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Arbitration in Soviet-American Trade Relations

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I

The provision of firm legal safeguards for trade relations is a major condition for the successful development of mutually beneficial cooperation between countries, including countries with different social systems. In the course of such cooperation these relations are established between legal entities or individual citizens of different countries and they include provisions governing the settlement of disputes that may arise between the parties.

The general trend of international practice regarding the problem of settling disputes has long ago come out unequivocally in favor of the broadest use of arbitration in all its forms as the most expedient instrument for settling disputes in international trade. This trend has been described quite eloquently, though not without some exaggeration, by a proponent of arbitration who declared that from the viewpoint of a businessman engaged in international trade, the true dilemma is not between arbitration and judicial decision, but either effective arbitration or no legal remedy at all.[1]

Small wonder, therefore, that alongside other problems the question of arbitration has received considerable attention in the mapping out of steps aimed at normalizing and substantially expanding trade and economic relations between the Soviet Union and the United States. Favorable prospects for such trade were opened as a result of the truly historic Soviet-American summit talks and of the bilateral agreements that included a joint document entitled "Basic Principles of Relations Between the Union of Soviet Socialist Republics and the United States of America," which was signed on May 29, 1972 in Moscow.[2] As a result, appropriate instructions for negotiating the coordination of the mechanism of settling commercial disputes by arbitration were included in the mandate of the Soviet-American

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1. Cohn, *Economic Integration and International Commercial Arbitration*, in INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION 26 (M. Domke ed. 1958).

2. Pravda, May 30, 1972, at 1, col. 2; 66 DEP'T STATE BULL 898 (1972).

Commission for Trade.[3] Following fruitful negotiations, Article 7 was included in the text of the Soviet-American Trade Agreement signed on October 18, 1972. The first paragraph of this Article states:

> 1. 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, such arbitration to be provided for by agreements in contracts between such persons and organizations, or, if it has not been so provided, to be provided for in separate agreements between them in writing executed in the form required for the contract itself, such agreements:
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> (a) to provide for arbitration under the Arbitration Rules of the Economic Commission for Europe of January 20, 1966, in which case such agreements should also designate an Appointing Authority in a country other than the United States of America or the Union of Soviet Socialist Republics for the appointment of an arbitrator or arbitrators in accordance with those Rules; and
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> (b) to specify as the place of arbitration a place in a country other than the United States of America or the Union of Soviet Socialist Republics that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Such persons and organizations, however, may decide upon any other form of arbitration which they mutually prefer and agree best suits their particular needs.

In Soviet trade practice, the inclusion of a provision on arbitration in such an agreement is not something new. Recognition of the utility of settling disputes arising from trade operations between Soviet organizations and their foreign contractors by arbitration received expression in the earliest international treaties and agreements signed by the Soviet Union. In Soviet treaty practice, the stipulation that disputes between citizens and enterprises of the contracting sides would be settled by arbitration was included for the first time in the Russo-German Private Law Agreement of August 27, 1918,[4] a supplement to the Brest-Litovsk Peace Treaty that was drawn up with the active participation of V.I. Lenin. At present the Soviet Union has bilateral agreements with over 30 countries that contain provisions on arbitration, and it is also a signatory of three multilateral conventions on arbitration. These agreements provide mainly for three types of conditions relative to arbitration:

> (a) treaties and agreements whose provisions are confined to the mutual obligation of the signatory countries to recognize the agreements of the juristic persons and individual citizens of these countries on the settlement of their disputes by arbitration;

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3. Joint Communique on the Creation of the Soviet-American Commission for Trade of May 26, 1972. Pravda, May 27, 1972, at 1, col. 2; 66 DEP'T STATE BULL. 898 (1972). For the text of the Trade Agreement, see 67 DEP'T STATE BULL. 595 (1972).

4. DOKUMENTY VNESHNEI POLITIKI S.S.S.R. (FOREIGN POLICY DOCUMENTS OF THE U.S.S.R.) 692-703 (1957).

(b) treaties and agreements, which, in addition to the above-mentioned recognition of arbitration agreements, provide for the obligation of the signatory countries to carry out the awards passed on the basis of such arbitration agreements;

(c) treaties and agreements containing provisions regarding the procedure for arbitration, notably the procedure for forming an *ad hoc* arbitration tribunal, and so on.

Examples of the latter type are the Supplement to Article 14 of the Agreement on Trade and Payments with Sweden of September 7, 1940,[5] and the Special Protocol to the Soviet-Danish Agreement on Trade and Shipping of August 17, 1946.[6] Evidently, Article 7 of the Soviet-American Trade Agreement is in the same category.

