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Heinz F. Strohbach

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Arbitration Between Foreign Trade Organizations of Socialist Countries and Parties from the Capitalist Economic Sphere

HEINZ F. STROHBACH†

Preliminary Observations

The author is an arbitrator living in the German Democratic Republic (GDR) and it is mainly in that country that he has taken part in arbitration procedures. For this reason, reference will usually be made to the arbitration law of the GDR.

Arbitration in socialist countries takes many different forms. For instance, dispute settlement in the Peoples Republic of China (PRC) is characterized by the concept of conciliation, whereas arbitration in European socialist countries is quite similar to judicial proceedings.¹ Consequently, this Article focuses on arbitration in only some of the socialist countries: the member countries of the Council for Mutual Economic Assistance² (CMEA).³

† Member, ICCA; President, Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic; International Court of Arbitration for Marine and Inland Navigation Gdynia; Professor of Law, Institute for Foreign and Comparative Law, Potsdam (GDR).

1. Newspapers often use the term East European socialist countries. One should not forget, however, that the geographic centre of Europe is located in the Polish capital of Warsaw. Countries like the CSSR and the GDR are thus correctly labeled while Hungary is actually west of Central Europe.

2. The Council for Mutual Economic Assistance (CMEA), established on January 8, 1949 at the Moscow Convention, is the most comprehensive international economic organization of socialist countries. The 10 member countries of 3 continents are Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Soviet Union, Mongolia, and Vietnam. The charter of the CMEA enables countries which are not members to participate in activities of the organs and institutions of this organization and other forms of occasional or permanent cooperation (Yugoslavia, Finland, Iraq, Mexico, Angola, Laos, Korea).

3. CMEA is the acronym used in official documents (e.g., U.N. documents). Mass media in the western countries often refer to the council as COMECON. In Russia, the acronym is SEW; in Germany it is RGW.

I. Organization of Arbitration in CMEA Member Countries

Arbitration has had a long tradition as part of the foreign trade of socialist countries.⁴ These countries attach special importance to conditions of international commercial relations which insure legal certainty for contractual obligations. Among these conditions is the availability of a legal mechanism for deciding commercial disputes concerning the existence of these obligations and the manner in which they are performed.

Arbitration has been viewed as the mechanism which most effectively corresponds to the legitimate interests of the parties in that it leads to the swift disposition of disputes. Initially, ad hoc arbitration played a dominant role in dispute settlement. Although this type of arbitration has advantages, the myriad individualistic aspects of ad hoc arbitration have scarcely contributed to the furtherance of uniform procedures governing international relations. Therefore, the Soviet Union at an early date perceived a strong need to institutionalize arbitration procedures.⁵

Today the oldest functioning permanent court of arbitration among the CMEA member countries is the Maritime Arbitration Commission of the All-Union's Chamber of Commerce which was established in Moscow in 1930. Only two years later, it was followed by the Foreign Trade Arbitration Commission attached to the same central Chamber of Commerce of the USSR.⁶ These courts of arbitration differ principally from ad hoc arbitration in that they have a permanent secretariat, their own rules of procedure, a fee schedule, and a list of arbitrators. The secretariats organize the arbitration: they see to it that the procedure is promptly carried out; that there is effective communication between the arbitrators and the parties, and that all administrative matters are efficiently managed. Moreover, they publicize the concept of arbitration, they give advice on the selection and ap-

4. This close connection is often termed "foreign trade arbitration" but that is an imprecise phrase when used to refer to the permanent arbitration courts that hear these cases. See *infra* note 11. The phrase came into being to make clear that an arbitration on domestic commercial disputes was not in question.

5. See J. WAHLER, *DIE AUßENHANDELS — UND SEESCHIEDSGERICHTS — BARKEIT IN DER UdSSR* (THE FOREIGN TRADE AND THE MARITIME ARBITRATION IN USSR) (1974).

6. D. RAMSAIZEW, *DIE AUßENHANDELSARBITRAGE IN DER UdSSR* (FOREIGN TRADE ARBITRATION IN THE USSR) 9 (1961).

plication of model arbitral clauses, and arrange for the publication of arbitral awards.⁷

One of the principal characteristics of the permanent arbitration courts is the compilation of the volumes of arbitral awards collected over the years since these awards form the basis for the arbitral practice of the arbitral courts. The decisions of the arbitral courts have had considerable influence on the manner in which businessmen draw up contracts.

The secretariats⁸ of the permanent arbitration courts are institutions or departments of the chambers of commerce. These chambers of commerce⁹ are considered private organizations which are the legal organs of the firms, institutions, and scientific institutes of their respective countries which take part in the furtherance of foreign trade. In other words, they are not state institutions. This status enables them to organize, sponsor, and carry out commercial arbitration on an independent basis.¹⁰

As a result of the social and economic changes after World War II, permanent commercial arbitration courts (attached to the respective central chambers of commerce) were established in all CMEA member countries. These countries relied upon the experience of the two Moscow arbitration institutions established in 1930 and 1932 and the progressive innovations of the pre-war period. As a result, an interesting variety of arbitration organizations developed in the CMEA countries.¹¹ Though com-

7. Collections of arbitral awards were published during the last years by: Foreign Arbitration Commission in Moscow (Russian and English); Court of Arbitration in Berlin (GDR) (German with summaries English, French); Court of Arbitration in Sofia (Bulgarian); Court of Arbitration in Bucharest (English). *See also* the arbitral awards of these courts of arbitration as published in *Yearbook Commercial Arbitration*.

