1974

United States-Soviet Commercial Arbitration under the 1972 Trade Agreement

J. Alex Morton

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United States-Soviet Commercial Arbitration
Under the 1972 Trade Agreement

Within the near future United States-Soviet commercial relations can be expected to expand substantially the 1972 U.S.-Soviet Trade Agreement calling for bilateral trade to increase three-fold over its 1969-71 level during the three-year period contemplated by the Agreement. Because the respective economic systems of the United States and the Union of Soviet Socialist Republics are so different, making it necessary for American private firms to deal with the Russian state-trading entities, these relations are obviously going to present novel and complex problems to both sides. One very critical problem is that of the resolution of the commercial disputes which will invariably arise in the course of U.S.-Soviet trade. The governments of both nations have encouraged the resolution of these disputes through the arbitration process.

Both governments have specifically encouraged arbitration to take place under the Arbitration Rules of the Economic Commission for Europe of January 20, 1966 (hereinafter referred to as E.C.E. Rules), calling for the appointing authority to be located in a nation other than the U.S. or U.S.S.R., and the place of arbitration to be in a nation other than the U.S. or U.S.S.R., which is a party to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards. The 1972 Trade Agreement also provides, however, that trade partners may agree to any other form of arbitration that they see fit. Because the Soviets have always sought to domesticate foreign trade disputes in their Foreign Trade Arbitration Commission (hereinafter referred to as F.T.A.C.), it is likely that arbitration not under the E.C.E. Rules would come before the F.T.A.C. This note will describe and compare the basic features of arbitration under both the E.C.E. Rules and the F.T.A.C. Rules from the standpoint of which set of rules is more advantageous to the U.S. investor.

Soviet Foreign Trade Framework

Since the U.S.S.R. is a socialist state there is no private enterprise and foreign trade, being no exception, is planned and admin-

2 Id. Art. 7, ¶ 1.
istered by the State. The level of foreign trade is determined by the officials responsible for formulating the national economic plan. This plan requires the importation of certain goods and materials from abroad and the exportation of Soviet goods and materials in order to earn the foreign currency necessary to finance these purchases. The administration of foreign trade is in the hands of three major divisions of the Soviet foreign trade framework: the Ministry of Foreign Trade, the Foreign Trade Organizations (hereinafter referred to as F.T.O.'s) and the All-Union Chamber of Commerce.

The Ministry of Foreign Trade is under the immediate control of the U.S.S.R. Council of Ministers, the executive and administrative authority of the U.S.S.R. according to the 1936 Constitution. Its major function is to plan and administer foreign trade within the framework of the national economic plan. To carry out this function the Ministry of Foreign Trade has the authority to draft and enter into trade agreements with other nations, to issue import and export licenses, and to work out and administer tariff policies. The Ministry of Foreign Trade also is charged with directing and controlling the establishment of the F.T.O.'s and with controlling the Foreign Trade Delegations. The Foreign Trade Delegations, part of the Soviet diplomatic mission and the beneficiaries of sovereign immunity, traditionally have appeared on the foreign market as representatives of the Soviet State. These Delegations had the power to conclude foreign trade contracts with private firms on behalf of Soviet F.T.O.'s. However, under the 1972 Trade Agreement their role is restricted to more that of a diplomatic trade representative, since they are forbidden to "participate directly in the negotiation, execution, or fulfillment of trade transactions or otherwise carry on trade."

The actual trade contracts of U.S. firms will be concluded with representatives of the Soviet Foreign Trade Organizations. The F.T.O.'s are the legal entities in the U.S.S.R. which are, so to speak, in the foreign trade business. Not an arm of the State, F.T.O.'s are separate juridical persons, which can acquire rights in property in their own names, incur obligations, sue and be sued. Most important, the F.T.O.'s are economically accountable for their liabilities.

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8 1972 Trade Agreement Art. 5, Par. 3.


10 Id.

11 1972 Trade Agreement Art. 5 Par. 3.
out of their own assets, the State not being answerable for the debt of an F.T.O. and vice versa. Each F.T.O. has a monopoly on foreign trade transactions in a particular sphere of the economy controlling such areas as petroleum, agricultural products, etc.⁶ The charters of the F.T.O.'s, which list the type of operations and merchandise the F.T.O. deals with, are published in the monthly journal of the Ministry of Foreign Trade, Vneshnaia Torgovla (Foreign Trade), in both the Russian and English languages.⁷ Due to legislative changes in the most recent Soviet Civil Code, foreign firms may negotiate, insofar as foreign trade transactions and related matters are concerned, directly with the F.T.O.'s without special permission from the Ministry of Foreign Trade.⁸

