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With the vast expansion of Soviet commercial contacts with the outside world in recent years, the legal principles governing the U.S.S.R.'s trade relations with foreign countries are likely to gain ever increasing importance. The purpose of this paper is to survey just one corner of this domain, namely, Soviet attitudes and practices with respect to the interpretation and application of so-called international trade customs.

All Soviet specialists in the field acknowledge that, according to prevailing usage, particular questions relating to the terms of international trade contracts may be regulated by trade customs. This circumstance determines the major significance of trade customs as one of the elements which may define the nature of the rights and duties of the interested parties and the scope of their material liability in the resolution of any disputes arising out of the transaction. The trade customs employed in international trade for the most part originated as rules adopted in trade operations conducted on the territory of specific countries or even in individual localities (e.g., designated ports) and, depending on the country, applied to both domestic and foreign trade operations or to foreign trade alone or to only special areas of the latter (for example, the wheat trade). Because of numerous discrepancies, states often encountered difficulties in figuring out precisely the relevant customs observed in different countries, except where sufficient global consensus had been built up over the years so that a given practice became almost universally accepted and functioned as a generally recognized trade custom. Even here, however, inconsistencies occasionally still occur on matters of detail and care must be taken to make sure that outwardly similar formulations do indeed reflect an identity of underlying views.

Thus, several technical problems affect the possibility of resort to trade customs in any matter and especially in regard to commercial contracts concluded by Soviet trade organizations with foreign partners. To begin with, Soviet sources emphasize, trade customs cannot apply where the law which governs the execution of the contract already features a positive norm regulating the disputed issue. However, even in the absence of such a norm, the corresponding trade customs may not be mandatory for the parties concerned if they expressly chose to abide by other terms diverging from the estab-

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lished customary rules. An arrangement of this sort cannot be challenged on grounds that it runs counter to custom; instead, it is custom that is set aside in favor of the "private" formula devised by the principals. In short, the issue of applying a trade custom arises solely where neither the contract itself nor the law governing the transaction contains the solution to the contested question. It should be noted that, by emphasizing the relatively subordinate position of customary norms in the formal hierarchy of legal sources pertaining to international trade, Soviet writers do not necessarily disparage in any way the importance of customary rules of international trade as an element of legal culture in the broader sense. For, in this latter capacity, international trade customs have always played a crucial role and still continue to shape and determine the substance of many of the key concepts and principles of positive law functioning in this area.

Next, what formal criteria must a commonly used *modus operandi* satisfy in order to qualify as a *bona fide* trade custom? First, there has to be a uniform rule containing clear and concrete stipulations on the question with which it deals. For example, according to custom which operates in Soviet ports, the clause calling for the performance of a specific contract obligation "around the middle of the month" means that it must be fulfilled in the period stretching between the 11th and 20th day of the designated month. Second, the rule must be the only one recognized as a custom with respect to the subject which it governs on the territory where the rule applies. In other words, there cannot be in one and the same place two different rules dealing with the same item, both of which are considered valid customs. In a situation of this type, it must be concluded that either no custom exists at all or that just one of these rules represents a custom, measured by the usual evidentiary standards used to ascertain the nature of a customary rule. Third, the rule must be universally recognized, i.e., it must in practice serve as the effective norm and be consistently applied in the sphere of relations to which it pertains.

Since, as already mentioned, from a legal point of view customs relating to international trade consist of rules operating on a particular territory, they tend to vary from country to country. In these circumstances, the question of applying a particular custom must be decided on the basis of the legislation of that country whose law governs the pertinent foreign trade transaction. That holds true even where the chances are that the custom in issue is altogether identical in content in a number of countries and, in fact, amounts to a general custom of international trade.

I would therefore disagree with the view recently expressed by a leading Soviet writer on private international law that "to the extent

that a given type of trade custom gives rise only to questions which are uniformly resolved in different countries, to that extent and to that extent alone the given custom possesses in effect an international character which bars the inception of a conflict-of-laws question."[1] As far as I can tell, that view is not shared by a majority of the author's learned colleagues either. If the implication here is that such a "universal trade custom" would operate independently and would obviate the need first to check the relevant prescriptions of the applicable system of national legislation to ascertain how that particular customary norm is interpreted in the pertinent municipal law and whether that interpretation is really congruent with the tenor of the purported "universal custom," the soundness of this theory is open to grave doubt and meets with serious technical objections. On the contrary, I would assert that a custom pertaining to a foreign trade contract cannot contradict the stipulations of the legislation of the country whose law regulates the transaction. The issue, then, of which national legal system governs the execution of the terms of the contract can be crucial in this connection.