8. These secretariats are comprised of one or two jurists and the personnel needed for technical and organizational matters. They all belong to the staff of their respective chambers of commerce.

9. The exact names vary. More and more "chamber of commerce and industry" is being used (Moscow, Sofia, Prague, Bucharest), but "chamber of foreign trade" (Berlin, Warsaw), "chamber of commerce" (Havanna, Budapest), or "committee for trade promotion" are also common.

10. *See* 158 S. LEBEDEV, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE SOCIALIST COUNTRIES MEMBERS OF THE CMEA* 11 (1977) (with detailed bibliography).

11. There are permanent arbitration courts which have *general* jurisdiction. These courts are imprecisely and narrowly termed foreign trade arbitration courts because most of the cases relate to foreign trade transactions. These courts are variously termed the Foreign Trade Arbitration Commission (Moscow), Board of Arbitrators (Warsaw), and Court of Arbitration (Berlin, Prague, Budapest).

mercial arbitration played an important role in the process of the socialist economic integration of the CMEA member countries, which had begun in 1969,¹² the variety of arbitration organizations did not impinge on the economic integration. Rather, the legal regulation for the purpose of harmony in the arbitration field focuses on the unification of rules governing the competence (jurisdiction) of arbitrators, and arbitral procedure. Regulations were also established for the legal framework of arbitral awards and settlement by the parties including recognition and enforcement of awards domestically and abroad.

As a result of these endeavors to construct the legal basis of the socialist economic integration in this area the Moscow Arbitration Convention of 1972¹³ and the Uniform Rules of Procedure of 1974¹⁴ were established. Although the Moscow Arbitration Convention of 1972 was an open convention, it was adopted and geared to the special features and peculiarities of transactions between the foreign trade companies of the CMEA members¹⁵ and, therefore, cannot accommodate readily to relations outside the sphere of the socialist economic integration.¹⁶

In addition to the permanent arbitration courts, permanent special arbitration courts are also active. These special courts include the Commodity Arbitration Bodies (wool, cotton, leather, etc.) and the Maritime Arbitration Commission (MAK) in Moscow as well as the International Court of Arbitration for Marine and Inland Navigation in Gdynia/Poland (IMAC Gdynia). The IMAC Gdynia is the interesting result of a joint venture agreement between the central chambers of commerce of the German Democratic Republic, Czechoslovakia and Poland providing joint establishment and maintenance of a special arbitration court in 1959. IMAC is also interesting as an institutionalized combination of charterers' and freighters' interests.

12. See Strohbach, *General Introduction*, 1 Y.B. COM. ARB. (1976).

13. Convention on Settlement by Arbitration of Civil Law Disputes resulting from Economic, Scientific and Technical Cooperation, Moscow, 26 May 1972, translated in *INTERNATIONAL COMMERCIAL ARBITRATION, DOCUMENTS AND SELECTED PAPERS* 250 (Schmitthoff ed. 1975), and in *MULTILATERAL CONVENTIONS AND OTHER INSTRUMENTS ON ARBITRATION* 191 (Assoc. Italiana per L'Arbitrato 1974).

14. *Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of the CMEA Countries*, Moscow (1974), translated in 1 Y.B. COM. ARB. 147 (1976).

15. Member countries in this convention include: Bulgaria, Cuba, Czechoslovakia, the GDR, Hungary, the People's Republic of Mongolia, Poland, Rumania, and the Soviet Union.

16. This convention could, nevertheless, serve as a model convention for similarly developed but nonsupranational unions on integration. In any case the example of the inter-national arbitral award set up by the Moscow (Arbitration) Convention 1972 is remarkable. All arbitral awards at home and abroad are enforced like inland judgments of

In contrast to the Moscow Convention, the Uniform Rules of Procedure have been drawn up in such a way that they are equally applicable to arbitration in which parties from the non-socialist economic sphere participate. For this reason, the author will place particular emphasis on these rules throughout the Article.

Summary

In all CMEA member countries, permanent courts of arbitration attached to the central (foreign trade) chambers of commerce have been in existence for many years. These courts have, in fact, largely replaced ad hoc arbitration. These permanent arbitration courts proceed on the basis of the Uniform Rules of Procedure of 1974.

II. The Legal Background of Arbitration

It has been observed that modern arbitration at some point broke away from state jurisdiction. As an illegitimate child whose vitality cannot be ignored or denied, it remains under the strict supervision of the parental state courts. This is reflected in the normal legal provisions concerning the admissibility of arbitration: it is legally tolerated as an exception to the rule that contract disputes are within the purview of judicial authorities. In order to understand the legal background of arbitration in CMEA countries one must first be aware that this child, to continue the metaphor, has freed itself from the taint of illegitimacy. When arbitrators from these countries participate in international conventions or seminars, or discussions on the inevitable issue of arbitration and the courts, CMEA arbitrators have the impression that they are in another world. The reason is that in the member countries of the CMEA, during the post war social and economic changes, another conception had emerged as to the most effective means of settling disputes.

