

Arbitration in Moscow

A study of the new 1975 USSR Arbitration Statute of the Foreign Trade Arbitration Commission

BY EUGENE M. KOTLARCHUK*

In the words of a leading Soviet arbitration authority¹ Sergei N. Lebedev in a keynote address to the New Delhi Congress on International Arbitration:

"At the present moment *one of the most timely directions for promoting international commercial arbitration, consists in seeking unification or standardization of rules of arbitration procedure.* This is something to which all arbitration organizations, including this congress (New Delhi Congress), can make a valuable contribution."² (emphasis added)

On April 16, 1975 the Presidium of the USSR Supreme Soviet confirmed by edict a new Statute on the "Foreign Trade Arbitration Commission (FTAC) attached to the USSR Chamber of Commerce and Industry."³ This statute replaced the 1932 "Decree of the Central Executive Committee and the Council of People's Commissars of the USSR Chamber of Commerce."⁴ In light of Mr. Lebedev's comment, the question that arises is whether the new Soviet Arbitration statute will indeed promote international commercial arbitration, more specifically whether it will attract East-West Commercial arbitration to Moscow before the Foreign Trade Arbitration Commission (FTAC). In addition, an awareness of the features of the new Statute is necessary for western enterprises because some short-form USSR Foreign Trade Organization (FTO) contracts used for purchases of display equipment "off the floor" at exhibits in Moscow still contain a clause calling for arbitration before the Foreign Trade Arbitration Commission in Moscow.⁵

CRITICISM OF THE FTAC UNDER THE 1932 STATUTE AND FTAC RULES (AS AMENDED IN 1959 AND 1967)

In the past, there have been numerous criticisms⁶ of the communist and foreign-trade arbitration commissions of which the FTAC is representative. One criticism has been that the FTAC is attached to the USSR Chamber of Commerce.⁷ As noted by one western author "... a Chamber of Commerce of a communist country is a creature of public legislation and an integral arm of a monolithic foreign-trade structure, designed to promote the state interest under the express supervision of its Ministry of Foreign Trade."⁸

Furthermore, under the old statute (1932) the
*Attorney, Sage Gray Todd & Sims, New York.

Presidium of the USSR Chamber of Commerce⁹ "appointed for one year" the 15 members of the Arbitration Commission who were chosen from representatives of "trading, industrial, transport and similar organizations and also from among persons possessing special knowledge in the sphere of foreign trade".¹⁰ As a result, western authorities argued:

"Because the chambers of commerce are associations of which some members are the foreign-trading corporations themselves, the argument has been made that the *foreign-trading corporations have become judges in their own cause, since they may, acting through the local chambers of commerce, appoint the arbitrators who will decide the disputes to which they are parties.*"¹¹ (emphasis added)

Another often heard criticism has been that the arbitration panel of 15 members has been composed exclusively of citizens of the Soviet Union. This criticism has two aspects:

1. The individuals selected for arbitration panels are persons¹² active in law, economics, commerce, industry and related fields. Such a composition is normal in commercial arbitration, but:

"... it acquires a different aspect in the context of total state ownership and planning ... in the ultimate analysis he (arbitrator) must be regarded as a civil servant employed and paid by the government. It is the State's interest, and in a more remote sense the arbitrator's own interest as a beneficiary of the socialist state, that is invariably involved whenever such a person, *preappointed* through another state medium, is invited to arbitrate a dispute between an alien business enterprise and a state instrumentality."¹³ (emphasis added)

More striking is the fact that Article 124 of the Soviet Constitution states that members of the Communist party are to be the "leading core of all organizations, both social and state".¹⁴ As noted by one western authority:

"... given strict party control over all aspects of social and economic life, it may be easily supposed that Soviet arbitrators are directly responsible to Soviet national interests as interpreted by the Party leadership."¹⁵

2. The second aspect is that because the panel is composed exclusively of Soviet citizens, it is unfair to the foreign party who may be unaware of the qualifications of the members, and would have a hard time in distinguishing who to choose,¹⁶ but more importantly because "the economic outlook of the panelist will necessarily differ from his own, the foreign party is deprived of an opportunity to choose someone even slightly sympathetic to his views."¹⁷

Furthermore, some western authorities have stated that the FTAC is not in fact an arbitration tribunal but a national court for foreign causes and that the awards of these tribunals accordingly should not be given effect by western countries where the judgments of communist

country courts would not ordinarily be enforced.¹⁸ The practical importance of this criticism has been removed substantially by the signing of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by the USSR and western countries including the U.S. Article III of the 1958 Convention states that contracting states must enforce foreign arbitral awards that come within the scope of Article I "in accordance with the rules of procedure of the territory where the award is relied upon." Article I states that the 1958 Convention is applicable to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Article IV specifically states that to obtain enforcement, the victorious party must only introduce authentic copies of the award and the agreement under which it was made. There is no need of making any affirmative showing such as that the award is final or binding.

