

TRADING WITH SOCIALIST PARTNERS

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Some progress, however limited, in cooperation between Socialist nations and the Western nations and in particular significant contacts between the Nixon Administration and Socialist "super powers" and some other Socialist states, *e.g.*, Romania, led recently to renewed interest within the American legal community in the law of Socialist nations and in the legal framework of trade relations with these countries. A rather pressing need for raw materials and for development of new markets for some American producers, coupled with the favorable governmental policy towards "East-West" trade, may stimulate an increase in volume of trade between American exporters and importers and their Socialist counterparts to the point where such trade could be of economic, rather than largely political, significance. The following remarks are aimed at a few of many problems that may be encountered by a Western businessman who desires to explore Socialist markets in Eastern Europe, with the exception of Yugoslavia and Albania.¹

I. NATIONAL ECONOMIC PLAN AND THE FOREIGN TRADE REGIME

Organization and direction of the economy is considered by Marxist theoreticians to be one of the basic functions of the Socialist state.² The state exercises its economic function through establishment of legally independent economic entities (corporations, enterprises, etc.)³ which are authorized to engage in activities specifically set forth in their "arti-

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¹Practically identical concepts of economic planning, state monopoly of foreign trade and functions, and subordination of enterprises engaged in foreign trade that exist in the Soviet Union, Peoples Republic of Bulgaria, Czechoslovakian Socialist Republic, German Democratic Republic, Hungarian People's Republic and Socialist Republic of Romania permit generalizations. Although the same could apply to Albania, its minimal contacts with the West and insufficient information about trading conditions with Albanian enterprises justify exclusion of Albania. Yugoslav companies engaged in foreign trade enjoy a greater degree of independence within the national economic plan, and this makes it inappropriate to compare them with foreign trade enterprises in other East European Socialist countries.

It should be noted that in the following remarks this writer will draw on his experience as former counsel of a Czechoslovak foreign trade corporation. Nevertheless what will be said about Czechoslovakia applies by analogy to the other Socialist countries discussed.

²THEORIE STÁTU A PRÁVA (Theory of State and Law) 20 (Boguszak ed., Prague 1969).

³In addition, the socialist state "encourages and approves of" the establishment of various cooperatives. In some Socialist countries a few marketing organizations of certain nonagricultural cooperatives are authorized to engage in export-import trade.

cles of incorporation;" through the national economic plan, approved by the government and the legislature, which prescribes limits and goals of production and distribution of goods and resources and operations of the Socialist enterprises; through direct supervision of the activity of these enterprises by governmental bodies;⁴ and last, but not least, through constant participation in policy decisions of these enterprises by the apparatus of the Communist Party on central and local levels.

In the area of foreign trade Socialist states have established so-called foreign trade organizations (or enterprises or corporations) entrusted with export-import activities in a given area.⁵ Each foreign trade organization buys good to be exported from a national manufacturing company or other concern and sells imported goods to a national corporate buyer pursuant to separate contracts governed by the respective national law. Foreign trade organizations are not agents of their national sellers and buyers or of the state;⁶ they are independent juridical persons, liable for their obligations within limits imposed by law of the state of establishment (incorporation)⁷ or set forth in published articles of incorporation. In the U.S.S.R. foreign trade organizations are practically the only legal entities authorized to enter into foreign trade contracts. In some of the other Socialist countries, in addition to foreign trade organizations, already established national companies or combinations of national companies may be authorized to engage in export-import trade.⁸ Although it is possible to speculate that, for example, manufacturers engaged in foreign trade may exhibit greater interest in the best returns on their exports and in the selection of commercially superior products needed for their production from abroad than do the foreign trade organizations, at present, and also for purposes of these remarks, it is not necessary to distinguish between the activities and the legal regime

⁴Government, ministries, various inspection commissions, etc. In contractual disputes between socialist enterprises (including disputes between an enterprise engaged in foreign trade and another national enterprise) the National Economic Arbitration Tribunal, which has exclusive jurisdiction over such disputes, must take into account in making its decision the portion of the economic plan governing operations of the enterprises in question.

⁵E.g., foreign trade organization for export and import of motor vehicles or textiles, etc.

⁶Knapp, *The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 52, 53, 61 (Schmitthoff ed., London 1964).

⁷E.g., certain assets such as real property entrusted to these organizations by the state and considered inalienable according to the Constitution of the state in question cannot be subject to claims.

⁸Art. 7 of Romanian Law No. 1 of March 17, 1971, On Foreign Trade and Economic Activities, Official Bulletin of the Socialist Republic of Romania, 11 ILM 161, 162 (1972). See also Grzybowski, *The Foreign Trade Regime in the Comecon Countries Today*, 4 N.Y.U.J. INT'L. L. & POL. 183, 184-90 (1971).

of the different types of Socialist enterprises mentioned above.

Each Socialist enterprise engaged in foreign trade is subordinated to the Ministry of Foreign Trade.⁹ Top executives of each foreign trade organization are in daily contact with the officials of the Ministry of Foreign Trade, and the Minister of Foreign Trade "appoints and dismisses . . . presidents and vice presidents [of the foreign trade organization]."¹⁰ There is no doubt that the Ministry of Foreign Trade has the authority to make any decision concerning export-import operations of any enterprise engaged in foreign trade.¹¹

With respect to its initiative concerning individual foreign partners and export and import contracts, each foreign trade organization is confined to the activities prescribed for it in the national five-year economic plan and further specified in annual plans within the five-year planning period. In theory, the plan for each foreign trade organization is proposed by the Ministry of Foreign Trade after consultations with the organization in question. After the necessary approvals, the plan "becomes an integral part of the uniform state plan of development of the national economy."¹² This means, among other things, that it has to tie in with that part of the national plan determining the activities of the national partners of the foreign trade organization. If, for example, foreign trade organization F is directed by its plan to export 1,000,000 barrels of crude oil in a planning period, then N, national producer of crude oil, must be directed in its plan to produce 1,000,000 barrels of crude oil to be sold to F, plus an additional quantity of crude oil to be sold to domestic users as specified in the plan. Should there be more than one national producer of crude oil, it must be planned from which

⁹Art. 5 of the Romanian Law No. 1 of March 17, 1971, On Foreign Trade and Economic Activities, Official Bulletin of the Socialist Republic of Romania, 11 ILM 161, 162 (1972). Knapp, *supra* note 6, at 53, 54. However, national enterprises established for other purposes than conduct of foreign trade, but subsequently authorized to engage in export-import trade, are also subordinated to the particular ministry in charge of the industry in question. It is this latter ministry which supervises *e.g.*, production activity, executive personnel, etc. of the enterprise.

¹⁰Nehemkis and Schölhammer, *International Business Transactions with the Soviet Union and Mainland China: Prospects and Hazards*, 28 BUS. LAW. 17, 30 (1972).

¹¹See the Award of the Soviet Foreign Trade Arbitration Commission concerning *Jordan Investments, Ltd. v. All-Union Foreign Trade Corporations Sojuzneftexport* in Domke, *The Israeli-Soviet Oil Arbitration*, 53 A.J.I.L. 787, 800-06 (1959). See in particular, point 4 of the Commission's summary of Sojuzneftexport's answer at 803, and points 1 and 4 of the "Reasons for the Award" at 804-05. It should be noted that the Commission emphasized that the Ministry not only refused to issue the pertinent export license (which would be within the power of a governmental body anywhere) but "moreover did generally enjoin [Sojuzneftexport] from implementing the contract" (point 4 at 805). In this connection, it should be also noted that in Czechoslovakia export and import licenses were abolished in 1957 (see Knapp, *supra* note 6, at 58). Obviously, "issuance of a license" is only *terminus technicus* for a particular decision of the Ministry of Foreign Trade.