Another prerequisite for understanding the legal framework of arbitral procedure is to be aware of the essential purpose of

the state courts, i.e., the difference between domestic and foreign awards on the one hand and awards and judgments of state courts on the other is irrelevant in recognition and enforcement of decisions.

procedural law; namely to lay the proper foundation so that the substantive law can come into play. The functional interaction between procedural and substantive contract law is considered during the drafting of legislation and the enforcement of contractual obligations via procedural law is an important consideration when shaping certain elements of substantive law. This is equally as true in the context of drawing up international regulations in the area of economic and scientific technological cooperation among the CMEA members as it is in the context of the further development of national law. Finally, this functional interaction is equally pertinent when defining the mechanism for deciding disputes.

A. *Legal Regulations Relating to Contractual Relations*

In the branch of law discussed here, three legal spheres are observed in the German Democratic Republic. First, there are the domestic commercial relationships. These relationships result from the production and distribution of goods among corporations and businesses within the country. As is well known, the management of the economy in a socialist system, which is characterized by state ownership of the most substantial means of production, is based upon the *state plan for the national economy* and the interconnecting plans for industries, businesses, and local regions. The conclusion of contracts is a specific phase of these plans, namely, targets set by these plans are transformed into mutual obligations between the parties to the contracts.

An independent law of contract for these so-called economic contracts has been in effect for quite some time. Disputes arising under such contracts are not decided by courts of law or by arbitral courts but rather by state institutions specifically established for these purposes called "*Staatliche Vertragsgerichte*" (*Gosarbitrash*).¹⁷ Generally speaking, they are administrative

17. The German term "*Staatliche Vertragsgerichte*" can not be literally translated and the Russian word "*Gosarbitrash*" is difficult for foreigners to understand. Literally translated it is "State Arbitration" but actually it has nothing to do with commercial arbitration. "*Gosarbitrash*" is, as an institution of the government, an instrument for the management of the people's economy by the socialist state. That is why one finds instructions and injunctions to the parties for "*Gosarbitrash*" — procedures to be used in connection with the settlement of *domestic* contractual disputes, if necessary. There is

authorities rendering their decisions under procedures similar to a court of law. These authorities have no jurisdiction over disputes in which foreign parties are involved.

This contract law, mentioned here in only general terms, is not appropriate (because of its functional interrelationship with the national economic plan) for the second sphere of legal interest: international commercial relations or relations between private individuals whether or not a foreign party is involved. For this reason, in the GDR (as in Czechoslovakia)¹⁸ there is a special act on international commercial contracts.¹⁹ A significant feature of the Act is its close conformity to the Vienna International Sales of Goods Convention.²⁰ This Act regulates all questions that may arise under an international commercial contract as well as a number of other specific types of contract.²¹ Of course, the application of this Act depends in each case on the choice of law clause in the contract, or on the applicable rules of law.²²

Disputes arising under such international commercial contracts are settled almost exclusively by arbitration which is considered to be the only adequate means of settling these disputes. Therefore, in the German Democratic Republic, there is an independent legal regulation for the procedure before the courts of arbitration: The Ordinance on Arbitration Proceedings of 1975.²³

extensive literature for specialists on questions of "Gosarbitrash" in all socialist countries. Unfortunately, foreigners sometimes mistake this literature for commercial arbitration procedures.

18. 1963 C.S.S.R. L. No. 101 (international trade).

19. Act on International Commercial Contracts of 5 February 1976. There exists an English translation of this law as a publication of the Staatsverlag der DDR, (GDR) Berlin 1979. It also will be translated in *BUSINESS, COMMERCIAL AND TRADE LAWS OF THE GERMAN DEMOCRATIC REPUBLIC* (scheduled for publication by Oceana Publications in 1984).

20. United Nations Convention on Contracts for the International Sale of Goods, II Apr. 1980, reprinted in [1980] 11 Y.B. COMM'N INT'L TRADE L. AT 149, U.N. Doc. A/CONF. 97/18, ANNEX I.

21. The 16 types of contracts are: Sales, Carrying out of Work, Assembly, Scientific Technical Services, Erection of Plant, Rendering of Services, Agency, Customer Service, Forwarding, Warehousing, Inspection, Loan, Lease, Licence, Insurance, and Partnership.

22. See Act Concerning the Law Applicable to International Private, Family, and Labour Law Relationships as well as to International Commercial Contracts — Act Determining the Applicable Law — of 5 December 1975, reprinted in 25 AM. J. COMP. L. 354 (1977).

23. See Strohbach, *German Democratic Republic*, 1 Y.B. COM. ARB. 40, 40 (1976).

This ordinance permits and encourages the application of international model arbitration laws for ad hoc arbitration,²⁴ and in the event of arbitration before the permanent courts of arbitration, the utilization of the procedural rules of the permanent courts. This will be discussed later in this Article.