Before proceeding with a discussion of the revisions made in the new statute and the effect, if any, such changes will have on the practice before the FTAC and also the effect such changes may have in persuading U.S. businessmen to provide for arbitration of East-West contract disputes in Moscow before the FTAC, it should be noted that western critics have stated that the decisions of the FTAC have on the whole — with one exception¹⁹ been fair. Some even believe that the FTAC has been more than fair in order to foster confidence abroad:

"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 be leaning backward to be harsh with their own."²⁰

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As noted by a western critic: ". . . for more than 40 years the decisions of the FTAC have given no indication of any lack of independence. Many of its decisions have gone against the Soviet parties."²¹ This statement is not entirely correct because of the FTAC award against a non-Soviet party in the Israeli-Soviet Oil Arbitration (involving Delek Israel Fuel Corporation, Ltd., an Israeli Corporation, and Soyuznefteksport, the Soviet oil export monopoly). In reaching an award favorable to the Soviet party, the FTAC appeared to have departed from customary private international law, in particular from accepted doctrines of the duty to obtain export licenses, impossibility, and *force majeure*. Martin Domke, as did other western authorities, suggested that the FTAC was less than partial: "(The USSR FTAC was comprised solely of) arbitrators bound to uphold an official policy which was implicit in the (Soviet party's) action."²²

On the whole, however, the FTAC has a high reputation. What then, one may wonder, is the fear that makes most of the western critics and enterprises leary of providing for arbitration in Moscow before the FTAC in arbitration clauses or in submitting an already existing dispute to the FTAC. In the words of one western critic it is the problem of the FTAC's structural independence which gives rise to the potentiality of abuse:

"... both the FTAC and MAC have an excellent reputation among traders of other countries and their awards are generally recognized and enforced

in foreign courts. Nevertheless, the problem of structural independence remains, together with the question of fairness in the legal sense to which it gives rise."²³

As put by Samuel Pizar:

"Each of the communist countries has established a specialized adjudicatory institution for the hearing of controversies with foreign firms. While these institutions have shown themselves to be capable of competent and fair determinations, particularly in trade among Eastern countries, certain structural and procedural flaws appear to disqualify them from adjudication in the East-West context. Western firms should insist on submission to alternative forms of adjudication."²⁴

The question that needs to be answered therefore is whether the new 1975 statute has removed the potentiality of abuse of the FTAC's independence and whether the "certain structural and procedural flaws" have been removed from the Soviet FTAC.

THE 1975 STATUTE AS COMPARED TO THE 1932 STATUTE

Before discussing the changes and additions in the new statute as compared to the old, there are two important facts that should be kept in mind. First, the Rules of Procedure of the Foreign Trade Arbitration Commission have not been revised since the enactment of the 1975 statute.²⁵ This is important because under Article 5 of the new 1975 Statute the formation of the arbitration panel's membership, as well as the selection by the parties or appointment of single arbitrators shall be carried out in accordance with the Rules of Procedure of the FTAC. Secondly, it should be noted that rules entitled "Uniform Regulation of the Arbitration Commissions Attached to the Chambers of Commerce of the Member States of the CMEA." (Counsel for Mutual Economic Aid — Communist Bloc Countries) were adopted by the Executive Committee of the CMEA on February 28, 1974 and recommended to the member countries from January 1, 1975 for disputes between economic organizations of the member countries. It is apparent that the newly enacted statute draws heavily on the recommended "Uniform Regulation." However, the Uniform Regulation is general enough in many instances to allow member countries to formulate more specific regulations, in particular those which would affect arbitration of disputes of member CMEA parties with non-CMEA parties. For instance, Article 3 of the 1975 USSR Statute has been drafted with a definite recognition of the criticisms voiced by numerous western critics. It is this author's view that the changes contained in Article 3 of the 1975 Statute may be one of the most, if not the most important, changes made in the revision of the old statute and a new era may develop for the FTAC in the arbitration of East-West trade disputes.

