LEGAL ASPECTS OF SOVIET-JAPANESE TRADE

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I

LEGAL STATUS OF SOVIET FOREIGN TRADE ORGANIZATIONS

Soviet-Japanese trade conforms to the general pattern of trade between Western industrial countries and the Soviet Union. The Soviets buy machinery and equipment, manufactured goods, and chemicals from Japan, while they export mainly raw materials and fuels, such as timber, cotton, oil, coal, and the like. Japan is now the U.S.S.R.'s largest non-communist trading partner.[1]

In the Soviet Union the state has a monopoly on trade; it is guided by five-year and one-year foreign trade plans which are an integral part of the national economic plan. In the case of Soviet-Japanese trade this monopoly operates in the same manner as it does in the case of Soviet trade with other Western countries. The actual purchase of foreign goods and the sale of Soviet products abroad is handled exclusively by the specialized Foreign Trade Organizations (FTO's), juridically independent entities under the general control of the Foreign Trade Ministry.[2] An important role in foreign trade operations in the Soviet Union belongs to the Foreign Trade Bank which finances individual contracts with Japanese firms. Neither the FTO's nor the Foreign Trade Bank are permitted to open branch offices in Japan. Contracts with Japanese firms are made through the Trade Representative (a member of the Soviet diplomatic mission in Tokyo) acting either as a negotiator for an FTO or signing contracts for them on the basis of powers granted by the FTO involved. Contracts for less than 400,000 rubles may be signed by the Trade Representative alone; no special authorization is required. For contracts in amounts exceeding 400,000 rubles the signing must be made on a case by case basis by the Deputy-Representative as well as the Trade Representative. Neither the Soviet Union nor Japan has agreed to allow their trading organizations to establish branch offices in their respective countries for the purpose of foreign trade. As a result, FTO's have to make contracts through the Soviet Trade Representative, and Japanese firms are able to maintain only liaison personnel in the Soviet Union.[3]

Soviet-Japanese trade is handled on the basis of individual transactions within

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[1] BUSINESS INTERNATIONAL, DOING BUSINESS WITH THE U.S.S.R.—A GUIDE FOR WESTERN CORPORATIONS 38 (1971).

[2] *Id.* at 49.

[3] In order to do business in Soviet territory, special authorization by the Minister of Foreign Trade is required; such authorization is not needed for conducting negotiations or making transactions (Decree of the Central Executive Committee and the Council of People's Commissars of March 11, 1971). *See* Ramzaitsev, *La Jurisprudence en matière de droit international privé de la Commission arbitrale sovietique pour le commerce exterieur*, 1958 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 464, 495.

the framework of the trade and payments agreement.[4] No Soviet-Japanese business transaction has ever been made in the name of the Soviet Representative, that is, on behalf of the Soviet government, despite the fact that the Agreement on the Legal Status of Trade Representatives (appended to the Treaty of Commerce between Japan and the U.S.S.R. which was concluded in 1957) grants that authority to him.[5] This is in keeping with the general Soviet practice.[6]

Soviet-Japanese trade is a business activity involving corporations and entities of the two countries. The nationality of these entities and their legal status is of great importance. The Soviet Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce applies the theory of incorporation to determine nationality, legal status, and capacity to make foreign trade transactions in an equal manner to both the Soviet FTO's and the Japanese firms engaged in trade with the Soviet Union. Japanese law is somewhat different.

In this area of legislation two approaches may be noticed. The Anglo-American approach relies primarily on the incorporation theory: nationality and legal capacity are determined by the law of the country of incorporation. In contrast, the Franco-German doctrine relies on domicile. Under this theory, a distinction is drawn between administrative domicile and real domicile. Real domicile locates the corporation in the country of its main business activity. Thus, a corporation incorporated in the country of administrative domicile may be deprived of legal capacity if its administrative center is not the same as its center of business activity. Should the country of industrial activity differ from the country of the administrative seat (*siège réel* distinguished from *siège administratif*) of the corporation, it may be denied the right to sue or be sued in a competent court.

It appears that Japanese law has adopted, in principle, the Anglo-American solution with a safeguard against undue intrusion by foreign corporations; a company which establishes its principal office in Japan or the chief object of which is to carry on business in Japan, even though incorporated in a foreign country, must comply with the same provisions as a company incorporated in Japan (article 482 of the Commercial Code of Japan). Most of the foreign corporations which follow this procedure have been Delaware corporations.