To complete these observations, I will briefly mention the third sphere of legal regulations related to contractual relations, although this area is irrelevant to the state economy and foreign trade. These regulations involve contracts between private individuals for the purpose of regulating private financial transactions or transactions in the field of retail trade and services including leases and other housing contracts. The statutory framework for such contracts is found in the socially oriented 1975 Civil Code of the GDR.²⁵ The competent courts for the settlement of disputes arising under these types of contracts are the social courts²⁶ (located in the domicile of the parties and businesses) and the state courts. The court procedure is regulated by the 1975 Code of Civil Procedure. This third sphere does not involve the jurisdiction of the arbitral courts.

B. *Arbitration and International Commercial Transactions*

Arbitration in the CMEA member countries is the typical method of settling disputes arising from international commercial transactions.²⁷ The fact that the state courts have concentrated primarily on the legal affairs of private citizens and do not have a special section such as a senate or chamber for commercial or economic matters probably has contributed to the development of foreign trade arbitration.

The foreign trade organizations of the GDR usually suggest to their foreign business partners that an arbitral clause be in-

24. *E.g.*, UNCITRAL Arbitration Rules, [1976] 7 Y.B. COMM'N INT'L TRADE L. 22, U.N. Doc. A/CN.9/SER.A/1976, reprinted in 2 Y.B. COM. ARB. 161 (1977); Arbitration Rules of the United Nations Economic Commission for Europe (ECE), reprinted in 2 P. SCHLOSSER, DAS RECHT DER INTERNATIONAL/EN PRIVATEN SCHIEDSGERICHTS — BARKEIT 153 (1975).

25. 1963 C.S.S.R. L. No. 98.

26. Act on Social Courts, 25 March 1982, Gesetzblatt der DDR [GBL.DDR] 1 1982, No. 13 at 269.

27. Solely in Hungary is arbitration applied, to a certain extent, to the settlement of domestic commercial disputes.

cluded in the contract. It is possible for the parties to agree on a mixed clause under the law of the GDR. This clause determines either the competence of the arbitrators or the competence of the court at the defendant's place of business. The plaintiff may choose between the two possibilities. By exercising the option, the mixed clause becomes a normal arbitration clause or a standard agreement as to venue.

1. *Ordinance on arbitration proceedings*

The exclusive relationship between arbitration and international commercial transactions is also reflected in the principles underlying the already mentioned GDR Ordinance on Arbitration Proceedings of 1975. The most important provision states: "The parties to an economic transaction may agree that a court of arbitration shall hear and decide an existing or a future legal dispute between them."²⁸

The legislature has explicitly refused to address the definitional problems of "international commercial matters" although it is well understood that this term presents many problems of interpretation. So as to avoid such difficulties and to draw the circle of arbitral matters as widely as possible, the term economic transaction was applied. For the same reason, the word international was omitted. Those who participated in the formulation of the Vienna Sales Convention²⁹ as well as the UNCITRAL Model Law on International Commercial Arbitration³⁰ will recall the complex discussions on the discussions on the definition of international. With the removal of the obstacles, the gates have been opened to allow for arbitration encompassing a broad range of issues.

However, the ordinance itself, in section 2, contains the following restrictive provision: "an agreement to arbitrate is not valid if the legal provisions provide for another method of dis-

28. (1) Ordinance on Arbitration Proceedings of 1975, § 2(1), GBL.DDR 1 1976 No. 1, at 8.

29. United Nations Convention on Contracts for the International Sale of Goods, *supra* note 20, art. 1.

30. For complete text of the most recent draft of UNCITRAL's Model Law on International Commercial Arbitration, see Herrmann, *UNCITRAL's Work Towards a Model Law on International Commercial Arbitration*, 4 PACE L. REV. 564 app. (1984).

pute settlement.”³¹ These can involve legal rules of an international character (for instance the international convention concerning the transport of goods by rail) or national laws such as the sphere of domestic commercial relations and the exclusive jurisdiction of “Gosarbitrash” in respect to disputes within this sphere (as mentioned earlier). If one compares the two paragraphs of section 2 and their area of application, then it follows that arbitration has legal and practical significance only in the field of international commercial matters.

The main significance of the Ordinance on Arbitration Proceedings (and corresponding regulations in other CMEA member countries) is that it is based on the explicit recognition of arbitration as a distinct mechanism for settling legal disputes. The Soviet legislation even goes one step further: Article 6 of the Fundamentals of Civil Legislation of 1961³² provides that the protection of individual civil rights, *inter alia*, is guaranteed by the arbitration courts.

Since the arbitration courts are not part of the system of state courts, they are not covered by the Act on Constitution of the Courts of the German Democratic Republic (Judicature Act) of 27 September 1974. It is clear, however, that a certain “relationship” between arbitration and litigation can not be denied. Perhaps the awareness of this continuing relationship is the reason that the CMEA member countries emphasize the judicial character of arbitration while the contractual aspect of its character is rejected. This judicial emphasis has resulted in arbitration *de jure*: the arbitrators apply a legally regulated procedure (at least by rules having been agreed upon by the parties), decide legal questions, apply material law, contract clauses, and customary practice in formulating their decisions. These practices clearly demonstrate the similarities between judges and arbitrators.