THE 1975 STATUTE

Article I

As is true under the old statute, the FTAC under the new statute is attached ("pru") to the USSR Chamber of Commerce. The wording of Article I of the new statute is almost identical to the recommended Article I of CMEA's "Uniform Regulation." The new Article I however adds that the FTAC shall be a "permanently functioning ar-

bitration tribunal." (See discussion re Articles 3 and 5 of the 1975 Statute below. Also, Martin Domke's comment re the Communist Bloc's insistence on placing the phrase "permanent" tribunal in the U.S. Convention of 1958 is of particular interest.)²⁶

Furthermore, the new Article I specifically provides for arbitration of not only disputes arising out of purely contractual relations but also "other civil law relations arising between subjects of law of various countries when carrying out foreign trade and other international economic and scientific-technical ties." It should be noted that Rule I of the FTAC Rules of Procedure provided for "arbitration disputes of *every nature* arising from foreign trade contracts." Such a phrase "every nature" in the Rules could be argued to be broad enough to cover the new language allowing arbitration of "other civil law relations" in the new statute. And as a consequence, it can be argued that no substantive change has been made in the types of arbitration disputes accepted. The new Article I further makes it known that disputes "arising out of international economic and scientific-technical ties" will be accepted for arbitration by the FTAC. One example of such "scientific-technical ties" is the U.S./USSR Commission on Scientific and Technical Cooperation. (A "Statement of Guiding Principles for Intellectual Property" was approved in 1973 by the U.S./USSR Joint Commission on Scientific and Technical Cooperation and a "Protocol" was adopted in May, 1975.) Disputes could arise in a joint U.S./USSR effort, for example, in determining whether revenues were properly apportioned from "Third Country Rights in Inventions Resulting from Cooperative U.S./USSR Research and Development."²⁷

Additionally, even though under the old statute, the FTAC had competence to arbitrate disputes between two non-Soviet parties the old articles's emphasis was mainly geared to arbitration of disputes between a Soviet party and a non-Soviet party: "*in particular* . . . between foreign firms and Soviet trading organizations." The new Article I emphasizes the FTAC's acceptance of disputes "arising between subjects of law of *various* countries," thus attempting to attract at least in words, disputes arising between parties of non-Soviet and possibly even non-Eastern Bloc origin.

Article 2

Article 2 of the 1975 Statute follows closely the recommendations of the Executive Committee of CMEA's "Uniform Regulation" Article 2. Under the 1975 USSR Statute, Article 2 provides that disputes "which already have arisen or a dispute which may arise" shall be accepted for consideration. The old 1932 statute referred to submission of disputes to the FTAC without specifying whether both arbitration clause agreements for future disputes and agreements to submit existing disputes were to be accepted. The Rules of the FTAC (as amended in 1959 and 1967 and still in effect) are quite clear, however, that both existing disputes and provisions in contracts for future disputes would be accepted by the FTAC. So, in effect, the new Article 2 of the 1975 Statute basically only incorporates the provisions in the rules. By incorporating the rules into the new statute itself it assures that the provisions will be more permanent, because the rules unlike the act, can be changed and amended much more easily.

Both under the old and presently under the new statute the FTAC Rules of Procedure are subject to confirmation of the USSR Chamber of Commerce. The statute itself, however, can be revised only by the Presidium of the USSR Supreme Soviet.

Visible Agreement

Another provision which the new statute has incorporated from the rules is that the agreement shall be "written." What this means is that the agreement has to be "visible" as noted by Martin Domke, and it does not mean that it has to be signed. The new statute adds, however, that an "agreement to refer a dispute for settlement"²⁸ may also be expressed by plaintiff bringing suit or by respondent through performance of an action testifying to his "voluntary" submission to the commission's jurisdiction such as "consent" in response to an inquiry by the commission. This provision as to an alternate method of an agreement to arbitrate was recommended by CMEA's "Uniform Regulation." The important element here is that it is "voluntary," because under the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the convention is only applicable to arbitration to which the parties have agreed, not to compulsory arbitration. To this author's knowledge there has been no compulsory arbitration forced on a party in the Soviet Union in a dispute involving foreign trade.

Article 2 adds a second paragraph providing for acceptance by the commission for consideration of disputes "which the parties are obliged to refer for its consideration by virtue of international agreements." This provision is entirely new and follows the recommendation of CMEA's "Uniform Regulation." This assures parties that an international agreement which provides for referral of disputes to the FTAC shall be complied with and the dispute accepted for arbitration by the Commission.

Article 3

In this author's opinion this article along with Article 5 which deals with the formation of the arbitration panel's membership in accordance with FTAC Rules of Procedure which are presently in the process of revision (according to conversations Martin Domke has had with the Soviets) may open up a new era in the future of the FTAC in the Arbitration of East-West Trade disputes.

