

1-1-1984

# Cuba's System of International Commercial Arbitration: A Convergence of Soviet and Latin American Trends

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## Recommended Citation

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# CUBA'S SYSTEM OF INTERNATIONAL COMMERCIAL ARBITRATION: A CONVERGENCE OF SOVIET AND LATIN AMERICAN TRENDS\*

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\* The authors gratefully acknowledge the help of Miss Ana María Reyes Sánchez and Mr. Justin Herscovici, respectively, in providing Cuban and Hungarian materials, otherwise unavailable.

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## I. INTRODUCTION

This article, principally aimed at common law attorneys, offers a practical description of the Cuban system of international commercial arbitration. In order to provide a frame of reference, the Cuban system is compared with the Soviet and Eastern European approach, as well as with Latin American trends. Comparative comments are mostly made parenthetically, in the footnotes. The latter are also used to provide general information regarding Cuban legal sources which are widely unavailable to American lawyers. Wherever possible, sources in English are given priority.

The present Cuban system of international commercial arbitration is principally regulated by Law 1303, enacted in May 26, 1976 (the Law).<sup>1</sup> Cuba is a member of the Council for Mutual Economic Aid (COMECON), an international organization which promotes intensive cooperation in economic and legal matters between socialist countries.<sup>2</sup> As other COMECON members, Cuba is a party to the 1972 Moscow Convention on arbitration,<sup>3</sup> and has also adopted the Uniform Arbitration Rules (the Uniform Rules) issued in Moscow on February 28, 1974.<sup>4</sup> Cuba's entry into COMECON, its accession to the 1972 Moscow Convention, and its adoption of the Uniform Rules have left an indelible mark on the Law. The most outstanding feature is the high degree of similarity existing among the arbitration acts of COMECON countries, due to the fact that they all follow the Uniform Rules.<sup>5</sup>

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1. Published in *Gaceta Oficial*, June 3, 1976, at 104-09. There is a Spanish text published in Havana by the *Camara de Comercio de la Republica de Cuba*, under the title of LEY Y REGLAMENTO DE LA CORTE DE ARBITRAJE DE COMERCIO EXTERIOR. The Spanish original text is also reproduced in INTERNATIONAL COMMERCIAL ARBITRATION, part IV-B, 11-28 (C.M. Schmitthoff ed. 1979) [hereinafter cited as Schmitthoff].

For a brief English account of historical aspects and a global description of the arbitration rules, see H. Garcini, *The Republic of Cuba*, I Y. B. COMMERCIAL ARB. 27-9 (P. Sanders ed. 1976).

2. On the mutual involvement of COMECON countries regarding the coordination of economic plans, the advancement of scientific and technical cooperation and the development of external trade, see T.W. Hoya, EAST-WEST TRADE COMECON LAW (1982).

3. An English translation of the Convention on Settlement by Arbitration of Civil Law Disputes Resulting From Economic, Scientific and Technical Cooperation, known as the Moscow Convention, can be found in Schmitthoff, part III, 1-6, at 1. This Convention became effective in Cuba on May 11, 1977, see A.M. REYES SÁNCHEZ, EL ARBITRAJE DE COMERCIO EXTERIOR EN CUBA, at 12 (unpublished manuscript 1982).

4. English versions of *The Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of the Council of Mutual Economic Assistance Countries* can be found in Schmitthoff, *supra* note 1, part III, 7-22, at 1, and in I Y.B. COMMERCIAL ARB. at 147-56 (1976).

5. Bulgaria, Czechoslovakia, Hungary, the German Democratic Republic, Rumania and

Cuba's foreign Trade Arbitration Court (the Court) is attached to the Chamber of Commerce of the Cuban Republic.<sup>6</sup> The Court is mostly active in disputes between COMECON members, but it can also intervene in cases involving Cuban and Western firms.<sup>7</sup> Since the rules are remarkably similar and interpretation techniques are in many ways uniform, awards published by other COMECON arbitration tribunals can be used to partially mitigate the lack of information regarding Cuban awards.<sup>8</sup> This is one of the reasons why comparing the Cuban system to that of the USSR and other Eastern countries carries practical importance.

The usefulness of comparing the Cuban international arbitral procedure to that of its Latin American neighbors exceeds the obvious geographic, cultural and linguistic similarities. Cuba shares the civil law tradition with the rest of Latin America, but the growth of its legal institutions after the revolution has been qualitatively different from that of the other Latin American countries.<sup>9</sup>

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the USSR, like Cuba, follow the Uniform Rules very closely. The difference among these countries is minimal, and it is conspicuous only in the order in which the various articles are introduced. Poland has shown some degree of independence by enacting rules that are somewhat less uniform. For an English version of the various Eastern European arbitration rules, see Schmitthoff, *supra* note 1, part III, at 1. The arbitration laws of the different COMECON States are hereinafter designated by the word "Rules" preceded by the indication of the respective country. [Due to the unavailability of suitable translations, the Mongolian and the Vietnamese Rules are not contemplated in this article.]

6. The Cuban Chamber of Commerce was created as a autonomous organization by Law No. 1091 of February 1, 1963, as amended by Law No. 1131 of November 26 of the same year. Article 10 of Law No. 1091 provides: "The Arbitration Court of Foreign Trade and Arbitration Court of Maritime Transportation shall act as organizations adjunct to the Chamber of Commerce of the Republic of Cuba. The composition, functions and powers of the said Courts shall be determined by corresponding laws." In order to comply with this provision, Cuba enacted the Law No. 1184 of September 15, 1965, later replaced by the current Law No. 1303 of May 26, 1976. [The same system is followed in the USSR and in all COMECON countries.]

7. [The same is true of other Eastern European countries. Between 1978 and 1981, the Soviet Foreign Trade Arbitration Commission entertained 1,083 cases that were mainly claims against Soviet foreign trade organizations. Ten percent of such figure involved parties of non-COMECON countries. See Pozdnyakov, *Fifty Years of the Foreign Trade Arbitration Commission*, 7 FOREIGN TRADE 36 (1982).]

8. The presidents of COMECON arbitration courts meet periodically, trying to achieve uniformity in the application of the respective arbitration rules. See Pozdnyakov, *supra* note 7, at 39. In this sense, and in the absence of Cuban awards, precedents of other Eastern tribunals could provide very useful guidelines. See, for instance, notes 106 and 131. [For an English translation of Soviet awards see W.E. BUTLER, *SOVIET COMMERCIAL AND MARITIME ARBITRATION* (1980).]

9. In the last several years, a few articles on the Cuban legal system have appeared in English which discuss certain aspects of the institutionalization of the Cuban revolution from a political standpoint. The following articles by Professor Max Azicri have been published in 6 REV. SOCIALIST L. (1980): *Crime and Law Under Socialism: The 1979 Cuban*

Although the Cuban legal system retains its similarity to other civil law jurisdictions in terms of its conceptual framework and the thought patterns of the lawyers who operate within it, Cuban legal institutions have acquired enough peculiarities during the last twenty years to require a special status vis-à-vis the rest of Latin America.<sup>10</sup> Nevertheless, it should be noted that the arbitral process is similar to procedural law and that international arbitrators usually reflect their own background, experience and procedural habits.<sup>11</sup> Consequently, the international arbitral process, as regulated by the Law, should be read against the background of Cuban procedural legislation, as established by the Law on Civil, Administrative and Labor Procedure of August 19, 1977.<sup>12</sup> It is also reasonable to assume that arbitrators, trained as lawyers in Cuba, will project into the arbitral proceedings the techniques and attitudes of lawyers trained in a civil law system. In contrast with the oral and adversary character of the Anglo-American trial, Cuban arbitrators will actively direct the proceedings, and will place greater reliance on documentary evidence to the detriment of testimonial evidence.<sup>13</sup>

#### The development of international commercial arbitration in

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*Penal Code*, at 5-29; *An Introduction to Cuban Socialist Law*, at 153-63; *Change and Institutionalization in the Revolutionary Process: The Cuban Legal System in the 1970s*, at 164-82; *The Cuban Family Code: Some Observations on Its Innovations and Continuities*, at 183-91; *A Cuban Perspective on Socialist Legality*, at 203-07. On the 1976 Cuban Constitution, see Comment, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223 (1981). For an interesting overview of the new legal order under the present Cuban regime, see Berman & Whiting, *Impressions of Cuban Law*, 28 AM. J. COMP. L. 475 (1980). For an English translation of the Cuban decree on joint ventures and a list of Cuban enactments relevant to international trade, see 21 I.L.M. 1106-14 (1982); Republic of Cuba Council of State, Legislative Decree No. 50 on Economic Association Between Cuban and Foreign Entities (enacted Feb. 15, 1982), translated in Chamber of Commerce of the Republic of Cuba, *Possibility of Joint Ventures in Cuba* (1982).