Recently, a Soviet-Japanese joint venture, a shipping and brokerage agency which is the first of its type in the economic cooperation of the two countries, was in-

[4] Under the Japanese Commercial Code, when a foreign company intends to do business in Japan, it is sufficient to appoint a representative in Japan and establish an office at the residence of this representative or at any other place designated by him, register these facts, and give public notice thereof (section 479 of the Code). However, in view of the fact that FTO's are state trade monopoly corporations, a special act or regulation is thought to be necessary for the purpose of permitting FTO's to do business in Japan. Incidentally, a recent request by the Soviet Foreign Trade Bank to open a branch in Tokyo in view of the increasing transactions between the two countries was rejected by the Minister of Finance on the ground of reciprocity.

[5] Under this Agreement, the Trade Representative and two Deputies enjoy all the diplomatic privileges and immunities.

[6] Ramzaitsev, *The Application of Private International Law in Soviet Foreign Trade Practice*, 1961 J. BUS. L. 343, 345 n. 1.

corporated under Japanese law.[7] It may be presumed that it also complied with the requirements of the Soviet law and qualifies as a corporate body in Soviet courts and before the Arbitration Commission.

II

THE MOST-FAVORED-NATION CLAUSE

The most-favored-nation clause is a keystone of Soviet-Japanese trade. In contrast with the U.S. policy regarding the clause and Soviet trade, Soviet-Japanese trade was marked by the reciprocal recognition of this clause to the fullest extent from the very beginning of the resumption of trade after World War II. Resumption of trade on the basis of the most-favored-nation clause was arranged in two international agreements: the Joint Japanese-Soviet Communique and the Protocol on the Promotion of Trade and Reciprocal Granting of the Most-Favored-Nation Clause. Both of these agreements came into force on the same day, December 12, 1956.

Article 7 of the Joint Communique also directed that Japan and the U.S.S.R. begin to negotiate a treaty or protocol of commerce and navigation. The Treaty of Commerce, concluded the following year on December 6, 1957, and effective on May 9, 1958, defined the most-favored-nation clause in broad terms.[8] It included trade and tariffs, navigation, access to port and dock facilities, and access to courts and other tribunals. In view of the generally negative attitude prevailing at that time in the U.S. and other Western industrial countries toward granting most-favored-nation treatment to the U.S.S.R. and other planned economy countries, this was an unusual step. It was based on the conviction that the foreign trade of planned economy countries is an integral part of foreign policy and is directed by political rather than purely commercial considerations.

The most conspicuous distinction between capitalist and socialist systems is that the former conduct foreign trade by private enterprises and the latter, by the state monopoly—even though the domestic fields in some countries are more or less nationalized "mixed economy systems." It is argued that state trading can fully penetrate the market of the free enterprise system under the umbrella of the most-favored-nation clause, whereas this clause is of little benefit to the free enterprise in the planned economy system. As a result of this view almost all West European countries were opposed to the unconditional granting of the most-favored-nation clause to the socialist countries at the 1957 Conference held under the auspices of the U.N. Economic Commission for Europe (ECE) aiming at an All-European Agreement of Economic Cooperation. After this failure, the Conference of the International Association of Legal Science, held in 1958 under the auspices of the

[7] Ramzaitsev, *supra* note 3, at 463-64; Ramzaitsev, *supra* note 6, at 345-46.

[8] 325 U.N.T.S. 35. The Annex deals with the status of the Soviet Trade Representation in Japan. The Exchange of Notes concerns the reopening of navigation. The Annex is on file in the Ministry of Foreign Affairs of Japan.

UNESCO, reevaluated the clause as its operates in relations between market and planned economy countries in terms of equal legal treatment. The Conference examined access to courts or other tribunals of the host country, availability of travel visas, and availability of fair and exhibition opportunities. General trade agreements, such as GATT, based on the most-favored-nation clause are likely to remain limited to states that share at least a minimum of common principles in the conduct of trade.[9]

Because of the dichotomy in economic principles between the two countries, there was some hesitation in Japanese governmental and business circles as to extending most-favored-nation status to the U.S.S.R. Formation of a consortium of Japanese firms for the purpose of balancing their bargaining power against the gigantic Soviet state monopoly was seriously discussed in some quarters. However, in practice, Japanese firms have maintained a fully competitive market in relation to Soviet state trading, despite the considerable disadvantages the individual firms suffer at the bargaining table.