Briefly, the operations of a Soviet F.T.O. are as follows. In the case of imports, an F.T.O. will, on the basis of the plan, request from the appropriate ministry the specifications of the particular products which the organization is authorized by plan to purchase abroad. Having received an import permit from the Ministry of Foreign Trade, the F.T.O. goes onto the foreign market and concludes a contract with a foreign supplier. Usually it is only after this contract is concluded that the F.T.O. contracts with the domestic customer, an enterprise under the control of the requesting ministry. The domestic enterprise pays for the goods at a rate which includes the cost of transportation as well as a commission for the F.T.O.⁹ In the case of exports, on the basis of the export plan, an F.T.O. presents to an appropriate ministry an order which obligates the ministry to deliver. The order is then submitted by the ministry to a subordinate enterprise along with an export permit. Either before or after the domestic order is placed, the F.T.O. goes onto the foreign market and concludes a contract with a foreign purchaser. After the goods are delivered, the domestic supplier is paid at the domestic wholesale rate. The F.T.O. receives a commission and deposits the rest of the money in the State treasury.¹⁰

The third division of the foreign trade framework is the All-Union Chamber of Commerce. Like the F.T.O.'s, the Chamber of Commerce is a juridical person with the right to acquire, sell and

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⁶ Berman, supra note 3, at 987-88.
⁹ Berman supra note 3, at 497-98.
¹⁰ Id. at 498.
lease property, to enter into transactions within the limits set by its charter, and to sue and be sued in court. Its functions are similar to those of many Western chambers of commerce, to establish links with economic organizations abroad. It participates in international congresses of chambers of commerce, the reception of foreign trade and industrial delegations, the sending of similar organizations abroad, and the organization of foreign and domestic trade and industrial fairs within the U.S.S.R. and abroad. Probably its most important function for the purposes of the 1972 Trade Agreement is that of operating the Foreign Trade Arbitration Commission.

The All-Union Chamber of Commerce is a social organization, supposedly not subordinate to any State organ, although the Ministry of Foreign Trade does supervise the work of the Chamber of Commerce. As a social organization, membership is voluntary and members participate to a high degree in the administration of their own affairs. While the Chamber of Commerce is technically not part of the State foreign trade apparatus, it has been pointed out that:

The fact that the All-Union Chamber of Commerce — at least to the extent that it participates in activities connected with foreign trade — helps to exercise the state foreign trade monopoly, and that its members are often officials of state organizations, raises the question whether the arbitration commissions which are attached to it, and whose panels are appointed by its presidium, are sufficiently independent of the Soviet foreign trade combines to be considered impartial in cases of disputes between them and foreign firms.¹¹

FOREIGN TRADE ARBITRATION COMMISSION — BACKGROUND

Arbitration tribunals play a vital role in the resolution of all types of commercial disputes and the value of the arbitration process is perhaps more appreciated in the U.S.S.R. than in any other nation. Commercial disputes between domestic enterprises are not resolved in the courts, but rather are heard in Gosarbitrazh, the State arbitration tribunals. Soviet recognition of the special advantages of arbitration carried over into the field of foreign trade transactions when, on June 17, 1932, a resolution of the Central Executive Committee and the Council of People's Commissars (now Council of Ministers) of the U.S.S.R. established the Foreign Trade Arbitration Commission. Located in Moscow, the F.T.A.C. is operated by the All-Union Chamber of Commerce, whose Presidium appoints the fifteen arbitrators who make up the F.T.A.C. and

¹¹ Id. at 493.
which, by the decision of its Presidium of January 21, 1949, formulated the F.T.A.C. Rules of Procedure governing the hearing of disputes. Section one of the F.T.A.C. Rules indicates that the tribunal is to hear disputes "of every nature arising from foreign trade contracts and, in particular, disputes between foreign firms and Soviet trading organizations."

The structure of the F.T.A.C., particularly the fact that it is operated by the All-Union Chamber of Commerce, presents many questions as to the extent that impartiality can be expected in F.T.A.C. decisions. This is so because all of the institutions making up the Soviet foreign trade apparatus intertwine to insure their subordination to the State. While the Presidium of the Chamber of Commerce appoints the arbitrators who make up the F.T.A.C., the Chamber of Commerce itself is under the supervision of the Ministry of Foreign Trade, an arm of the government. The Ministry of Foreign Trade is responsible for appointing the heads of the F.T.O.'s, the same entities which would appear before the F.T.A.C. as the party opposing the U.S. investor. This state of affairs results in a great potential for abuse in the form of coercion of the arbitrators. The fact that the F.T.A.C. is potentially subject to State control makes it different from Western arbitration tribunals, such as the American Arbitration Association, which are essentially private in nature. This drawback to F.T.A.C. arbitrations has caused one observer to wonder "if they are not in essence national courts for foreign causes functioning under the color of international arbitration."