¹²Knapp, *supra* note 6, at 59.

producer F must buy for export, etc.

The economic plan of each foreign trade organization is itemized in considerable detail. With respect to each item (goods, services, etc.) the plan contains descriptions of quality, quantity to be exported and imported, estimate of payments for the total volume of each item to be imported, estimate of payments received for items exported, etc. The plan of financial operations of each foreign trade organization, which includes the plan of accounts payable and accounts receivable for the planning period, is an integral part of the national budget which in turn can be called "the financial mirror" of the national economic plan. Projected receipts and expenditures in convertible currencies are planned separately. Each foreign trade organization receives an allocation of convertible currency for planned payments to its Western partners, whereas convertible currency received is transferred to the State.

As can be seen, economic planning in Socialist States is a complex matter. The plan of each foreign trade organization must correspond to the economic plans of various national companies. Therefore, the various factors considered in the preparation of the plan of foreign trade organizations are of vital importance, especially with respect to the question whether the plan is based on the projected commercial needs of their national partners and the needs and tastes of the ultimate consumers.

It is the unquestionable objective of the Socialist states to export to the West as much as is economically feasible in order to obtain much-needed convertible currency for imports of technologically sophisticated capital goods and for imports of goods needed to overcome shortages.¹³ This objective, together with the nature of the described type of economic planning, based on arbitrary decisions with respect to a rather distant future, and with the considerable shortage of convertible currency experienced by the Socialist states, poses the main difficulty for the Western businessman. The problem can be best illustrated by an example:

Since the 1950's there has been a severe shortage of passenger automobiles in Czechoslovakia. The supply (including imports from the West and the U.S.S.R. and German Democratic Republic) satisfied less than 50% of the demand. Ownership of a car has been a matter of

¹³Nehemkis and Schöllhammer, *supra* note 10, at 25. It is necessary to differentiate between a "shortage" contemplated by the Socialist planners and a "shortage" caused by an unforeseen event, such as a wheat shortage caused by drought. The former is caused by the anticipated inability of national companies to produce certain goods and hence the supplementary imports of the goods in question are planned. If the latter is to be alleviated by imports, governmental decision to authorize imports notwithstanding the plan is required.

status, a primary desire of a Czechoslovak consumer; the Czechoslovak government has been therefore under considerable popular pressure to increase production of automobiles. Through the 1960's the increase in production was not commensurate with the increase in demand. For that reason, the Government devised a special system of distribution (the term rationing may be more appropriate) of passenger cars. A national centralized retail outlet called Mototechna was the only seller of cars to consumers. Mototechna kept lists of applicants desirous of buying a car. Each applicant had to deposit with Mototechna a substantial portion of the price of the car; he was then put on the waiting list and received his car two to five years after the date of his deposit. The exorbitant retail price of any car reflected governmental policy to discourage car buyers and bore no relation to production costs of the Czechoslovak cars manufactured by enterprises Skoda and Tatra, or to the import price of the foreign cars. Mototechna bought passenger automobiles either from the Czechoslovak manufacturers or from the importer—a foreign trade organization.

In the 1950's and 1960's the Czechoslovak foreign trade organization called Motokov was entrusted with the export and import of motor vehicles. Motokov had several divisions (e.g., division of passenger automobiles, division of motorcycles, etc.), each one having a separate plan of operations, separate allocation of convertible currency, etc. Each division had several departments, usually established on the territorial principle (e.g., Western Europe), and each department had a separate plan of operations based on the plan of the division. Motokov exported some cars bought from Skoda and Tatra and sold imported cars to Mototechna.

Motokov was subordinated to the Ministry of Foreign Trade, Mototechna by the Ministry of Internal Trade, and Skoda and Tatra by the Ministry of Automobile Industry. These ministries along with the Central Planning Commission, the Ministry of Finance (charged with the allocation of convertible currency to foreign trade organizations) and the appropriate department of the Central Committee of the Communist Party,¹⁴ participated in the preparation of the national economic plan of production, export and import and national distribution of passenger automobiles. They had to decide the following items: (i) the goal of production of the Czechoslovak producers,¹⁵ and within the plan of production, the volume to be sold to Motokov for export and to Mototechna for sales to consumers; (ii) the goal of national distribution by Mototechna, whose plan included detailed descriptions

¹⁴*Cf.* art. 1 of the Romanian Law No. 1 of March 17, 1971, On Foreign Trade and Economic Activities, Official Bulletin of the Socialist Republic of Romania, 11 ILM 161 (1972).

¹⁵Needless to say the production plan of *Skoda* and *Tatra* had to coincide with the production plan of manufacturers of accessories, and so on, *ad infinitum*.

of models of cars to be sold on the national market, since Mototechna had to be able to advise the buying public that deposits would be accepted for, say, Fiat 600's to be imported within the next five year planning period; (iii) the wholesale and retail prices of automobiles; and (iv) with respect to Motokov, the allocations of convertible currency for purchases outside of the Socialist world and the specific number of cars to be exported and imported, as well as descriptions of the car models to be imported.

Three major points are demonstrated by this example. First, because of the interrelationships among various national organizations it is almost impossible to achieve any substantial change in the plan affecting a particular foreign trade organization while the national economic plan is in operation without rewriting the whole plan. Second, each foreign trade organization has practically all its future contracts with national suppliers and buyers, including price terms, already worked out in the plan. And third, because of the designation of goods to be imported, each foreign trade organization has a limited choice of its foreign trading partners.

The Socialist planner's decision as to which goods to import is based on a combination of economic, commercial and political factors, one of which may occasionally prevail. Obviously, if a technologically advanced product can be obtained in one Western country only and if that product is considered vital for the development of the Socialist economy, the foreign trade organization will buy the product from the seller in the country in question. On the other hand, if products planned to be imported are obtainable from a variety of sources in the West, in addition to the usual commercial considerations the following political considerations may become determinative as to the decisions which product and from where to buy: (i) General political considerations. Usually Socialist countries prefer to import goods from Western states with which they maintain friendly relations. In the late 1950's and early 1960's imports from France were favored over imports from Great Britain, whereas imports from the Federal Republic of Germany were confined exclusively to plant equipment and other technologically advanced products. (ii) Political Considerations related to trade conditions. Availability of credit and various restrictions on imports from and exports to Socialist states or otherwise unfavorable attitude to East-West trade¹⁶ figure prominently among these considerations. Also, a commitment to increase imports from particular Western countries in return for various concessions, *e.g.*, tariff concessions, affecting Social-

¹⁶See Bilder, *East-West Trade Boycotts*, 118 U. PA. L. REV. 841 (1970).

ist exports¹⁷ represents a potent reason for designation in the plan of countries of origin of goods to be imported. Generally speaking, Socialist states give considerable preference to export-import trade with Western states with which intergovernmental trade agreements were concluded. It must be emphasized, however, that the Socialist states have made considerable efforts to reach such agreements with the Western nations.¹⁸

The preceding description of the planning system gives rise to the conclusion that in practical terms a western businessman can obtain access to the Socialist markets only to the extent that the state economic plan permits him to do so. If he is an importer, he has a fair chance to buy goods from foreign trade organizations unless the Socialist planners do not plan the export of such goods or unless the foreign trade organization in question is directed to sell the entire volume of goods elsewhere. If he is an exporter, however, his position is considerably more difficult. Not only must the goods he wants to sell be included in the plan of imports, but also the foreign trade organization authorized to import such goods must either be specifically permitted to import these goods from the state of his business domicile, or—and this does not happen too often—be free to import them from anywhere. Unless these conditions exist, no matter how much the foreign trade organization may like the exporter's goods and commercial terms, he must wait at least for the next planning period. As to the foreign exporter's chances "to be included" in the plan, he will be well advised not to rely exclusively on quality etc. of his product, but also to actively seek contacts not only with the foreign trade organization in question, but also with the officials of the Ministry of Foreign Trade or of the Communist Party.¹⁹

Once a foreign trade organization decides to buy goods from a particular Western exporter, it will negotiate the contract. The purchase price, referred to in the Socialist states as import (export) price, is computed in convertible currency, usually on a CIF or FOB basis, and more or

¹⁷See Comment, *East-West Trade: The Accession of Poland to the GATT*, 24 STAN. L. REV. 748, 754-58 (1972).