10. On the categorization of the socialist legal system as members of an autonomous legal family, see 1 K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW, 294-300 (1977); M.A. GLENDON, M.W. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS, 267-77 (1982).

11. See de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 70 (1982).

12. Law No. 7 on Civil, Administrative and Labor Procedures was published in the Official Gazette of the Republic of Cuba of August 20, 1977, at 417-18. This law superseded Law No. 1261 of January 4, 1974, the earlier statute on administrative and labor procedure. Divided into three parts, it covers civil procedure (arts. 1-653), administrative procedure (arts. 654-695) and labor procedure (arts. 696-738).

13. See generally, Robert, *Administration of Evidence in International Commercial Arbitration*, in Y.B. COMMERCIAL ARB. 221 (1976-81).

Latin America has been slow. In fact, most Latin American countries have shown a regional distrust towards arbitration as a means of settling commercial disputes arising between the government or government-controlled enterprises and foreign private parties.<sup>14</sup> In contrast, socialist countries, including Cuba, have increasingly recognized the value of arbitration in facilitating international trade.<sup>15</sup> Furthermore, within the Cuban legal system, arbitration is the preferred mode of settling commercial disputes because it is considered more compatible with Cuba's underlying economic system.<sup>16</sup> Corroborating this trend, Cuba is one of the few Latin American countries which has ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>17</sup> Since it is not a member of the Organization of American States, however, Cuba did not participate in one of the major steps undertaken by the countries of the Western Hemisphere towards establishing uniform rules for international commercial arbitration: The Inter-American Convention on International Commercial Arbitration of 1975.<sup>18</sup> According to article 3 of the Inter-American Con-

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14. See generally, Straus, *Why International Commercial Arbitration is Lagging in Latin America: Problems and Cures*, 33 *ARB.J.* 21 (1978); Note, *The Future of Arbitration in Latin America: A Study of its Regional Development*, 8 *CASE W. RES.J.INT'L L.* 480 (1976); Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 *HARV.INT'L L.J.* 131 (1976); van den Berg, *L'arbitrage commercial en Amerique Latine*, 1979 *REV. DE L'ARBITRAGE* 123; Summers, *Arbitration and Latin America*, 3 *CALIF.W.INT'L L.J.* 1 (1972); Summers, *Private Versus State Arbitration in Latin America*, 4 *CALIF.W.INT'L L.J.* 121 (1973).

15. See the introductory comment made in the report by S. Bratus regarding international commercial arbitration in the Soviet Union and Eastern Europe, published in English in 27 *ARB. J.* 230 (1972); W. Melis and H. Strohbach, *East-West Arbitration*, 7 *Y.B. COMMERCIAL ARB.* 398 (1982); Holtzman, *Arbitration in East-West Trade*, 9 *INT'L LAW* 77 (1975); Orban, *The Challenge to the Enforcement of Socialist Arbitral Awards*, 17 *VA.J.INT'L L.* 375 (1977).

16. On the Cuban system of state arbitration and its relationship with the Cuban court system, see J. Vega Vega, *El arbitraje estatal y la justicia*, 18 *REVISTA CUBANA DE DERECHO* 105 (1982); M. Reyes Saliá, *El sistema de arbitraje estatal en Cuba*, 20 *REVISTA CUBANA DE DERECHO* 73 (1981).

17. U.S.T. 2517, T.I.A.S. No. 6997. The United Nations Convention of 1958, also known as the New York Convention, was sponsored and opened for signature on June 10, 1958 by the United Nations Conference on International Commercial Arbitration, convened in accordance with Resolution 1204 (XXI) of the Economic and Social Council of the United Nations, adopted on May 3, 1956. It came into force on June 7, 1959 as the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. The United Nations Convention became effective United States law in July 1970 through the implementation of federal legislation. Cuba ratified the convention on March 30, 1975. See *infra* notes 116 and 117. The U.N. Convention has not been widely accepted in Latin America. Despite its being in force for some twenty years, only five Latin American countries have ratified it: Chile, Cuba, Ecuador, Mexico and Trinidad.

18. O.A.S.T.S. Nos. 9, 92. The Inter-American Convention on International Commercial

vention, the parties to an arbitral proceedings may agree on any procedural rules. In the absence of an express agreement, arbitral proceedings are conducted in accordance with the Rules of Procedure of the Inter-America Commercial Arbitration Commission (IACAC Rules), which are based on the *ad hoc* arbitration rules recommended by the U.N. Commission on International Trade Law (UNCITRAL Rules).<sup>19</sup>

## II. JURISDICTION

The Court has subject matter jurisdiction over international disputes arising from contractual, commercial, economic, scientific or technical relations.<sup>20</sup> Such jurisdiction is very broad, and it is designed to cover any possible dispute originating from commercial transactions between a Cuban and a foreign corporation. For the Court to exercise jurisdiction, there must be either an agreement to arbitrate a future dispute that binds both the plaintiff and the defendant, or a voluntary and clear submission to arbitrate an ex-

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Arbitration, known as the OAS or Inter-American Convention, was signed in Panama at the Inter-American Specialized Conference on Private International Law, on January 30, 1975. The Inter-American Convention contains provisions which are similar to those of the United Nations Convention, but the latter does not contemplate rules of arbitral procedure. It is open for accession by any country, and it has been ratified by Chile, Panama, and Paraguay, and signed by Argentina, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Peru and Venezuela. For an overview of the Inter-American Convention and the various regional efforts which preceded it, see the following articles by Charles Norberg: *Inter-American Commercial Arbitration*, 1 *LAW. AM.* 25 (1969); *Inter-American Commercial Arbitration Revisited*, 7 *LAW. AM.* 275 (1975); *Recent Developments in Inter-American Commercial Arbitration*, 13 *CASE W. RES. J. INT'L L.* 107 (1981). See also G. Asken, *The Inter-American Convention—Where It Stands*, in *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA* 105 (S. Stairs, ed. 1981).

19. UNCITRAL adopted the UNCITRAL Arbitration Rules on April 28, 1976, and their text can be found in the UNCITRAL Report on the Work of its Ninth Session, U.N. Doc. A/31/17, par. 57. By resolution 31/98, the General Assembly adopted the UNCITRAL Rules on December 15, 1976, recommending their use in commercial contracts. See generally, Dietz, *Introduction: Development of the UNCITRAL Arbitration Rules*, 27 *AM. J. COMP. L.* 449 (1979); Sanders, *Procedures and Practices Under the UNCITRAL Rules*, 27 *AM. J. COMP. L.* 449 (1979); Thompson, *The UNCITRAL Arbitration Rules* 17 *HARV. INT'L L.J.* 141 (1976). On May 6, 1977, the Executive committee of the Inter-American Commercial Arbitration Commission adopted the UNCITRAL Rules with changes appropriate for their use in the Western Hemisphere, to become effective January 1, 1978. All cases submitted to the Inter-American Commercial Arbitration Commission are governed by the newly amended UNCITRAL-adopted procedure, unless a contract was signed prior to January 1, 1978 and both parties indicate a preference for the older IACAC Rules.

20. Art. 2 of the Law states that the Court may "intervene in and solve disputes arising between different countries out of their contractual relations of international or foreign trade, or out of their economic and technical-scientific links, as well as those [disputes] of a civil nature emerging from such links or relations."

isting dispute.<sup>21</sup>

Doing business with a Cuban enterprise may raise the issue of jurisdictional immunity, for instance, when the arbitration clause is being negotiated. Following the Soviet model, enterprises formed by the State, with State capital, are largely responsible for Cuban import-export operations, but these companies behave like private companies with respect to other parties. One consequence of this profit-oriented activity is that such enterprises usually waive sovereign immunity in their charters.<sup>22</sup>

According to the Law, when the arbitral Court has jurisdiction, judicial courts may not intervene.<sup>23</sup> Thus, the arbitration and

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21. Art. 3 of the Law states as follows:

The Foreign Trade Arbitration Court shall be seized by the disputes indicated in the previous article when between the parties involved there is an agreement to submit to such court the disputes that have arisen or those that may arise in the future. Such agreement can also be expressed by the plaintiff through the mere fact of filing the complaint, and by the defendant through the performance of procedural steps that show his voluntary decision of submitting to the Court's jurisdiction, or also through an express communication to the Court agreeing to submit to its jurisdiction.