II

A major landmark in the development of arbitration in the U.S.S.R. was the establishment in Moscow in the early 1930s of two standing arbitration tribunals: the Maritime Arbitration Comission (December 1930) and the Foreign Trade Arbitration Commission (June 1932).[7] The competence of the Maritime Arbitration Commission encompasses a wide range of disputes arising in the merchant marine, including international disputes, while the Foreign Trade Arbitration Commission is empowered to examine disputes arising from foreign trade transactions, especially disputes between foreign firms and Soviet commercial organizations.

Neither the Foreign Trade Arbitration Commission nor the Maritime Arbitration Commission is part of the all-union or republican system of legal, administrative, or other government organs. By their legal nature they are social organizations that consider disputes on the basis of a voluntary agreement by the disputing parties.[8] The legal procedure in the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission is defined not by the norms

5. SBORNIK TORGOVYKH DOGOVOROV, TORGOVYKH I PLATEZHNYKH SOGLASHENII I DOLGOSROCHNYKH TORGOVYKH SOGLASHENII S.S.S.R. S INNOSTRANNYMI GOSUDARSTVAMI (COLLECTION OF TRADE TREATIES, TRADE AND PAYMENTS AGREEMENTS AND LONG-TERM TRADE AGREEMENTS BETWEEN THE U.S.S.R. AND FOREIGN STATES) 563-66 (1961).

6. *Id.* at 172-73.

7. The American Arbitration Association, which, in addition to other categories of disputes (labor, civil misdemeanors, and so on), was set up in the United States only six years before the establishment of the U.S.S.R. Arbitration Commission. According to the statistics cited at the IIIrd International Arbitration Congress in Venice by D. Straus, then President of the Association, the American Arbitration Association in 1968 handled nearly 1,700 commercial disputes, including 52 foreign trade disputes. Straus, *Cooperation Among Arbitration Organizations* in IIIRD INTERNATIONAL ARBITRATION CONGRESS 200 (1970). The Association of Maritime Umpires of New York was established in the 1960s as a specialized maritime arbitration tribunal.

8. The Arbitration Commission accepts cases also when the two parties are obliged to put their dispute before the commission under an international agreement, for instance, the 1972 CMEA Convention.

of civil legal procedure established for the usual courts but by their own legislatively approved Rules, and by the Rules of Procedure that are adopted by the Presidium of the Chamber of Commerce on the basis of the above Rules.[9]

Procedures in both the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission are very similar, although each of these bodies has certain specifics, the most important of which concerns the possibility of appealing from an arbitration award. Awards of the Foreign Trade Arbitration Commission are final and not subject to appeal, while in the case of the awards of the Maritime Arbitration Commission an appeal may be lodged within a month with the highest court in the country, the Supreme Court of the U.S.S.R.[10]

Each of these commissions consists of a definite number of arbiters (the Maritime Arbitration Commission—25; the Foreign Trade Arbitration Commission—15), who are appointed by the Presidium of the Chamber of Commerce and Industry of the U.S.S.R. for a term of one year. Each of the parties to a dispute chooses an arbiter from among them and these two arbiters choose an umpire from among the remaining members of the panel.

The arbiters of the two commissions are completely independent. No government organ or official, or any organization, including the Chamber of Commerce and Industry of the U.S.S.R., has the right to instruct them on how to decide a given dispute or to interfere in any other way in the arbitration.

The procedure for arbitration in the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission, which ensures genuine equality and the protection of the legal interests of the disputing parties, and the practical activity of these commissions in settling disputes have earned them wide recognition in Soviet and foreign business circles. In the course of a period of over 40 years the two commissions have examined several thousand cases involving foreign firms from more than 60 countries, including trade, shipping, insurance, and other firms from the United States.

Representatives of foreign firms which have taken part in arbitration in Moscow and many eminent foreign arbitration experts have given a high evaluation of the organization and the work of the Maritime Arbitration Commission and the Foreign Trade Arbitration

9. Now called the Chamber of Commerce and Industry of the U.S.S.R.

10. Lack of space does not allow a description of the structure, procedure, and practice of the two commissions; these questions are dealt with at length in a number of works by Soviet authors, including works that have been published in English. A short bibliography of these works is given in the supplement to this paper.