¹⁸With respect to Soviet initiative in the 1950's and 1960's vis-à-vis the United States, see Professor Berman's comment *The US-USSR Trade Agreement From a Soviet Perspective*, 67 A.J.I.L. 516, 519 (1973). Two prominent Czechoslovak authors in a study on the principles of international law concerning friendly relations and cooperation among states wrote: "Socialist . . . countries rank economic and trade cooperation second only to the maintenance of international peace and security." (Potocny and Myslil, *Legal Principles of Peaceful Coexistences* 235 (English Translation, Prague, 1969)).

¹⁹Comment, *Cooperation Agreements and Joint Ventures with Socialist Business Associations: The Hungarian System*, 21 AM. J. COMP. L. 752, 754 (1973).

less reflects a foreign market price.²⁰ Customs duties of the importing state are paid by the Socialist importer who simply transfers the respective amount from his account in national currency to the state. That financial transaction is purely technical and the tariff rate does not enter into consideration with respect to the import (export) price.²¹ The national corporate buyer has to buy pursuant to the economic plan all the goods in question from the importer (foreign trade organization) for the price expressed in the national currency. As has been mentioned above, the retail price charged by the national buyer is planned well in advance of the particular transaction between the Western exporter and the foreign trade organization, and is wholly unrelated to the import price. In that sense, the Western exporter does not have to worry whether goods from the state of his business domicile enjoy status under a most-favored-nation regime or not. The role of most-favored-nation regime is to put foreign goods and foreign exporters which enjoy it into exactly the same position on the national market, at least as to tariffs, so that they can compete for the national consumers particularly on the basis of the quality and price of their goods and services. But how can a particular western exporter effectively compete with the others if the Socialist planners arbitrarily decide in advance how much the foreign trade organizations will buy from each of them, or possibly exclude one or more exporters at all?²² The prevailing answer is that "In the light of experience of the years since the emergence of state trading the conclusion seems inescapable that the most-favored-nation clause cannot achieve an increase in trade, as it was originally intended to do"²³ Indeed, the most-favored-nation clause, taken out of the context of an intergovernmental trade agreement, is of no use to the Western exporter whose goods enjoy the most-favored-nation regime in a Socialist country pursuant to that clause. It might well have been of no use, even in the context of East-West trade agreements, "since the

²⁰In the case of Socialist exports, the Socialist states have been in the past confronted with allegations of "dumping" since the national manufacturer's wholesale price is arbitrarily set by the state authorities and cannot be in any reasonable way related to the asking price (in convertible currency) of the foreign trade organization. See *supra* note 17, at 749-52.

²¹Rohlík, *K Některým Otázkám Valorizace Kupní Ceny Podle Našeho Nového Zákoníku Mezinárodního Obchodu* (The Problem of Revalorization of the Purchase Price according to the New Law on Foreign Trade) 9 CZECHOSLOVAK J. OF INT'L L. 65, 71 (1965). According to § 347 of the Czechoslovak Law No. 101/1963 Sb. (Collection of Statutes), "Unless otherwise agreed . . . customs duties . . . and other costs related to imports shall be borne by the buyer."

²²Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet American Example*, 24 LAW & CONTEMP. PROB. 482, 501 (1959).

²³Domke and Hazard, *State Trading and the Most-Favored-Nation Clause*, 52 A.J.I.L. 55, 67 (1958).

emergence of state trading", *i.e.*, since the Russian revolution of 1917, because the prevailing political and economic conditions were not favorable to "East-West" trade. However, if we assume that these conditions are undergoing a process of change, we may speculate that the most-favored-nation clause in an East-West trade agreement may favorably affect all its beneficiaries, although in a different sense than we understand it in a free market economy.

As has been mentioned above, Socialist states prefer to trade with Western states with which they have concluded intergovernmental trade agreements. It can be safely said that at present an overwhelming majority of such agreements among friendly states include a most-favored-nation clause. For the Socialist states and particularly for the Soviet Union, the grant of most-favored-nation treatment is not only of economic significance²⁴ but also of political significance, a matter of principle. As Professor Berman puts it, "[most-favored-nation treatment]—in its proper sense of nondiscrimination—is a matter of national pride: indeed, the Soviets, with some justification, consider our tariff discrimination against their exports to be a violation of international law."²⁵ Thus, it seems to be at least justified to suggest that if the Soviet Union is finally granted most-favored-nation regime in the United States, and the U.S.-U.S.S.R. Agreement on Trade of October 18, 1972²⁶ becomes wholly operative,²⁷ the American exporter will have a better chance to penetrate the Soviet market by the mere fact that the Agreement was concluded, and the same should apply by analogy to other Socialist countries. Moreover, the U.S.-U.S.S.R. Agreement on Trade contains what this writer considers to be some specific Soviet commitments in this direction. According to article 2, paragraph 1 of the Agreement, "Both governments will take appropriate measures . . . to encourage and facilitate the exchange of goods and services between the two countries on the basis of mutual advantage . . . In expectation of such joint efforts, both governments envision that total bilateral trade in comparison with the period 1969 - 1971 will at least triple over the three year period contemplated by this Agreement."

²⁴See Starr, *A New Legal Framework for Trade Between the United States and the Soviet Union: The 1972 US-USSR Trade Agreement*, 67 A.J.I.L. 63, 68, 69 (1973).

²⁵Berman, *supra* note 18, at 520. Compare Domke and Hazard, *supra* note 23, at 66 (citing unpublished study of Erler and Zieger).

²⁶67 DEP'T STATE BULL. 595 (1972). For an analysis of the Agreement and related matters see Grzybowski, *United States-Soviet Union Trade Agreement of 1972*, 37 LAW & CONTEMP. PROB. 395 (1972) and Starr, *supra* note 24.

²⁷As of this writing there has been a considerable congressional opposition to the grant of most-favored-nation status to the U.S.S.R. and other Socialist states.

Paragraph 4 of the same article states, "The Government of the Union of Soviet Socialist Republics expects that, during the period of effectiveness of this Agreement, foreign trade organizations of the Union of Soviet Socialist Republics will place substantial orders in the United States of America for machinery, plant and equipment, agricultural products, industrial products and consumer goods produced in the United States of America."²⁸ Pursuant to article 5 the U.S.A. may establish a Commercial Office in Moscow and the U.S.S.R. may establish a Trade Representation in Washington. According to the White House Fact Sheet the U.S. Commercial office is expected to ". . . provide the U.S. business community with up-to-date information on Soviet markets, facilitate introductions of U.S. businessmen to the appropriate Soviet ministries" ²⁹ According to article 6 of the Agreement, American business firms may open their representations in the U.S.S.R. and Soviet foreign trade organizations may establish their offices in the U.S.A.