The Foreign Trade Arbitration Court shall equally be seized by all disputes where the parties are bound to submit to its decision, due to the fact that its jurisdiction has been established in international treaties.

The last paragraph is aimed basically at COMECON countries which are bound by the 1972 Moscow Convention (see note 3) to settle their commercial disputes through arbitration in the defendant's country (arts. I and II).

It is important to distinguish between an agreement to arbitrate future disputes (*clausula compromisoria*) and an agreement to submit to arbitration an existing dispute (*compromiso*). Whereas the Codes of Civil Procedure of many Latin American countries regulate arbitration of existing disputes, there is little legislation supporting recognition of future dispute agreements. See de Vries, *supra*, note 11 at 53. Under the first paragraph of article 3 of the Law, the agreement to arbitrate will be enforced even if the parties fail to agree on a "submission" (*compromiso*), prepared in furtherance of a clause to arbitrate and drafted after a controversy had in fact arisen. [Similarly, article 1 of the IACAC Rules provides for the validity of an agreement to arbitrate either a present or a future dispute, which can be evidenced by "an instrument, signed by the parties, or in the form of an exchange of letters, telegram or telex communications."]

22. [Characteristically, the charter of Mebelintorg, a Soviet foreign trade enterprise, states its capacity "to sue and be sued in courts of law and arbitration and to conclude amicable settlements." (Art. 10.4, reproduced in 6 FOREIGN TRADE 53 (1981)).]

23. Article 55 of the Law establishes as follows:

The People's Courts, at a party's request, shall refrain to entertain those disputes where, due to arbitral agreement, the (Arbitral) Court has jurisdiction, unless it was decided, on a party's request, that said agreement is null, ineffective and inapplicable.

Under the second paragraph of article 3 of the Law on Civil, Administrative and Labor Procedure (see note 12 and accompanying text), disputes arising from foreign trade and submitted to the Court are exempted from the jurisdiction of Cuban courts of law. Article 3 reads:



the judicial spheres of influence remain separate.<sup>24</sup> There is, however, some jurisdictional overlap between the arbitral Court and Cuban courts of law, which favors the latter in conflicts regarding the enforcement of an award. This occurs because Cuban courts of law retain the power to refuse enforcement of a Cuban award if the award decides a dispute not covered by the arbitration agreement, or the subject matter of the dispute is not susceptible of being settled by arbitration or the award is found to be contrary to public policy.<sup>25</sup>

### III. ARBITRATORS

The Court has a permanent panel of fifteen professional arbitrators and an infrastructure of experts, interpreters and clerical staff. The President of the Cuban Chamber of Commerce appoints the arbitrators in an honorary capacity for a two-year period.<sup>26</sup> While compiling the list of arbitrators, the President of the Cuban Chamber of Commerce must choose persons who possess sufficient knowledge and experience in such matters as foreign trade, transportation law, insurance, banking as well as the necessary knowledge to solve the disputes submitted to the Court.<sup>27</sup> The Law does not specifically require that the arbitrators be Cuban citizens, but citizens of foreign countries have never appeared as members of

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The jurisdiction of Cuban courts is unwaivable. The courts cannot refuse to hear the disputes submitted to them if one of the parties is Cuban or if property located in Cuba is at stake, even if there is pending litigation regarding the same matter in another country or if the dispute has been submitted to foreign courts or arbitral tribunals.

Disputes arising from foreign trade and which are expressly or tacitly submitted to arbitral tribunals, as well as those disputes which are to be decided by foreign arbitral tribunals according to law or international agreements, are exempted from the provisions of the foregoing paragraph.

24. The administrative organization of the various Cuban judicial courts is established in Law 4, *Law on the Organization of the Judicial System* of August 10, 1977, published in the Official Gazette of August 12, 1977, at 299-320. The Cuban Ministry of Justice published an English translation in May 1978. Courts can be of four different types: the People's Supreme Court; the People's Provincial Courts; the People's Municipal Courts; and the Military Courts (art. 2). Courts are granted "functional independence," but at the same time, they are hierarchically subordinated to the National Assembly of People's Power and to the Council of State (art. 3). Courts are composed of professional and lay judges who share equal rights and duties in their activities (art. 9 para. 2).

25. See *infra* note 114 and accompanying text.

26. Art. 4. [This period varies in other Eastern countries. In the USSR, it is four years (USSR Rules, art. 4 (1)), and in Hungary, it is three years (Hungarian Rules, art. 4 (1)).]

27. Art. 4 (2); [USSR Rules, art. 4 (1)].

the Court.<sup>28</sup> There is a longstanding hostility in some Latin American countries toward permitting foreign arbitrators,<sup>29</sup> but many modern arbitration rules tend to relax the citizenship requirement by specifically stating that arbitrators may be either nationals or foreigners.<sup>30</sup> The Law attempts to dissipate any suspicion of local favoritism by providing that arbitrators shall be independent and impartial in fulfilling their duties.<sup>31</sup>

### A. Selection and Appointment

Each party to the dispute is entitled to nominate an arbitrator from among the fifteen members of the Court.<sup>32</sup> Appointing a panel of three arbitrators is the commonly accepted practice in international arbitration,<sup>33</sup> and the Law allows a panel of either one or three arbitrators (the Tribunal) to handle a case.<sup>34</sup> The parties

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28. See H. Garcini, *supra* note 1, at 27. [The Uniform Rules, as well as the USSR Rules remain silent about the nationality of arbitrators, although in practice they are always local citizens. In contrast, Bulgaria boldly proclaims that "The Arbitrators included in the list shall be Bulgarian citizens" (Bulgarian Rules, art. 4 (3)). More equitably, the Hungarian Rules allow the appointment of a foreign arbitrator if Hungarians can do the same in the other party's country (art. 4 (2)). On the other hand, the Czech Rules expressly state that "Czechoslovak citizenship shall not be a condition precedent for an entry into the list of Arbitrators" (art. 7 (3)). Hungary and Czechoslovakia provide a glaring contrast on this point in comparison to other COMECON countries.]

29. [Under the law of some Latin American countries, such as Columbia, aliens or non-residents may not be arbitrators. See Commercial Code of Colombia, art. 2012 (1971); Colombian Code of Civil Procedure (enacted by Decree No. 1400 of August 6, 1970, amended by Decree No. 2019 of October 26, 1970), arts. 663-77.]

30. [See, e.g., Inter-American Convention on International Commercial Arbitration, art. 2. The IACAC Rules art. 6(4), provide that in making the appointment of single arbitrators, the Inter-American Commercial Arbitration Commission shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties. In cases where a single arbitrator constitutes the arbitral tribunal, article 6(1) of the UNCITRAL Rules provides that the single arbitrator shall be of a nationality other than that of the parties.]

31. Art. 6; [USSR Rules art. 4(2). This principle is repeated in other Eastern arbitration rules]. The unrestricted independence that Cuban arbitrators are granted provides a curious contrast when matched against the hierarchical subordination imposed on the Cuban judiciary by article 3 of the Law on the Organization of the Judicial System. See *supra* note 24.

32. [By way of contrast, under the IACAC Rules (art. 6(3)), the appointment of arbitrators is primarily left to the parties themselves; see also UNCITRAL Rules, art. 6(2).]

33. [See P. Sanders, *The Economic Commission for Asia and the Far East Rules for International Arbitration*, in *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 175 (1975).]