Another important aspect of the Ordinance on Arbitration Proceedings is the explicit recognition of the rules of permanent

31. Ordinance on Arbitration Proceedings of 1975, § 2(2), GBL.DDR 1 1976 No. 1, at 8.

32. These Fundamentals of Civil Legislation of 1961 have the character of a basic law of the Union, upon which the civil law codes of the 16 republics of the Soviet Union are based.

arbitration courts and of the rules for ad hoc arbitration agreed upon by the parties. The provisions of the Ordinance set out the minimum standard which is to be applied in all arbitration procedures held in the GDR for the purpose of guaranteeing that the parties are accorded basic and consistent legal rights.³³ Accordingly, these legal provisions apply this minimum standard to the rules which the parties have agreed upon and to the rules which are used by the arbitrators. Upholding these minimum standards is, so to speak, the prerequisite that allows the results from such a procedure — arbitral awards and settlements confirmed by arbitration — to be recognized as effective legal titles by the state, and, ultimately, are considered effectively as judgments of state courts.

A third function of this legislation on arbitration has considerable practical significance. In case the parties do not appeal to a permanent arbitration court or do not agree upon the application of model arbitration rules (for example, UNCITRAL Arbitration Rules) the Ordinance provides a mechanism by which an arbitration is initiated and terminated.³⁴ In this way, the law seconds the party interested in arbitration and keeps measures available (anti-frustration clauses) to enable arbitration even if the other party creates obstructions. To be accurate one must say that the arbitration law has not developed uniformly in all CMEA member countries. The legal regulations of a number of these countries are of a venerable age and do not speak at all about ad hoc arbitration. Moreover, national legal regulations exist which only consider the activities of permanent arbitration courts — at least in the economic sphere — and leave questions of ad hoc arbitration entirely to the parties.³⁵

33. There are regulations on admissibility, form and legal effect of the arbitration agreement, on the challenge of arbitrators, on requisites of an appeal for arbitration, on the granting of a legal hearing, and on the pre-conditions and necessary contents of an arbitral award.

34. There are regulations on the composition of the arbitral tribunal, the place (venue) of arbitration, the substitutional appointing of arbitrators, the consultation of appointing authorities, counter claims and inquiry on evidence, and termination of proceedings.

35. See 158 S. LEBEDEV, *supra* note 10, at 108 for further details.

2. Rules of the permanent arbitration courts of CMEA member countries

Repeatedly I have referred to the regulations of permanent arbitration courts which involve many complex rules: rules on organizational and statutory questions, rules on procedure and arbitration fees, and the compensation of legal and business expenses. Rules in the first category deal with such issues as the name, scope of assignment;³⁶ the secretariat and the seat of the arbitration court, the president³⁷ of the arbitration court (presidium), functions of the president in respect to the presidium,³⁸ and the compilation and maintenance of the list of arbitrators.³⁹

Rules of the second and third categories regulate in detail the initiating of an arbitration, its course, and its termination. These rules specifically define and complete the very general determinations on procedure of the national and international law of arbitration. Here we are mainly interested in the rules of the second category. They are not legal regulations but a category of general business terms according to which the arbitration court (or the body standing behind it) agrees to offer its good services to the interested parties. These terms rank as an immanent component of the respective arbitral agreements. This means that together with the agreement on the clause, all disputes arising from or connected with the contract are to be settled by the court of arbitration attached to the chamber of foreign trade (chamber of commerce). As a result, all rules on the procedure of this arbitration court are considered as agreed upon between the parties.

I stated earlier that the rules on procedure of the permanent arbitration courts attached to the chamber of commerce of the CMEA member countries were largely harmonized and stan-

36. General or special arbitration (e.g. for maritime disputes).

37. The president elected by the assembly of the arbitrators or by the executive bodies of the respective chambers of commerce.

38. The Presidium of the Prague Court of Arbitration decides, for example, questions of jurisdiction over respondents. At other permanent arbitration courts the arbitrators rule on such pleas themselves, subject to subsequent review by a law court.

39. These rules include: maintaining a list of those registered and their date of registration, resolution on the list by the presidium of the arbitration court or by an executive body of the chamber of commerce, the possibility for the president or members of the presidium to be elected as arbitrators, etc.

standardized. In 1970 the CMEA instructed its legal commission to elaborate proposals which concentrated on reducing or abolishing unjustified differences in procedures of permanent arbitration courts in order to obtain the same conditions for initiating and carrying out arbitrations in each country. As a result of these deliberations and efforts, the Uniform Rules of the Arbitration Courts (attached to the chamber of commerce of the CMEA countries) were established in 1974.⁴⁰ These Uniform Rules were created to facilitate co-operation between the foreign trade organizations of the CMEA countries in the event of legal disputes. But once these rules were enacted, these Uniform Rules contributed to the rationalization of arbitrations before all permanent arbitration courts on a large scale, thereby benefiting the parties from non-socialist countries. As a result, there are generally uniform conditions for initiating and conducting arbitrations whether the procedure takes place in Moscow, Prague, Berlin, or Havana. That is an extraordinary achievement considering the marked differences among the Central European, East European, Latin American, and Asian legal traditions and practices. Since 1958, the standardization of the law of arbitration had been incrementally pursued by multilateral actions of the CMEA countries.⁴¹ This had led to a largely uniform interpretation of international commercial arbitration during the past twenty years, in spite of distinct historical differences. This uniform conception made the Uniform Rules practicable and at the same time standardization was developed further by the use of the Uniform Rules.

