, "The increasingly important role of persons possessing specialized scientific and technical experience in connection with problems which may arise at various stages of projects for industrial, scientific and technical cooperation," *supra* note 52.

⁶⁰The importance of early intervention by technically qualified experts was emphasized in several reports by representatives of both capitalist and socialist countries to the Moscow Congress, *supra* note 24, including N. Pearson (Great Britain) "Role of Arbitrators and Consulting Engineers with Regard to Contracts on Civil Construction Works"; S. Stern (U.S.A.), *supra* note 32; I. Rucareanu (Rumania), *supra* note 55; and L. Kopelmanas (Switzerland), *supra* note 58. See also, H.M. Holtzmann, "Use of Impartial Technical Experts to Resolve Engineering and Other Technological Disputes Before Arbitration," Report to XXIV Congress of the ICC, Rio de Janeiro (May, 1973).

experts and the disputes to be referred only to arbitrators. Many contracts now being written fail to make that distinction adequately.

As to the second question, whenever parties provide in their contract for intervention by an expert to decide certain technical disputes, the contract should also state whether the decisions of the technical expert are to be final or whether a party who objects to the decision will have the right of appeal under the arbitration clause of the contract. A contract provision that the decision of the expert will be final has the advantage of resolving technical disputes most quickly and economically. On the other hand, when very important issues are at stake some parties may prefer to have the right of appeal to arbitration which typically insures greater procedural safeguards and a more juridical approach than are customary in the relatively informal atmosphere in which decisions are made by technical experts. The parties to each contract must weigh these relative advantages and disadvantages and determine the matter in the light of the particular circumstances of their transaction. It appears that Soviet and other COMECON country arbitration experts strongly favor contracts which provide that the decisions of technical experts will be subject to appeal to arbitration, with the arbitrators having unlimited power to review the decision of the experts—often in the light of testimony of counter-experts.

Conclusion

Businessmen and lawyers engaged in East-West trade will find that arbitration is the generally-accepted method for resolving disputes which may arise under contracts between socialist foreign trade organizations and capitalist companies. They will find, too, that arbitration decisions may reasonably be expected to be effective because, in both East and West, there is a long history of willingness to comply with arbitration decisions and because legal practice and international treaties favor recognition and enforcement of arbitration decisions.

Parties engaged in East-West trade have a fairly broad spectrum of choices among various available arbitration mechanisms. Most Western companies prefer, and socialist trading organizations will usually agree to, neutral arbitration in which the arbitration proceeding is conducted in a third country, before an arbitrator from a third country, and applying law of a third country to govern the rights of the parties.

Arbitration is of value not only for resolving disputes in traditional import-export transactions, but also it provides unique advantages in the newer types of long-term business arrangements involving industrial, technical and scientific development.

Arbitration is well established as a helpful adjunct to East-West trade. There are hopeful indications that it will become even stronger and more helpful as efforts for further improvement of procedural mechanisms move forward.