Soviet law lets the parties themselves, if they wish, specify the country whose law shall apply to their transaction; a similar principle appears in several Soviet treaties. Where the parties have not indicated their preference, Soviet law observes the principle of *lex loci contractus*. According to Article 126 of the 1961 Fundamentals of Civil Legislation of the U.S.S.R., and the Union Republics, "the place of conclusion of the transaction shall be determined pursuant to Soviet law," a formula described as a peremptory norm of "public order in the positive sense" which presumably applies in all instances irrespective of whether foreign or Soviet law governs the transaction as a whole.[2] With regard to contracts concluded by correspondence, Soviet practice identifies the country where the acceptance of the offer is received as the place where the contract was concluded.

Soviet spokesmen insist that in Soviet foreign trade practice the right to apply trade customs raises no doubts. Soviet legislation contains no norms prohibiting the application of trade customs to contracts concluded by Soviet organizations with foreign institutions and persons. In fact, the Merchant Shipping Code of the U.S.S.R. explicitly sanctions the use of local port customs in certain instances and some Soviet commerical treaties likewise permit supplementary resort on occasion to universally recognized international trade customs. The record of the Foreign Trade Arbitration Commission in

1. L.A. LUNTS, VNESHNETORGOVAIA KUPLIA-PRODAZHA (KOLLIZIONNYE VOPROSY) (FOREIGN TRADE PURCHASE AND SALE (CONFLICTS QUESTIONS)) 62 (1972).

2. *Id.* at 44. Likewise, L.A. LUNTS, MEZHDUNARODNOE CHASTNOE PRAVO (INTERNATIONAL PRIVATE LAW) 264-65 (1970).

Moscow further attests to Soviet willingness to allow the application of customs in situations where, due to the absence or incompleteness of the appropriate legal norm, the application of the corresponding custom derives from the content of the contract obligations in force in the relations between the parties. Thus, the contents of the four-volume set of collected decisions of the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce and Industry for the years 1934-1965 show that of the 148 cases reported, references to international trade customs are featured in 20 of them and references to customs of the port in 2 more. When the terms of a custom are in doubt, an attempt is made to establish them by checking the available evidence, such as private codifications and draft restatements, reference manuals, affidavits issued by the competent organizations (chambers of commerce, etc.), as well as depositions of suitable experts and specialists.

In addition to trade customs, trade practice also includes trade usages which consist of special rules and conditions current in certain areas of commerce. Such usages are established by chambers of commerce, stock exchanges, and the like, and are compulsory for the members of the respective organization and those businesses which observe them in their operations. They do not apply to contracts prescribing different terms.

A glimpse of the status of trade customs in the U.S.S.R. is furnished by the reported proceedings of the Foreign Trade Arbitration Commission dealing with cases in which that issue is involved. Of course, the rulings of the Commission do not have the force of legal precedent. They do, nevertheless, constitute an authoritative statement of opinion on the subject which is not apt to be treated lightly. In the majority of the instances in which the matter of trade customs arose, the issue revolved around the proper interpretation of c.i.f. and f.o.b. contract terms. Thus, a check of the contents of the four-volume set of collected decisions of the Foreign Trade Arbritation Commission for the years 1934-1965, mentioned earlier, reveals that of the 148 cases reported, the subject of c.i.f. was involved in 29 of them (5 of which expressly involved the problem of international trade customs), the subject of f.o.b. came up 18 times (7 of them expressly involved the problem of international trade customs), and one case concerned issues of c.a.f. The decisions in these cases show that the Commission in determining the content of the corresponding custom is also guided by the practice which has crystallized in the foreign trade relations between Soviet organizations and their foreign partners. Hence, the decisions of the Commission, by synthesizing the experience of applying customs, contain information on the basis of which can be fixed the various trade customs observed in the foreign trade turnover of the U.S.S.R. The following cases are typical

of the kinds of problems which the Commission has been called upon to resolve in recent years.