The most significant change between the 1932 Statute and the 1975 Statute is that under the 1932 Statute the FTAC was to consist of "*fifteen* members appointed for one year by the Presidium of the USSR Chamber of Commerce" (Article 2). Under Article 3 of the 1975 Statute all three elements (underscored) have been changed. First there is no longer a limitation that the arbitration commission consist of 15 members from which arbitrators can be chosen by the parties. Membership is open-ended. Secondly, the members of the Arbitration Commission are no longer "appointed" by the Presidium of the USSR Chamber of Commerce, rather they are now only "confirmed" by the Presidium of the Chamber. Third, the arbitrators will now be members of the Commission for four years instead of one. The three elements of the old statute were constantly under attack by western critics who argued that it created the potentiality for abuse.²⁹ Presently under the new provisions of Article 3, the four year period insulates

the arbitrators from control by the Chamber for a relatively long period of time and the elimination of the restriction of fifteen members on the Arbitration Commission gives parties a greater choice of arbitrators from an open-ended membership list. In addition, it opens up the greater possibility that some of the members may turn out to be citizens of western countries, or at least non-Soviet citizens. This latter belief is encouraged particularly by the other change, that the membership in the Arbitration Commission shall not be "appointed" but rather "confirmed" by the Presidium of the USSR Chamber of Commerce. Under Article 5 of the new statute the formation of an arbitration panel to consider a dispute shall be in accordance with the FTAC Rules of Procedure. The Rules provide that the claimant must choose a name of the member of the FTAC and appoint him as his arbitrator (or leave it up to the president of the FTAC) and state that the respondent must inform the FTAC which of the members of the FTAC he chooses as his arbitrator (or leave it up to the president of the FTAC). Now it may be true as stated by a Soviet writer: "There are no restrictions whatsoever in Soviet law regarding the right of foreigners to be arbitrators."³⁰ But as noted above, the rules provide that the arbitrators must be chosen from a panel of arbitrators who in practice in the past have all been Soviet nationals "appointed" by the Presidium of the USSR Chamber of Commerce. (See example of composition of the panel — note 12).

The question now remains if the Presidium of the USSR Chamber of Commerce only confirms the arbitrators on the panel, who will do the suggesting and whose suggestions will the Presidium take note of. If the answer is that only the members of the Chamber of Commerce may submit names for confirmation, or if no restriction is made on who can submit names, but in practice the Presidium were to confirm only Soviet nationals, then the change of an open-ended membership with terms of four years may create a more independent Arbitration Commission, but it may be one that is not sufficiently independent to induce non-communist country parties to agree to arbitration before the FTAC. In particular this is true for U.S. parties since the 1972 U.S.-USSR agreement which the Soviets decided not to put into force because the U.S. did not extend most-favored-nation treatment to the USSR (Trade Act of 1974). However, the Soviet position on the 1972 Trade Agreement has not affected individual provisions of the agreement that do not require Congressional authorization and which do not depend on the existence of a trade agreement. As a result, Article 7 — encouragement of third-country arbitration — already has been implemented by both sides. During the period October 1972 to January 1974, of a sample group of 14 Soviet-American contracts monitored by the American Arbitration Association and the Bureau of East-West trade of the U.S. Dept. of Commerce, three provided for arbitration in the Soviet Union under the rules of the FTAC.³¹ If the Soviet Union would like to see more of the East-West disputes arbitrated before the FTAC it may have to do more to assure the independence and impartiality of the FTAC by including westerners as members of the arbitration panels. According to one western author, however:

"Appointment of Westerners to the arbitration panels would, at present, be a difficult step for the various chambers of commerce to take, because of

the combined jurisdiction of the commissions over the disputes arising both from East-West trade and from trade among the CMEA countries."³²

It is this author's opinion that to include westerners on the FTAC arbitration panel is not a difficult step, at least not as of May 1975. First of all, the panel's membership is no longer limited to 15, it is open-ended. Therefore, any argument that could be made by anyone that the overwhelming majority of disputes arbitrated will be between parties from CMEA countries and that therefore it would be undesirable for a westerner to undertake to adjudicate CMEA disputes since they are governed by a special set of rules (the General Conditions of Delivery) and would not be familiar with their extensive interpretations is not valid because: (a) a sufficient number of Soviet or other CMEA country nationals could be included on the panel to take care of all CMEA-related disputes, leaving the few western arbitrators on the Commission to be available along with the Soviet and other CMEA nationals (who might also be confirmed to the panel) for East-West disputes;³³ (b) the western arbitrator could say that he is "unable" to take part in the hearing under the FTAC Rules of Procedure, and (c) even if the westerner were to sit in on a purely CMEA dispute the other arbitrators and the umpire would probably be CMEA nationals.

