

View of East-West Cooperation

Norwegian looks at legal aspects of coordinating business transactions and successful negotiations

BY HANS B. THOMSEN*

East-West trade, which was stagnant for a considerable time, has taken on new growth in the last decade. One basis for this has been the official agreements between the different countries in East and Western Europe on the promotion of technical, economic, and industrial cooperation. These agreements and the corresponding enactments in the various East-European countries form the legal foundation for some very interesting and at times fairly complex cooperational contracts.

Before we enter the domain of cooperation, however, it would seem advisable to say a little about contract relations in East-West trade in general.

One important aspect for a Western firm starting export marketing or other contract activity in Eastern Europe is the role played by the authorized foreign trade organizations. Although contracts are negotiated and signed with the official foreign trade organization, the buyer or other commercial partner often is another legal person.

The commercial activity, however, goes directly between the Western contract partner and the industrial plant in the Eastern country. This implies that any change agreed between the two commercial parties would have to be authorized by the foreign trade organization, the legal Eastern party to the contract. This emphasizes the necessity of a written agreement, and extremely clear and detailed contract work.

Streamlining

Contract negotiations in East and West trade have proved to be lengthy and detailed, but they are becoming much more streamlined. For example, for delivery of mechanical goods, the Norwegian party would tend to make his offer on the basis of the General Conditions of the ECE 188, which he is used to. The fact is that the Eastern countries of Europe did not take part in the deliberations of these general conditions. Another set, numbered 574, was negotiated by a group of experts from both East and Western countries (although in fact it

**Director, Export Council of Norway; lecture given at the Polish-Norwegian Seminar, Oslo.*

differs only very little from 188). On the other hand, foreign trade organizations of East Europe do a major part of their external trade within their region utilizing the general conditions of CMEA of 1968, which are binding on the parties in trade between member countries. Most foreign trade organizations tend therefore to use standard contract forms built upon the CMEA conditions which differ fairly widely from the ECE 574 forms. (It may be mentioned here that there has been a Swedish initiative to discuss a further alignment of standard contract forms for East-West trade in the ECE.)

In a straight sales contract, the chances of renegotiating the standard terms of the buyer are limited. If the goods are very special, the agreement is long-term or of considerable size, etc., negotiation of certain terms may become essential. Turnkey contracts usually require a separate detailed phase of detailed contract negotiations.

In recent years there has been increasing interest in East European countries in buying technology and marketing expertise from Western Europe. It has been a difficulty that this would require repayment in fully convertible currency. Industrial cooperation therefore has developed very much on the basis of these two aspects—transfer of technology and the possibility of repayment in kind.

INDUSTRIAL COOPERATION AGREEMENTS

Industrial Cooperation Agreements involve transactions beyond the straightforward sale or purchasing of goods and services, and entail a lasting community of interest designed to provide mutual advantages to the parties concerned. They usually involve a mixture of established contract forms such as:

- Sale—Erection—Turnkey
- Purchase—Procurement
- Leasing
- Civil Engineering
- Marketing and Distribution
- Franchising
- Licensing (Patents, Trademarks and Know-How)
- Subcontracting, Contract Manufacturing
- Management Contracting
- Joint Venture

A detailed survey of industrial cooperation among ECE countries was prepared by the Executive Secretary of the ECE in his analytical report (E/ECE/844) of 14th March 1973. In a survey of 202 cases of East-West industrial cooperation, excluding Yugoslavia, the following details appeared:

Indeed, the technology transfer is an important element in cooperation agreements, and usually long-term licensing is accepted as a full-fledged cooperation. Often, however, it is combined with the procurement of machin-



H. B. Thomsen

ery, know-how, and training, and components may be delivered to and assembled by the East European licensee in the beginning of the contract.

Another main type is the supply of complete plants. Here, as is the case with cooperation licensing, payment is often made in resultant components or products. The supply of plant or equipment also could be done on a leasing basis. One could furthermore foresee joint tendering and joint projects.