34. Art. 7; [USSR Rules, art. 4(3). The same principle applies to all other Eastern arbitration rules. Under the IACAC and UNCITRAL Rules, if the parties do not reach an agreement on whether to have one or three arbitrators, three arbitrators will be appointed. IACAC Rules, art. 5, UNCITRAL Rules, art. 5].

may prefer to have a Tribunal of three arbitrators when the dispute arises from a complex transaction. In situations involving the performance of trade agreements for the shipment of goods, a single arbitrator may be more convenient since he can conduct a faster proceeding in dealing with matters such as timeliness of delivery, merchantability of goods or compliance with sample requirements.<sup>35</sup> The list of names from which the parties are to select arbitrators may help them to choose a competent arbitrator if it includes information on each arbitrator's expertise and personal qualifications. In such a case, a reasonable choice can be made according to the particular issues in dispute.<sup>36</sup>

If the parties agree that a sole arbitrator shall settle the dispute but disagree as to his identity, the President of the Court will make the appointment.<sup>37</sup> If three arbitrators are to be designated, each party chooses one arbitrator and these, in turn, choose the third, who will preside over the Tribunal.<sup>38</sup> The statement of claim submitted to the Court must include the name of the claimant's chosen arbitrator or the request that the President of the Court appoint an arbitrator on behalf of the claimant.<sup>39</sup> The respondent must also include the same information in his statement of defense.<sup>40</sup> Each party may also select a substitute arbitrator who will act in the event that the chosen arbitrator is not able to perform his functions. If the parties fail to choose a single arbitrator within the proper time, the President of the Court shall make the appointments.<sup>41</sup>

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35. [See generally, G. Asken, *Commercial Arbitration with Latin America: A Practical Assessment*, in REFERENCE MANUAL ON DOING BUSINESS IN LATIN AMERICA 112, 116 (D.R. Shea ed., 1979).]

36. Article 4(3) of the Law provides that the list of arbitrators shall state, among other things, the scientific degree and area of expertise of each arbitrator; [USSR Rules, art. 4(1). Very similar equivalents are included in other Eastern arbitration rules. See also IACAC Rules, art. 8(a)].

37. Art. 8; [USSR Rules, art. 19; IACAC Rules, art. 6(a)].

38. Art. 7(2); [USSR Rules, art. 18(1); IACAC Rules, art. 7(1)]. If two or more claimants or respondents intervene in the dispute, each party must agree on one arbitrator. If they fail to agree on the choice of arbitrator, the President of the Court will appoint the arbitrator (art. 7 (3)). [USSR Rules, art. 18(3); IACAC Rules, art. 7(3).]

39. Art. 15(g); [USSR Rules, art. 14(2)(e). Under the IACAC Rules, the choice of arbitrators is not made in the statement of claim, but is included in a notice of arbitration served on the other party (arts. 3 and 6 to 8)].

40. Art. 18(2); [USSR Rules, art. 17(3)].

41. Art. 8; [USSR Rules, art. 19. The preceding rules on appointment of arbitrators are identical to the Soviet approach. All Eastern European arbitration rules include equivalent provisions].

### *B. Challenging the Arbitrators*

Although not all arbitration rules provide for the ability to challenge the arbitrators, this right is an important element in establishing confidence in the arbitral process.<sup>42</sup> Under the Law, the parties can challenge the arbitrators if there are doubts about their impartiality or if there are reasons to suppose that they have a personal interest, whether direct or indirect, in the outcome of the dispute.<sup>43</sup> Direct financial or personal interest in the outcome of the arbitration on the part of the arbitrator, as well as family ties between an arbitrator and a party, are among the broad grounds for challenge.<sup>44</sup> Any arbitrator can refuse to intervene in the proceedings on the above-mentioned grounds.<sup>45</sup> Under the IACAC Rules, arbitrators can be challenged if there are "circumstances" causing "justifiable doubts" as to their impartiality or independence,<sup>46</sup> whereas under the Law, the movant does not have to prove that the doubts are justifiable. Nevertheless, the IACAC Rules attempt to forestall the necessity of a challenge by requiring that a prospective or appointed arbitrator disclose any circumstances that would give rise to justifiable doubts about impartiality.<sup>47</sup>

The petition to challenge an arbitrator must be submitted before the commencement of the proceedings. A petition submitted at a later date will only be considered if the President of the Court (not of the Tribunal) finds the delay justifiable.<sup>48</sup> Under the IACAC Rules, arbitrators can be challenged at any stage of the proceedings; however, the challenge must be raised within fifteen days after the challenging party becomes aware of the circumstances that allow justifiable doubts as to the arbitrator's impartiality or independence.<sup>49</sup> The Law does not preclude the possibility of a party challenging his own nominee, and the IACAC Rules ex-

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42. [See Subramanian, *Choice of Arbitrators*, in INTERNATIONAL SEMINAR ON COMMERCIAL ARBITRATION 45 (1968). All Eastern European countries allow the challenging of arbitrators, experts, and interpreters. All these countries have very similar versions to the pertinent Cuban rules. See, e.g., USSR Rules, art. 22.]

43. Art. 9; [USSR Rules, art. 22(1); IACAC Rules, art. 10].

44. [See generally Thompson, *The UNCITRAL Arbitration Rules*, 17 HARV. INT'L L.J. 141 (1976), discussing the grounds for challenging arbitrators under article 8 of the UNCITRAL rules.]

45. Art. 9; [USSR Rules, art. 22(1)].

46. [IACAC Rules, art. 10(1).]

47. [IACAC Rules, art. 9.]

48. Art. 9(1); [USSR Rules, art. 22(1), para. 2].

49. [IACAC Rules, art. 11(1).]

pressly allow a party to challenge his chosen arbitrator for reasons which became known after the appointment was made.<sup>50</sup>

The two remaining members of the Tribunal decide the issue of the challenge. If they fail to come to an agreement, or if two arbitrators or the single arbitrator are challenged, the President of the Court decides the question. If the challenge is sustained, a substitute arbitrator will be appointed in accordance with the Law.<sup>51</sup> Experts and interpreters can also be challenged in the same way as arbitrators, in which case the Tribunal decides the question.<sup>52</sup>

Although the possibility of a challenge is an important issue, one wonders to what extent it can be a practical consideration. Normally, the arbitrators will be unknown to the parties, who will choose them only on the strength of their legal or technical background. Their names will not ring any particular bell. In a country with as little free enterprise as Cuba, collective organizations tend to overshadow individuals, and anonymity becomes the rule.

#### IV. ARBITRAL PROCEEDINGS

##### *A. Institution of Proceedings*

The parties to the dispute can participate in the proceedings personally or through their legal representatives who are not required to be Cuban citizens or attorneys.<sup>53</sup>

Proceedings are commenced by filing a statement of claim which can be delivered personally or mailed to the Court.<sup>54</sup> The statement of claim must contain basic elements such as the name and address of both parties, an account of the facts and legal arguments backing the claim, proof of payment of the arbitration fee, the name of the claimant's chosen arbitrator and a list of docu-

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50. [IACAC Rules, arts. 9 and 10(2).]

51. Art. 9 (3); [USSR Rules, art. 22(3). Under the IACAC Rules, in the event that the single or presiding arbitrator is replaced following a successful challenge, or for any other reason that precludes him from performing his functions, any hearings previously held will have to be repeated. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal. IACAC Rules, art. 14].

52. Art. 10; [USSR Rules, art. 22(4)].

53. Art. 11; [USSR Rules, art. 24(1). The Uniform Rules, the IACAC Rules and those of other East European countries remain silent about this issue].

54. The date of the filing of the statement of claim shall be the date of its delivery to the tribunal and, if the statement is sent by mail, the date is that of the post stamp of the place of sending. Art. 14; [USSR Rules, art. 13].

ments attached to the statement of claim.<sup>55</sup> The amount of the claim must always be specified, and the Law furnishes several guidelines to be followed in order to determine the amount.<sup>56</sup> If the plaintiff fails to determine the amount of the claim or assesses it incorrectly, the Court may, on its own initiative or at the defendant's request, determine the amount on the basis of the available information.<sup>57</sup>

All documentary evidence must be submitted with a sufficient number of copies so that each party and the Tribunal receive one copy of each document. Documents can be submitted either in their original version, or in copies certified by the party who offers them in evidence.<sup>58</sup>

The language generally used in the proceedings, especially at the hearing, is Spanish.<sup>59</sup> Documents submitted by the parties, however, should be expressed, or translated into, either the language of the contract, or the language the parties used in their correspondence or, alternatively, in Spanish. The Tribunal may order, on its own initiative or at the request of either party, that the documents submitted be translated into Spanish at the cost of the party submitting such document.<sup>60</sup>

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55. Art. 15; [USSR Rules, art. 14. *See also* IACAC Rules, art. 18].