Although theoretically F.T.A.C. arbitration is subject to abuse, based on the limited information available concerning actual cases heard by the F.T.A.C., justice can be obtained by the Western party. A compilation of thirty-three cases, twenty-three of which involved Western parties, heard by the F.T.A.C. between 1951 and 1958, indicates that the Soviet tribunal does not show any blatant bias toward non-Soviets. It should also be remembered that the Soviets

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seek to attract as much litigation as possible to the F.T.A.C. and that they cannot accomplish this objective unless the F.T.A.C. establishes a reputation for impartiality. In view of this goal, it has been suggested that current publication in the West of F.T.A.C. decisions without editorial omission "might do much to allay the suspicion with which Soviet requests for reception of her arbitration system have been received.""\textsuperscript{16}

\textbf{Arbitration Rules of the Economic Commission for Europe — Background}

Very little has been written about arbitration under the Economic Commission for Europe Rules because, until the conclusion of the 1972 Trade Agreement, they were very unimportant. In fact, it is believed that before the 1972 Trade Agreement, no arbitration had ever been organized under the E.C.E. Rules.\textsuperscript{16} Even now most parties involved in the negotiation of contracts under the 1972 Trade Agreement have opted for ad hoc arbitration in Stockholm, calling for the President of the Stockholm Chamber of Commerce to act as appointing agent should the parties fail to agree upon the third or neutral arbitrator.\textsuperscript{17} Nevertheless, the importance of the E.C.E. Rules cannot be ignored and as more attorneys in the U.S. become familiar with them, their importance will increase. The recent action of the American Bar Association's International Law Section, urging the adoption of a uniform set of international rules of procedure to supplement the E.C.E. Rules for the resolution of commercial disputes growing out of East-West Trade, cannot help but contribute to their use.\textsuperscript{18}

The Economic Commission for Europe was established by the Economic and Social Council of the U.N. in March, 1947, as a regional body to promote cooperation among its members leading to the eventual economic integration of Europe.\textsuperscript{19} Membership in

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\textit{Courts} in \textit{INTERNATIONAL TRADE ARBITRATION} 107, n. 16 (M. Domke ed. 1958); \textit{But see Hazard, State Trading and Arbitration} in \textit{INTERNATIONAL TRADE ARBITRATION} 94-96 (M. Domke ed. 1958).
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\textsuperscript{16} Hazard, \textit{supra} note 14, at 100.
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\textsuperscript{18} Resolution of the Section of International Law of the American Bar Association (December 8, 1973).
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\textsuperscript{19} Siotis, \textit{E.C.E. In the Emerging European System}, from \textit{INT'L CONCILIATION} 1 (January, 1967).
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the E.C.E. is confined to European members of the U.N. and the U.S., although non-member nations of Europe can participate in a consultative but nonvoting capacity. Previous efforts in the field of commercial arbitration by the E.C.E. included the 1961 European Convention on International Commercial Arbitration. In 1966 a group of E.C.E. experts prepared the Arbitration Rules of the Economic Commission for Europe of January 20, 1966 (E.C.E. Rules) with their use in disputes arising out of East-West Trade as their ostensible purpose.

The key feature of the E.C.E. Rules is the appointing authority, which makes them particularly suited for resolving disputes growing out of East-West Trade between parties of different economic systems. The appointing authority is called upon to resolve problems which have traditionally been stumbling blocks to the functioning of the arbitration process, such as the appointment of arbitrators, the replacement of arbitrators, and determination of the place of arbitration. Arbitration under the E.C.E. Rules calls for the naming of a national appointing authority and an international appointing authority, named by both parties to a commercial contract to function in disputes arising out of that contract. The model arbitration clause provided in the Rules recommends that both the appointing authority and the place of arbitration be spelled out in the arbitration agreement.