It is important to remember that the Uniform Rules are a model. The CMEA Executive Committee in its Decision of 1974 recommended that the CMEA member countries urge the competent bodies of their countries to issue rules on the procedure for permanent arbitration courts and to reconcile the rules already in force with these Uniform Rules so that all permanent arbitration courts by 1975 would follow the same regulations for initiating, conducting and termination of arbitration.⁴² The rec-

40. See *supra* note 14.

41. This work, in part, created arbitration law adapted to modern economic relations in countries where none formerly existed (e.g., Mongolia).

42. The Special and Commodity Arbitration Courts are excepted.

ommendations are the most important expression of the purpose of the CMEA. The competent bodies of the CMEA coordinate with the governments of the CMEA member countries through recommendations. According to the Charter of the CMEA, the governments are obliged to consider the recommendations within a fixed period and to convey the result of their decisions to the CMEA Secretariat. The adoption of a recommendation places the respective CMEA member country in the same legal position vis-à-vis the other member countries which also signed the recommendation as if they had signed (referring to the contents of the recommendation) a contract relating to international law. This is the manner in which the uniform law of contract of the CMEA countries has developed and the recommendation procedures regulate their economic and scientific-technological co-operation. For example, the recommendations explicitly provide legal status for the specific texts regarding the general conditions of delivery of goods, and the assembling of machinery. This recommendation procedure was not as effective regarding Uniform Rules because the recommendations were not intended to alter the status of the rules since they were not to be ranked with legal regulations. Therefore, the 1974 recommendation only obliged the member countries to adapt their existing rules to the recommendation and to the Uniform Rules in conformity with the usual methods in the respective countries. In the GDR, the President of the Chamber decided on the rules of procedure of the Court of Arbitration attached to the Chamber for Foreign Trade according to the statute of this organization. Consequently, the competent member of the government, the Minister of Foreign Trade, sent the President of the Chamber of Foreign Trade a letter enclosing the Uniform Rules with the request to adapt the 1954 Rules of Procedure to the Uniform Rules of 1974.⁴³ On February 1975, the GDR put into effect the new rules "on the basis of the Uniform Rules." The chambers of commerce were also prepared for

43. That adaptation was made throughout the CMEA countries with Warsaw providing an interesting variant. There, in 1973, rather modern rules on procedure had been introduced. To have renounced these rules suddenly would have been inappropriate so they were retained and amended by the Uniform Rules of Procedure in those cases where parties from CMEA member countries participated.

the Uniform Rules because the specialists on arbitration of all chambers had co-operated in the working groups (which consisted of the juridical committee of the CMEA) for the preparation of the Uniform Rules.

It must be emphasized that the new rules of procedure enacted in 1975 are "national" rules on arbitration for the decision of legal disputes arising from international commercial contracts between parties from different countries. A model espoused by all CMEA countries underlies the uniformity of the national rules. During the formulation of this model the experience of the permanent arbitration courts in the CMEA member countries was utilized as well as the experience of well-known centres of arbitration in other parts of the world. The work of UNCITRAL and ECE were also considered. For this reason, in spite of some differences in details, there are no incompatibilities between the 1975 rules of procedure of the permanent arbitration courts attached to the chambers of commerce of the CMEA member countries and the later UNCITRAL Arbitration Rules. These CMEA member countries, in fact contributed to the accomplishment of the objectives of the 1975 Conference on Security and Co-operation in Europe⁴⁴ in the field of commercial arbitration by the preparation of these largely uniform rules of procedure for arbitration before permanent arbitration courts, and by the acceptance of the ECE and UNCITRAL Arbitration Rules for ad hoc arbitration held in the CMEA countries.

3. Priority of contractual provisions relating to international law

Any discussion about the legal background of arbitration is incomplete without referring to section 32 of the Ordinance on Arbitration Proceedings. (This Ordinance exists with similar wording in the arbitration law of all CMEA member countries). It gives priority to the provisions of contracts relating to international law over the provisions of the Ordinance. A more complete picture emerges when we consider the CMEA member countries participating in international conventions in the field

44. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, reprinted in 73 DEP'T ST. BULL 323 (1975), and in 14 I.L.M. 1292 (1975).

of international commercial arbitration.⁴⁵ If we disregard regional bilateral agreements, the situation is as follows:

	1923	1927	1958	1961
Bulgaria			+	+
CSSR	+	+	+	+
Cuba			+	+
GDR	+	+	+	+
Hungary			+	+
Mongolia				
Poland	+		+	+
Rumania	+	+	+	+
USSR			+	+
Vietnam			+	+

The affiliation to the 1958 New York Convention is of special significance. It guarantees the recognition and enforcement of arbitral awards (including arbitral awards on agreed conditions) in all major countries of the world which take part in international trade. However, the national law on arbitration of the CMEA countries is more flexible in all regards than the 1958 New York Convention. For example, it is easier for the creditor to carry out the enforcement of an arbitral award according to the GDR Ordinance on Arbitration Proceedings than according to the 1958 New York Convention. For this reason, the CMEA member countries supported the proposal to simplify certain procedures of the New York Convention; in particular a facilitation of the recognition and enforcement of foreign awards. However, we are of the opinion that the time has not come for such an alteration of the basic structure of the New York Convention. Presently, we do not aim to revise the Convention, but rather to