56. Art. 15(e) and 16; [USSR Rules, arts. 14(2)(c) and 15].

57. Art. 16 (4); [USSR Rules, art. 15(4)].

58. Art. 13(1) and (3); [USSR Rules, arts. 7(1) and 27(2)].

59. Article 54 provides that the official language of the Arbitration Court is Spanish, but the arbitral tribunal may use the services of translators and interpreters "in order to facilitate the participation in the proceedings of those parties who do not know the Spanish language." [The Soviet rules include an equivalent principle which further provides that with the parties' consent, the tribunal may conduct the hearing in a language other than Russian. (*See* USSR Rules, art. 8.) In this largely uniform field, there are noticeable Eastern European diversions. The Czech Rules state that "if necessary, the Arbitration Court may, with the consent of the parties, hold hearings in other [foreign] languages as well" (art. 11). The Polish Rules contradict the Cuban approach even further: "The hearing shall be in the Polish language. The tribunal may order the use of another specified foreign language (English, French, German, Russian) if it is thought to be expedient" (art. 26(1)). Under the IACAC Rules, the parties can agree on the language or languages used in the proceedings. In the absence of such an agreement, the tribunal shall decide which language shall be used. IACAC Rules, art. 17(1).]

60. Art. 13(2); [USSR Rules, art. 7(2). IACAC Rules, art. 17(a)]. In view of the great practical importance of the language used in arbitral proceedings, it would be desirable to leave maximum flexibility to the parties and the arbitral tribunal in agreeing or determining this issue. This is the view expressed by the UNCITRAL Working Group on International Contract Practices, which is currently preparing a draft model law on international commercial arbitration [hereafter cited as UNCITRAL draft model law]. *See* United Nations Commission on International Contract Practices on the Work of its Sixth Session. Vienna, 29 August- 9 September 1983. UN Doc. A/CN.9/245 [hereafter cited as UNCITRAL Working

The Secretary of the Court is in charge of examining the statement of claim and of inviting the claimant to rectify his statement in case it is filed without complying with the statutory requirements.<sup>61</sup> Proceedings are suspended pending the rectification of defects, but if the claimant insists on the case being heard, the Tribunal must render an award or issue a ruling terminating the proceedings.<sup>62</sup>

The Court's Secretary will send the respondent copies of the statement of claim and of the documents attached thereto, notifying him that he has thirty days to submit his defense with supporting relevant evidence. This thirty day period may be extended at the respondent's request.<sup>63</sup> The respondent can also submit a counterclaim at any time before the termination of the proceedings.<sup>64</sup> The counterclaim must comply with the same requirements as the statement of claim. The plaintiff is entitled to answer the counterclaim also within thirty days.<sup>65</sup>

The statement of claim must substantiate the Court's jurisdiction,<sup>66</sup> if any, within the allotted term to answer the claim.<sup>67</sup> A chal-

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Group] at 9.

61. If the statement of claim fails to include the names and addresses of the parties or the relief sought, the claimant must cure the defects within two months from the date of receiving the Secretary's request for rectification. If the defects are rectified within such period, then the date of the filing of the statement of claim shall be the date of its original filing or mailing. Art. 17; [USSR Rules, art. 16(1). Under the IACAC Rules, either party may amend or supplement his claim or defense, "unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances" (IACAC Rules, art. 20)]. Similarly, there has been wide support in the UNCITRAL Working Group for the policy of allowing the parties to amend or supplement their claim or defense at any time during the course of the arbitral proceedings. UNCITRAL draft model law, draft art. C(3): UNCITRAL Working Group, at 8.

62. Arts. 17 and 36(e); [USSR Rules, arts. 16(2) and 37(2)(c)].

63. Arts. 18 and 20; [USSR Rules, art. 17, para. (1) and (2). Under the IACAC Rules, the arbitral tribunal determines the period of time within which the respondent must file the statement of defense. In principle such a period cannot exceed 45 days, but the arbitral tribunal may grant an extension. IACAC Rules, arts. 19(1) and 23].

64. Art. 22; [USSR Rules, art. 26(1). The Soviet rules punish counterclaims used as dilatory tactics with the possibility of requiring that the respondent bear the extra costs it originates].

65. Art. 23; [USSR Rules, art. 26, para. (2). Under the IACAC Rules, the counterclaim must be raised in the statement of defense; it is possible to submit it at a later stage, only "if the arbitral tribunal decides that the delay was justified under the circumstances." (art. 19(3))].

66. Art. 15(ch); [USSR Rules, art. 14(2)].

67. Art. 24. [The USSR Rules do not include an equivalent provision. Other Eastern European rules also remain silent on this point. Under the IACAC Rules, a plea of lack of jurisdiction must also be raised not later than in the statement of the defense or, with re-

lence to the Court's jurisdiction can only be grounded on the inexistence, nullity or lapse of the arbitration agreement, or on the lack of subject matter jurisdiction. Such a plea suspends the term to answer the statement of claim, and the President of the Court must decide the plea within thirty days. If the plea is rejected, the term to answer the complaint is counted *de novo* from the time the respondent is notified of the ruling.<sup>68</sup>

### *B. Preparation of the Case for Examination*

If three arbitrators are chosen, one can act as reporter, verifying the evidence submitted by the parties, and, if he is in the majority, drafting the award. If the arbitrator designated as reporter dissents from the majority opinion, then any of the other two arbitrators will be entrusted with drafting the award.<sup>69</sup>

Each party has the burden of proving the facts each relies on to support, respectively, the claim or the defense. The Tribunal may request further clarification or whatever evidence it considers appropriate. Accordingly, the reporter or the Tribunal's President shall fix a period of time, not exceeding thirty days, within which either party must produce the requested evidence or submit the necessary written explanations.<sup>70</sup> The Law, unlike other rules of arbitral procedure, does not contemplate the power of the arbitrators to take necessary interim measures regarding the subject matter of the dispute, for example, as to the preservation or sale of perishable goods that are in dispute.<sup>71</sup>

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spect to a counterclaim, in the reply to the counterclaim. IACAC Rules, art. 21(3).]

68. Art. 24. [Soviet and other Eastern European rules treat jurisdictional challenges in a far more general way, lacking the details included in the Law. Whereas under the Law, a jurisdictional contest must be decided as a preliminary question, under the IACAC Rules, the arbitral tribunal may proceed to examine the case and decide such issue in the final award (IACAC Rules, art. 21(4).]

69. Art. 25. [Under the Soviet system, this equivalent provision is limited to verifying the evidence. USSR Rules, art. 27(3).]

70. Arts. 26; [USSR Rules, art. 27(1). Under the IACAC Rules, the arbitral tribunal may request the parties to produce other evidence within such period of time as the tribunal shall determine. IACAC Rules, art. 24].

71. [See IACAC Rules, art. 26; UNCITRAL Rules, art. 22. The Rumanian Rules are the only ones, among the Eastern statutes, which expressly provide for urgent measures to safeguard "the object of the litigation . . . or to ascertain some actual circumstances" (art. 28). The Czech rules repeat the same concept, but only in relation to evidence (art. 18(1)).] UNCITRAL draft model law, draft art. XIV; UNCITRAL Working Group, at 15. The revised draft article E of the UNCITRAL draft model law provides for court assistance in gathering evidence to be used in arbitral proceedings. Court assistance can be requested by either party before the competent court of the State where the arbitration takes place, and



Once the Tribunal ascertains that the case is ready for examination, it will set the date for an oral hearing. The Court's Secretary is in charge of notifying the parties of the date and time of the hearing to give them at least thirty days to prepare for the hearing.<sup>72</sup>

### C. The Examination of the Case

At the request of the parties, the arbitrators may proceed to settle the dispute without a hearing on the basis of documents and other written matter. Nevertheless, the Tribunal may decide that the dispute cannot be resolved solely on the basis of the documentary evidence and hold a hearing.<sup>73</sup> The hearing of the case is open to the public, but a private hearing can be held at the request of either party or on the Tribunal's initiative.<sup>74</sup>

The parties can intervene in the hearings personally or through their representatives who do not need to be Cuban citizens.<sup>75</sup> Failure to appear by a party who has been duly notified of the hearing does not prevent the case from being heard, unless before the commencement of the hearing the defaulting party requests an adjournment for founded reasons. The Tribunal can rule that the hearing be postponed or the proceedings stayed upon the application of either party or on its own initiative.<sup>76</sup> Furthermore, either party can petition that the hearing be conducted in his absence.<sup>77</sup>

The arbitrators freely evaluate the evidence presented at the hearing as well as the documents furnished by the parties.<sup>78</sup> A re-

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the arbitral tribunal must approve the request. The UNCITRAL Working Group has also considered the possibility of including a provision on international court assistance in taking evidence. UNCITRAL Working Group, at 10.