Contract negotiation with Soviet representatives of the trading organizations is usually a hard and tough proposition. Soviets are generally skilled and shrewd negotiators, expert in exploiting the competition existing in free market countries.[10] Soviet officials use standard form contracts, drawn up in advance and difficult to modify. They are usually hesitant to agree to any changes of the terms, as they would require approval by higher authorities, which is a complicated and time consuming process.[11]

Nevertheless, not all advantages in contract negotiation lie with the Soviets. Japanese firms are in a stronger position as regards contracts concerning the purchase and installation of highly complicated technical equipment (turnkey contracts) and those dealing with the export of chemical products. Such contracts usually take a long time to make. Soviet experts and technicians in end-uses of the imported products have to assist Trade Representative officials who are not always able to manage the entire process of negotiations. Contracting with Soviet buyers

[9] E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 31, 36 (2d ed. 1960). As far as a general principle of recognition of foreign organizations in Japan is concerned, the Japanese Civil Code provides in section 36 that with the exception of states, administrative divisions of states and business organizations, the existence of foreign juristic persons shall not be recognized. However, this does not apply to such juristic persons as are recognized in accordance with the provisions of the preceding paragraph. They shall enjoy the same private rights as juristic persons of the same classes formed in Japan; but this shall not apply to rights from which aliens are excluded or to those in respect of which different provisions are made in laws or treaties. The reciprocal recognition of FTO's in Japanese territory and of Japanese firms in U.S.S.R. territory is explicitly prescribed in section 12 of the Soviet-Japanese Treaty of Commerce.

[10] With regard to assessment of the most-favored-nation clause in the case of trade with planned economy systems, see W. FRIEDMANN, CHANGING STRUCTURE OF INTERNATIONAL LAW 352-56 (1964), and S. PISAR, COEXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST 195-98, 486 (1970).

[11] David, L'Arbitrage commercial international Conference à L'université de Téhran, 55-56 (mimeo, 1967). Dr. Pisar seems rather to emphasize the socialist tendency of strict observance of law. They do not want their decisions to appear arbitrary in terms of Marxist-Leninist "equity." PISAR, *supra* note 10, at 419. *See also* 1958 REVUE DE L'ARBITRAGE 7-8.

is frequently encumbered by the requirement of free training of Soviet technicians in Japanese firms, as is also the case with other Western industrial countries.[12] The Soviets insist on the lifting of restrictions concerning the presence of Soviet technical personnel in Japan which, again, is not covered by the most-favored-nation clause and depends on the reciprocity available in the U.S.S.R.

Generally speaking, the individual firms of free market economy countries are necessarily placed in a passive position in dealing with the Soviet state trading organizations. It must be realized that FTO's are merely foreign traders. Japanese firms have no contact with the consumers or end-users in the Soviet economy. Consequently, it is very difficult to gauge the capacity of the Soviet market, and it is impossible to stimulate the demand for Japanese goods in the Soviet Union.[13] The only method of advertising foreign goods in the Soviet Union is through the trade fairs held under the auspices of the U.S.S.R. Chamber of Commerce.[14] There appears to be no choice other than to gear exports to the five-year or one-year plan of trade agreements imposed by the Soviets.

In this connection the following factor should not be overlooked: FTO's are independent, juristic persons. Therefore, each individual FTO must keep a balance between imports and exports; this contributes to restricting the volume of transactions. To stimulate trade, private firms of a specific free market country have to buy Soviet goods in order to sell their own products.

III

TRADE AND PAYMENT

The first trade and payment agreement was signed in Tokyo on December 12, 1957, taking effect immediately. It was followed by a series of agreements covering the following periods: 1960-62; 1963-65; 1966-70; and, concurrently, the agreement covering the period of 1971-75. The latest agreement, signed in Tokyo on September 22, 1971, merely lists the names of commodities but leaves the quantity of goods to be exchanged open.[15] This seems to indicate a growing confidence between the parties.

The first agreement provided that payments be made in "Pound Sterling." However, this formula has not been used in practice so far, and individual contracts provide that payment be made in dollars. Therefore, pound sterling is called "the currency of the agreement" and the dollar is called "the currency of the contract."

A. Terms of the Contract

Contracts usually are made on C.I.F. or F.O.B. terms. It might seem that the *jus gentium* of international commerce is being adjusted in socialist commerce. However, not a few deviations from the traditional concept of *lex mercatoria*

[12] BUSINESS INTERNATIONAL, *supra* note 1, at 80, 85.

[13] *Id.* at 80.

[14] *Id.* at 59.