In Case of Dispute

It should be noted at this point that in a U.S.-USSR dispute, for example, even if westerners were on the arbitration panel, if the U.S. party chose a westerner and the Soviet party chose a Soviet national, and the party-appointed arbitrators could not agree on an umpire, the probability is that the umpire appointed by the president of the FTAC would be a Soviet national. The reason for this is that under the present Rules of the FTAC, if the two party-appointed arbitrators cannot agree on an umpire, the president of the FTAC would appoint an umpire from members of the permanent panel. And it is this author's view that even though theoretically a westerner could be elected a president, practically speaking because under Article 3 the members elect the president and vice-presidents, and these members are confirmed by the Presidium of the USSR Chamber of Commerce, the number of westerners on the panel would probably never be sufficient to elect a president. As a consequence, the president would most likely be a Soviet national who would probably appoint a Soviet national as umpire. So the result would be that out of the three arbitrators two would be Soviet nationals and only one would be a westerner. Such a composition of the tribunal is significant because under Rule 30 the award is made by a "majority vote" and consequently the "potential" for abuse would still be present. To alleviate this problem, it would be desirable if the Soviet Union wants to attract more East-West trade disputes to be arbitrated before the FTAC that the FTAC Rules be revised. Apparently, according to Mr. Lebedev's comment at the New Delhi Conference quoted at the beginning of this article, the Soviet Union is seeking the standardization of rules of procedure. (According to Martin Domke — as mentioned previously — the Rules are being revised by the Soviet Union.) A revised rule could follow the provisions outlined for both sole arbitrators and the umpire (neutral arbitrator) in either the Rules for

the International Chamber of Commerce (ICC) Court of Arbitration (Article 2, Section 6):

"The sole arbitrator or the chairman of an arbitral tribunal shall be chosen from a country other than those of which the parties are nationals."

or the Commercial Arbitration Rules of the American Arbitration Association (section 15):

Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States the sole Arbitrator or the neutral Arbitrator shall, upon request of either party, be appointed from among nationals of a country other than that of any of the parties.

Another change in Article 3 is that the arbitrators confirmed to the panel shall be "persons possessing the *necessary special knowledge for the settlement of disputes* accepted by the commission for consideration." What this change seems to imply is what one western author has reported in the past: "Soviet and other COMECON practice favors appointing lawyers as arbitrators in virtually all cases."³⁴ Or as stated by S. Bratus in reporting on the Fourth International Congress on Arbitration in Moscow and describing the Soviet view:

"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."³⁵

Article 4

Article 4 is a new provision stating that the arbitrators of the FTAC shall be "independent and impartial in the execution of their duties." As noted, this was one of the criticisms leveled by numerous western authors against the FTAC, namely that because the FTAC was comprised of only Soviet nationals there was always the potential that the FTAC's independence and impartiality could be abused. Where this article may be important is in enforcement of awards. (See discussion re Article 9.)

Article 5

The old statute specifically provided, within the articles themselves, the method of choosing arbitrators by parties in a dispute. The new Article 5, however, states that the arbitrators on the arbitration tribunal shall be chosen as per the FTAC Rules of Procedure which have not as of yet been changed. (See discussion re Article 3 above.)

Article 6

Article 6 of the 1975 Statute replaces Article 7 of the 1932 Statute. It incorporates one of the rules of the FTAC Rules of Procedure stating that the parties may present their cases directly or through duly authorized representatives appointed "at their discretion," including foreign citizens of "organizations." What has been added to both the provisions of the Rules and old Article 7 is the phrase "at their discretion" to make it clear that it is completely up to the parties as to who may represent them and that the parties may appoint "organizations" to represent them.

The issue that arises under this article is that although

the statute and the rules seem fair in allowing any foreign citizen or organization to represent them, that foreign citizen may run into problems obtaining a visa. John Hazard noted:

"Admission of foreign attorneys to represent their clients before Moscow arbitration tribunals seems to be an absolute minimum to successful commercial arbitration, yet the problem of obtaining a visa is always raised when the issue is faced in a concrete case . . . the exclusion might be based not upon what such a person might accomplish before the arbitration tribunal on behalf of his clients but rather upon a possible threat to Soviet state security offered by the very presence in the Soviet capital of such a knowledge-able person."³⁶

Although, it is true that the Soviet Union can exclude any person from entering its country by not issuing a visa, if the Soviets do, in fact, want to attract East-West Trade arbitration to the FTAC in Moscow, the Soviets would have to forego the use of such means to prevent the entry of a representative of a Western party. The adverse publicity would forever damage any possible future submission of any trade disputes to the FTAC in Moscow.

Article 7

Article 7 replaces Article 9 of the 1932 Statute and remains basically unchanged. The article provides that an amount and form of security for the suit may be established.

Article 8

Article 8 replaces Article 13 of the 1932 Statute and remains basically unchanged. The article provides that the Rules of the FTAC shall be confirmed by the Presidium of the USSR Chamber of Commerce and Industry. One western author comments on the requirement of confirmation of the Rules by the Presidium of the USSR Chambers of Commerce:

"It affects the independence of the arbitrators, however, only in that it limits their freedom to decide for themselves exactly how they wish to proceed . . . the rules of the Communist tribunals are generally fair."³⁷

Article 9

Article 9 replaces Articles 11 and 12 of the 1932 Statute. Furthermore, it follows the recommendations of Article 35 of CMEA's "Uniform Regulation." Two items have been added to the "Uniform Regulation": that the award shall be executed by the parties "voluntarily" within the period established by the Commission; and secondly that awards not executed within the period specified shall be executed "in accordance with law and international agreements."

