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## INTERNATIONAL ECONOMIC ARBITRATION IN THE USSR AND EASTERN EUROPE

VRATISLAV PECHOTA\*

Arbitration in the Soviet Union and its homologue in the West are two concepts separated by a common legal language. Although the two arbitral systems make use of the same notions, many of these notions acquire different meanings when applied in the other setting.

In the Soviet Union and Eastern Europe, arbitration is a process whereby appointed individuals (to whom the arbitration task is entrusted) exercise a judicial function in reaching their decisions. The Soviet and Eastern European concept is not only legalistic, but also prefers institutional settings over *ad hoc* arrangements.<sup>1</sup> The institutional paradigm in the East conforms with a social and economic life that detests improvisation in general.

In Eastern Europe and the USSR, arbitration is considered a particular form of jurisprudence, and not a private matter. It is a substitute for an action at law. Arbitral procedure, however, is not simply another means of adjudicating disputes. It is also an important method of enforcing planning directives in the socialist economy. In the Soviet Union and Eastern Europe, economic activity is carried on by public enterprises controlled by the government. In most cases, only state-owned enterprises may engage in transnational commerce or industrial cooperation. Each country's economic plan, which has the force of law, requires smooth performance on all levels of activity. Non-fulfillment of contractual or other obligations is of concern not only to the parties,

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1. See Samuels, *The Soviet Position on International Arbitration: A Wealth of Choices or Choices for the Wealthy*, 27 VA. J. INT'L L. 417, 421 (1986).

but touches the public nerve as well.

In this sense, arbitration is a public response to dysfunction in the economic sphere. Recourse to arbitration is not truly voluntary, since more often than not, the parties to an economic dispute have a legal obligation to arbitrate.<sup>2</sup> For all practical purposes, the choice between arbitration and court adjudication is non-existent, since the courts lack jurisdiction over economic disputes involving public enterprises.<sup>3</sup> Thus, in most instances, arbitration looms as the only and inevitable course the parties to a contract can take when a controversy arises.

Although arbitration and court adjudication are not alternative means of deciding issues in dispute, with each operating in a sphere closed to the other, the two systems do have many common features. While their powers remain separated, a unity of purpose accounts for the fact that arbitral institutions are modeled on the court system and that many rules of arbitral procedure are derived from the principles governing civil litigation.

## I. TWO DISTINCT TYPES OF ECONOMIC ARBITRATION

Arbitration in the Soviet Union and most Eastern European countries consists of two separate and unrelated systems: domestic economic arbitration and foreign trade arbitration. While this article focuses on the latter, it will be of interest to observe how the former has the potential to influence foreign trade arbitration.

In the Soviet Union, the domestic economic arbitration system is represented by a network of state agencies whose primary task is to settle economic disputes among Soviet enterprises subordinated to different governmental departments. Most of these controversies arise in connection with the conclusion and execution of economic contracts. An individual or the state arbitration agency may initiate arbitration if an enterprise has deviated from its assigned purposes or has violated the law or its contractual obligations. Moreover, the state arbitration agency has the authority to void contracts that are contrary to law or planning orders, and, at the request of either party to a contract, the state agency also has the power to enforce the obligations of a contract. The party submitting a dispute to arbitration must show that it sought an agreed solution but that the conciliation attempt failed.

As a rule, a case is heard before a sole arbitrator who is a professional adjudicator and civil servant. This arbitrator is appointed to hear the case by the chairman of the state arbitration agency, and not by the parties. His primary task is to assist the parties in reaching an

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2. *Id.* at 425.