[15] Not registered at the U.N.; File No. 2083 of the Japanese Ministry of Foreign Affairs.

prevalent among Western industrial countries can be detected in Soviet trade practices. Whether by F.O.B. or by C.I.F., the risk passes to the buyer at the loading port. Therefore, the inspection certificate issued by the appropriate authority in the country where the place of loading is located is usually final, unless otherwise provided in the contract. However, the Soviet practice shows that inspection certificates issued by the Soviet authority or some other authority which the Soviets appoint is thought to be final, regardless of whether the Soviet port is the loading or landing place. In case the Soviets import complicated machinery or equipment, Soviet experts and technicians representing the end-users participate in the negotiation of the contract and inspect the machinery and equipment on the spot.

Both the maker and the trading firm are contractors in a transaction with a Soviet FTO. They may be contractors or subcontractors depending upon circumstances. As far as the guarantee of performance is concerned, Soviet FTO's require stronger guarantees than are customary in international business.[16] Frequently long and rigorous negotiation is required before a mutually acceptable solution is found. Therefore, in presenting a preliminary proposal a two or three year delay can be anticipated, particularly so because of Soviet insistence on outlining the guarantee of performance stipulation in great detail. Soviet partners insist on rigid and literal adherence to this stipulation. If a superior quality material is substituted for an inferior commodity, with a corresponding reduction in weight, the Soviet partner will insist on the payment of a penalty for non-performance according to the terms of the contract. The guarantee period varies according to the product; for machinery and equipment it usually runs no longer than twelve to eighteen months. It is important to determine clearly when the guarantee period is to begin. For machinery it should be the date of delivery or arrival in the Soviet port and not the date when actual operation begins since there may be considerable delay before the equipment is put into operation at the end-user's plant.

Provision should be made in the contract for every contingency; otherwise, the foreign partner of a Soviet FTO may find itself facing a non-performance penalty demand. Specific mention should be made of such things as the expiration date for the guarantee period, the delivery of spare parts during or after the guarantee period, and the method of their shipment. Other important matters are to provide the buyer with instructions on maintenance and operation of the equipment for Soviet workers and to provide expressly that the cost of repairs be borne by the Soviet buyer should the equipment or machinery be damaged through misuse or inexpert handling by the Soviet workers. This last point represents an issue on which the Soviets will concede only after much negotiation. Soviet policy is to insist on the training of Soviet technicians or workers in the use of the equipment by the supplier. It is important to specify at whose cost this is to be done, how it will be done, and in which location.

[16] BUSINESS INTERNATIONAL, *supra* note 1, at 86-87. The report describes correctly Soviet trade practice, including Soviet-Japanese trade with regard to guarantees and other details.

According to Soviet law the contract must be in writing. Oral stipulations, not reduced to writing, are not valid. The legal theory behind this doctrine is that FTO's are in charge of the government monopoly of foreign trade, which as a sovereign function[17] is an aspect of international relations between the U.S.S.R. and any other country.[18] It is noted, however, that the writing requirement may be met by a telegram accepting a contract negotiated by correspondence.

The meaning of "Act of God" is a controversial issue arising in trade relations with Soviet partners. Commonly, in international trade strikes or sabotage are considered circumstances excusing non-performance. At the same time, a government ban on the export of certain items or a refusal to issue an export license are not considered to be in the same category unless it is expressly so stipulated in the contract. The Soviet view on the matter is quite the opposite, as illustrated by the Israeli-Soviet Oil Arbitration case decided by the Moscow Foreign Arbitration Commission, a decision widely criticized by Western experts.[19] However, these deviations from the internationally accepted standards are inevitable in transactions with state trading organizations.[20]

B. Method of Payment

As far as payment is concerned, usually a letter of credit in dollars against acceptance of a draft is issued. The Soviet Foreign Trade Bank (FTB) has twelve correspondents in Japan including the Bank of Japan, the Bank of Tokyo, and other leading banks authorized to handle foreign exchange transactions. At present, the FTB is not permitted to open a branch office in Japan on the grounds that reciprocity is lacking.

In the case of Soviet imports from Japan, the FTO asks the FTB to issue a letter of credit. The FTB is an issuing bank and its correspondent in Japan, for example the Bank of Tokyo, is appointed as an advising bank which conveys this information to the Japanese firm (beneficiary). The same method is followed in the case of Japanese imports from the Soviet Union except that a letter of credit is issued by a Japanese bank. Usually, the FTB does not ask the advising bank or another Japanese bank to make a confirmation. It avoids charging the confirmation fee to its own account. This procedure is quite understandable in view of the fact that the FTB as well as the FTO does not assume the risk of non-payment. They are all state trading agencies. However, long-term credit transactions, such as the sale of a plant complex, are another matter. In such a case, a letter of guarantee is usually issued by the FTB.

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[17] Ramzaitsev, *supra* note 6, at 344.

[18] Ramzaitsev, *supra* note 3, at 465.