A claim filed by a Belgian buyer, S.A. Importbois H. and J. Van Reet, against Eksportles as seller stemmed from Eksportles' contractual duty to dispatch to the claimant standards of sawn timber c.i.f. free out of Antwerp, by one ship, without co-consignees. However, the size of the ship chartered by Eksportles prevented the ship from entering a particular basin of the port of Antwerp for discharge at the Belgian firm's moorages, resulting in the latter's sustaining extra expenditures for the discharge and delivery of the cargo to its warehouses. Eksportles denied liability for these expenditures, explaining that "the buyer wishing to specify the size of the ships and thus to ensure the discharge of these ships directly alongside certain moorages stipulates in the contract either the condition of discharge at a certain basin or the size (draft) of the ship." In support of this assertion, Eksportles submitted as evidence one of its contracts with another Belgian firm in which the size of the ship carrying the cargo was specified.

The Commission found for Eksportles, noting that the parties' contract did not specify the size of the ship and asserting that "[i]f the claimant wanted to specify the size of the ship, he ought to have done that in the contract, as is the usual practice."[3]

This same case also dealt with the issue of whether Eksportles' contract c.i.f. free out of Antwerp by one ship without co-consignees was violated by the fact that the vessel, on which the claimant's goods were shipped, first delivered three-quarters of its initial load at Amsterdam, the first port of discharge, before delivering the remainder at Antwerp to the claimant. Eksportles argued that "in international trade practice the consignee in another port is not regarded as a co-consignee, and that the notion of a co-consignee means the presence of two or more consignees in the same port of discharge." Eksportles supported this alleged international practice by referring to its own practice of performing contracts for deliveries in Belgium and the Netherlands in this manner and by submitting as evidence another contract, with terms the same as those in issue here, where two batches of cargo had been delivered by one vessel to Britain and Antwerp without any complaints lodged by the consignees.

The Commission found on this point as well that Eksportles had fulfilled its contractual obligations because it did in fact deliver the

3. S.A. Importbois H. and J. Van Reet v. V/O Eksportles, [1964] 4 ARBITRAZHNAIA PRAKTIKA (RESHENIIA VNESHNETORGOVOI ARBITRAZHNOI KOMISSII 1963-1965GG.) 95, Case 128 (1970) [hereinafter cited as ARBITRAZHNAIA PRAKTIKA], 4 COLLECTED ARBITRATION CASES (AWARDS OF THE FOREIGN TRADE ARBITRATION COMMISSION 1963-1965) 96, Case 128 (English language edition, 1973) [hereinafter cited as ARBITRATION CASES].

timber which the Belgian firm had contracted for and because, when the ship arrived in the port of Antwerp, the timber on board was exclusively for the claimant, without any other Antwerp co-consignees.

The obligations of the seller under c.i.f. terms are also discussed in an action filed against Eksportles as seller by the French corporation Comptoir de Bois. The French firm, acting as consignee for a French buyer, filed its claim on the ground that Eksportles, as the seller on c.i.f. terms, was obliged to charter a vessel fit to carry the goods sold. The claimant asserted that the vessel chartered by Eksportles was unseaworthy due to the peculiar shape of its deck, which rendered the vessel unfit to carry the sold timber for long distances, such as the trip in question, from Leningrad to Nice. After hearing the evidence, the Commission found that Eksportles' conduct in chartering the vessel was "in full conformity with [its] duties as a c.i.f. seller." This conclusion was based on the following facts: (1) the charter vessel had been classified by a first-rate classification society; (2) on many occasions the vessel had made similar voyages with Eksportles' sawn timber; and (3) the charter-party for the vessel was sent in good time by the seller to the buyer and was accepted by the latter without any objection.[4]

A claim submitted by the English company Tennison against Eksportles alleged that the Soviet exporter had failed to deliver lumber of a specific average length as required by a custom of the trade. Since the existence of such a custom was contested and the company adduced no evidence to corroborate its assertion, expert opinion was sought. The expert concluded that the "concept of 'average length' is familiar to the export practice of Soviet ports in shipping sawn lumber. However, Soviet port customs do not establish the obligation of the exporter to ship ordinary sawn lumber with the guarantee of a precise average length." In light of the fact that the company did not prove the existence of the custom to which it referred and that the findings of the expert not only did not confirm the existence of such a custom but indeed denied it altogether, the Foreign Trade Arbitration Commission, in deciding the case, found that the custom invoked by the company was not present.[5]

For our present purposes, it may be sufficient to summarize some of the other aspects of c.i.f. contracts which have come before the Commission.[6] Thus, the Commission has had occasion to rule that,

4. Comptoir de Bois v. V/O Eksportles, [1964] 4 ARBITRAZHNAIA PRAKTIKA 108, Case 131, 4 ARBITRATION CASES 108, Case 131.

5. H.T. Tennison & Co. v. V/O Eksportles, [1957] 2 ARBITRAZHNAIA PRAKTIKA 108, Case 58, 2 ARBITRATION CASES 107, Case 58.