If an appointing authority is not named in the arbitration agreement, Article Four of the Rules indicates that the appointing authority of the place of arbitration is to serve as appointing authority for the dispute. If neither an appointing authority nor a place of arbitration has been designated in the arbitration agreement, Article

20 D. WIGHTMAN, ECONOMIC CO-OPERATION IN EUROPE 56-57 (1956).
21 The Annex to the E.C.E. Rules lists institutions in member countries of the E.C.E which may be required to act as appointing authorities. The All-Union Chamber of Commerce is listed as appointing authority in the U.S.S.R. There is as yet no national appointing authority within the U.S. In the opinion of Gerald Aksen, General Counsel of the American Arbitration Association, expressed in a letter to this writer on February 11, 1974, the reason for this is that it was not originally anticipated that E.C.E. arbitrations would be held in the U.S. and the 1972 Trade Agreement calls for U.S.-Soviet arbitrations to be held in a neutral third country.
22 It is likely that the Stockholm Chamber of Commerce will be designated as international appointing authority in contracts concluded between U.S. and Soviet trading partners. Previous contracts under the 1972 Trade Agreement have provided for ad hoc arbitration in Stockholm, naming the President of the Stockholm Chamber of Commerce as appointing agent if the parties fail to agree upon a third or neutral arbitrator. Supra note 17.
Five indicates that the claimant has three options. First, he may choose as an international appointing authority the national appointing authority of the country in which the respondent has his habitual residence or seat. A second option for the claimant is the Special Committee set up under Article IV of the European Convention on International Commercial Arbitration of April 21, 1961. The Special Committee consists of three members, a chairman and two ordinary members. The Chambers of Commerce or other designated organs of the capitalist Western European nations, party to the 1961 Convention, elect one ordinary member who serves for four years, and a chairman. The Chambers of Commerce or other designated organizations of the socialist Eastern European members, party to the Convention, do the same. The respective chairmen elected by the two groups serve alternately for two years each. Since the committee was established with the problem of East-West disputes in mind, it could prove to be useful under the Rules in the selection of the appointing authority, even though the U.S. is not a party to the 1961 Convention. The third option calls for the appointing authority to be appointed by the Court of Arbitration of the International Chamber of Commerce if the parties have their habitual residence or seat in countries in which a National Committee of the I.C.C. exists. Since the U.S.S.R. does not have such a National Committee, this option is inapplicable to U.S.-Soviet arbitration.

The importance of the appointing authority cannot be underestimated within the framework of U.S.-Soviet commercial relations. Conceivably the fairness and integrity of the entire arbitration can be in the hands of the appointing authority should the parties not be able to agree upon an arbitrator or should their selected arbitrators not agree upon an umpire. The fact that the appointing authority can and will break such a deadlock insures that the parties signing an arbitration agreement are manifesting their willingness to lose the dispute, a factor which is essential to the arbitration process. Because the appointing authority can compel arbitration, the realization by each party that the arbitration will result in an award, no matter what they do, should be a force in influencing each party to act justly and in good faith in carrying out the arbitration procedures. Each hopes that, if nothing else, his fellow disputant will also act in such a manner. The appointing authority is the type of feature, especially if U.S. and Soviet disputants can come up

with a consistently reliable appointing authority such as the Stockholm Chamber of Commerce, that can be profitably studied for possible application to non-commercial arbitration between the governments of the U.S. and U.S.S.R.

JURISDICTION

F.T.A.C.

The F.T.A.C. has jurisdiction to hear only those disputes to which both parties have consented in writing. Additionally, the subject matter jurisdiction is limited to disputes arising out of foreign trade contracts in F.T.A.C. Rules Section 1. Written consent may be conferred in three ways: most often, by an arbitration clause in the sales contract; by a special written agreement between the parties subsequent to the sales contract; finally, although not applicable in the case of trade under the 1972 Trade agreement, by an arbitration clause in a treaty regulating trade between the U.S.S.R. and some other country. The question of whether the F.T.A.C. has jurisdiction is decided by the arbitrators themselves, but the danger of a grossly unfair assumption of jurisdiction is countered by the fact that it can be resisted in the course of enforcement proceedings according to the provisions of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

E.C.E.

For arbitration to take place under the E.C.E. Rules it is recommended that it be so provided in an arbitration clause of a sales agreement. A party intending to raise a plea against the arbitrator's jurisdiction, because the arbitration agreement is improper in some way, must do so at the time he submits his statement of claim or defense regarding the substantive dispute. If the party's jurisdictional objection is based on the arbitrators having exceeded their terms of reference, it must be presented as soon as the issue over which the arbitrators have no jurisdiction is raised. As under the F.T.A.C. Rules, the arbitrators themselves decide the jurisdictional

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25 Leff, supra note 14, at 135.
28 Id. Art. 17.
While this decision also may be challenged during enforcement proceedings, it should be noted that a U.S. court would seemingly be more reluctant to invalidate an E.C.E. arbitration in a neutral country, than one before the F.T.A.C.