[19] Domke, *The Israeli-Soviet Oil Arbitration*, 53 AM. J. INT'L L. 787, 793 (1952). *See also* Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investment Ltd. v. Soiuznefteskport*, 73 HARV. L. REV. 1128 (1960); Robert, *Observations sur une sentence arbitrale internationale*, 1960 REVUE DE L'ARBITRAGE 76; Sassoon, *The Soviet-Israeli Oil Arbitration*, 1959 J. BUS. L. 116, 132.

[20] PISAR, *supra* note 10, at 518.

Another form of payment which is gradually gaining acceptance in Soviet-Japanese trade is "cash against document" (Incasso) which is prevalent among COMECON countries. With this method neither letters of credit nor drafts are issued. The buyer promises to pay sometime (40-50 days) after the receipt of documents. On that promise the FTB makes the payment and a promissory note is issued. Whether the letter of credit or the cash against document method is used, the ultimate settlement between the FTO and a Japanese firm is made between the FTB and a Japanse bank by entering debit or credit in the dollar accounts.

IV

SETTLEMENT OF DISPUTES AND COMMERCIAL ARBITRATION

As a matter of course, socialist countries prefer arbitration for settling trade disputes internally as well as internationally. Especially in international transactions, arbitration can dispense with the troublesome problem of sovereign immunity in view of the fact that FTO's are state agencies. This author is of the opinion that one of the reasons why socialist countries prefer arbitration to courts of justice is that under Marxist-Leninist law the state is to ultimately wither away;[21] therefore, socialist governments seem to hesitate to stress "the rule of law" which Western civilization underlines as its essential characteristic.[22]

A. Provisions for Arbitration

On April 30, 1956, an agreement between the U.S.S.R. Chamber of Commerce and the Japanese Commercial Arbitration Association was signed in Tokyo in anticipation of the conclusion of the Treaty of Commerce and the first Agreement of Trade and Payment.[23] Both of these agreements encouraged resort to arbitration for settling trade disputes, in preference to courts of justice, and promised reciprocal recognition and enforcement of arbitration awards rendered in the respective countries. Under the Arbitration Agreement mentioned above, the U.S.S.R. Chamber of Commerce and the Japanese Commercial Arbitration Association agreed to advise the FTO's and Japanese firms to insert arbitration clauses in their contracts. Arbitration is to take place at the permanent arbitral tribunal of the country of the defendant, following its rules of arbitral procedure. The award is final and binding between the parties. Following this advice, contracts between an FTO and a Japanese firm usually contain an arbitration clause stipulating the place of arbitration as described above. Thus far, there has been no arbitration case in Soviet-Japanese trade; all disputes have been settled amicably out of court.

The Soviet Foreign Trade Arbitration Commission has a high reputation for impartiality even though it is a semi-governmental body whose members are all Soviet citizens. Generally speaking, the foreign trade arbitration tribunals of East European countries do not stick rigidly to the rules of law in settling trade disputes.

[21] *Id.* at Introduction and *passim*.

[22] FRIEDMANN, *supra* note 10, at 343-46.

[23] Text in the files of the Japanese Commercial Arbitration Association.

Their attitude is quite flexible, taking into consideration equity or general principles of law and international customs which are deemed applicable under the circumstances. It would not be misleading to say that they are more flexible than the French amiable composition. One of the best examples of the attitude of socialist commercial arbitrators is the "Polish rule": arbitrators shall decide in accordance with their best knowledge and conscience, taking into account commercial customs relative to the dispute concerned and principles of good faith and equity.[24]

B. Choice of Law

The Soviet Foreign Trade Arbitration Commission puts emphasis on the laws in force. Its rules of arbitral procedure provide that arbitrators shall decide in accordance with Soviet rules of private international law, that is, conflict of law rules. The general opinion of experts seems to indicate that the choice of law clause is of prime importance in contracts with Soviet FTO's. In the absence of any indication by the parties to the contract, the law of the country where the contract was concluded shall be applicable. It is to be noted, however, that the terms of contracts and customs of international commerce are usually taken fully into account.[25] Therefore, the Soviet Foreign Trade Arbitration Commission is somewhat flexible in its decisions. Arbitrators are free to apply the law which seems to be appropriate, including customs of international commerce.[26] Awards of the Soviet Foreign Trade Arbitration Commission contain written accounts of the reasons underlying the decision. Soviet, Bulgarian, and Rumanian rules of arbitral procedure provide that awards are final and that no appeal lies to other tribunals or courts of justice.[27]

As far as the Soviet-Japanese contracts are concerned, the choice of law clause has not been used, at least to this author's knowledge. As regards the place of the contract, the president of the FTO concerned comes to Tokyo and signs the contract there. In that case, the location of the contract is Tokyo and the applicable law is Japanese law. Conversely, in the case of Japanese exports (plants, machinery, chemical products) the president or other representative of the Japanese firm concerned goes to Moscow and signs the contract. Therefore, the applicable law is Soviet law. Even after everything was settled in Moscow, there have been several cases where the president of the FTO concerned came to Japan merely to sign in an effort to promote friendly relations.