Within the USSR, enforcement of awards for all practical purposes can really only be sought against a Soviet national. Foreign corporations have little if any assets in the USSR. They must be pursued abroad, if unwilling to comply. According to one western author the Soviet party has always complied with the award:

"It is a striking fact that compliance by the state party is always voluntary and prompt; in no instance has it been necessary to enlist judicial assistance."³⁸

Action to enforce the award in the USSR against a Soviet party in the unlikely event that the Soviet party

fails to comply voluntarily with an award rendered by the FTAC, may be taken under the Code of Civil Procedure of the RSFSR. A further fact of importance is that as was true in the old Statute the awards are final³⁹ and not subject to appeal.

Enforcement of an FTAC award in the U.S. would be subject to international agreement for example under the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the U.S. Federal Arbitration Act which includes the implementing legislation of the U.N. Convention.⁴⁰ Under Article III the courts of an enforcing country which is a signatory to the convention must recognize the "valid" award of an arbitration tribunal of another signatory state or an award which involves foreign parties and which was rendered by an arbitral body located within the enforcing country. There are three important grounds which are especially of interest in East-West trade disputes under which enforcement may be refused: (a) that the composition of the arbitral authority or the arbitral procedure is not in accordance with the parties' agreement, or if not specified, the agreement is not in accordance with the law of the country in which the arbitration takes place;⁴¹ (b) that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country;⁴² and (c) that the recognition or enforcement of the award would be contrary to the "public policy" of that country.⁴³ For more detailed information on the enforcement of "foreign" awards in the United States under the Federal Arbitration Act and the U.N. Arbitral Convention, the reader is referred to Martin Domke's article entitled "The United States Implementation of the United Nations Arbitral Convention."⁴⁴

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Article 10

Article 10 replaces Article 10 of the 1932 Statute. The only difference is that the old statute provided for an amount of the fee to cover expenses of the proceedings not to exceed 1% and it was to be fixed at the hearing by the FTAC. The new statute deletes reference to the 1% limit and states that the fees shall be calculated and distributed in accordance with the Statute on Arbitration Fees and Expenses and on Costs of the Parties, confirmed by the Presidium of the USSR Chamber of Commerce and Industry.⁴⁵

OTHER AVAILABLE FORMS OF ARBITRATION IN U.S.-USSR TRADE

In addition to providing for arbitration before the FTAC under its rules in Moscow, there are other forms of arbitration which are available and being used. As noted by one western author the spectrum of choices in East-West trade includes:

- (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), as recommended in the U.S.-USSR . . . Agreements.

(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.

(e) Arbitration in a third country with no specification of any rules at all.⁴⁶

If a decision is made to arbitrate in a third country as is encouraged in the U.S.-USSR Trade Agreement Article 7, it is recommended that the locale of an arbitration be in a contracting state of the U.N. Convention. As noted by a western author:

"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. 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.-USSR Trade Pact recommends that the parties specify as the place of arbitration a country that is a party to the U.N. Convention.*"¹⁷ (emphasis added)

Conclusion:

As noted in the discussions above, the new Soviet Arbitration statute has strived to assure the independence and impartiality of the USSR FTAC and its arbitrators. Such new provisions where the arbitrators are "confirmed" by the Presidium of the USSR Chamber of Commerce (instead of "appointed"); where the arbitrator's tenure has been extended from one year to four years; and where the membership on the arbitration panel is open-ended are definitely a step in the right direction and will do much to tone down the mistrust of the FTAC by western enterprises. However, doubts and mistrust as to the FTAC's impartiality and independence will remain until such time as westerners are allowed to become members of the arbitration panel. The Soviet Union has the opportunity at the present time since it is presently in the process of revising the Rules of the FTAC to include such provisions. If the USSR wishes to attract more East-West Trade disputes to be arbitrated in Moscow before the FTAC it may be necessary (in particular in light of the other forms of arbitration available in East-West Trade) for the Soviet Union to include a provision ensuring the presence of westerners on the arbitration panel. In the words of a western author:

"The noncompulsory nature of the FTAC jurisdiction creates a need for the FTAC to persuade Western traders of its reliability; unless this is done, disputes will not be submitted."⁴⁸

AUTHOR'S NOTE:

Since the completion of this article, it was announced in the *Wall Street Journal* on January 11, 1977 (p. 33) that the American Arbitration Association and the Soviet Chamber of Commerce and Trading have agreed to a model arbitration clause which both the AAA and the Soviet Union will recommend for use in their respective countries. The clause suggests Stockholm as the situs for arbitration, with Swedish law governing. In addition, the U.N. Commission on International Trade Law (UNCITRAL) working closely with the International Council for Commercial Arbitration (on which the Soviet Union is represented) and the Corporate Counsel Committee of the AAA has established new rules for commercial arbitration. In December, 1976, the U.N. adopted these new UNCITRAL rules.)