Commission.[11] For instance, in an article on the Maritime Arbitration Commission, Professor Le Clere of France underscored the rational character of its procedure, which preserves the classical phases of arbitration but is, at the same time, conveniently simplified.[12] It would not be out of place to recall that Frances Kellor, who has at times been called the "mother of American arbitration," wrote that the Foreign Trade Arbitration Commission was one of the best arbitration organizations of its kind in the world.[13] Even those Western, including American, commentators, who have made various reservations or expressed doubts regarding the arbitration commissions in Moscow, sometimes even distorting the actual state of affairs,[14] have had to acknowledge that the actual practice of the commissions, (which is, in our opinion, the principal criterion of the work of any arbitration tribunal), "bears the imprint of fairness,"[15] "can hardly evoke objections,"[16] shows "no bias or favoritism towards the Soviet side,"[17] and so on. In a speech of welcome at the Third International Arbitration Congress in Venice in 1969, A. Fanfani, President of the Italian Senate, spoke of various arbitration institutions that are promoting the development of arbitration on the international level and made special mention, along with the Arbitration Tribunal of the International Chamber of Commerce and the American Arbitration Association, of the Foreign Trade and Maritime Arbitration Commissions in Moscow.[18]

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11. Commenting in The Times of London of September 14, 1967, at 9, col. 4, on the handling by the Foreign Trade Arbitration Commission of a dispute between the British firm, Romulus Films, Ltd., and Sovexportfilm, the director of the former wrote that it was pleasant to note that any businessman having grounds for a claim may, as his own experience had shown, confidently count on scrupulous and fair justice in Moscow.

12. Le Clere, *La Commission d'Arbitrage Maritime de l'U.R.S.S.*, 8 LE DROIT MARITIME FRANCAIS 498, 500 (1956).

13. Kellor, *Coordination of Commercial Arbitration Systems*, 1 ARB. J. 139, 140 (1946).

14. These distortions concerned, in particular, the legal status of the commissions, which have at times been described as government agencies. For example, Professor M. Domke asserts that the Foreign Trade Arbitration Commission is an agency of the Soviet government by claiming that there are no nongovernmental bodies in Moscow. PROCEEDINGS OF THE INTERNATIONAL TRADE ARBITRATION CONFERENCE OF MARCH 25, 1955 49 (1955). Professor N. Spulber has gone so far as to declare that the Arbitration Commission is a functional department of the Ministry for Foreign Trade of the U.S.S.R. Spulber, *The Soviet Bloc Foreign Trade System*, 24 LAW & CONTEMP. PROB. 420, 421 (1959).

15. ASSOCIATION INTERNATIONALE DES SCIENCES JURIDIQUES, ASPECTS JURIDIQUE DU COMMERCE AVEC LES PAYS D'ECONOMIE PLANIFIEE 231 (1961).

16. DOMKE, *International Arbitration of Commercial Disputes*, in PROCEEDINGS OF THE 1960 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 149 (1960).

17. Pisar, *The Communist System of Foreign Trade Adjudication*, 72 HARV. L. REV. 1409, 1432-3 (1959).

18. *See* Straus, *Cooperation Among Arbitration Organizations*, *supra* note 7, at 187.

III

In briefly summarizing Soviet legislation on arbitration, it is necessary to refer to Article 27 of the Civil Procedure Code of the Russian Soviet Federated Socialist Republic (R.S.F.S.R.) (and the corresponding articles of the civil procedure codes of the fourteen other Union Republics) which state that:

> In cases provided for by the law or by international agreements, disputes arising out of civil law relations may, by agreement of the parties, be referred for settlement to a court of conciliation, to the Maritime Arbitration Commission, or to the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce.

We have already described the Maritime Arbitration Commission and the Foreign Trade Arbitration Commission. As regards the court of conciliation, which is mentioned in Article 27 of the Civil Procedure Code of the R.S.F.S.R. and which should be understood as *ad hoc* arbitration, the rules for such a tribunal are established only for disputes between individual citizens[19] and for disputes between Soviet state organizations, enterprises, cooperatives, and public organizations.[20] In the case of *ad hoc* arbitration in the U.S.S.R. of disputes between Soviet commercial organizations and their foreign contractors, internal Soviet legislation has no special rules. The pertinent provisions are to be found in some international agreements, which are specifically referred to in Article 27 of the Civil Procedure Code of the R.S.F.S.R., or they may be determined by agreement between the disputing parties themselves.

However, when we speak of international agreements we must underscore the importance of Article II of the International Convention on the Recognition and Execution of Foreign Arbitral Awards of June 10, 1958,[21] (hereinafter referred to as the 1958 Convention), which records a general rule on the recognition of a written agreement "by which the parties pledge to turn over to arbitration all or any disputes that have arisen or may arise between them in connection with some specific contractual or other legal object which may be the subject of an arbitration examination." Thus, Article II of the 1958 Convention (ratified by the Soviet Union without any reservations regarding the provisions of this Article) leaves no doubt that in each signatory country recognition of arbitration awards depends neither on the venue of the arbitration proceedings (as distinct from the arbitration awards that are recognized and executed if they are

19. See, for example, Supplement No. 3 to the R.S.F.S.R. Code of Civil Procedure.

20. INSTRUKTIVNYE UKAZANIIA GOSUDARSTVENNOGO ARBITRAZHA PRI SOVETE MINISTROV S.S.S.R. (INSTRUCTIONS FOR STATE ARBITRATION AT THE COUNCIL OF MINISTERS OF THE U.S.S.R.) 61-63 (1964).

21. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (1970).

handed down within a country that has signed the 1958 Convention)[22] nor on whether the parties in the arbitration agreement are citizens of any of the Convention's signatory states.[23] One can therefore conclude that as applied to the relations between Soviet commercial organizations and their foreign contractors, Soviet law will recognize agreements which provide that disputes shall be turned over to standing or *ad hoc* arbitration tribunals in the U.S.S.R. or a foreign country. Consequently, if in spite of such an arbitration agreement, one of the parties institutes an action in a Soviet court, the latter is obliged by the Fundamentals of Civil Procedure of the U.S.S.R. and the Union Republics to refuse to handle the case (Article 31) or to end the hearing of the case (Article 41).

The question of recognizing an agreement on foreign arbitration arose, for instance, at the hearing of an action brought in a court in Moscow by Ingosstrakh, the Soviet foreign trade insurance agency, for the payment of losses on cargo transported from the U.S.S.R. to Cuba in the vessel *Dikto*, which, in the opinion of the plaintiff, was not seaworthy. The defendant, Sovfrakht, the Soviet Foreign Trade Transport Agency, as the time-charterer of the *Dikto* opposed the suit on the merits and alternatively requested the court, in the event the suit was granted, to give the defendant a regressive recovery against the co-plaintiff, the owner of the above-mentioned vessel—the Norwegian firm of Aabis Rederi. In the opinion of the defendant, Aabis Rederi was obliged under the terms of the time-charter contract to maintain the vessel in a seaworthy condition. The representative of Aabis Rederi objected to the court's consideration of his firm's relations with Sovfrakht on the grounds that the time-charter agreement contained a clause providing that all disputes arising from the contract would be settled by "arbitration in London or some other place agreed upon by the parties."

In the verdict handed down on May 6, 1968, the Division for Civil Cases of the Moscow City Court rendered a decision against Sovfrakht but refused to consider the relations between Sovfrakht and Aabis Rederi in view of the latter's objections based on the arbitration clause, whose recognition, according to the verdict, "ensues from Soviet law (Article 27 of the Civil Procedure Code of the R.S.F.S.R.)

22. In ratifying the Convention, the Presidium of the Supreme Soviet of the U.S.S.R. and the Presidiums of the Supreme Soviets of the Ukraine and Byelorussia stated that the application of the Convention's provisions was to be made "to the arbitration awards handed down in countries that have not signed the Convention only on terms of reciprocity." [1960] 46 Ved. Verkh. Sov. S.S.S.R. 421.

23. The provisions on arbitration made in the bilateral trade treaties and agreements of the U.S.S.R. with foreign countries may be applied only to disputes between Soviet organizations and legal entities and individuals of the foreign country concerned.

and from international agreements signed by the U.S.S.R. and Norway." Further, citing Article 10 of the Soviet-Norwegian Treaty on Trade and Shipping of December 15, 1925 and also Paragraph 3 of Article II of the 1958 Convention the court noted that "the claims which Sovfrakht may have against the Norwegian firm of Aabis Rederi on the basis of the time-charter agreement . . . are subject to settlement by arbitration . . . ."[24]

Analogously, it may be concluded that Soviet law will recognize similar arbitration clauses in contracts between Soviet organizations and their American contractors, although there is no direct provision for such recognition in the 1972 Soviet-American Trade Agreement.[25]

As regards the execution of foreign arbitration awards in the U.S.S.R., Article 63 of the Fundamentals of Civil Court Procedure of the U.S.S.R. and the Union Republics declares:

> The procedure in the U.S.S.R. for executing the decisions of foreign courts and arbitration tribunals is determined by the pertinent agreements of the U.S.S.R. with foreign countries or by international conventions signed by the U.S.S.R. The decision of a foreign court may be enforced by compulsion in the U.S.S.R. in the course of three years from the date the decision comes into operation.[26]

IV

In regulating the question of arbitration, the Trade Agreement says nothing, as we have already noted, about recognition of arbitration awards or about the execution of these awards, as is done in other bilateral trade and navigation agreements signed by the Soviet Union and analogous agreements signed by the United States.[27] The two sides evidently felt that these questions are satisfactorily settled in the 1958 Convention, to which both the U.S.S.R. and the United

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24. SEKTSIIA TORGOVOGO MOREPLAVANIIA I MORSKOGO PRAVO PRI VSESOIUZNOI TORGOVOI PALATE S.S.S.R., TORGOVOE MOREPLAVANIE I MORSKOE PRAVO. SBORNIK STATEI I MATERIALOV, (SECTION OF MERCHANT SHIPPING AND MARITIME LAW OF THE U.S.S.R. CHAMBER OF COMMERCE AND INDUSTRY, TRADE NAVIGATION AND MARITIME LAW, COLLECTION OF ARTICLES AND MATERIALS) 34-38 (1972).