72. Art. 28; [USSR Rules, arts. 20 and 21. Under Article 25(1) of the IACAC Rules, the parties must be given "adequate advance notice" of the date, time and place of the hearing].

73. Art. 32; [USSR Rules, art. 25. The IACAC Rules determine that oral hearings must be held at the request of either party. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or to conduct the proceedings on the basis of documents and other materials. IACAC Rules, art. 15].

74. Art. 29. [Such is also the norm in the USSR (USSR Rules, art. 23) and other COMECON countries. As an exception, Rumania (Rumanian Rules, art. 32) and Bulgaria (Bulgarian Rules, art. 30) do not allow public hearings. Under article 25(4) of the IACAC Rules, hearings shall be conducted *in camera*, unless the parties agree otherwise.]

75. Art. 30(1); [USSR Rules, art. 24(1)].

76. Art. 31; [USSR Rules, art. 28].

77. Art. 30 (2) and (3); [USSR Rules, arts. 24(2) and (3)].

78. Art. 33. [The USSR Rules (art. 27(4)) and those of other Eastern European coun-

cord of the hearing must be prepared in which, *inter alia*, a short description of the events that took place is included. The parties are entitled to receive a copy of the record and may request the insertion of amendments.<sup>79</sup>

Conciliation proceedings are expressly contemplated and can only take place with the parties' approval. The Court's Secretary, not the Tribunal, conducts conciliation proceedings, and he attempts to help the parties reach an agreement during the conciliation hearing.<sup>80</sup> The settlement reached by the parties during the arbitral proceedings has the same executive force as an award rendered by the Tribunal.<sup>81</sup>

## V. APPLICABLE LAW

The Law allows the parties to agree on the applicable legislation.<sup>82</sup> No "reasonable connection" nor any other restriction is mentioned. In the absence of a chosen legal system, the Court will apply substantive Cuban law. The Court's power to interpret or construe contractual clauses<sup>83</sup> should be exercised in accordance with commercial usage and custom.<sup>84</sup>

It is unclear whether the reference to substantive Cuban law

tries also adopted the system of free evaluation of proof.]

79. Art. 34; [USSR Rules, art. 29].

80. Arts. 42 and 43.

81. Art. 46. [The USSR Rules remain silent about conciliatory proceedings, and so do other Eastern European rules, with the exceptions of Bulgaria (Bulgarian Rules, art. 31), Czechoslovakia (Czech Rules, art. 47) and Hungary (Hungarian Rules, art. 37). The USSR Rules, however, briefly mention amicable settlements as a reason for terminating proceedings with a ruling instead of an award (art. 37(2)(b)). Such is the equivalent to the Cuban article 36(b). See *infra* note 93. Under the IACAC Rules, if the parties agree on a settlement before the award is made, the arbitral tribunal shall either issue an order for the termination of proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an award. IACAC Rules, art. 34(1).]

82. [This is a standard feature of Eastern European countries which extends to international contracts in general. The USSR, for instance, has adopted such a position in art. 566(1) of the RSFSR Civil Code. For an English translation see A.K.R. Kiralfy, in *The Soviet Codes of Law* 539 (W.B. Simons ed., 1980).]

83. [For a useful guide on how the Soviet tribunal deals with this issue, see M. Rozenberg, *Interpretation of Contracts in the FTAC Practice*, 2 FOREIGN TRADE, 39-42 (1981). See also IACAC Rules, art. 33(3), directing the tribunal to take into account "the usages of the trade applicable to the transaction."]

84. Art. 56 of the Law provides as follows:

The Arbitration Court shall settle disputes applying the norms of Cuban substantive law, interpreting the contractual clauses and taking also into account commercial usage and custom, without prejudice to the parties' right to agree on the norms that shall become applicable in deciding their disputes.

includes conflict rules.<sup>85</sup> Eastern European rules are not particularly biased toward their own legislation.<sup>86</sup> In abstract, there is no reason to automatically favor the *lex fori* in absence of a chosen law. Such, in fact, is the very attitude that international tribunals strive to avoid the appearance of bias.

Cuba's main sources of private international law can be found in its Civil Code which is the Spanish Civil Code of 1889.<sup>87</sup> This

85. Most international treaties governing international arbitration contain express guidance as to the applicable substantive law. [For example, the European Convention on International Commercial Arbitration of 1961, effective in Cuba since November 30, 1965, provides that "failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages." European Convention art. VII. Significantly, this Convention was specially designed for mixed Western-Eastern European cases. Under article 33(1) of the IACAC Rules, if the parties fail to designate the applicable law, the arbitral tribunal applies the law determined by the conflict of laws rules that it deems applicable. In view of all these conventions disallowing the direct applicability of the *lex fori*, one wonders why the Law still clings to Cuban substantive legislation as the second automatic option.]

It is, however, questionable whether the words "Cuban substantive law" (*normas de derecho sustantivo cubano*) refer not only to Cuban internal law but also to Cuban rules of private international law. Draft article XIX(2) of the UNCITRAL draft model law provides that failing any designation of the applicable law by the parties, the arbitral tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable." UNCITRAL Working Group, at 21. The recent tendency in international arbitration—as in domestic private international law—has been towards a grouping of contacts for determining the choice of law. See generally, J.D.M. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION. A STUDY IN COMMERCIAL ARBITRATION AWARDS* (1978).

86. Art. 12 of the USSR Rules establishes that:

The Foreign Trade Arbitration Commission shall settle disputes on the basis of the applicable rules of substantive law, being guided—if the dispute has arisen from contractual relations—by the provisions of the contract and having regard to trade usages.

A very similar concept is expressed in the Uniform Rules (art. 12) and in the respective Rules of Bulgaria (art. 9), Czechoslovakia (art. 13), the German Democratic Republic (art. 12) and Hungary (art. 12). The Polish Rules summarize, to a certain extent the prevalent position of the COMECON countries, stating that:

The Tribunal shall apply that country's law which has been chosen by agreement of the parties, and in absence of such choice, the law which in the opinion of the tribunal is most closely connected with the relation of the parties in litigation. The Tribunal shall take into consideration the principles of equity and of customs in so far as they are permitted by the proper law (art. 29, para. 1).

87. For English translations of the Spanish Civil Code, see FISHER, *THE CIVIL CODE OF SPAIN 1-685* (1930), or C.S. WALTON, *THE CIVIL LAW IN SPANISH AMERICA 121-472* (1900). The existence of a communist country with a "bourgeois" civil code is not so strange. The German Democratic Republic continued using the old German BGB until January 1, 1976. Cuba also retains the 1885 Spanish Commercial Code, which is particularly relevant to international transactions where Western Corporations are involved. By contrast, in transactions with other COMECON countries, the Cuban Commercial Code is superseded by special treaties and ancillary legislation. See Lisbonne, in *INTERNATIONAL ENCYCLOPEDIA OF*

code includes only a few, and very general, principles of private international law.<sup>88</sup> As to the applicable law which is to regulate the proceeding, the Law and the USSR Rules remain silent. Other Eastern European arbitration rules are more explicit, either establishing the tribunal's discretionary power,<sup>89</sup> or providing for the subsidiary applicability of the domestic civil procedural code and taking into account the clauses agreed to by the parties.<sup>90</sup> The Law's silence would allow the parties to determine procedural rules which the Law has not specifically contemplated. A case in point would be, for instance, the mechanism available to avoid deterioration of perishable goods during proceedings.<sup>91</sup> The rules of the Cuban Law on Civil, Administrative and Labor Procedure can be sub-

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COMPARATIVE LAW I-C99 (1979). There is an English translation of the Cuban Commercial Code, prepared by H.L. Lewis (Lewis Loose Leaf Law Service), which is undated. Another English translation of the Spanish Commercial Code can be found in 20 COMMERCIAL LAWS OF THE WORLD 1-32 (1979). This translation does not include Book Third (maritime law) and Book Fourth (bankruptcy), both of which are available in Lewis' version.

88. The most noticeable Cuban rules of private international law in business transactions are the following:

*Article 10.* Movable property is subject to the law of the owner's country; immovable property is subject to the laws of the country in which it is located.

*Article 11.* Forms and formalities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed.

When the instruments referred to are authorized by Cuban diplomatic or consular officials abroad, the formalities stipulated by Cuban laws shall be observed in executing them.