The most-favored-nation clause appears in article 1 of the Agreement. It is the so-called general most-favored-nation clause, since in addition to customs duties and "charges of any kind" (art. 1 § 1(a)), it includes internal taxation, sale, distribution, storage and use (art. 1 § 1(b)), charges imposed upon the international transfer of payments for importation or exportation (art. 1 § 1(c)), and rules and formalities in connection with importation or exportation (art. 1 § 1(d)). Paragraph 2 of the same article provides for equitable shares of exports (imports) in the event that either government applies quantitative restrictions. Paragraph 3 incorporates exceptions with regard to privileges granted to neighboring countries, to developing countries under 1968 UNCTAD Resolution 21 (II), or with respect to any action permitted under existing multilateral agreements.

Although, as has been emphasized above, the most-favored-nation clause in itself does not assure either free access to the Soviet market or "inclusion" of American goods into the Soviet plan of imports, it would seem that use of a clause such as that employed in the U.S.-U.S.S.R. Agreement on Trade, especially when read in the context of the Agreement, would at least stimulate the Soviet government to plan an increase of Soviet imports from the U.S.A. in relation to possible increase of imports from other Western countries with which similar

²⁸Soviet commitment to purchase goods of certain value within a specified period already accompanied Soviet-American trade agreements in the 1930's. See Domke and Hazard, *supra* note 23, at 57.

²⁹67 DEP'T STATE BULL. 593 (1972).

agreements were concluded.³⁰

Finally, a speculation that the rigid system of planning in the Socialist states will change does not seem to be out of order. Already in the early 1960's a prominent Soviet economist, Lieberman, and an equally prominent Czechoslovak economist, Sik, advocated more freedom and independence for Socialist enterprises. Romania and Hungary are actually seeking Western investment in their respective countries (see *infra*). The Soviet phobia about "capitalist encirclement" and hostility seems to be fading with the improved political and economic position of the USSR and, correspondingly, the Soviet desire to engage in a meaningful trade with the West seems to be sincere. If the Socialist states can avail themselves of most-favored-nation regime in the West (hopefully including the U.S.A.) and as a result will be able to increase their exports there, one of the rational reasons for rigid planning of foreign trade—significant lack of convertible currency—can be alleviated. We may then see a system of planning according to which each Socialist enterprise engaged in the export-import trade will be allocated a certain volume of convertible currency (dependent on their real needs or on their profits from exports), which these enterprises will be permitted to use more or less freely, according to their own commercial judgment. If the contemporary East-West trade agreements contribute to such changes, the initial advantage of the Soviet exporter under the most-favored-nation regime (access to Western markets) and the lack of reciprocity as to the free access of the Western exporter to the Soviet market due to the system of planning, will more than offset. After all, it should be remembered that there are around three hundred million people in the U.S.S.R. and Eastern Europe who need not only American wheat and Western technology, but who are literally hungry for Western automobiles, textiles and other consumer products and who, in contrast to the situation in some developing countries, are sophisticated enough to avail themselves of the opportunity to buy, should it arise.³¹

II. EXPORT-IMPORT CONTRACTS AND LAW IN SOCIALIST STATES

The Socialist states which emerged after a series of "coups d'état" in Eastern Europe in the late 1940's absorbed very quickly the Soviet "model" of regulation of national economy;³² the same cannot be said

³⁰In that sense only does this writer share Professor Berman's view as to the significance of the most-favored-nation clause extending beyond customs duties. See Berman, *supra* note 18, at 521, and Berman, *supra* note 22, at 525, n.133.

³¹See also McQuade, *U.S. Trade With Eastern Europe: Its Prospects and Parameters*, 3 LAW & POL. INT'L BUS. 42, 44-51 (1971).

³²*Supra* note 1.

about commercial law (as opposed to public law). The Soviet Union after the 1917 revolution had "abolished" the overwhelming majority of prior statutes, and development of the new Socialist law resulted in a rather fragmentary system. A multitude of gaps was filled by decisions of courts and administrative agencies which considered the "will of the proletariat," in the absence of statute, as a source of law, and although the situation improved since the 1960's, Soviet law can hardly be considered to be a model of clarity and normative precision. At present, the Principles of Civil Legislation of the U.S.S.R. and the Union Republics of 1961, the Principles of the Law of Civil Procedure of the U.S.S.R. and Union Republics of 1961, Civil Codes of Soviet Republics, administrative regulations and international agreements are the principal sources of Soviet law applicable to foreign trade contracts.³³ The Soviet forum for litigation arising out of such contracts,³⁴ which for all practical purposes is the Soviet Foreign Trade Arbitration Commission,³⁵ routinely applies recognized commercial customs in addition to the law, whether Soviet or foreign, governing a contract in question before it.³⁶ Generally speaking, the Commission has a good reputation; its arbitrators do not lack expertise, and its awards contain well-reasoned opinions.

Most of the other Socialist states, in particular Czechoslovakia, the German Democratic Republic and Poland did not break too quickly

³³Lunz, *Conflict of Laws in International Sale: Theory and Practice of Socialist Countries*, 114 RECUEIL DES COURS DE LA HAYE 5, 7-9 (1965).

³⁴*Id.* at 5-7.

³⁵The Commission is constituted and operates within the All-Union Chamber of Commerce. Similar Foreign Trade Arbitration Commissions exist in other Socialist countries (as part of respective Chambers of Commerce). See Grzybowski, *Arbitral Tribunals for Foreign Trade in Socialist Countries*, 37 LAW & CONTEMP. PROB. 592 (1972). Soviet foreign trade organizations have usually insisted on the Commission as the forum in arbitration clauses in export-import contracts. However, according to article 7, paragraph 1 of the U.S.S.R.-U.S. Agreement on Trade (*supra*) both governments will encourage adoption of arbitration for settlement of disputes arising out of commercial contracts between American businessmen and Soviet foreign trade organizations: the arbitration clauses should "provide for arbitration under the Arbitration Rules of the Economic Commission for Europe of January 20, 1966;" the arbitrations should be held "in a country other than the United States of America or the Union of Soviet Socialist Republics that is a party to the 1958 [New York] Convention on Recognition and Enforcement of Foreign Arbitral Awards."

It should be noted that the Foreign Trade Arbitration Commissions in the U.S.S.R. and other Socialist countries do, of course, have jurisdiction only in accordance with arbitration clauses. In other words—although in foreign trade it is not of practical significance—foreign parties have access to courts of general jurisdiction in these countries.

³⁶Berman, *supra* note 22, at 493. Kitagawa, *Legal Aspects of Soviet-Japanese Trade*, 37 LAW & CONTEMP. PROB. 557, 565 (1972). Lunz, *supra* note 33, at 12, 13. Ramzaitsev, *The Law Applied by Arbitration Tribunals*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 138, 151 (Schmitthoff ed., London 1964).

with their long tradition of legal culture, based on the philosophy of European positivism and for the most part expressed in concise and well structured civil codes. East Germany retained the old German Civil Code (*Bürgerliches Gesetzbuch*), and Czechoslovakia adopted a new Civil Code in 1950, modelled on the old Austrian Civil Code of 1811, with but a few changes which were relatively insignificant in practice. However, the reality of life in the Socialist countries required substantial changes. On one hand, the state's monopoly of industry, trade, etc. and the system of economic planning required special rules governing relations between national enterprises based on the economic plan, and on the other hand, infrequent and simple contracts between citizens required simple regulations. As a consequence, in 1964 Czechoslovakia adopted new Civil and Economic codes,³⁷ and Poland, on January 1, 1965, substituted a new Civil Code for its Code of Obligations of 1933 and Commercial Code of 1934.³⁸ At the same time, it was recognized that new simplistic civil codes could not govern sophisticated foreign trade contracts with Western businessmen.³⁹ Therefore, Poland retained in force certain provisions of the 1934 Commercial Code,⁴⁰ whereas Czechoslovakia adopted in 1963 a modern International Trade Code (law No. 101/1963 Sb.)⁴¹ based on traditional concepts. In addition, Czechoslovakia and Poland adopted new codes of private international law (conflict of laws).⁴² Of course, in all Socialist countries, aside from private law, various statutes and administrative regulations governing activities of foreign trade organizations, banking, foreign exchange, customs duties, authority of the Ministry of Foreign Trade, etc. are important sources of each national law applied to foreign trade contracts. And as in the U.S.S.R., application of these administrative regulations, of private law (whether respective national law or foreign law) and of commercial customs by the Foreign Trade Arbitration Tribunals did not lead to objectionable results - quite the contrary. Accord-

³⁷See Vasek, *Survey of Czechoslovak Laws Affecting East-West Trade*, 20 AM. J. COMP. L. 453, 454-56 (1972).