**SELECTION OF ARBITRATORS**

**F.T.A.C.**

The F.T.A.C. is composed of fifteen arbitrators appointed for one year by the Presidium of the All-Union Chamber of Commerce from representatives of trading, industrial, transport and similar organizations and also from persons having special knowledge of foreign trade. When the claimant submits the Points of Claim, he either selects a member of the F.T.A.C. as his arbitrator or asks that the choice be left to the President of the F.T.A.C. The President then forwards the Points of Claim to the respondent who within fifteen days of its receipt must either choose his arbitrator from members of the F.T.A.C. or leave it to the President of the F.T.A.C. — unless the parties have agreed upon a longer time period. If the respondent does not choose an arbitrator within fifteen days the President of the F.T.A.C. makes the selection. Once the respondent's arbitrator has been chosen or appointed, the arbitrators have fifteen days after notice of his selection to choose an Umpire. If they cannot agree upon one, the President of the F.T.A.C. makes the appointment. In exceptional cases, if both parties consent, the case can be settled by a sole umpire chosen by the parties or by the President of the F.T.A.C. if they desire.

Obviously, the most unattractive aspect of these procedures to the U.S. investor is the fact that all of the arbitrators are Soviets. As a result, it is unlikely that a U.S. investor would be at all familiar with any of the arbitrators and practice has shown that most foreign investors waive their right of selection to the President of the F.T.A.C. In addition to his unfamiliarity with the arbitrators, a U.S. investor faces the possibility of both nationalistic and socialist bias. F.T.A.C. arbitrators, although eminent specialists in various fields, are usually Party members, or at the very least committed to Communism. While it has been argued that the all-Soviet make-

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29 Id. Art. 18.
31 Id. at 1423.
up of the F.T.A.C. is not discriminatory *per se*\(^2\), the distinguished scholar of Soviet law, John Hazard, has observed:

... the world has come to know the measure of loyalty expected of all Soviet citizens regardless of whether they are directly employed by the Ministry of Foreign Trade, and this knowledge has led many private merchants outside the U.S.S.R. to doubt that even the best informed expert can dissociate himself from the view of the Soviet party to any dispute before the arbitration commissions.\(^3\)

Even assuming that the Soviet arbitrators are free of any conscious bias, they, like all other individuals, are products of their environment and it is very probable that unconscious bias toward the claims of a U.S. businessman, perhaps toward his desire to make a large profit, could exist and influence the decision of the arbitrator.

**E.C.E.**

Under the E.C.E. Rules the claimant gives notice to the respondent of the dispute by a registered letter which makes reference to the arbitration agreement. In this letter the claimant calls upon the respondent to reach agreement with him regarding an arbitrator or arbitrators. The claimant proposes: appointment of a sole arbitrator; appointment of three arbitrators, each party appointing one arbitrator and the two appointed arbitrators choosing a presiding arbitrator; or appointment of a specific arbitral institution in which case settlement of the dispute is conducted under the rules of this institution. Selection of three arbitrators is the rule and selection of a sole arbitrator the exception.\(^4\) It is preferable for the parties to agree beforehand, when the arbitration clause is adopted, whether a sole arbitrator should be used or whether three will make the award. It has been suggested that the decision be based on the value of the claim, resorting to a sole arbitrator when it is below a specified figure and otherwise using three arbitrators.\(^5\)

After receipt of notice by the respondent, the parties have thirty days in which to agree upon the selection of a sole arbitrator or an arbitral institution and forty-five days in which to agree upon selection of arbitrators and a presiding arbitrator. If there is no agreement in this time the claimant may apply to the appointing authority

\(^{32}\) Leff, *supra* note 14, at 174.
\(^{33}\) Hazard, *supra* note 14, at 94-95.
designated in the arbitration agreement or, if there is no appointing authority designated in the agreement, to the appointing authority of the place of arbitration if that is fixed in the agreement. The appointing authority then, if the parties give their consent in writing, appoints either a sole arbitrator or an arbitral institution which will settle the dispute according to its own rules. If the parties do not consent to either of these alternatives, the appointing authority then invites each party to appoint an arbitrator and the two arbitrators then appoint a presiding arbitrator. If one of the parties fails to appoint an arbitrator within thirty days of the appointing authority's invitation, or if the two arbitrators can't agree upon a presiding arbitrator within forty-five days of the invitation, the appointing authority himself makes the appointment.

Thus, in the case of a three-man arbitration in which the parties cannot agree, they have forty-five days to agree and then, after what is, in effect, a warning by the appointing authority, a thirty to forty-five day period of grace exists before the appointing authority takes action. The two waiting periods, in addition to providing a cooling-off period in which the parties may resolve their dispute amicably, effectively minimize the compulsory nature of the procedure. This is another technique of much value in East-West disputes, with their accompanying suspicion and distrust and it insures that although arbitration cannot be evaded, it will at least be implemented by an authority in which both parties have some amount of faith.