When contracts are negotiated by correspondence, the place of conclusion is deemed to be the place from which the offer emanates,[28] in other words, the place

[24] David, *Existe-t-il un droit occidental*, in 20TH CENTURY COMPARATIVE AND CONFLICT LAWS IN HONOR OF HESSEL E. YNTEMA 56 (1961). *See* Tol, *Le depassement du droit et les systémes de droit contemporains*, 1963 ARCHIVES DE PHILOSPHIE DE DROIT.

[25] Benjamin, *Aperçu des institutions arbitrales de l'Europe de l'Est qui exercent une activité dans le domaine de l'arbitrage commercial international*, 1957 REVUE DE L'ARBITRAGE 114; 1958 REVUE DE L'ARBITRAGE 2, 6-7.

[26] 1958 REVUE DE L'ARBITRAGE 2, 7.

[27] A general survey of Soviet foreign trade arbitration is furnished by Ramzaitsev in his two articles mentioned above. Ramzaitsev, *supra* note 3, at 459; Ramzaitsev, *supra* note 6, at 343.

[28] Ramzaitsev, *supra* note 6, at 348.

where an offeror received the telegram of acceptance.[29] Presented with a contract proposal from the other side, the Soviet FTO answers by a counter-offer which usually reads as follows, "Referring to your offer of ——— we place with you, with the exception of stipulations contrary to the present, the following order, etc."[30] In effect, Western firms are ultimately forced to send acceptance by telegram as shown by a number of cases decided by the Moscow Foreign Trade Arbitration Tribunal.[31] One of the stipulations contained in the standard form contract invariably used by the Soviets is that the place of conclusion is Moscow and that Soviet law will apply.

Under the rules of the Japanese Commercial Arbitration Association the arbitrators are not bound by strict rules of law; in principle they can decide in accordance with natural justice, taking into account the terms of the contract and customs of international commerce. It goes without saying that they are not bound by conflict of laws like the ordinary Japanese court of justice. In this respect, Japanese arbitral law contained in the Code of Civil Procedure (sections 786-805) follows the liberal and modern provisions of the German Code of Civil Procedure, which became a part of the Japanese legal system.

Rules of Japanese Arbitral Procedure adopted by the Japanese Commercial Arbitration Association were modelled after the rules of the American Commercial Arbitration Association, with which the Japanese Association has a joint arbitration agreement providing an interesting method for the resolution of the preliminary question regarding the place and the country of arbitration when this point has not been resolved in the arbitration clause between the parties. Absent agreement, a committee consisting of three members, one American, one Japanese, and one from a third country, choose the place of arbitration.

In contrast with the Soviet Foreign Trade Arbitration Commission, the Japanese panel includes many foreign arbitrators. With the consent of the parties the award may be rendered without a formal statement of reasons, although in practice the parties always require written reasons for the tribunal's decision. Unless the parties expressly stipulate otherwise in the arbitration clause, error in law does not affect the validity of the arbitral award.[32] Parties may attack the arbitral award in

[29] Ramzaitsev, *supra* note 3, at 469-70. Under the Japanese conflicts rule concerning this issue, the solution is the same as the Soviet one. The formulation and effect of the contract by correspondence is governed by the law of the place from which the offer emanates. The habitual residence of the offeror is deemed to be the place of emanation if the offeror did not know the place of emanation when he sent his acceptance (*Horei*, § 9). *Horei* contains provisions about general rules, sources of law, and conflict of laws rules.

[30] BUSINESS INTERNATIONAL, *supra* note 1, at 85.

[31] *Id.*

[32] The Japanese arbitration law with regard to this issue follows lines similar to the text of section 30 of the Draft Uniform Law on Arbitration in Respect of International Relations of Private Law which was drawn up by the International Institute for the Unification of Private Law (the last draft being amended by the Legal Committee of the Consultative Assembly of the Council of Europe, December 18, 1957).