45. *E.g.*, Conventions under the Auspices of the League of Nations: Convention for the Execution of Foreign Arbitral Awards, 26 Sept. 1927, 92 L.N.T.S. 302, *reprinted in* 2 REGISTER OF TEXTS OF CONVENTION AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 13 (1973) [hereinafter cited as U.N. REGISTER OF TEXTS]; Protocol on Arbitration Clauses, 24 Sept. 1923, 27 L.N.T.S. 158, *reprinted in* 2 U.N. REGISTER OF TEXTS, *supra*, at 8; Conventions under the Auspices of the United Nations: European Convention on International Commercial Arbitration, 21 Apr. 1961, 484 U.N.T.S. 364, *reprinted in* 2 U.N. REGISTER OF TEXTS, *supra*, at 34; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, T.I.A.S. No.6997, 330 U.N.T.S. 3, *reprinted in* 2 U.N. REGISTER OF TEXTS, *supra*, at 24.

encourage more countries to participate in it.

The complex questions concerning the legal admissibility of arbitration, filling of gaps, and the adaptation of contracts to arbitration is always topical. *Force majeure* clauses and hardship clauses assigning arbitrators for assistance to the parties are also known in the CMEA member countries but there has not been any practical experience with these clauses to render opinions and recommendations. That is why articles and lectures⁴⁶ are restricted to the discussions of legal positions only as they relate to the Ordinance on Arbitration Proceedings. I will mention, however, two occurrences which demonstrate that these important issues are being addressed. The permanent arbitration court attached to the Bulgarian Chamber of Commerce and Industry in Sofia amended its rules on procedure and informed the contracting parties that it was ready to assist them in the event problems were encountered relating to the adaptation of contracts and the amendment of contracts. Also The International Commercial Contracts Act of the GDR of 5 February 1976 regulates the amendment of contracts, the filling of gaps, and the concurrence of a third party, including the concurrence of arbitrators.⁴⁷

Summary

National legal regulations exist in all CMEA member countries for admitting and regulating international commercial (and maritime) arbitration. The activities of the permanent arbitration courts attached to the chamber of commerce are clearly more significant than the ad hoc arbitration. The national legal regulations favour the application of model arbitration rules. These rules give the parties the maximum possibility to adapt the procedures to the particulars of the individual case. Anti-frustration provisions and rules minimize the negative effects of a party seeking to obstruct the proceedings. The party relying

46. *E.g.*, International Chamber of Commerce, Third Seminar on East-West Arbitration, Paris, Dec. 1983.

47. Strohbach, *Filling Gaps in Contracts*, 27 AM. J. COMP. L. 479 (1979). See Staley, *Arbitration to Adapt Long Term International Economic Contracts to Changed Circumstances*, in NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS, ICCA Cong. Series No. 1, at 208 (1982).

on the validity of the arbitration agreement and seeking assistance through arbitration proceedings will be protected and supported. Harmonizing the rules of the permanent arbitration courts by adapting the Model Uniform Rules, as elaborated by the CMEA, has essentially simplified and intensified the co-operation between the parties and the arbitrators. Nearly all CMEA countries are members of the universal conventions in the field of international commercial arbitration. To date, difficulties have not arisen in connection with the enforcement of foreign arbitral awards within the CMEA countries.

III. Agreements on Arbitration Among the Chambers of Commerce

Repeatedly I have referred to the central chambers of foreign trade (or chambers of commerce and industry) as the bodies responsible for arbitration in the CMEA member countries. These chambers organize the arbitration through the formation and the maintenance of permanent arbitration courts. They provide for rooms, for technical equipment for the offices, and for means of communication as well as for personnel to operate the equipment. More importantly, they give legal advice to the parties and assist the arbitrators. The arbitrators do not belong to the staff of these chambers of commerce; they are lawyers and judges, university teachers, functionaries of the economic management; mostly jurists but also economists and engineers. Arbitrators with education in more than one area, e.g. jurists/economists have proven to be particularly successful. Potential foreign partners of the chamber of commerce of the CMEA countries include special organizations active in this field such as the Japan Commercial Arbitration Association and the Indian Council of Arbitration. Actually, a network already exists of such agreements between chambers of commerce and arbitration organizations in Austria, India, Italy, Japan, Spain, and the United States.⁴⁸ Among these inter-institutional agreements, the tri-lateral agreement between the Chamber of Commerce and Industry of the USSR, the American Arbitration Association and the

48. See 158 S. LEBEDEV, *supra* note 10, at 159.

Stockholm Chamber of Commerce is the most influential.⁴⁹ It was signed five years ago, and led to a fruitful symposium on international commercial arbitration in Stockholm in 1982.