25. A similar regime is evidently ensured for such agreements within the United States by virtue of its internal legislation (e.g., the Federal Arbitration Act of 1925; a number of decisions by the U.S. Supreme Court, such as Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967), and others; law of July 31, 1970, enforcing the 1958 Convention with its appropriate additions to Title 9 of the U.S. Code (9 U.S.C.A. § § 201-208) (1970) (Added Pub. L. 91-368, § 1, July 31, 1970, 84 Stat. 693).

26. The law bringing the 1958 Convention into force in the United States establishes a three-year period for confirmation of an arbitration award recognized under the Convention. This period, however, is counted from the moment the award is handed down. 9 U.S.C.A. § 207 (1970).

27. Since 1950, the United States has signed 18 Treaties of Friendship, Commerce and Navigation which contain provisions on arbitration. See AMERICAN ARBITRATION ASSOCIATION, NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES, 196-97 (1971).

States are signatories. This surmise is confirmed by paragraph 16 of Article 7, which states that in the arbitration agreements between Soviet and American contractors provision shall be made for the venue of arbitration in a third country that is also a signatory of the 1958 Convention. We should note, however, that according to Article 7, the arbitration agreement must be given the "form required by the contract itself" and be applicable to the disputes which arise. Thus, from the standpoint of form, the question of the validity of an arbitration award may sometimes be decided differently than paragraph 1a of Article V of the 1958 Convention provides, which refers to the law selected by the parties or the law of the country where the award is handed down.

Under Article 7 the governments of the two countries, i.e., the U.S.S.R. and the United States, "shall encourage" the adoption of arbitration for the settlement of disputes arising from foreign trade transactions between Soviet and American contractors, envisaging definite conditions for the rules of procedure and the venue of such arbitration.

It seems to us that any lawyer analyzing this document cannot help but question the legal meaning of the words "shall encourage." In this connection the question has already been raised of whether the parties are justified at all in including in their contracts terms establishing conditions for arbitration different from those to be "encouraged."[28] We feel that there are no grounds for concluding that a contract which does not contain these provisions may be found to be legally invalid, especially since paragraph 2 of Article 7 of the Trade Agreement speaks unequivocally of the right of corporations, companies, and other organizations of one country to appear in the courts of the other country as plaintiffs and defendants, without being limited to the suits emanating from or relating to transactions provided for in the Agreement.

May the sides in their contracts agree to arbitration on terms other than those provided for in paragraphs 1a and 1b of Article 7? We believe that in this respect the words in the Agreement about encouraging arbitration with regard to certain specific conditions, cannot be interpreted as meaning the invalidity (in whole or in part) of a contract which stipulates other conditions for arbitration. Moreover, in the concluding section of paragraph 1 of Article 7 a direct provision is made for the right of the parties to adopt decisions as to any other form of arbitration which they jointly prefer and agree upon as best meeting their specific aims.

28. 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*, 67 AM. J. INT'L. L. 63, 78 (1973).

Thus, regarding each individual contract, the arbitration conditions provided for in paragraphs 1a and 1b of Article 7 cannot be regarded as being automatically included *propio vigore* in that contract. It follows from the text of this Article that the parties themselves are to conclude the pertinent agreement in which they must provide for the application of the arbitration rules of the European Economic Commission, the agency authorized to appoint arbiters and name the venue for arbitration.[29]

At a press conference devoted to the signing of the Soviet-American Trade Agreement, Mr. Peterson, who signed the Agreement on behalf of the U.S. Government, stated, in answering the question why the word "encouragement" was used in Article 7, that it was quite obvious that some of the private companies concerned might not desire arbitration. He felt that it was not possible to insist on arbitration in this case, for to do so would be presumptuous for the United States.[30] In other words, by agreeing to "encourage arbitration" on the terms of paragraphs 1a and 1b of Article 7, the American side acted in the belief that it would be impossible through provisions in an international treaty or through subsequent legislative, administrative, or other steps to oblige American companies to include arbitration clauses with these conditions in contracts with their Soviet counterparts. By virtue of the principle of reciprocity it must be considered that the obligations of the Soviet side under the Trade Agreement cannot include the unilateral adoption of steps of this kind.