³⁸Sadowski, *The Law of Foreign Trade in the Polish People's Republic*, 37 LAW & CONTEMP. PROB. 506, 523 (1972).

³⁹For the most part, the export-import contracts between foreign trade organizations of different Socialist countries, members of the Council of Mutual Economic Assistance (COMECON), are governed by the 1958 unification convention (as amended in 1968)—the General Conditions for the Delivery of Goods.

⁴⁰Sadowski, *supra* note 38, at 529.

⁴¹See Vasek, *supra* note 37, at 456-460.

⁴²In Czechoslovakia Law of December 4, 1963 No. 97/1963 Sb. on Private International Law and Procedure. Its choice of law rules are very similar to those of the prior Law on Private International Law No. 41/1948 Sb. which was drafted in the 1930's. Poland's new Code of Private International Law came into force on July 1, 1966 and replaced the Code of 1926.

ingly, it is the opinion of this writer that if a Western businessman has to resort to contract litigation in the Socialist states, he will be "sub-jected" to fair treatment. The law applied by the Arbitration Tribunal is determined according to acceptable standards discussed below; if it happens to be the law of the Socialist state in question, its rules will by no means be found extravagant and will differ in each Socialist state. In this connection it is necessary to emphasize that mere difference, even perhaps a striking difference, between a provision of law of a Socialist state and, say, a provision of law concerning the same subject as we know it in this country does not make that provision objectionable to the extent that it would be below the limits of tolerance. For example, Soviet insistence on application of Soviet mandatory rules concerning the form of a contract even if the *lex causae* (the law governing the contract) and *lex loci contractus* (the law of the place of making of the contract) is a foreign law, is peculiar. At the same time it can be hardly called more objectionable than notoriously known application of our antitrust laws to a contract concluded by aliens outside of U.S. territory.

The following is a brief look at some principles of law of certain Socialist states which may affect export-import contracts.

Legal Capacity and the Form of Foreign Trade Contracts

As has been emphasized above, only those Socialist enterprises with specific authorization from the state can engage in foreign trade, and then only within the limits of their authorization. In accordance with the well-established Socialist principle of private international law all Socialist countries that the legal capacity of a person is governed by the *lex personalis*, the legal capacity of the Socialist enterprises is determined by the law of their business domicile. In the case of Socialist enterprises it is not necessary—for obvious reasons—to distinguish between *siege social* and place of incorporation as determinative criteria. Accordingly, it is the law of the business domicile of each Socialist enterprise which will determine whether the enterprise is authorized to engage in foreign trade in general and whether it did or did not act *ultra vires* with respect to a particular transaction. It is that law which must be consulted to determine the liability of a Socialist enterprise for the actions of its organs and agents.

With respect to the formal validity of export-import contracts, it is possible to state in very general terms, and with due regard to the exceptions stated below, that (i) the contracting parties must comply with the mandatory rules of the *lex causae* (the law governing the contract) affecting formal validity of the contract, and (ii) in all other respects it is sufficient that the form of the contract satisfies the *lex loci*

contractus or, as specifically provided for in some Socialist states, that the form of the contract satisfies directory rules of the *lex causae*. This rule applies in Poland⁴³ and Czechoslovakia,⁴⁴ and neither Polish nor Czechoslovak laws prescribe any special form for international contract of sale.⁴⁵ In the U.S.S.R. the aforementioned rule would be partially applied in exceptional circumstances when the *lex causae* would contain stricter mandatory requirements as to the form of a contract than did Soviet law.⁴⁶ For example, if the *lex causae* conditioned validity of a contract on affixation of a seal, a written agreement without a seal would not suffice. Otherwise, the situation in the Soviet Union is quite different from that in Czechoslovakia and Poland. All foreign trade contracts to which a Soviet foreign trade organization is a party must be in writing and must be duly signed by two authorized representatives (usually one signature must be that of the chief executive officer of the organization or of his deputy), whose names appear in a publication of the Ministry of Foreign Trade, called *Vneshniaia Torgovlia*.⁴⁷ According to article 14 of the Principles of Civil Legislation of the U.S.S.R. and Union Republics, failure to observe these requirements results in nullity of the contract. Exchange of forms, letters, etc. with two authorized signatures appearing on behalf of the Soviet organization satisfies the "in writing" requirement.⁴⁸

It has been suggested that "[I]t may be embarrassing to request a Soviet official to show proof of his authority to bind his organization . . ." and that it is unlikely that officials of Soviet organizations would exceed their authority.⁴⁹ That is probably true. But apart from the *ultra vires* issue,⁵⁰ the writing requirement has a very important parole evidence aspect. In the case of *Schenker and Co. v. V/O Raznoimport*, the French plaintiff based his claim for additional transportation costs on a promise of the Soviet defendant made orally in France. The Soviet

⁴³Comment, *The Polish System of Private International Law*, 15 AM. J. COMP. L. 330, 339 (1967).

⁴⁴§ 4 of the Law No. 97/63 Sb. (Code of Private International Law and Procedure).

⁴⁵Bystrický *et al.*, *Právo Mezinárodního Obchodu* (The Law of International Trade) 331 (Prague, 1967). Sadowski, *supra* note 38, at 529.

⁴⁶But see Grzybowski, *supra* note 26, at 418.

⁴⁷Grzybowski, *supra* note 26, at 417-19. Lunz, *supra* note 33; at 43, 44. Nehemkis and Schöllhammer, *supra* note 10, at 33, 34.

⁴⁸Lunz, *supra* note 33, at 45.

⁴⁹Nehemkis and Schöllhammer, *supra* note 10, at 34.

⁵⁰In the sense of an official exceeding his authority either beyond the scope of the organization's activity or beyond the scope of his authority within the organization. Assumption of an oral "contractual" commitment would amount, *stricto sensu*, to an excess of authority. In that sense, from the point of legal dogmatics, Soviet foreign trade organizations do not possess legal capacity to enter into any other but written contract.

Foreign Trade Arbitration Commission held that "[S]uch oral promises, if they had been made, were not binding upon the defendant since all alterations and additional agreements to a contract of foreign trade to which a Soviet organization is a party are to be made only in writing, in the same form as the basic contract."⁵¹ In *Kattenburg v. V/O Teknoexport*, the same rule was applied against the Soviet defendant who claimed that "[T]he contract should be interpreted in accordance with the oral negotiations which took place at the time when the transaction was concluded."⁵²

In this connection it may be interesting to note that according to the Czechoslovak Code of Foreign Trade a contract must be interpreted in accordance with the intention of the contracting parties and negotiations between them, and in accordance with the prior dealing between the same parties; in addition, a contract may be supplemented by international customs generally observed in the particular trade, provided that such customs are consistent with the contractual terms and the Code.⁵³

In Bulgaria, legal requirements as to capacity and form seem to be even more stringent than those in the Soviet Union. A Bulgarian foreign trade organization may conclude a foreign trade contract only with the permission of the Ministry of Foreign Trade and only in a written form.⁵⁴

In general, it may be said that foreign trade organizations in all Socialist countries insist on written contracts, whether it is necessary or not. However, in dealing with Soviet or Bulgarian partners, Western businessmen should be aware that their contracts will be interpreted by Foreign Trade Arbitration Commissions of these countries strictly in accordance with the written terms.