6. Companie Europeenne de Cereal v. V/O Eksportkhleb, [1964] 4 ARBITRAZHNAIA

where the contract did not prescribe otherwise, the seller is responsible for loading the goods on a vessel chartered by him with the destination being the port designated in the contract, for insuring the goods against marine risks, and for transmitting to the purchaser the invoice, bill of lading, and insurance policy or certificate. The purchaser is required to pay the cost of the goods as stated in those documents. As concerns shipping procedure, the seller is entitled to ship the goods during the period indicated in the contract in one or several contingents. All the risks relating to the goods which arise after they are shipped, independent of their nature, pass to the purchaser from the moment they are loaded (in particular, the risks stemming from the vessel's delay en route). The seller, if the contract does not state otherwise, is responsible for the correspondence of the quality of the goods when they are loaded to the description given in the contract; changes in the quality of the goods occurring after they are loaded are not the seller's responsibility, except in situations where the changes stem from the actions of the seller (i.e., where the deterioration in the quality of the merchandise occurred through the fault of the seller). With respect to quantity, the goods are considered to have been delivered in the amounts stipulated in the bill of lading. Therefore, the seller is not responsible for quantitative shortages of goods in the port where the merchandise is unloaded as against the quantity indicated in the bill of lading.

A few illustrations of the Commission's manner of handling disputes involving f.o.b. contract terms will round out the picture. For example, the Commission has taken the position that the f.o.b. seller is liable for qualitative defects in the goods noted at the time the goods were loaded on board the vessel (as compared with the quality specified in the contract).[7] Notations on the bill of lading indicating defects in the condition of the goods may be used as valid evidence in this connection.[8] In ruling on a claim filed by a Turkish company, the Commission observed that the bill of lading, which contained notations of apparent defects in the merchandise delivered for load-

PRAKTIKA 76, Case 122; Maucesson et Cie. v. V/O Eksportles, [1960] 3 ARBITRAZHNAIA PRAKTIKA 59, Case 81; V/O Raznoeksport v. Arup and Associates Ltd., [1956] 2 ARBITRAZHNAIA PRAKTIKA 94, Case 55; Establissement Christian Veerts v. V/O Soiuzpromeksport, [1955] 2 ARBITRAZHNAIA PRAKTIKA 65, Case 48; V/O Eksportlyon v. Amtorg Trading Corp., [1951] 2 ARBITRAZHNAIA PRAKTIKA 9, Case 33; Societe d'Avance Commerciale v. V/O Soyuzpromeksport, [1940] 1 ARBITRAZHNAIA PRAKTIKA 55, Case 12; V/O Eksportles v. Patrick & Thompson Ltd., [1938] 1 ARBITRAZHNAIA PRAKTIKA 26, Case 5.

7. Ramzaitsev, *Praktika Vneshnetorgovoi arbitrazhnoi komissii po razresheniiu sporov kasaiushchikhsia tolkovaniia usloviia "fob" (The Practice of the Foreign Trade Arbitration Commission in Disputes Concerning the Interpretation of an FOB Clause)* [1955] 7 VNESH. TORG. 16.

8. *Id.*

ing, constituted a proof of non-fulfillment by the seller of his obligations regarding the quality of the merchandise.[9] In this instance, the Turkish seller transmitted to the Soviet buyer a bill of lading with the notation that the sacks in which the goods were packed were damp. The dispute involved the damp condition of the merchandise and the aforementioned notation on the bill of lading confirmed the delivery of the goods in an unsuitable condition.

In another case between the Soviet foreign trade organization Prodintorg and the Belgian company Neeton S.A., the Commission decided that where the parties had agreed to a preliminary acceptance of the goods, as regards their quality, at the port of embarkation, such an acceptance, in the absence of contrary stipulations in the contract, could not be viewed as a surrender by the purchaser of his right to file possible future claims with respect to the quality of the goods delivered.[10] Similarly, the Commission affirmed the responsibility of the seller under f.o.b. contract terms for merchandise shipped under conditions which did not prevent the possibility of its sustaining damage en route.[11]