In digressing from a formal legal analysis of the provisions of Article 7 of the Agreement, it must be forcefully stressed that, though recommendatory rather than imperative, these provisions in practice are called upon and are able, nonetheless, to play a decisive role in orienting Soviet and American contractors in the question of arbitration when they conclude commercial transactions. By declaring that they would encourage examination of disputes by arbitration on the

29. This differs from the 1972 CMEA Convention, under which the parties are required to turn over their disputes, which are envisaged in the Convention, to the court of arbitration at the Chamber of Commerce of the defendant's country even if no agreement has been concluded on this point by the two sides. In accordance with Article 64 of the Fundamentals of Civil Procedure of the U.S.S.R. and of the Union Republics, in the event that "an international treaty or an international agreement signed by the U.S.S.R. has established rules other than those in the Soviet civil law, the rules of the international treaty or international agreement shall be applied." Thus, on the basis of Article 64, the provisions of the 1972 CMEA Convention are applied notwithstanding the general rule of Soviet law (as, for example, the above-mentioned Article 27 of the Code of Civil Procedure), which requires the agreement of both sides for the transfer of the dispute to a court of arbitration.

30. U.S. DEPARTMENT OF COMMERCE, U.S.-SOVIET COMMERCIAL AGREEMENTS, 1972 85 (1973).

terms stated in paragraphs 1a and 1b of Article 7, the two governments thereby reaffirmed that from the viewpoint of each of them these terms are consistent with the requirements of Soviet organizations and American companies in their commercial contracts with each other.

As regards the scope of application, the provisions of paragraph 1 of Article 7 of the Trade Agreement encompass, as we have already noted, disputes arising from foreign trade transactions. Soviet practice and scientific doctrine regard the concept "foreign trade transactions" as covering a fairly wide field. Included are transactions in which at least one of the parties is a foreigner (a foreign citizen or a foreign legal entity) and transactions which themselves involve the import or export of goods, or subsidiary operations linked with the export or import of goods.[31] In other words, foreign trade transactions embrace not only purely import and export operations governed mainly by purchase and sales contracts but also other "subsidiary" operations covered by agreements on transportation, insurance, storage and forwarding, as well as operations involving the drawing up and transfer by the seller of technical instructions concerning the supplied equipment, assembly work, services, maintenance, and so on.[32]

Thus, the provisions of paragraph 1 of Article 7 of the Trade Agreement are not of an all-embracing character. *Stricto sensu,* they do not concern non-contract relations such as torts or other contract relations between American individuals or legal entities and Soviet organizations which are not engaged in foreign trade. This interpretation, however, does not rule out the possibility that the participants in such relations will agree on arbitration provisions identical or similar to those envisioned in the Trade Agreement. Such provisions, of course, will be subject to any applicable laws then prevailing.

As we have pointed out, paragraph 1 of Article 7 of the Trade Agreement presupposes that in each specific case the Soviet and American contractors adopt the pertinent arbitration agreement by including this agreement in the body of the contract or by signing it as a separate agreement. Regarding the content of such an arbitration

31. L.A. LUNTS, VNESHNETORGOVAIA KUPLIA-PRODAZHA (KOLLIZIONNYE VOPROSY) (FOREIGN TRADE PURCHASE AND SALE (CONFLICTS QUESTIONS)) 14 (1972).

32. Some Soviet authors regard as foreign trade operations those activities which are conducted outside the purchase and sale of goods, for instance, foreign exchanges of technical services (e.g., contracts for aerial surveys, geological exploration, and so on) or the temporary use of machines and equipment (rent contracts and so on). For details see, V.S. POZDNIAKOV, GOSUDARSTVENNAIA MONOPOLIIA VNESHNEI TORGOVLI V S.S.S.R. (STATE MONOPOLY OF FOREIGN TRADE IN THE U.S.S.R.) 168-73 (1969).

agreement, paragraph 1 of Article 7 provides for three basic requisites, one of which is directly specified in the Article (i.e., arbitral consideration according to the arbitration rules of the Economic Commission for Europe). The two others require the agreement of the parties themselves and the observance of certain conditions: first, the selection of an agency authorized to appoint an arbitrator or arbitrators who must be resident in a country other than the U.S.S.R. or the United States and, second, selection of an arbitration venue which must likewise be in a country other than the U.S.S.R. or the United States, but which must be a signatory of the 1958 Convention.