The Law of the Contract

All Socialist states adopted the principle of autonomy of will of the parties; *i.e.*, parties to a foreign trade contract are free to choose the "proper law of the contract," called *lex causae*, within the limits imposed by each national law. In the U.S.S.R. and Czechoslovakia this freedom of the parties is unrestricted,⁵⁵ according to the Polish Code of

⁵¹Lunz, *supra* note 33, at 44.

⁵²*Id.* at 44, 45.

⁵³§§ 23, 118 of the Code of International Trade No. 101/63 Sb. Bystrický *et al.*, *supra* note 45, at 34, 230, 231. Compare UCC § 2-202.

⁵⁴Sipkov, *The Law of Foreign Trade in the People's Republic of Bulgaria*, 37 LAW & CONTEMP. PROB. 485, 497, 498 (1972).

⁵⁵Lunz, *supra* note 33, at 32. § 9(1) of the Czechoslovak Code of Private International Law and Procedure No. 97/63 Sb. In contrast, § 9 of the old Czechoslovak Code of Private International Law No. 41/48 Sb. required that the chosen law must have a substantial connection with the

Private International Law, parties to a contract "may subject their transaction to a system of law with which the transaction is connected."⁵⁶ The same rule applies in Hungary.⁵⁷ As to the other Socialist countries, relatively few arbitration decisions in this area make any positive conclusion too speculative; the same would apply, *mutatis mutandis* with respect to choice of law *per factam concludentiam infra*. According to section 9(1) of the Czechoslovak Code of Private International Law and Procedure parties may choose the law of the contract either *expressis verbis* or *per factam concludentiam*. In section 9(2) of the same Code renvoi is excluded, unless otherwise indicated by the parties. The same applies to the Soviet Union.⁵⁸ Professor Lunz seems to indicate that according to practice in the other Socialist states the choice of law can be equally inferred from the conduct of the parties.⁵⁹ At least one author has concluded otherwise as to Poland.⁶⁰

If the parties fail to choose the law of the contract for the sale of goods, Foreign Trade Arbitration Commissions in the U.S.S.R. and Romania will apply *lex loci contractus*.⁶¹ As in other Socialist countries, *locus contractus* in a contract *inter absentes* is the place where the offeror received the acceptance. In East Germany the law of the seller's business domicile will be applied.⁶² The Hungarian Foreign Trade Arbitration Commission applies the law of the seller's business domicile, or the law of the buyer's business domicile; the latter choice is made if the place of performance is within the state of buyer's business domicile, or if goods at the time when the contract was made were situated within the territory of buyer's state, or if the contract was made on the territory of buyer's state.⁶³ The Bulgarian Foreign Trade Arbitration Commission applies either *lex loci contractus* or *lex loci solutionis*.⁶⁴ In Poland, the law of the seller's business domicile will be applied to contract for sale. Different choice of law criteria will determine the law governing other contracts.⁶⁵ The Czechoslovak Code of Private International Law

contract and must not contradict the mandatory rules of the law which would otherwise govern the contract according to the Code.

⁵⁶*Supra* note 43, at 347.

⁵⁷Lunz, *supra* note 33, at 29.

⁵⁸*Id.* at 30, 34. According to Lunz, tacit choice of law can be found only if parties satisfactorily prove their intentions. In other words choice of law *per factam concludentiam* is not tantamount to finding of "hypothetical will" of the parties. As to Czechoslovakia, *see infra*.

⁵⁹*Id.* at 29.

⁶⁰*Supra* note 43, at 347.

⁶¹Lunz, *supra* note 33, at 31, 34.

⁶²*Id.* at 31.

⁶³*Id.*

⁶⁴Sipkov, *supra* note 54, at 499.

⁶⁵Comment, *supra* note 43, at 347, 348.

and Procedure adopted a rather interesting approach based on the "center of gravity" doctrine. Section 10 of the Code reads:

- (1) If the parties do not choose the governing law, their rights and obligations shall be governed by the law whose application is in keeping with a reasonable settlement of the respective legal relationship.
- (2) Usually
 - (a) contract of sale of goods . . . is governed by the law of the place where the seller . . . is domiciled at the time when the contract was made.⁶⁶

In *Koospol v. Arthur Lafont et Fils* the parties failed to stipulate expressly the law of the contract. The Czechoslovak plaintiff alleged that the parties had tacitly chosen the Czechoslovak law, as evidenced by the choice of the forum clause. The Turkish defendant denied that allegation. The decision of the arbitrators, rendered on October 13, 1966, contains the following paragraph:

[T]he contract is written in French and was signed in Izmir, *i.e.*, in Turkey. The seller is a Turkish juridical person and the place of performance is Izmir. In the arbitration clause in the contract the parties designated the Arbitration Court of the Czechoslovak Chamber of Commerce as the forum for settlement of their disputes. The Arbitrators, in accordance with the prevailing doctrine of private international law and practice of the Czechoslovak Chamber of Commerce, view the choice of the forum as only one, even if important, connection to be considered in determination of the law of the contract. The choice of the Czechoslovak Chamber of Commerce could be considered to be the choice of the Czechoslovak law *per factam concludentiam* according to section 9 of the Code No. 97/63 Sb. only if other choice of law criteria did not indicate otherwise. The principle *qui eligit iudicem eligit ius* is in this case inappropriate since other choice of law criteria (the place of the making of the contract, *lex personalis* of the seller, place of performance, the object of the contract of sale) did refer the Arbitrators to the Turkish law. Therefore, the Arbitrators concluded that in accordance with section 10(1) (2a) of the Code, center of gravity of the contract in question is within the domain of the law of Turkey and application of Turkish law is in keeping with a reasonable settlement of this matter."⁶⁷

Evidently, the arbitrators "counted" the relevant contracts and relied on the Code's provision that the contract of sale is usually governed by the law of the seller's domicile; any effort to explain why the application

⁶⁶With respect to other contracts the Code contains different choice of law criteria.

⁶⁷ROHLÍK, ÚVOD DO MEZINÁRODNÍHO PRÁVA SOUKROMÉHO (Introduction to Private International Law) 204 (Prague 1968).

of the Turkish law is in keeping with a reasonable settlement of the matter, whereas the application of the Czechoslovak law would not be, is missing.

In all Socialist countries, *lex fori* can be applied instead of the foreign law chosen by the parties or the foreign law applicable according to the conflict rules of the forum pursuant to the "public order" exception or concept of "evasion of law." Evasion of law is a doctrinal concept not expressed in the law of Socialist states and the exception has never been used in decisions concerning foreign trade contracts.

The public order provision of the Czechoslovak Code of Private International Law and Procedure is rather typical of the Socialist laws:

§36. A provision of a foreign law cannot be applied if the effects of such application would be contrary to such principles of social and state order of the Czechoslovak Socialist Republic, which have to be observed without reservation.⁶⁸

It has been theorized that this section can be applied only if the effects of application of a foreign rule would be injurious to the fundamental moral and legal principles of *lex fori*; specifically, the section is inapplicable if the foreign rule is only different from the mandatory rules of the law of the forum.⁶⁹ To this writer's knowledge the public order exception has never been applied by the Foreign Trade Commissions of the Socialist countries.⁷⁰

Finally, it should be noted that foreign law is in all Socialist states treated as "law" and not as "fact." Accordingly, the forum is under the obligation to ascertain the contents of the foreign law in question even if the parties do not respond to the invitation to submit to the arbitrators or to the court a foreign statute or evidence of practice. The arbitrators or the court can request from its Ministry of Justice an opinion as to the contents of the foreign law in question.⁷¹ If the contents of the foreign law is not ascertainable, *lex fori* will be applied instead.