NOTES

1. At the time of his Keynote Address to The New Delhi Congress he was Chairman of the Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry, and Vice Chairman of the International Council for Commercial Arbitration.

2. Lebedev, S.N. "Developing Effective International Commercial Arbitration: A keynote Address to the New Delhi Congress" 30 *The Arbitration Journal* 59, 65 (March 1975).

3. "Vedomosti Verhovnogo Sovieta SSR" No. (1779) Item No. 269, 23 April 1975. Most of the sections of the Statute used and quoted in the article were translated by the author. For a published translation of the whole statute which was also used by the author see XIV *International Legal Materials* 1035, No. 4, July 1975 (Amer. Soc. of Intl. Law) translated by William E. Butler, Reader in Comparative Law, Univ. of London.

4. Collection of Laws of the USSR, 1932, No. 48, s. 281. USSR Chamber of Commerce publication "Foreign Trade Arbitration Commission" Moscow 1968.

5. Hoya, T. & Stein, D. "Drafting Contracts in U.S.-Soviet Trade" 7 *Law & Policy in International Business* 1057, 1098-9, fn. 195 (1976).

6. See for example Domke, M., "Arbitration of State — Trading Relations" 24 *Law & Contemp. Prob.* 317 (1959); Hazard, J. "State Trading and Arbitration", in *International Trade Arbitration* 96 (M. Domke ed. 1958, reprint 1973); Pizar, S., "the Communist System of Foreign — Trade Adjudication", 72 *Harvard Law Review* 1409 (June 1959); Leff, E. J. "The Foreign Trade Arbitration Commission of the USSR and the West", 24 *Arbitration Journal* 1, (1969) and Holtzman, H. M., "Arbitration in East-West Trade", 9 *International Lawyer* 77 (Jan. 1975).

7. Article 1 of the Charter of the USSR All — Union Chamber of Commerce states that the Ministry of Foreign Trade "exercizes general supervision" over its activities. However, unlike the Foreign Trade Organizations (FTO's), which may be dissolved by the Ministry of Foreign Trade, the Chamber, being an autonomous "social" (rather than "state") organization, may only be liquidated or reorganized by order of the USSR Council of Ministers. Dissolution or reorganization of an FTO is regulated by Decree of the Central Executive Committee and the Council of People's Commissars of the USSR of March 27, 1936, Sobornie Zakonov S.S.S.R. No. 18, art. 151 (1936). See also Berman, H. J. and Bustin, G. L. "The Soviet System of Foreign Trade" in *Business Transactions In the U.S.S.R.*, R. Starr ed. (Amer. Bar Ass'n. 1975) p. 34.

8. Pizar, S., "The Communist System of Foreign — Trade Adjudication", 72 *Harvard Law Rev.* 1409, 1426 (1959).

9. "Full members of the USSR Chamber may be state, cooperative and public institutions, enterprises and organizations." See Tuttle, W. H. "Soviet Socialist Foreign Trade Arbitration". L. L. M. Thesis to U. of California Law Sch. p. 44 (1963) at Columbia Law Library.

10. Article 2 of the 1932 Soviet Arbitration Statute, Collection of Laws of the USSR, 1932 No. 48, s. 281.

11. S. King — Smith, "Communist Foreign — Trade Arbitration" 10 *Harvard Intl. L. J.*, 34, 39, (1969).

12. In 1966 the FTAC panel consisted of 12 lawyers and 3 economists. (Members all Soviet nationals). S. King — Smith, *Id.* at 53.

13. Pizar, S. *supra* note 8, at 1424.

14. Berman, H. "The Legal Framework of Trade between Planned and Market Economies: The Soviet — American Example", 24 *Law & Contemp. Prob.* 482, 495 (1959).

15. *Id.* at 495.

16. King — Smith, *supra* note 8, at 40.

17. *Id.* at 40.

18. *Id.* at 40.

19. Domke, M. "The Israeli — Soviet Oil Arbitration", 53 *A.J.I.L.* 767, 799, (1959).

20. Pizar, S., *Coexistence and Commerce* (1970) p. 408. See also:

Holtzman, H. "Arbitration in East — West Trade", 9 *International Lawyer* 77, 90 (Jan. 1975).