Section 30 provides that the award shall also be set aside if the arbitrators have not observed the rules of law when the parties have expressly agreed that the arbitrators should observe the rules of law, on pain of the award being set aside.

courts of justice for reasons of serious violation of procedural rules, especially the principle of impartiality or the denial of the right of defense.

V

NAVIGATION AND AVIATION

A. Shipping Agreements

The normalization of navigation between the Soviets and the Japanese after the end of World War II was initiated by the Joint Communique issued on December 6, 1957, the same day that the Treaty of Commerce was signed. This Communique provided that the Soviet and Japanese governments open a regular line between both countries for the purpose of promoting and fostering trade. To implement this agreement, the Japanese shipping companies and the Soviet shipping organizations which run this service shall negotiate a mutual understanding fixing tariffs and schedules and designating agencies and other indispensable commercial matters relating to the establishment of a regular line. Other matters were to be dealt with in an agreement between the governments concerned.

On June 3, 1958, an agreement between the Japanese and Soviet shipping organizations was reached. It established a regular service between the Japanese and Soviet (Jokohama-Nakhodka) ports. It was engineered by the Japan-Nakhodka Line (J.N.L.) which is a Japanese conference composed of Yamashita (presently Shinnihon) Steamship Co. Ltd., IINO Steamship Co. Ltd., and Kawasaki Steamship Co. Ltd., and the Soviet's Far Eastern Steamship Co. (FESCO).[33] According to the agreement both sides participate in this service on an equal basis, assigning two vessels each month respectively. In case cargoes exceed the capacities of the assigned vessels, the Soviet vessels are added on the ground that the Japanese shipping may enter Nahodka only, a port with a limited capacity and not large enough to accommodate many vessels at the same time, while Soviet vessels have other ports at their disposal. In addition, the Odessa line (Yokohama-Odessa) was opened. On this service the Soviet vessels are exclusively assigned on the ground that such a line cannot be run on a purely commercial basis.

The regularly scheduled ships mainly handle ordinary cargoes, including machines, chemical products, and other similar commodities. Bulk cargoes such as timber, fuel, or oil are shipped on tramps. The passenger traffic is served exclusively by Soviet vessels on the ground that such service is not a commercial proposition. The most-favored-nation treatment is reciprocally recognized in the ports of both countries.

All disputes relative to running this line are to be amicably settled. The tariff rate is fixed by agreement between the J.N.L. and the Sovfracht (All Union Charter Corporation). All other matters concerning the line, such as the change of stop-over ports and tariff rates, are to be handled by J.N.L. and the Sovfracht on

[33] SURVEY OF SOVIET-JAPANESE TRADE 273-83 (1959).

behalf of the FESCO. A conference between J.N.L. and Sovfracht is held each year. The agency for the J.N.L. vessels is performed by Sovinflot (All Union Foreign Agency Organization), the general function of which is the performance of agency in Soviet territory for foreign shipping companies and the supervision of Soviet agencies abroad.

As already mentioned, the J.N.L. is something like a conference; this is noteworthy in view of the usual Soviet insistence on exploiting market competition between Japanese firms in other areas of trade. That the formation of such a shipping conference was allowed in the regular service is thought to be a result of the fact that Soviet export is on C.I.F. and the import on F.O.B. terms, thus the assignment of vessels is consistently under the Soviet control. In other words, the Japanese merely handle cargoes allocated by the Soviets, as there is no competition between the shipping lines involved. In such circumstances the conference is a rather useful instrument. Its main function is to allocate the Japanese share of cargoes among the Japanese lines involved and to represent joint Japanese interests vis-à-vis FESCO. In this situation there is no need for an arbitration clause. The Shipping Agreement of 1958 was concluded between the U.S.S.R. Foreign Maritime Commission and the Japanese Shipping Exchange, and no arbitration agreement has been made.

The Japanese Shipping Exchange (originally the Kobe Shipping Exchange) was established for the purpose of resolving disputes arising from domestic shipping transactions, mainly from charter parties. This is the oldest permanent arbitral tribunal in Japan. The reason that only the Shipping Exchange has established a firm foundation in Japan is quite interesting from the comparative law angle.[34] While maritime law is based on the Continental Code, maritime practice from the very beginning has been based on English business practice. Because of this divergence, shipping circles in Kobe established their own tribunal, side-stepping the ordinary courts of justice where the Franco-German modelled Commercial Code is applied. The Exchange regards this tribunal as its own court. Awards are elaborately worked out in writing and are published in a manner similar to court decisions. The Shipping Exchange is gradually expanding its jurisdiction to include international maritime transactions.