Standard Contracts of Socialist Foreign Trade Organizations

In accordance with the prevailing business usage the Socialist foreign trade organizations make every effort, at least if they are sellers, to use standard (form) contracts for the sale of goods with printed conditions

⁶⁸Cf. Lunz, *supra* note 33, at 32, 33. Sipkov, *supra* note 54, at 499. Comment, *supra* note 43, at 335, 336.

⁶⁹Bystrický, *Les Traits Généraux De La Codification Tschécoslovaque En Droit International Privé*, 123 RECUEIL DES COURS DE LA HAVRE 413, 448, 449 (1968).

⁷⁰Cf. Lunz, *supra* note 33, at 15.

⁷¹§ 53 of the Czechoslovak Code of Private International Law and Procedure. Comment, *supra* note 43, at 335.

on the reverse side of the form. Sometimes these standard contracts may pose a dilemma for a Western businessman. Printed conditions in the contract form are approved and very often drafted by the Ministry of Foreign Trade in each Socialist country and insistence on significant changes may lead to protracted negotiations, since the representative of the foreign trade organization will have to seek approval of the Ministry. If the Ministry of Foreign Trade does not approve of the proposed change, the foreign trade organization may abandon its negotiations with its Western partner rather than to inform him that it simply does not have authority to renegotiate the change in question. It should be added that occasionally, in negotiations of a routine transaction, a particular representative of a foreign trade corporation may lack sufficient commercial expertise and may not fully understand the effects of a particular clause in the contract form of his own enterprise, not to speak of the effects of the proposed change.⁷²

On the other hand, a Western businessman will be well advised to take a very close look at three clauses—or at least three clauses that this writer is going to mention—which often appear in the printed form: the penalty (also called “conventional fine”) clause, the “Act of God” (*force majeure*) clause and the gold clause.

According to the law of all Socialist countries delivery under a contract for sale must be made at the agreed place of delivery and on or, with certain exceptions, before the exact date specified in the contract. A one day delay is already regarded as a breach of contract and under the penalty clause the seller must pay an agreed fine for each day of delay in performance.⁷³ The fine may represent a fixed sum of money or, as is more usual, a percentage of the purchase price payable for each day of delay up to a certain limit agreed by the parties; the limit may be as high as 10% of the purchase price.⁷⁴ Depending on the contents of the penalty clause, the fine may be imposed on a party for nonconforming performance other than delay.⁷⁵ Payment of a fine as a deterrent against delay in delivery is also firmly established in commercial transactions within Socialist countries. It is very often a statutory remedy available in most Socialist countries to national buyers against national sellers and it is also a conventional remedy, according to sec. 83 of the General Conditions of Delivery of Goods of Comecon.⁷⁶

⁷²*Cf.* Nehemkis and Schöllhammer, *supra* note 10, at 31.

⁷³*Id.* at 35.

⁷⁴*Id.*

⁷⁵Kitagawa, *supra* note 36, at 562.

⁷⁶According to § 83 the maximum amount of the penalty is 8% “of the value of the goods not delivered on time.” An English translation of the General Conditions (1968 revised version) can

It is a direct consequence of the Socialist system of planning and subordination that the specific performance of a foreign trade organization is excused if it is made impossible by the decision of the Ministry of Foreign Trade or by a change in the national economic plan. The crucial question, therefore, is whether in these cases the Socialist obligor is liable for damages. In the infamous *Soviet-Israeli Oil Arbitration*,⁷⁷ the Soviet Foreign Trade Arbitration Commission denied damages to the Israeli buyer pursuant to a questionable interpretation of a *force majeure* clause in the contract.⁷⁸ The decision seems to indicate that at the very least that Arbitration Commission will require specific language in the contract to rule otherwise. On the other hand, it means that the Western buyer can protect himself, if he succeeds in obtaining a stipulation in the contract which would specifically mention that "a change in the economic plan or a decision of the Ministry of Foreign Trade does not relieve the Socialist obligor of his liability for damages."⁷⁹

It is not at all unusual to see a gold clause in the form contract of a Socialist seller.⁸⁰ According to most of these clauses, if between the time when the contract was made and the time for payment the gold contents of the contractual currency changes, the buyer is obligated to pay at the time for payment the amount of money which would buy the content of gold in the currency as expressed in the purchase price at the time when the contract was made. The American buyer should be aware that the gold clauses of any kind are void in the U.S.A.⁸¹ It should be noted that the Czechoslovak Code of Foreign Trade contains revaluation provisions in its sections 343 and 344⁸² applicable if the contract is silent

be found in Hoya & Quigley, *Comecon 1968 General Conditions for the Delivery of Goods*, 31 OHIO ST. L.J. 1 (1970).

⁷⁷Domke, *supra* note 11. The Soviet Ministry of Foreign Trade prohibited performance of the Soviet seller.

⁷⁸*Id.*

⁷⁹According to §§ 252 and 292 of the Czechoslovak Code of International Trade, circumstances excluding liability for damages (i) must be of extraordinary and objective nature, (ii) must occur after the contract had been made but before the obligor is in delay, and (iii) cannot be prevented or avoided by the obligor. Specifically, failure to obtain an official permit necessary for obligor's performance is not to be considered a circumstance excluding liability. In general see Vasek, *supra* note 37, at 479-81.

⁸⁰Terada, *The System of Trade Between Japan and the East European Countries, Including the Soviet Union*, 37 LAW & CONTEMP. PROB. 429, 443 (1972).

⁸¹Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324 (1937). Guaranty Trust Co. v. Henwood, 307 U.S. 247 (1939).

⁸²§ 344 is a statutory gold clause applicable if contents of gold of the unit of the contractual currency changes by more than 10%. § 343 is a statutory monetary clause applicable if the exchange rate between the currency of the state of seller's domicile and contractual currency changes by more than 10%.

on the subject. However, these provisions are directory and their operation can be excluded by stipulation in the contract.

III. JOINT VENTURES WITH SOCIALIST ENTERPRISES

There is an attraction for the Western investor in the Socialist countries, which is nowadays almost a rarity: well disciplined, skilled and cheap labor.⁸³ However, with the notable exception of Yugoslavia and recently also Romania and possibly Hungary, direct Western investment in Socialist countries has not been permitted by the Socialist states. Cooperation between a Western company and a Socialist enterprise which would resemble a joint venture amounted only to "agreements on scientific and technical cooperation,"⁸⁴ license agreements, production sharing agreements,⁸⁵ etc. Under these agreements, the Western partner usually supplied technology and know-how, some equipment and possibly also capital to its Socialist partner, and in turn received royalties, products manufactured by the Socialist partner, or raw materials for marketing in the West.