21. Berman H. Bustin G., "The Soviet System of Foreign Trade", in *Business Transactions In the USSR.*, R. Starr, ed., (Amer. Bar. Ass'n. 1975). at p. 51, fn. 86: Of 44 published cases reported in the Commission during the period 1963-1965, 22 were decided against the Soviet Party — an even 50%. It is impossible to say what proportion this may be of all cases decided by the Commission—see: *Arbitrazhnaya Praktika: Reshenia Vneshnetorgovoi Arbitrazhnoi Komisii* (Moscow 1972).

22. Domke, M. "Arbitration of State — Trading Relations" 24 *Law & Contemp. Prob.* 317, 326 (1959).

23. Berman H. and Bustin G., *supra* note 18 at 35.

24. Pizar, S. "Trade, Law and Detente" 10 *J. Intl. Law & Economics* 267, 286 (1975).

25. According to personal conversations with Martin Domke the Soviet Union is in the process of revising its rules for the FTAC.

26. Domke, M. *supra* note 22 at 327-8.

27. Federal Register Notice Oct. 17, 1975 (Vol. 40) No. 202, pp. 48705-6.

28. *Supra* note 1. The author of the present article translates "peredache" as "refer" not as "transfer" which appears in the *International Legal Materials*. To "transfer" a dispute may give a misleading connotation.

29. Berman, H. *supra* note 11 at 496. Under the new statute the first of Berman's three co-existing conditions — "appointment" by the Chamber has been removed. As stated by Berman: "So long as these three conditions co-exist: (a) they are appointed by the All-Union Chamber of Commerce, (b) that the All-Union Chamber of Commerce is under the supervision of the Ministry of Foreign Trade, and (c) that the Ministry of Foreign Trade appoints the heads of the export-import combines—so long will their independence be subject to potential abuse." (emphases added)

30. Oussenko, "USSR", in *International Commercial Arbitration* 221 (P. Sanders, ed. 1960).

31. Straus, D., "Interim Observations on Arbitration Arrangements in Soviet-American Trade", 28 *Arbitration Journal* 105, 108 (June 1973).

32. King — Smith, *supra* note 11 at 43.

33. *Id.* at 55: Provision can be made in the FTAC Rules as in the rules of the Hungarian Arbitration Commission which specifically authorizes the foreign party to the dispute to appoint a foreign arbitrator if he agrees to pay the arbitrator's expenses.

34. Holtzman, H. "Arbitration in East-West Trade" 9 *International Lawyer* 77, 86 (Jan. 1975).

35. Bratus, S. "The Fourth International Congress on Arbitration", *Foreign Trade*, No. 4 (Moscow 1973) p. 48.

36. Hazard J., "State Trading and Arbitration" from *International Trade Arbitration* ed. Domke, M. (1958, reprint 1973) pp 97-98. (N. B. As of the enactment of the 1975 Statute, Arbitrators are no longer appointed, but confirmed.)

37. King — Smith, *supra* note 11 at 42.

38. Pizar, S., *supra* note 8 at 1468.

39. However, awards of the USSR Maritime Arbitration Commission are appealable. The Supreme Court of the USSR may cancel the Award and return the case to the Maritime Arbitration Commission — Article 10 of the Maritime Arbitration Commission (Moscow 1968). [See also W. E. Butler and J. B. Quigley Jr., eds. and Transl. *The Merchant Shipping Code of the USSR* (1968), Baltimore (1970) pp. 123-131.]

40. Public Law 91-368 of July 31, 1970, 84 Stat. 692; 9 U.S.C. 201 added a second chapter to Federal Arbitration Act — U.S.C. Sections 1-14, 61 Stat. 670 as amended, 68 Stat. 1233 (1954). With respect to the U.N. Convention, the United States gave its consent and advice on Oct. 4, 1968. The U.S. made use of two reservations — recognition and enforcement based on "reciprocity" and the U.S. will not recognize awards re noncommercial disputes. Domke, M. "The United States Implementation of the United Nations Arbitral Convention" 19 *Am J. Compar. Law* 575 (1971).

41. U.N. Convention, Article V para. 1.

42. U.N. Convention, Article V para. 2 (a).

43. U.N. Convention, Article V para. 2 (b).

44. Domke, M. "The United States Implementation of the United Nations Arbitral Convention", 19 *Am J. Compar. Law* 575 (1971).

45. Under CMEA "Uniform Regulation Appendix on the Provisions on Arbitral Fees and Expenses, and Costs of the Parties," the breakdown in the amount of the fees is similar to the ICC and AAA. The calculation begins with 3% of the amount of suit, with the percentage reduced as the amount of the suit is higher. It should be noted that for higher amounts of the suit, under CMEA the fees would be higher than either in the ICC or AAA.

46. Holtzman, H. *supra* note 34 at 81-82.

47. *Id.* at 83.

48. Leff, E. "The Foreign Trade Arbitration Commission of the USSR and the West", 24 *Arbitration Journal* 1, 11-12 (1969).