Despite the provisions of this and the preceding article, prohibitive laws concerning persons, and their acts or property, and laws protecting public policy and good moral customs, shall not be rendered inoperative by laws, judgments, provisions or agreements executed abroad. (Translated by Organization of American States, CIDIP-II, *General Rules of Private International Law*, at 39 (1977)).

Cuba has also adopted the Bustamante Code (1928 Havana Convention on Private International Law). For an English translation of the articles of this Convention most relevant to arbitration, see Associazione Italiana Per L'Arbitrato, MULTILATERAL CONVENTIONS AND OTHER INSTRUMENTS ON ARBITRATION, 205-11 (1974).

89. [Art. 12(2) of the East German Rules, for instance, provide that "the Arbitration Court applies to proceedings these Arbitration Court Rules. Otherwise the arbitration committee operates at its own discretion."] Article XV of the UNCITRAL draft model law confers upon the arbitral tribunal the power to adopt its own rules of evidence in case the parties fail to agree on the procedure to be followed. UNCITRAL Working Group, at 16.

90. [The Bulgarian Rules provide as follows: "The rules of the Bulgarian Code of Civil Procedure, inasmuch as they can be applied in view of the character of the arbitration proceedings, shall be valid for matters not regulated by the present Rules or by the respective arbitration agreement." (art 11).]

91. [The Inter-American Convention on International Commercial Arbitration expressly allows the parties to agree on the applicable procedural law or rules. Only in the absence of an express choice, "the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Arbitration Commission" (art. 3).]

siarily applied to arbitral proceedings.

## VI. THE AWARD

After the hearing, the rendering of an award or a ruling terminates the proceedings. An award is made when the dispute is decided on the merits, or when the parties request an award in accordance with an amicable settlement.<sup>92</sup> Proceedings may also be concluded without an award in certain cases specifically determined by the Law.<sup>93</sup>

A majority of the arbitrators determines the award; however, dissenting opinions must be recorded as well. If no majority opinion can be reached, the opinion of the presiding arbitrator shall prevail.<sup>94</sup> The award must be in writing, decide all the issues subject to dispute, state summarily the circumstances of the case and the reasons upon which the award is based.<sup>95</sup> The Law does not provide for the publication of the award, and in fact, the publication of arbitral awards is not customary in Cuba.<sup>96</sup>

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92. Art. 35; [USSR Rules, art. 31(1) and (2)].

93. Art. 36 of the Law provides as follows:

When no award is made, proceedings shall be terminated by a ruling.

The ruling shall be made:

- a) when the plaintiff withdraws his claim;
- b) when the parties reach a settlement that is confirmed by the Tribunal, without requesting an award as foreseen in the previous article;
- c) in the absence of the necessary elements to examine and to decide on the merits of the case; when proceedings remain stationary during six consecutive months due to the plaintiff's inactivity.
- d) when the plaintiff does not request reopening of proceedings during the month following the end of the stay ordered in accordance with Article 31;
- e) when the plaintiff, without correcting the defects of the claim, requests the continuation of proceedings.

The moment of termination of arbitral proceedings may be important in order to assert the continuation of the running of a limitation period or the possibility to institute legal proceedings before another forum on the same dispute. [See also USSR Rules, art. 37(1) and (2).]

94. Art. 38; [USSR Rules, art. 32(2)]. The USSR Rules do not grant any special power to the presiding arbitrator in the case of a draw. Article 31(2) of the IACAC Rules gives the deciding power to the presiding arbitrator, but only as to procedural questions]. Draft article XX(2) of the UNCITRAL draft model law also adopted the rule that questions of procedure, for the sake of expediency and efficiency, may be left to a presiding arbitrator, provided that the arbitral tribunal or the parties had authorized him to do so. The Working Group agreed that, once this authorization had been given, an individual decision on procedure should not be subject to revision by the arbitral tribunal. UNCITRAL Working Group, at 23.

95. Art. 39; [USSR Rules, art. 33].

96. See Garcini, *supra* note 1, at 28. [The Soviet rules also remain silent on this point. However, Soviet awards are regularly published and even translated by the Soviet Foreign

In principle, the resolute part of the award must be communicated immediately to the parties after the hearing, and a full version of the award must be sent to them within a period not exceeding thirty days after the award is rendered. The Tribunal may, however, choose not to announce the decision immediately after the hearing. Further, the Court may prolong the thirty day period to notify the parties of the full version of the award.<sup>97</sup>

Within thirty days after the award, either party may request a supplementary award if it appears that the award does not solve all the questions at issue. Before rendering the supplementary award, the Tribunal may decide to reopen the hearings and request the production of new evidence. A ruling of the Tribunal, either on its own initiative or at a party's request, may correct obvious clerical mistakes, such as misprints and arithmetical errors. Both the supplementary award and the ruling correcting clerical mistakes are deemed to be an integral part of the original award, and the parties are not responsible for the expenses connected with supplementing or rectifying the award.<sup>98</sup>

## VII. COSTS

A special provision of the Law authorizes the President of the Cuban Chamber of Commerce to issue a Schedule on Arbitration Fees, Costs of the Proceedings, and Costs of the Parties (the Schedule).<sup>99</sup> The Schedule, approved by Resolution No. 4 of July 5, 1976, provides for a set of regulations governing the computation and allotment of arbitration fees and costs. According to these regulations, there are three items which the parties must pay for: (1) arbitration fees, comprising also the remuneration of legal and clerical staff and expenses of clerical services; (2) costs of the proceedings, including sums to be paid to the interpreters, experts and witnesses, and arbitrator's traveling expenses; and (3) costs of the parties, comprising the expenses which the parties incurred in de-

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Trade Arbitration commission. For a private translation of many of such awards into English, see Butler, *supra* note 8. The rules of Bulgaria (art. 49(3)), The German Democratic Republic (art. 38) and Poland (art. 33) expressly admit the possibility of publishing awards. Under article 32(5) of the IACAC Rules, the award may be made public only with the consent of both parties.]

97. Art. 40; [USSR Rules, art. 34. The IACAC Rules do not provide for a fixed period within which the award must be rendered].

98. Art. 41; [USSR Rules, art. 35. IACAC Rules, arts. 36-7].

99. See Additional Provisions, following the end of the Law. [An equivalent schedule follows the USSR Rules.]

fending their interests before the Court (traveling expenses, lawyers' fees, etc.).<sup>100</sup>

Arbitration fees are structured on the basis of the amount of the claim and are assessed in accordance with the guidelines specified in the Schedule.<sup>101</sup> Although the statutory fee is expressed in transferable rubles, it must be paid in the currency in which the amount of the claim was expressed.<sup>102</sup> When a single arbitrator is chosen, the fee is reduced to 30%.<sup>103</sup> Arbitration fees and other expenses connected with the arbitral proceedings must be paid before the oral hearing takes place.<sup>104</sup> In fact, the claimant must prove that he paid the arbitration fee at the time he files the statement of claim.<sup>105</sup> In principle, fees are imposed on the losing party, and if the defeat is only partial, the fees are borne according to each party's respective degree of success.<sup>106</sup> The parties may agree, however, to a different way of allotting the arbitration fees.<sup>107</sup> The local party's payment of fees could then be used as one more bargaining point for the foreign party to agree to arbitration in Cuba.

The costs of the proceedings are apportioned in the same way as arbitration fees, but the party requiring the translations into a language other than Spanish bears such cost.<sup>108</sup> As to the costs of the parties, the Tribunal decides who shall finally pay for them.<sup>109</sup> The party who acts in bad faith, employs dilatory tactics, etc., may be made to bear the totality of fees and costs incurred by the other

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100. Schedule art. I; [USSR Rules, schedule art. 1. See IACAC Rules, art. 38].

101. The Schedule, art. II (2), states that the amount of the arbitration fees shall be determined according to the amount of the claim and graded according to a scale. The scale starts with a 3% fee on claims up to 10,000 rubles, and goes as low as 0.5% of whatever exceeds 200,000 rubles. [The Soviet schedule includes identical provisions (art. 2(3) and (4)).]