**Choice of Law**

**F.T.A.C.**

One problem with taking cases before the F.T.A.C. arises from the application of Soviet conflict of law rules. They are marked by:

a general desire to ensure as wide an immunity from the applicability of foreign law as a respectable degree of conformity to traditional choice of law rules will allow.\(^3\)

Naturally, the unfamiliarity of the U.S. litigant with Soviet rules of law puts him at a disadvantage in relation to his Soviet trading partner with regard to both actions taken in performance of the contract and the appearance before the F.T.A.C. An additional pitfall is that the U.S. party may find himself bound by an absolute

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rule of Soviet law, even though the contract provided that some other law was to govern.

The basic Soviet conflict's rule for foreign trade transactions is found in Section 566 of the 1964 Russian Soviet Federative Socialist Republic (R.S.F.S.R.) Civil Code which provides:

The rights and duties of parties under external trade transactions are defined by the law of the place in which they were concluded, unless the parties otherwise provide by their agreement. Soviet law decides in which place a transaction is [regarded as] effected.\footnote{Translation of R.S.F.S.R. Civil Code in 2 Kiralfy, Law in Eastern Europe (1966).}

Under Soviet law the place where the contract is concluded is where both parties signed or, if both parties are not present, the place where the offeror receives his acceptance.\footnote{Leff, supra note 14, at 159.}

It would seem from this provision that the Soviets accept party autonomy in choosing the applicable law to govern a contract, but this conclusion is not warranted. To begin with, foreign law cannot be applied in the U.S.S.R. if its application would contravene fundamental principles of Soviet law (R.S.F.S.R. CIVIL CODE Sec. 568).\footnote{R.S.F.S.R. Civil Code \S 568 in 2 Kiralfy, supra note 37, at 150.} Although no decision in the F.T.A.C. has applied this provision,\footnote{Ramzaitsev, supra note 26, at 150.} because of its broad scope, its potential effect of negating a choice of foreign law by the parties seems virtually unlimited. Secondly, freedom in choice of law is also circumscribed in that if the parties choose law which is unrelated to the transaction, this decision will lose its effect due to the fraud provisions of the R.S.F.S.R. Civil Code. The Code renders invalid those transactions made for a purpose contrary to law, in fraud of law, or directed to the prejudice of the state.\footnote{Pisar, supra note 37, at 632.} Finally, it has been pointed out that allowing party autonomy in choice of law, without interference by the government:

far from being a renunciation of authority, . . . procures a considerable advantage for the state. On closer analysis, the adoption of this time-honored principle of Western "bourgeois law" is found to favor the maximum expression of the public foreign trade monopoly's tremendous bargaining power in its commercial dealings with individual and generally less powerful foreign firms.\footnote{Pisar, supra note 31, at 1443.}

In short, party autonomy as to choice of law in the past has often
meant that a Soviet F.T.O. could dictate to its Western partner that Soviet law would be used.

The application of Soviet law in disputes before the F.T.A.C. is further enhanced because of certain absolute rules of Soviet law which cannot be varied by agreement and which the F.T.A.C., as a Soviet tribunal, is obligated to apply. One such rule is that the validity of the arbitration agreement depends upon the observance of the law of the country in which the arbitration is to be held. This means that an agreement to arbitrate before the F.T.A.C. must be proper under Soviet law, i.e., the F.T.A.C. is competent to hear the dispute under Soviet law. A second absolute rule is that the legal capacity of a juridical personality is determined by its charter under the law of the nation in which it was created, no matter where the contract was made. Consequently, the F.T.A.C. will determine under Soviet law whether a particular F.T.O. had the capacity to enter into a particular contract, even if it was made in the U.S. The importance of this rule can be fully comprehended only in connection with the discussion of the Soviet agency concept of authority which follows.

Section 565 Par. 2 of the R.S.F.S.R. Civil Code provides that:

The form of external trade transactions effected by Soviet organization and the procedure for their signature are determined by the legislation of the U.S.S.R., irrespective of the place where they were effected.