The arbitration rules of the Economic Commission for Europe[33] envisage what is sometimes called a "self-adjusting mechanism." In order to set this mechanism in motion, it is, in principle, sufficient for the parties to agree on the application of the ECE Rules even without naming the agency authorized (a "competent agency"), in the event of difficulties, to appoint an arbitrator or arbitrators, or to name the venue of the arbitration. According to Article 5 of the ECE Rules, if the arbitration agreement makes no provision for either a competent agency or the venue of the arbitration, the plaintiff may, at his own discretion, request (a) a competent agency of the country of the defendant,[34] or (b) the Special Committee set up in accordance with Article IV of the 1961 European Convention on Foreign Trade Arbitration to appoint an arbitrator or arbitrators. The venue is decided by the arbitrators themselves (Article 14 of the Rules).

However, it is obviously in the interests of the parties themselves to determine by mutual agreement both the competent agency and the venue of arbitration beforehand, i.e., at the signing of the arbitration agreement. This is precisely recommended in paragraph 1 of Article 7 of the Soviet-American Trade Agreement. The agency and the venue may be selected by the parties at their discretion in any country other than the U.S.S.R. or the United States, in other words, in any third country.[35] It would evidently be more expedient, at least

33. U.N. Doc. E/ECE/625/Rev.I, E/ECE/Trade/81.Rev.I, Sale No. 70.II.E/Min.14. (1967).

34. A list of such competent agencies, chiefly national chambers of commerce, that were appointed in each signatory country of the European Convention on the basis of paragraph 6 of Article X, and also almost all the other European countries that have not yet signed the Convention is given in the supplement to the ECE Arbitration Rules (see Article 2 of the Rules). In the Soviet Union, this competent agency is the Chamber of Commerce and Industry of the U.S.S.R. The United States is not a member of the European Convention.

35. The signatories of the 1958 Convention as of January 1, 1974 are: Austria, Botswana, Bulgaria, Byelorussia, Cambodia, the Central African Republic, Czechoslovakia, Denmark, Ecuador, Egypt, the Federal Republic of Germany, Finland, France, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Korea, Madagascar, Mexico, the

for technical reasons, to name the competent agency and the venue of arbitration in one and the same country, although the parties, needless to say, can decide this question in some other way, naming, for example, the Chamber of Commerce of Hungary as the competent agency and Sweden as the venue of arbitration. The country named as the venue of arbitration must be a signatory of the 1958 Convention (although paragraph 1a of Article 7 does not make this requirement relative to the country of the competent agency). This condition quite plainly has the purpose of ensuring the enforcement of the award of such arbitration in accordance with the rules of the Convention both in the U.S.S.R. and the United States.[36] However, it must be noted that from the standpoint of the "territorial" application of the Convention, decisive significance attaches not to the venue of arbitration but to the place where the arbitration award is made. Article 37 of the Rules of the Economic Commission for Europe gives arbitrators the right to hand down the award not in the country where the arbitration hearings took place but in another country. In this context it is recommended that Soviet and American contractors should state in their arbitration agreements that not only the venue but also the place where the award is to be handed down should be in the country selected by them, i.e., a country that has signed the 1958 Convention.

V

Under the Rules of the Economic Commission for Europe the competent agency's functions are limited mainly to the appointment of an arbitrator or arbitrators in the event difficulties arise over such an appointment. The Rules do not state whether a case should be decided by one arbitrator, three arbitrators, or a standing arbitration organization. This question has to be agreed upon by the parties when disputes arise and the plaintiff should suggest one of the three named methods of arbitration in his notification to the defendant that he has applied for arbitration (Article 3). However, taking into account the fact that the provisions of the Rules are of a dispositive nature, i.e., they may be modified by agreement between the parties (Article 1), the latter have the right to determine this question in their arbitration agreement, namely, to stipulate, for example, that disputes between them will be examined by a panel of three arbitrators, of whom

Netherlands, Niger, Nigeria, Norway, the Philippines, Poland, Rumania, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, the Ukraine, the U.S.A., and the U.S.S.R. Treaties in Force, January 1, 1974.

36. Like the Soviet Union (see *supra* note 22), the United States declared when it signed the 1958 Convention that it would apply it on reciprocal terms in respect to the recognition and execution of only those arbitration awards that are handed down in the territory of the contracting state. Declaration of Sept. 30, 1970, 21 U.S.T. 2566 (1970).

one will be appointed by each of the parties, and that the two arbitrators thus appointed will name a third arbitrator to preside at the hearings. Agreement on this procedure beforehand is perhaps most typical in *ad hoc* arbitration and it simplifies and speeds up the procedure of forming the panel of arbitrators.