102. Schedule art. II(3); [USSR Rules, schedule, art. 2(2)].

103. Schedule art. III (1); [USSR Rules, schedule art. 3(1)].

104. Art. 47. [Neither the USSR Rules nor other Eastern European enactments includes an express equivalent provision.]

105. Art. 15(f); [USSR Rules, art. 14(2)(d)].

106. Schedule, art. III(2) and (6); [USSR Rules, schedule art. 3(2) and (6)]. See, for instance, the Soviet tribunal's ruling of December 15, 1977 in a case involving an Italian enterprise and a Soviet foreign trade organization, dealing with a partial refund of arbitration fees following a settlement and the subsequent withdrawal of the claim. An English account of the case can be found in V Y.B. COMMERCIAL ARB. 213 (1980).

107. Schedule art. V; [USSR Rules, schedule, art. 5].

108. Schedule art. VI (1); [USSR Rules, schedule, art. 6(1)].

109. Art. 48 and schedule, art. VII; [The USSR Rules, schedule, art. 7, differ in determining that the parties' expenses shall be borne individually. Accordingly, the Soviet tribunal, unlike the Cuban one, lacks in principle the power to decide otherwise].

party as a consequence of the acts of the former.<sup>110</sup> The schedules of fees and costs delineated in other Eastern enactments are almost identical.

### VIII. ENFORCEMENT OF THE AWARD

Awards are final and not subject to appeal of any kind. The arbitral rules direct the parties to comply voluntarily with the award within sixty days following its notification.<sup>111</sup> If the award is not complied with, the Court, either *ex officio* or at the request of any of the parties, shall inform the international and foreign Chambers and Organizations of Commerce about the lack of compliance.<sup>112</sup> Moreover, the prevailing party is entitled to request enforcement of the award before the People's Court of Havana since the award is considered to have the same force as a judgment rendered by a Cuban Court.<sup>113</sup> The People's Court may refuse to enforce the award if it deems the award to be contrary to public policy, or believes that it decides a dispute not covered by the arbitration agreement or passes judgment on an issue which has not been subject to discussions in the arbitral proceedings.<sup>114</sup> This public policy exception has no counterpart in any of the Eastern European arbitration rules and, more importantly, it is in direct contradiction with the supposed finality of the award expressed in article 50 of the Law.<sup>115</sup>

Awards rendered in other countries may be enforced in Cuba pursuant to the terms of applicable international treaties. If no treaty exists, such awards will be complied with according to the rules established by the law on Civil, Administrative and Labor

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110. Schedule, art. VIII; [USSR Rules, schedule, art. 8].

111. Art. 50, [USSR Rules, art. 36(1). As a minor exception among Eastern countries, the Czech Rules do not predetermine the period for compliance, leaving it to each individual award (art. 44). The Bulgarian rules provide that if no time limit is mentioned in the award, immediate compliance must follow. (art. 28(2)) A substantial exception is evident in Rumania, where awards "may be contested by the extraordinary way of a reexamination demand," based on certain limited grounds (Rumanian Rules, art. 37). Art. 32(2) of the IACAC Rules states that the award is final and the parties undertake to carry it out without delay].

112. Art. 51. [Except for Poland (Polish Rules, art. 34), none of the other Eastern rules includes a similar rule.]

113. Art. 52. [The USSR Rules state more broadly that "awards not carried out voluntarily within the period indicated shall be enforced according to law and international agreements". (art. 36, para. 2)].

114. Art. 52(3). [The USSR Rules lack any similar provision.]

115. See text accompanying note 110.



Procedure.<sup>116</sup>

On March 30, 1975, Cuba ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, dated June 10, 1958, also known as the U.N. Convention or as the New York Convention.<sup>117</sup> This Convention became effective in the United States on December 29, 1970<sup>118</sup> so that arbitral awards rendered in the United States are, at least theoretically, entitled to the benefits of the U.N. Convention in Cuba.<sup>119</sup>

## IX. CONCLUSION

The Law offers a clear system of international arbitration. Unfortunately, no reported decisions are available to illustrate how such rules are applied in practice. This lack of information, extensive to other legal areas, provides a strange contrast to the interna-

116. The Law on Civil, Administrative and Labor Procedure of 1977 rules the question of foreign judgments enforcement in article 483, which provides as follows:

Judgments of foreign courts, which are final in the country where they were rendered shall have in Cuba the force granted to them by treaties, and in absence of the latter, they shall be enforced as national (judgments), provided that the following requirements are met:

1. that it was rendered as a consequence of the filing of a personal cause of action.
2. that it was not rendered in the defendant's default.
3. that it relates to obligations that are licit according to Cuban law.
4. that the document incorporating the obligations is properly certified as to its authenticity in the country where it was issued, and that Cuban law is satisfied as to the requirements of authenticity needed in the national territory.
5. that the judgment is accompanied by a statement from the Ministry of Foreign Relations to the country where it was rendered, expressing that the authorities of such country shall enforce, as a matter of reciprocity, judgments rendered in Cuba.
6. that the Cuban address of the person condemned in the judgment is accurately indicated.

See Perez Suarez, *El Arbitraje en las relaciones comerciales internacionales*, 14 REVISTA CUBANA DE DERECHO 237 (1978). [To compare the different Soviet approach, see Kiralfy, A.K.R., *The Code of Civil Procedure of the R.S.F.S.R.*, art. 437, *supra* note 82, at 673.]

117. U.N. Doc. A/CN.9/68 (1979). Cuba joined the Convention with the reservation of enforcing only those awards rendered in another Contracting State, and provided that the award is to be considered as commercial under Cuban law. See Department of State, *TREATIES IN FORCE*, 201-02 (1982).

118. 21 U.S.T. 2517, T.I.A.S. No. 6997. The enabling legislation can be found in 9 U.S.C. §§ 201-08 (1976). [Other Eastern European countries party to the UN convention are Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the USSR.]

119. See Nattier, *Handling Disputes Outside the Inter-American Convention*, in *CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA* 125, 128 (S.T. Stairs ed., 1981).

tional notoriety that Cuba displays in world affairs.

The influence of Soviet and COMECON law is overwhelming. The few instances where departures from the Soviet model are noticeable are in some aspects of the applicable law,<sup>120</sup> conciliatory proceedings,<sup>121</sup> enforcement of the award,<sup>122</sup> decision in case of a draw<sup>123</sup> and payment of costs.<sup>124</sup> Latin American law plays a less noticeable role because, unlike the Soviet case, its statutory influence is remarkably small. A Latin American approach could, however, set the tone of issues such as substantiation of evidence and the general attitudes towards the decision-making process prevailing in a civil law jurisdiction.<sup>125</sup>

Casting a general and retrospective glance, it seems that the preference for the *lex fori*<sup>126</sup> and the public policy exception to the enforcement of the awards<sup>127</sup> are the two most objectionable sections of the Law. On the other hand, the flexibility the Tribunal enjoys in imposing costs and expenses to the defeated party<sup>128</sup> deserves praise.

From an entirely practical point of view, the following should be born in mind. One's own system of private international law would not be an important guideline for the Tribunal. Consequently, stating the applicable law, in writing, becomes overwhelmingly important. When lack of time is the problem, postponements can be sought, either to answer the claim,<sup>129</sup> or in relation to the hearing.<sup>130</sup> Nothing would prevent the parties from agreeing beforehand to accept the postponement the other party requests. The non-Cuban party could resort to this method as a way of neutralizing, in part, the disadvantage of litigating abroad. Furthermore, the plaintiff should be extremely careful to avoid the lapsing of his action. This is not an uncommon way for the case to end.<sup>131</sup>

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120. See note 86 and accompanying text.

121. See note 81 and accompanying text.

122. See note 114 and accompanying text.

123. See note 94 and accompanying text.

124. See note 109 and accompanying text.

125. See note 13 and accompanying text.

126. See note 85 and accompanying text.

127. See note 114 and accompanying text.

128. See note 109 and accompanying text.

129. Art. 20 of the law states that "the defendant can, before the time to answer runs out, request a postponement by alleging just cause."

130. See note 76 and accompanying text.

131. See art. 36(ch) and (d), translated in note 93. [For a Soviet case bearing on this issue, see the ruling of February 1, 1977, in V Y.B. COMMERCIAL ARB. 212 (1980).]

Finally, it is sobering to recall that Cuban lawyers, through intense practice, are likely to be good arbitration strategists. This is because Cuba, as other COMECON countries, has a system of administrative or State arbitration<sup>132</sup> that replaces judicial litigation in matters related to commercial disputes between state enterprises.

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132. Decree Law No. 10 of December 12, 1977, Decree 23 of July 3, 1978, and Decree No. 46 of September 18, 1978, cited and discussed in Vega Vega and Reyes Saliá, *supra* note 16.