This is also an absolute rule of Soviet law which governs a contract with a Soviet F.T.O. notwithstanding the fact that the contract is concluded in the U.S. or some third country. In addition to precluding the formation of a valid contract by an oral agreement, this provision effectively eliminates the concept of apparent authority from Soviet law regarding foreign trade transactions.\(^\text{43}\) An oral agreement does not meet the form requirements of Soviet law and would be ruled invalid by the F.T.A.C., even if the contract was to be governed by U.S. law and was valid under U.S. law. Similarly, a contract concluded with an unauthorized official of a Soviet F.T.O., even if he possessed apparent authority under U.S. jurisprudence, would be ruled invalid by the F.T.A.C.\(^\text{44}\)

\(^{43}\) Under the concept of apparent authority an agent possessing no actual authority may bind his principal to a contract if the contracting party, on the basis of some communication from the principal, reasonably believes that the agent has actual authority to bind his principal. See Seavey, HANDBOOK OF THE LAW OF AGENCY § 22 (1st ed. 1964).

\(^{44}\) See Kos-Rabcewicz-Zubkowski, supra note 7, at 4.
Contracts with Soviet F.T.O.'s require two signatures, the signature of the president of the F.T.O. or his deputy and the signature of the representative authorized to sign contracts under a written power of attorney.\textsuperscript{45} The names of persons authorized to sign contracts on behalf of the F.T.O.'s are published in the official journal of the Foreign Trade Ministry, Vneshnaia Torgovla.\textsuperscript{46} A contract signed by an improper representative would be void under Soviet law both because its form was improper and because the so-called representative didn’t have the capacity and authority to bind the F.T.O. This strange conflict’s rule stems from the nature of the Soviet economy as a single planned and integrated unit. Thus, whatever affects an F.T.O. is thought of as also having an effect on the national economy, and hence on the nation’s sovereignty. As one observer has explained:

the negligent or deliberately dishonest act of a Soviet foreign trade corporation official could submit the Soviet economy to a significant undesired obligation. It is to preclude such interference by its own trade officials with its carefully drafted foreign trade plan that the Soviet Union has established its conflict’s rule.\textsuperscript{47}

\textbf{E.C.E.}

The handling of choice of law under the E.C.E. Rules is more advantageous to the U.S. disputant, since it is more flexible. According to Articles Thirty-eight and Thirty-nine, the resolution of disputes shall be based on law as determined by the parties, unless both parties agree to let the arbitrators act as 'amiables compositeurs', in which case the decision will be made according to equitable principles. If the parties cannot agree the arbitrators themselves will decide upon an applicable law. While this solution to the choice of law problem is not very satisfactory, it has been pointed out that a more specific rule could not have gained widespread consent.\textsuperscript{48} The E.C.E. rule at least insures that the U.S. investor will not be surprised by the application of an absolute rule of Soviet law of which he was not aware.

The arbitrators are also directed by Article Thirty-eight to "take account of the terms of the contract and trade usages" in making this decision. This provision, too, leaves something to be desired

\textsuperscript{45} Hoya, \textit{The Legal Framework of Soviet Foreign Trade}, 56 MINN. L. REV. 1, 32 (1971).
\textsuperscript{46} Id. at 33.
\textsuperscript{47} Id.
\textsuperscript{48} Cohn, \textit{supra} note 36, at 973.
because of its vagueness. The terms of a contract will many times call for interpretation and methods of interpretation which under various legal systems may differ significantly. Additionally, the fact that the Soviets reject customary international law, unless they have consented to the custom in some way, minimizes the application of trade usage as a source of law. The eventual solution to the choice of law problem in arbitration under the E.C.E. Rules may lie in the use of the "transnational law" clause, the application of generally recognized rules of law of the civilized nations. In the case of U.S.-Soviet arbitration, however, this type of clause is years away. Much time will be required before commercial relations between the two nations will afford the development of sufficient general principles.

HEARINGS

F.T.A.C.

General F.T.A.C. arbitrations are based on documents, with the parties appearing only for the examination of proofs and verification procedure, and the giving of the award at a public session, unless an in camera hearing is requested, during which the parties may orally plead their case. While a party is entitled to plead his own case, the F.T.A.C. Rules provide that he may also be represented by an attorney. Foreign attorneys are authorized to plead cases and the Soviet College of Advocates is also authorized to offer the services of a Soviet attorney. The wisdom of a U.S. investor using Soviet representation has been questioned due to the loyalty to the interests of the Soviet state expected of attorneys.

F.T.A.C. arbitrators may be challenged before the beginning of the hearing if it appears that they may have an interest in the outcome of the dispute. They have a free hand in verifying the evidence and evaluating it in making an award. Decisions are made by majority vote and the award rendered in writing, including the reasons for the award. Generally, the winning party is awarded the costs of conducting his case, not exceeding 5% of the award.