It may be thought that in most cases the parties concerned duly appoint the arbitrators desired by them, and that the latter elect the chairman. The need for firm legal security requires, however, that provision should be made for cases where one of the parties, namely the defendant, seeks to avoid appointing an arbitrator for one reason or another and thereby complicates the formation of the panel of arbitrators. Account must also be taken of a situation, which is fairly frequent in international practice, where in *ad hoc* arbitration the two arbitrators cannot agree on the appointment of the chairman. This is precisely a case where a competent agency authorized to appoint an umpire or umpires comes in. However, a question arises as to the criteria which are to serve as a guide to such an agency, in the appointment of an arbitrator or the chairman of the tribunal.[37] Article 7 of the Soviet-American Trade Agreement does not establish any restrictions regarding the nationality of the arbitrator; in other words, not only the arbitrator appointed for the defendant but also the chairman of the tribunal may, in principle, be a Soviet or an American citizen. In practice, of course, the competent agency will generally appoint the chairman from among the citizens of a third country. It may also appoint a citizen of the defendant's country as arbitrator for the defendant, especially if the plaintiff has already appointed a citizen of his own country as an arbitrator.

The task of ensuring the mutual interests of Soviet and American contractors in the area of arbitration would evidently be facilitated by a study of the question of compiling a list or lists of recommended arbitrators, or tribunal chairman, which would include Soviet and American citizens and citizens of third countries.[38] In making the choice of the tribunal chairman and of the arbitrators appointed by the parties, the competent agency could (and, in the event of agreement between the parties, should) be guided by such lists, thereby avoiding the complications which might arise in the selection of the most suitable candidate for an arbitration or tribunal chairman in each separate case.

Space does not permit a discussion of many other aspects of arbitration under the Rules of the Economic Commission for Europe.

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37. An analogous question arises in the selection of a chairman by the arbitrators appointed by the parties.

38. Straus, *Interim Observation on Arbitration Arrangements in Soviet-American Trade*, 28 ARB. J. 105, 109 (1973).

These aspects are in themselves extremely important and must be meticulously studied in order to find the best possible way of meeting the requirements of arbitration in Soviet-American trade and commercial relations.

What we have already examined shows, in our opinion, that it is necessary to work out definite recommendations that would guarantee the full equality of the sides and could be taken into account by Soviet and American contractors when they sign arbitration agreements on the terms envisaged in paragraph 1 of Article 7 of the Trade Agreement of October 18, 1972. In particular, this could concern the drawing up of a properly worded standard arbitration clause or several alternative clauses that would specify these terms (regarding the number of arbitrators, the competent agency, the venue of arbitration, the venue of the arbitration award, the compilation of lists of potential arbitrators and tribunal chairmen, and so forth).[39]

Recommendations of this kind could be worked out in several ways. Their efficacy would quite definitely depend on whether they are carried out bilaterally or unilaterally; in the latter case, obviously, the utility of such recommendations would be extremely problematic. We feel that the experience and assistance of the appropriate Soviet and American organizations that professionally engage in arbitration, namely, the arbitration commissions at the Chamber of Commerce and Industry of the U.S.S.R., the American Arbitration Association, and others, would be undoubtedly valuable in the working out of these recommendations.[40] The practice of actually using arbitration in Soviet-American trade and commercial relations and the drawing up of projects for the "other forms of arbitration" men-

39. There are a number of other points, contained particularly in the provisions of the ECE Arbitration Rules, which it would be advisable to specify beforehand in such an arbitration clause: e.g., the language to be used at the arbitration hearings, which in the absence of agreement between the parties is determined by the arbitrators (Article 26 of the Rules); the form of the arbitration award, which, by a "strange omission," is not specified at all in the Rules. *See* Cohn, *The Rules of Arbitration of the United Nations Economic Commission for Europe*, 16 INT'L & COMP. L. Q. 946, 976 (1967).

40. The U.S.S.R. Chamber of Commerce and Industry has, for instance, signed two bilateral agreements: one with the Federation of Indian Chambers of Commerce and Industry and the other with the Japanese Association of Commercial Arbitration, both of which contain a model arbitration clause recommended for inclusion in contracts between Soviet foreign trade organizations and their Indian and Japanese contractors respectively. A number of similar agreements (with the London Arbitration Tribunal, the International Chamber of Commerce, the Japanese Association of Commercial Arbitration, and others) have been signed as well by the American Arbitration Association. See, Benjamin, *Inter-Institutional Agreements Designed to Extend Existing Facilities for International Commercial Arbitration*, 8 INT'L & COMP. L. Q. 289-98 (1959).

tioned in the closing part of paragraph 1 of Article 7 of the Trade Agreement could subsequently be organized with the participation of the above-mentioned organizations.

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