These agreements pursue several objectives. To begin with, they are intended to bring together the organizations active in the field of arbitration and to establish lasting contacts. These contacts enable countries to discuss legislation, legal decisions of law courts, and the practice of arbitration. As a result of this trust and co-operation, a recommendation is usually made to the economic organizations of the two countries to make use of arbitration if difficulties arise from contracts. For corroboration of these recommendations, the agreements contain a model arbitration clause, the legal effectiveness of which is insured in view of the law on arbitration of the two countries. The inter-institutional agreements vary considerably regarding the contents of this model arbitration clause. Finally, (obviously under the influence of the UNCITRAL rules in the field of arbitration and according to a careful scrutiny of the International Council for Commercial Arbitration (ICCA)), recent agreements include those on co-operation between the parties in all matters related to the fulfillment of the recommended clause. Of course the economic organizations which make use of the model clause have wide discretion to apply to the competent state court should problems arise. Moreover, these agreements do not displace the mechanism of enforcement of arbitral awards which depend on procedures based on the model clause. However, the co-operation between the partners relating to these agreements should make it unnecessary to resort to state courts. It might be sufficient to give a warning to the partner who will compel the debtor to intervene in order to give rise to the voluntary performance of the arbitral award. That would save time and money and it would not burden the business relations to such an extent as would an enforcement procedure with the unavoidable application of state power.

49. The main feature of this agreement was a model arbitration clause known as *Optional Arbitration Clause for Use in Contracts in USA-USSR Trade 1977*, reprinted in 3 J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS* 465-67 (1979) and in Lebedev, *The 1977 Optional Clause for Soviet-American Contracts*, 27 AM. J. COMP. L. 469, 476-77 (1979).

The most important aspect of these arrangements is the recommended model clauses. Unfortunately, there is no survey to demonstrate to what extent the economic organization utilize this recommendation. An increase in arbitrations between the parties of the respective countries cannot be statistically documented by the competent arbitration courts.⁵⁰ Indeed, there are no statements on ad hoc arbitration; these procedures are not registered or in any way recorded. Hearsay and publications of arbitrators appointed in ad hoc situations are the only methods of obtaining information. The model clauses are as a rule mere clauses on mutuality combined with the principle *actor sequitur forum rei*. That means that the plaintiff refers to a permanent arbitration court in his country and would apply to the arbitration court in the respondent's country only in case of a dispute. The arbitration court in either country would apply its rules to the proceedings.

Another kind of model clause combines this mutuality with the possibility to appeal to a permanent arbitration court of a third country or to constitute an ad hoc arbitration there. The claimant has the right to choose the arbitration court. Agreement on the UNCITRAL Rules of Arbitration is recommended for ad hoc arbitration. Such model clauses are preferred if the legal situation concerning the arbitration in the partner's country could not be easily supervised and consequently arbitrations should be avoided.

Recent agreements of this kind go one step further and assign a "tailored" clause⁵¹ which contains the organization of an

50. Figures on proceedings before permanent arbitration courts in the CMEA member countries are not tabulated if parties from non-socialist countries are involved in them. Information on the number of cases is exchanged between the arbitration courts only if they relate to "CMEA cases." The interest in CMEA cases depends on the fact that they are based on a uniform CMEA law of contract. Its application, by the economic organizations and the arbitration courts, is mutually observed and discussed with the purpose of developing this law of contract. This purpose is inapplicable if the parties participating in the arbitration come from non-socialist countries. At the Court of Arbitration attached to the Chamber of Foreign Trade of the GDR there has been a constant 20 to 24 cases pending per year as opposed to 460 "CMEA cases" per year. These are mostly cases with considerable value in dispute and full of judicial and commercial (sometimes even technical) complications.

51. Various countries are involved including the United States. There is no concentration in any particular country. In Prague, the permanent arbitration court deals with more of such procedures, the same may be said of Budapest.

ad hoc arbitration in a third country with the chamber of commerce or the body for arbitration as appointing and administering body following the pattern of the UNCITRAL Arbitration Rules. Annexes to these agreements are lists on experts specially made out for the parties and/or the appointing authorities so that they can refer back to them for an appointment of arbitrators.

Inter-institutional agreements played a special role at the 1982 International Arbitration Congress in Hamburg. In order to abridge I expressly refer only to the congress reports which contain a complete documentation on the agreements to date. There is a real danger in concluding such agreements for the sole intent of expressing good will between the partners. This could be misleading in business practice and such agreements could be devaluated or invalidated in certain business circles.⁵² The lengthy negotiation preceding such agreements and a careful examination and weighing of the real requirements of the practice indicate that nowadays this selection of partners and of the contents of such agreements are tackled with more care and consideration than previously. So we await an even greater effectiveness of the recent institutional arrangements.

Summary

The chambers of commerce of the CMEA member countries endeavour to foster international commercial arbitration. The organization and the maintenance of permanent arbitration courts are the main vehicles to fulfillment of this objective. Another tool is the impartial assistance of ad hoc arbitration. The efforts of these chambers of commerce are significant and promising; they aim to create a network of international co-operation in the field of arbitration together with their corresponding partner organizations with the view towards the promotion of international trade.⁵³

52. Coulson, *Agreements Between Arbitration Institutions: Potential for Control, Danger of Abuse*, in *NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS*, ICCA Cong. Series No. 1, at 33 (1983).

53. Melis & Strohbach, *East-West Arbitration*, 7 Y.B. COM. ARB. 395 (1982).