Distinction

There is a fine distinction here toward coproduction and specialization agreements. Such production could be in a final product, in a range of products, and in component parts, and it could entail production, marketing, and

research and development.

Again there is not a great distance from this type of agreement to subcontracting and contract manufacturing.

From an organizational point of view, the question of establishing joint ventures, either in one of the countries of the participating partners or in a third country for joint marketing, is of special interest. It should be pointed out, however, that although legislation would permit it, no example exists of formal joint ventures with foreign partners in Poland.

Economic, industrial, and technical-scientific cooperation between Norway and Poland is based upon the official agreement of November 28, 1972. Since this is the legal background, it might be of interest to take a good look at Article I:

TYPES OF EAST-WEST TECHNICAL COOPERATION: ECONOMIC INDUSTRIAL

I Distribution of East-West industrial cooperation within selected branches by type of agreement (percentages)

	Licensing	Plant delivery	Specialization	Subcontracting	Joint venture projects	Total
Total manufacturing	28.2	11.9	37.1	7.9	14.9	100.0
Chemicals	20.5	23.1	33.3	2.6	20.5	100.0
Transport equipment	29.0	5.3	50.0	15.8	—	100.0
Mechanical engineering (excl. machine tools)	28.9	4.4	48.8	8.9	8.9	100.0

II Distribution by country and type of agreement (percentages)

	total	USSR	Chechosl.	Hungary	Poland	Romania
A Licensing — joint R&D	28	50	14	33	28	29
B Plant deliveries	12	9	9			
C Coproduction & specialization	37	20	36	33	38	10
D Subcontracting	8		14			25
E Joint ventures	15	9	27		13	25
	<u>100</u>					

The Contracting Parties will endeavor to encourage, promote and facilitate the development and the strengthening of economic, industrial, and technical-scientific cooperation between interested organizations, associations, and enterprises in various sectors of economic life, i.e. in industry, including shipbuilding, agriculture, forestry, fishery, transport, and trade in the two countries and on third markets.

In pursuance of this aim the Parties will endeavor to promote and facilitate cooperation between interested organizations, associations and enterprises in the two countries, i.e.:

- Direct contracts between enterprises and institutions concerned.
- Joint feasibility studies, planning and implementation of projects of common interest, including deliveries of industrial plants (turnkey projects etc.) as well as other forms of industrial cooperation.
- Joint research and development of new technological processes with the view to modernize production.

d) Joint treatment of problems within applied science with the view to application of the results in industrial production.

e) Exchange of technical know-how and technology, including licenses, patents, etc.

f) Arrangements of conferences and exhibitions.

g) Exchange of specialists.

h) Exchange of technical documentation and information.

i) Other projects of common interest.

It should be noted that the agreement extends to organizations, associations, and enterprises, and embraces agriculture, forestry, fisheries, transport, and trade in addition to industry. The detailed elements, especially b) to e), are worthy of study.

The agreement is for 10 years and the other six articles deal with practical aspects of securing effective cooperation. It is upon this basis that negotiations and contracts of

cooperation between Poland and Norway are formed.

The general structure of cooperation agreements will appear from the following model:

Cooperation Agreements—Eastern Europe

Phase I

Basic Agreement (of Intent)

Intent, Area, Scope, Parties, etc.
(often preamble to II)

Phase II

Cooperation Agreement (General)

Types & Volume & Promotion of Cooperation
Prices & Payment Conditions
Industrial Rights, Secrecy, Force Majeure
Duration, Renewal, Termination
Law, Arbitration, Others

Phase III

Subcontracts

A	B	C	D	
Commercial	Service	Technical	Licensing	Etc.

The model is meant to illustrate the structural elements in a general way—actual contracts differ widely. It comprises three different stages in order to facilitate the general understanding and to show the various stages of negotiation.