49 Id. at 974.
50 See RAMUNDO, PEACEFUL COEXISTENCE, INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 60-64 (1967).
51 Cohn, supra note 36, at 973.
52 LEFF, supra note 14, at 156.
53 Hazard, supra note 14, at 97.
E.C.E.

The E.C.E. Rules provide that an arbitration may be conducted solely by means of documentary evidence without an oral hearing, but this appears to be the exception and not the rule. A party may plead his own case or use a representative. The arbitrators are given complete discretion in the admission and assessment of evidence and also in the manner in which they conduct the hearing, subject to the requirement that it be a fair hearing on the basis of absolute equality. Arbitrators are subject to challenge if it appears that they are interested in the outcome of the dispute. The Rules also provide for the rendering of an award on the basis of an ex parte hearing should a party fail to appear or fail to submit documentary evidence in the case of an arbitration based solely on documentary evidence. Costs generally are to be borne by the unsuccessful party, but may be apportioned.

ENFORCEMENT OF AWARDS

F.T.A.C.

The enforcement of F.T.A.C. judgments has received a great boost from the recent U.S. accession to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, since the U.S.S.R. is also party to the Convention. Because there is no appeal from an F.T.A.C. decision, the enforcement procedure increases in importance. One real advantage to the U.S. investor's making use of the F.T.A.C. is the fact that a ruling against the Soviet party will not have to be judicially enforced, since the Soviet party will invariably comply voluntarily. It has been explained that:

... a refusal on the part of state traders to abide voluntarily by a decision of their national foreign trade tribunal is in fact inconceivable since it would reflect not only on its reliability as a business partner and on that of each branch of the monopoly of which it is a part, but more directly it would destroy the effectiveness and prestige of tribunals designed to inspire confidence abroad and to attract a maximum volume of jurisdiction.

Another advantage to the U.S. investor is that under the 1958 U.N. Convention a U.S. court may refuse to enforce an F.T.A.C. decision on several grounds. Two of the more important grounds are first,

55 Pisar, supra note 31, at 1468-1469.
that the U.S. party was given neither proper notice nor an opportunity to present his case, and second, that enforcement of the decision would violate the public policy of the U.S. The typical American court would be much more likely to be alert to an unfair decision and countenance its nonenforcement when the tribunal rendering that decision is the F.T.A.C.

E.C.E.

Enforcement of arbitral decisions under the E.C.E. Rules also has the advantage of the 1958 U.N. Convention since the 1972 Trade Agreement provides that the place of arbitration should be a third country, other than the U.S. or U.S.S.R., which is party to the Convention. The award is not subject to appeal unless the law of the nation in which the award is made is contrary to this rule. However, since the Rules permit an award to be rendered in a country other than the one in which the arbitration took place, a law contrary to the spirit of Article 42 can be circumvented. Consequently, in the case of the E.C.E. Rules enforcement proceedings are of special importance to the U.S. investor as the only opportunity to appeal an E.C.E. award. While the aforementioned grounds of resisting an arbitral award provided by the 1958 U.N. Convention are available, it is unlikely that an American court would overturn a neutral third-country arbitral award as readily as it would an F.T.A.C. award.

CONCLUSION

The choice made in the 1972 Trade Agreement to encourage the use of arbitration to resolve commercial disputes was a wise one. Neither U.S. nor Soviet participants in international transactions relish the thought of litigating disputes in the courts of their trade partner. The delays alone are intolerable but particularly troublesome is the mutual unfamiliarity with the rules of law and procedure of the respective judicial systems. In addition to being swift, the arbitration process is familiar to the Soviets, who make use of it domestically and to the U.S. business community, where its use has been increasingly on the rise in recent years. Neither U.S. nor Soviet traders feel secure about the objectivity of the local judiciary,

57 E.C.E. Rules Art. 42.
58 Cohn, supra note 36, at 971.
but the arbitration process, allowing for the selection of international trade experts as arbitrators, gives greater assurance of a more objective and international outlook in settling commercial disputes.

Since the development of trade is yet in an early stage, there is little data upon which to evaluate the operation of the arbitration process in U.S.-Soviet trade. The main obstacle to its successful employment would be the failure to establish an appointing authority acceptable to U.S. and Soviet traders. The ultimate goal of the facilitation of the arbitration process would be to find a consistently reliable appointing authority, such as the President of the Stockholm Chamber of Commerce. The psychological importance of establishing a neutral forum for the airing of U.S.-Soviet disputes should not be underestimated. Although at first only commercial disputes would be subject to resolution by arbitration, mutual U.S.-Soviet confidence in the neutrality of a forum might ultimately lead to the resolution of political differences in the same fashion.

J. ALEX MORTON