In 1971 Romania promulgated Law No. 1 on Foreign Trade and Economic Activities,⁸⁶ which contains the basic provisions regulating foreign trade activities of Romanian enterprises and in Chapter V, under the title, International Economic, Technical and Scientific Cooperation, provides basic provisions on joint ventures of Romanian and foreign companies. The Romanian Law No. 1 was followed in 1972 by the Decree on Constitution, Organization and Operation of Joint Companies in the Socialist Republic of Romania⁸⁷ [hereinafter Decree No. 424] and by the Decree Regarding Tax on Profits of Joint Companies constituted in the Socialist Republic of Romania,⁸⁸ which contain more detailed provisions regulating organization, operations and taxation of

⁸³For example, it has been estimated that in Romania "the overall labor costs in absolute terms is about 50% less" than in the U.S.A. Morse and Goekjian, *Joint Investment Opportunities with the Socialist Republic of Romania*, 29 BUS. LAW. 133, 146 (1973).

⁸⁴Terda, *supra* note 80, at 438, 439.

⁸⁵See Comment, *supra* note 19, at 754, 755. Starr, *supra* note 24, n. 17 at 70. McQuade, *supra* note 31, at 58, 59.

⁸⁶Law of March 17, 1971, On Foreign Trade and Economic and Technico—Scientific Cooperation Activities in the Socialist Republic of Romania, published by the Official Bulletin of the Socialist Republic of Romania on March 17, 1971 [hereinafter referred to as Romanian Law No. 1] English translation appears in 11 INT'L LEGAL MAT'LS 161 (1972).

⁸⁷Decree No. 424 On Constitution, Organization and Operation of Joint Companies in the Socialist Republic of Romania, published in the Official Bulletin of the Socialist Republic of Romania on November 2, 1972. English translation appears in 12 INT'L LEGAL MAT'LS 651 (1973).

⁸⁸Decree No. 425 Regarding Tax on Profits of Joint Companies Constituted in the Socialist Republic of Romania, published in the *Official Bulletin* of the Socialist Republic of Romania on November 2, 1972. English translation appears in 12 INT'L LEGAL MAT'LS 656 (1973).

joint companies with foreign participation in Romania. The aforementioned Decrees and the participation of the first U.S. company, Control Data Corporation, in a joint venture company established in Bucharest are already thoroughly analyzed elsewhere.⁸⁹ For the purposes of these remarks it is sufficient to note the following:

According to article 1 of the Decree No. 424, "Joint Companies with foreign participation may be formed in the Socialist Republic of Romania in the fields of industry, agriculture, construction, tourism, transport, scientific and technological research" Joint companies can be organized as joint stock companies or limited liability companies. Article 4 of the same Decree states: "The Romanian share in the registered capital shall be of at least 51 per cent." According to article 20, export is the primary objective of the joint company. The Constitution of the joint company and other documents necessary for its formation must be approved by the Council of State⁹⁰ at the proposal of Council of Ministers,⁹¹ and the joint company must be registered with the Ministry of Foreign Trade and the Ministry of Finance. The Romanian State guarantees the financial contribution of the Romanian partner to the joint companies as well as transfer abroad of profits of the foreign partner, of agreed portion of wages of foreign employees, and repatriation of capital share and of assets of the foreign partner.

The joint company must prepare annual and five-year plans of economic and financial activity. Practically all of its financial operations must be conducted in agreed convertible currency. It must keep an account in that currency in Romanian banks. It can, however, dispose freely of the balances of these accounts. Products of joint companies may be traded both in Romania (with payments in agreed convertible currency) and abroad.

Both partners participate in management of the company and may agree, in the statute of the company, that certain decisions be made unanimously. According to article 31 of Decree No. 424, "A number of 1-2 delegates from the Ministry of Finance shall belong to the Joint Company's body controlling its accounting activity."

Disputes between joint companies and Romanian national enterprises or natural persons shall be brought before the courts; disputes arising

⁸⁹Morse and Goekjian, *supra* note 83.

⁹⁰Interim legislative body functioning between the sessions of the Grand National Assembly (the Romanian parliament).

⁹¹The Romanian government.

out of contracts may be settled by arbitration pursuant to an arbitration agreement. Control Data Corporation and its Romanian partners agreed on settlement of disputes between them by arbitration in Paris pursuant to the Arbitration Rules of the International Chamber of Commerce.⁹²

It must be emphasized that what was said earlier about the economic planning and subordination of the Socialist enterprises engaged in foreign trade applies to Romania, too.⁹³ It is, therefore, too early to tell whether a Western company will find the joint company sufficiently suited for the purpose for which the Western company joined in the project. If the Western company in question is capable of absorbing its share of production of the joint company for its independent manufacturing operations in the West, the Romanian labor conditions may be the dominant motive for participation in the joint company. Otherwise, the following questions might be asked: If the joint company has to operate pursuant to the economic plan, will it have sufficient freedom to adjust to the changing needs of its foreign customers? In other words, if, for example, the joint company plans to buy for its manufacturing purposes product A from a Romanian national enterprise during the planning period, will the joint company be able, in the middle of the planning period, to buy product B and discontinue purchasing of product A if the needs of foreign importers so require? Also, if foreign market conditions cause a temporary decline in exports of the joint company, will Romanian national enterprises be free enough to buy (for convertible currency) sufficient amounts of products of the joint company and thus possibly ensure its economic survival?

On the other hand, the aforementioned Romanian laws represent an important change in the attitude of a Socialist country towards "capitalist" investors and justify a conclusion that Romania is sincere in its efforts to attract foreign investors. Consequently, if the Romanian State finds that the operations of the joint companies "benefit Romanian society," the government will no doubt create conditions necessary for profitable operations of the joint companies. After all, it is only the Socialist state which has power to create such conditions almost at will.

Direct foreign investment seems to be equally encouraged in Hungary. Certain Hungarian economic organizations and foreign enterprises may establish economic associations in Hungary, in the form of "unlimited liability partnership," "company limited by shares," "limited liability company" and "joint enterprise;" the capital share of a

⁹²Morse and Goekjian, *supra* note 83, at 146.

⁹³*Cf.* chapter I, II and III of the Romanian Law No. 1, *supra* note 8, at 161-69.

foreign partner "should generally not exceed 49 per cent."⁹⁴ However, the Hungarian legislation on this subject is not sufficiently specific and as has been written, joint ventures with foreign participation in Hungary "are at the embryonic phase."⁹⁵

CONCLUSION

Socialist countries regulate their exports and imports by the national economic plan; individual export-import transactions can be affected by decisions of governmental institutions. Tariff rates and similar regulations affecting importation and sales of foreign goods in "free market economies" are at best of minor significance in the Socialist countries. Consequently, an improvement in the Western businessman's opportunity to penetrate Socialist markets depends to a considerable extent on the decision of each Socialist state to increase the volume of trade with the country of the businessman's domicile.

It appears that the general improvement in East-West relations is accompanied by the sincere desire of the Socialist countries to improve their trade relations with the Western nations; the trend towards "open door" policy vis-à-vis Western investors is equally discernible. If this development continues, it is possible to anticipate relaxation of the rigid planning system in the Socialist countries to the point where Western businessmen would have reasonable opportunity to penetrate Socialist markets in accordance with accepted commercial practices. At the same time there does not seem to be any compelling reason why the Western states should not promote this development on an intergovernmental level and conclude trade agreements with the Socialist states which would create—at least in legal terms—trading conditions generally accepted by the overwhelming majority of nations.

Although the laws of the Socialist nations may be found different and sometimes even peculiar, the Western businessmen will find that these laws and their interpretation by Foreign Trade Arbitration Commissions in Socialist countries provide an acceptable legal environment with respect to export—import contracts.

⁹⁴§§ 1 and 4 of the Decree of the Minister of Finance No. 28 of October 3, 1972, On Economic Associations with Foreign Participation published in *Magyar Kozlony*, No. 76 of October 3, 1972. English translation appears in 12 INT'L LEGAL MAT'LS 989 (1973).

⁹⁵Comment, *supra* note 19, at 756.