In 1969 the United Orient Shipping and Agency Co. Ltd. (UNIORIENT), a Soviet-Japanese 50/50 joint venture, was established. It is the first and the only Soviet-Japanese organization of this type. Its purpose is to provide shipping agency and brokerage for the Soviet shipping companies in Japan covering all fields other than the business of the Soviet-Japanese regular line. Under the agency agreement of 1969, all disputes arising between the Soviet owners and UNIORIENT are to be referred for arbitration in the country of the respondent in accordance with the arbitration law and procedure prevailing in that country (article XII).

[34] Kitagawa, *Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective*, 1967 LIBER AMERICORUM 133, 134-35; Kitagawa, *Commercial Arbitration and Practice in Japan*, 1968 JAPANESE ANNUAL OF INT'L L. 59, 65.

B. Air Traffic

The regular air traffic service between the U.S.S.R. and Japan is based on the Air Service Agreement between the U.S.S.R. and the Japanese government signed on January 21, 1966, in Moscow (in force since March 3, 1967).[35] This agreement followed the International Civil Aviation Organization (ICAO) standard form bilateral agreement, even though at that time the U.S.S.R. was outside the ICAO. The U.S.S.R. joined the ICAO last November. However, the Soviet Union is still not a member of the International Air Transportation Association (IATA).

The service started with joint operation on the Moscow-Tokyo route by Aeroflot and Japan Air Line (JAL), aircraft and crew being supplied by Aeroflot and the stewardship and other services by JAL since the Soviets were familiar with trans-Siberian flight. This regime was changed by the agreement made in November, 1969, and at present JAL and Aeroflot run their flights independently.

At present, JAL planes fly on four routes, Tokyo-Moscow, Tokyo-Moscow-Paris, Tokyo-Moscow-London, and Tokyo-Moscow-Copenhagen or Amsterdam. With the exception of the Tokyo-Moscow route, these routes are beyond traffic lines which are classified as the fifth freedom of air under the Chicago Convention, whereas Aeroflot still makes no use of this freedom beyond Tokyo. Passengers boarding JAL planes far outnumber those travelling Aeroflot; most of the JAL passengers are going to Europe via Moscow. For this reason the Soviets insist on the present half and half distribution of total revenues between Aeroflot and JAL, seeking commercial equality in the spirit of cooperation without competition.

Under the Commercial Agreement of 1966 as well as the technical service agreement, Aeroflot and JAL are mutually obliged to render assistance, whether in commercial matters or in technical services, in their respective territories. Aeroflot and JAL serve as general sales agents for each other. However, this does not necessarily mean that both companies must make half and half allocation of passengers or cargoes between them. The choice of the airline is made by the passenger or consignor. This is the reason why the Japanese would prefer revenue distribution in proportion to actual service volume.

In addition to the revenue distribution problem, which is a constant bone of contention between the parties, there are other issues which still have to be resolved. One of these is that neither JAL nor Aeroflot is permitted to maintain branch offices in the territory of the other party. However, while Aeroflot maintains sales agents in Japan, JAL is not allowed to employ its sales agents in the Soviet Union. In the view of the Japanese, this is a violation of the equal rights of both parties; the Soviets point out, however, that no other airline has such sales agents in the Soviet Union. These and other problems make the annual service conference difficult for both parties.

[35] File No. 1674 of the Japanese Ministry of Foreign Affairs.

CONCLUDING REMARKS

Japan recovered miraculously after World War II, overcoming serious difficulties. She still faces important problems. The Peace Treaty with the U.S.S.R. is not yet concluded. Territorial problems along the northern frontier are not yet resolved. But she is a disarmed country committed to a policy of peace.

The Japanese policy of peace is demonstrated by the extent to which Japan applies the most-favored-nation clause, not requiring that her trade with the Soviet Union and other socialist countries be balanced over a fixed period of time. This is done despite the contention of Western experts that such an approach might lead to the exploitation of the Japanese market by the socialist countries. While it cannot be denied that Japanese firms are experiencing great difficulties in dealing with the Soviet state foreign trade monopoly and its huge organizations, the Japanese have generally been successful in their efforts to sustain a workable relationship. The fact that no arbitration case between Japanese firms and FTO's has so far been reported is indicative of this situation. To maintain equal bargaining power in the future, however, it may be necessary to develop scientific and technological innovations which are indispensable for the development of the socialist economies. Even this may not be a final answer, for such an undertaking must confront the fact that Western industrial countries have been developing innovations concurrently and there is already heavy scientific and technological competition in the world economy. Nonetheless, the past experiences of Japanese-Soviet trade have convinced the Japanese that continued relations warrant expenditure of the effort which will be required.