There is a general agreement of interest which defines the situation and intentions of the parties and outlines all the main aspects. This may constitute a preamble to the final cooperation contract. The main contract will define the different types of cooperation and the total relationship between the parties in order to secure that the cooperation is established on a harmonious basis as regards *inter alia* prices, deliveries, use of industrial rights, force majeure, taxes, and arbitration etc., etc. Added to this will come the special technical contracts. A central aim of the main agreement is to tackle the interface problem of the various technical aspects. A great amount of technical documentation will appear in the annexes which form an integral part of the total contract system. The full set is therefore voluminous and involves a great deal of work and cost.

Provisional Clearance

Some years ago a West European firm negotiated a large cooperation deal in Eastern Europe (not Poland). Negotiations took nearly three years and the resulting contract documentation contained more than 900 pages. In the end, the proposal was turned down by the authorities of the East European country. Obviously, this was frustrating for both negotiating parties. Therefore, it is now often possible to get provisional clearance on the basis of the first or second phase of the contract. Experience shows that at least in the field of licensing the detailed contract may later be passed quickly and with minor if any modifications.

I stressed that the contracts are voluminous. One reason for this is that cooperation is established within the framework of two widely different legal systems, but it is also because of the complexity and the novelty of this type of agreement. For these reasons it is important to detail in the agreement all the main practical and legal consequences, and to try to find efficient ways of creating harmonious solutions. It is therefore of great importance to sit down and define well in advance all the different aspects and functions of the cooperation, and to detail these in the agreements in such a way that the contract forms a law unto itself. This may seem complicated. It builds, however, on a vast amount of experience of established contract forms, e.g. with regard to licensing, procurement, delivery and erection of plant etc.

Real Problems

It is in the coordination of these different elements that some of the real problems may be found. For instance East European countries are usually not experienced in the payment of royalty for the grant of a license; a lump-sum payment is often preferred. You will appreciate, however, that a licensor who is getting a royalty is directly interested in handing over to his licensee all technical developments during the lifetime of the agreement, whereas if he has received a lump-sum no such active interest exists.

Another way of creating mutual interest lies in a long-term agreement, such as a joint marketing venture in a third country, use of trademark in combination with giving export rights to promising markets, etc. One important aspect of a cooperation complex is the right of modification and securing the interest of the other party in getting his supply of parts or products. This has to do with the quality, control, and such other factors as escalation hardship or force majeure clauses. Obviously price and price-revision clauses and the settlement of payment are of primordial importance. One aspect which has created some complexity here is the introduction of new tax system, e.g. in Poland where provisions with regard to taxes and levies gain new importance.

Documentation

Since the technical documentation is of essence to the contract it is important that the documentation drawings, manuals, instruction and the like are properly defined as to the amount of documentation to be given, the way and time in which it is to be transferred, and the language concerned. It is important for both parties to find a practical solution. Very often it is done so that all the documentation and the contract itself is in the English or the German language. The Norwegian partly takes the responsibility of translating all matters into English, whereas the Polish copartner takes the responsibility of possible translation into Polish. Also when it comes to other matters of technology transfer, such as training, use of qualified technical personnel and visits to factories, detailed provisions with regard to the amount of time and people, and the division of cost should be described in a detailed manner.

(Please turn to Page 184)

during the examination procedure.

It is to be assumed that when the microorganism is deposited in a foreign depository and when the declaration of release is made at said depository, this declaration will be effective only for the Federal Republic of Germany if the declaration guarantees that it includes the release of the microorganism for export to the Federal Republic of Germany.

*If no repeatable method for producing a microorganism can be stated, a method claim, e.g. for the production of the product obtained by means of the microorganism, or a use claim may be suitable (remark of the authors).

9. Marketing
10. Loyalty & Secrecy
11. Modifications
12. Quality control (Trademarks)
13. Prices & Payments, Escalation
14. Taxes, Levies, Approvals & Clearance
15. Promotion - Joint committee
16. Guarantees
17. Hardship, Force majeure
18. Enter into force, Duration, Termination
19. Effects of termination - Breach
20. Legal succession
21. Choice of law and language, Notice, Disputes

Options, Rights of First Refusal

(Continued from Page 167)

from operating the refreshment room.