In another case a British purchaser had deducted sums due the Soviet seller on the grounds that the seller was responsible for damages caused to the vessel chartered by the purchaser in the process of loading merchandise sold on f.o.b. terms. The Soviet party, as claimant in the default proceeding, showed there was conflicting evidence as to whether the damage to the mast was due to the fault of of the stevedores in loading the vessel or to the shipowner's failure to correct a defective condition in the ship itself. The Commission found that responsibility for damage to the mast, regardless of who was at fault, could not fall on the seller because the contracts to deliver goods f.o.b. did not provide for a duty on the part of the seller to load the goods on the ships furnished by the purchaser. On the contrary, the contract indicated that the hiring of the stevedores to load the merchandise was the duty of the owners of the vessels chartered by the purchaser, and "consequently, the seller cannot be held liable for the acts of the winchmen." In short, the Commission seemed to honor in this case an explicit allocation of risks by the parties in their contract over the customary duties associated with an f.o.b. contract.[12]

In closing, it is perhaps worth noting that Soviet scholars attrib-

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9. *Id.*

10. Nector S.A. v. V/O Prodintorg, [1957] 2 ARBITRAZHNAIA PRAKTIKA 120, Case 61, 2 ARBITRATION CASES 118, Case 61.

11. Ramzaitsev, *supra* note 7, at 17-18.

12. V/O Eksportles v. Timber Control of the Board of Trade of Great Britain, [1951] 1 ARBITRAZHNAIA PRAKTIKA 124, Case 30, 1 ARBITRATION CASES 123, Case 30.

ute the failure of all attempts so far in the "capitalist" universe to unify the body of trade customs to the persistence of profound contradictions plaguing the world capitalist market. Neither the "Warsaw-Oxford" rules nor the various editions of "Incoterms" have ever won governmental recognition as international rules and continue to operate solely at the private level.[13]

Only in foreign trade relations between socialist states, Soviet spokesmen add, has it proved possible to set down by means of intergovernmental agreements a uniform content for individual principles functioning as trade customs, a development which has found reflection in the "general conditions of deliveries" governing trade between these countries. To be sure, even the "general conditions" do not embrace all the customs used in the trade relations between the socialist states.

These "general conditions" were adopted by the Council for Mutual Economic Assistance in 1958 and were revised, up-dated, and expanded in 1968. Although they do not embrace all the customs used in trade relations among the socialist states, they represent a substantial achievement of unification.

However, the bulk of the commercial flow between the states concerned moves by rail and highway, while sea traffic represents merely short-distance haulage. Thus only a few of the conditions have much relevance for the mechanics of Soviet-American trade. The Soviet-Cuban experience could be enlightening, but, unfortunately, the corresponding protocol on general conditions of deliveries between the two countries has not yet been published and the substance of its provisions is not available for analysis. To a limited extent, the legal framework of trade between the U.S.S.R. and its Far Eastern associates, about which we know a little more, displays some comparable elements. Since local commentators explain the differences which distinguish the contents of these documents from their European counterparts as due to special geographical features peculiar to the Asian setting, parallels with the Soviet-American phenomenon readily come to mind. However, from what secondary sources reveal about the nature of these "Asian components," they turn out to be

13. Nevertheless, Soviet practice with respect to international trade customs closely parallels on most counts the formulas recommended by both the "Warsaw-Oxford" rules and "Incoterms." It is also interesting to observe that, despite the allegedly private nature of "Incoterms," the Foreign Trade Arbitration Commission tends to assign considerable weight to that document, as witness the tone of its pronouncement in the suit filed by the Hamburg company Willy Brun against Raznoeksport. Discussing some aspects of the contract of sale and delivery on c.i.f. terms, the Commission opened its analysis with the statement that, "according to the commonly accepted interpretations of 'c.i.f.' terms, which were reflected, in particular, in the 1953 'Incoterms' . . ." and proceeded from there to draw the necessary conclusions.

rather minor innovations and it would seem that, by and large, the stock formulas still dominate the scene, including most of the traditional conceptions regarding the meaning of f.o.b. and c.i.f. terms. One exception is that in transportation of goods by water, the bilateral "general conditions" with the People's Republic of China and the Democratic Republic of Vietnam foresee only deliveries on f.o.b. terms. Another is the clause in the "general conditions" concluded between the U.S.S.R. and the Korean People's Democratic Republic, the People's Republic of China, and the Democratic Republic of Vietnam which prescribes that, in the sale of goods on f.o.b. terms, the seller must load the goods on board the vessel, as well as stow them in the holds, at his own expense and furnish appropriate materials for separating the cargo. Risk passes from the seller to the purchaser not from the moment the goods are placed on board the vessel, as is envisaged in the 1958 Council for Mutual Economic Assistance's "general conditions," for instance, but from the moment the goods are stowed on board the ship.