Thus, when a license contains both an option to determine the agreement and a right of first refusal to the licensee, the licensor can determine the license and commence operations itself without infringing the licensee's right of first refusal.

CITATIONS

- | | | |
|------|-----------|-------------------------|
| (1) | (1946) | S.A.S.R. 17 |
| (2) | 47 S.R. | (N.S.W.) 315 |
| (3) | (1954) | 92 C.L.R. 245 |
| (4) | (1973) | 3 W.L.R. 884 |
| (5) | (1960) | Od. R. 465 |
| (6) | (1963) | N.S.W.R. 815 |
| (7) | (1972) | V.R. 737 |
| (8) | (1970) | 91 W.N. (N.S.W.) 222 |
| (9) | (1971) | 1 N.S.W. L.R. 735 |
| (10) | (1960) | S.C.R. 126 (Canada) |
| (11) | (1969) | 91 W.N. (N.S.W.) 468 |
| (12) | (1971) | 3 W.L.R. |
| (13) | (1970) | 45 A.L.J.R. 102 |
| (14) | (1974) | All. E.R. 161 |
| (15) | (1904) | 1 Ch. 305 |
| (16) | (1974) | 47 A.L.J.R. 606 |
| (17) | (1970) | 45 A.L.J.R. 102 |
| (18) | (1856) | 22 Beav. 625 |
| (19) | (1897) | 1 Ch. 937 |
| (20) | (1960-61) | 34 A.L.J.R. 491: (P.C.) |
| (21) | (1901) | 2 Ch. 37 |
| (22) | (1921) | 1 A.C. 85 |

184

View of East-West Cooperation

(Continued from Page 170)

This is not the place to go into details of different contract clauses. I think though that some main aspects should be outlined. Let us therefore take a brief look at this model of some important clauses in a cooperation agreement:

Main Clauses of a Cooperation Agreement

1. Parties to the Contract - Situation & Intentions
2. Object and Scope - (Definitions)
3. Grant of rights
4. Documentation
5. Technical assistance
6. Training
7. Improvements, R & D, Information
8. Production etc. / Deliveries

You will immediately recognize many items. In a cooperation agreement, however, they take on a somewhat different aspect in view of the long-term and the mutual interests created by the cooperation. Let us pick two central questions.

The first is the question of guarantees. In a straight delivery of goods this could be very difficult. In a cooperation agreement it forms an essential part of the cooperation atmosphere. The other is the question of what to do when things turn out otherwise than expected. This stresses the importance of a working committee to smooth the way. All problems of this kind should be put before that committee for amicable settlement at once.

Usually, misunderstandings and difficulties arise over special questions regarding performance: quality, quantity, questions of service, etc. Very often an arrangement for quick and simplified arbitration of particular trouble points would clear the way for continued peaceful cooperation. In more important cases, however, a broader arbitral solution is required. Very often both parties will accept arbitration in a third country, such as Switzerland, Sweden, or Austria, and they will then also agree on the use of that country's law both with regard to material and procedural questions.

Considerable Cost

Negotiating a contract of this type takes time and implies considerable cost. A fairly moderate Norwegian turnkey contract for delivery of a factory inclusive of recipes cost a quarter of a million N.Cr. For this reason it is imperative that the parties should take a good look into the different aspects of a cooperation: technical matters, marketing, finance, and the legal implications at a fairly early stage. A team representing these aspects should undertake a functional analysis of the project to ensure practical solutions. At a given stage these elements should be put before a legal expert on East-West matters, and he should preferably also take part in the final contract negotiations.

To conclude, however, let me stress one point. Many legal and economic specialists tend to prefer the more complex forms of cooperation, as if sophistication was a goal in itself. Let us be reminded of the old saying that, "the proof of the pudding is in the eating." If we can create good, simple, and effective cooperation, it is extremely valuable simply because it is easier to operate and could therefore be more efficient.

In the final analysis we are dealing with human cooperation. Contracts, though important, provide only the framework.