3. *See id.* at n.37.

agreement. Where a compromise cannot be reached or where public interest so demands, the arbitrator hears the evidence and decides the case in the same manner as would a judge. He may award damages and even impose penalties, and his decision is final and binding upon the parties. His award is enforceable by virtue of an order issued by the arbitrator along with the decision. This order may require that the bank in which the unsuccessful party holds its assets transfer the amount of damages or penalty from that party's account either to the winning party or to the state treasury, depending on the case. The organization, authority and fundamental principles of procedure are outlined in special legislation.<sup>4</sup>

State economic arbitration in the Soviet Union and in other countries of the Council for Mutual Economic Assistance (CMEA) is designed to ensure compliance with obligations under the state plan and contracts.<sup>5</sup> The authority of the arbitration agencies is not derived from the consent of the parties, but rather flows from the regulatory power of the government. These arbitral agencies have no counterparts in the West, where arbitral systems are based on voluntary agreements to arbitrate. In countries such as Czechoslovakia and Poland, the nationalization of private industries has led to state economic arbitration replacing the commercial courts as a means of settling commercial disputes.

Foreign trade arbitration is a separate arbitral system comprised of arbitral institutions for general economic cases and special tribunals that handle particular categories of disputes, such as maritime cases.<sup>6</sup>

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4. Law Concerning State Arbitration in the USSR of November 30, 1979, Ved. Verkh. Sov. SSSR (1979) No. 49, item 844, as amended by the Decree of the Presidium of the USSR Supreme Soviet of Dec. 30, 1987, Ved. Verkh. Sov. SSSR (1988) No. 1, item 3. See YURIDICHESKII ENTSIKLOPEDICHESKII SLOVAR' 67-68 (1984) for a full description of the contemporary system of state economic arbitration. See also T.E. ABOVA, ARBITRAZHNIY PROTSESS V SSSR: PONIATIE, OSNOVNYE PRINCIPY (1985).

5. See R. BYSTRICKY, LE DROIT DE L'INTEGRATION ECONOMIQUE SOCIALISTE 280 (1979).

6. For a discussion of the Soviet and East European concept of foreign trade arbitration, see Hanák, *Arbitration in Socialist Countries*, 44 ARB. 180 (1978); Jakubowski, *Arbitration in the CMEA*, in ASSOCIAZIONE ITALIANA PER ARBITRATO, ESSAYS IN MEMORIAM EUGENIO MINOLI 238 (1974); Juhasz, *Arbitration in the Council for Mutual Economic Assistance*, 24 ACTA JURIDICA ACADEMIAE SCIENTIARUM HUNGARICAE 105 (1982); I.O. KHLESTOVA, ARBITRAZH VO VNESHNEKONOMICHESKIKH OTNOSHENIYAKH STRAN-CHLENOV SEV (1980); S.N. LEBEDEV, MEZHDUNARODNYI TORGOVYI ARBITRAZH (1965); Lebedev, *International Commercial Arbitration in the Socialist Countries Members of the CMEA*, 158 RECUEIL DES COURS 87 (1977); HANDBOOK ON FOREIGN TRADE ARBITRATION IN THE CMEA COUNTRIES (S.N. Lebedev ed. 1983); LEBEDEV, U.S.S.R. 2 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION (P. Sanders ed. 1984) [hereinafter HANDBOOK COM. ARB.]; Lebedevs Pozdnyakov, U.S.S.R., 1 Y.B. COM. ARB. 91 (1976); Lew, *The Structure and Role of Arbitration in Eastern Europe*, 44 ARB. 213 (1978) A.I. MINAKOV, ARBITRAZHNYE

Both types of tribunals are permanent courts of arbitration created by law, with jurisdictional and procedural rules linking them to the judicial system. There is an arbitration court for commercial disputes in each country, usually located in the capital city and affiliated with the national chamber of commerce.<sup>7</sup> There are special arbitration courts for maritime cases in Moscow<sup>8</sup> and Gdynia, Poland.<sup>9</sup> Specialized arbitration tribunals attached to the Cotton Trade Association and the Wool Trade Federation have also been established in Gdynia.<sup>10</sup> With

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SOGLASHENIA I PRAKTIKA RASSMOTRENIYA VNESHNEEKONOMICHESKIKH SPOROV (1985); I. NES-TOR, PROBLEME PRIVIND ARBITRAJUL PENTRU COMERTUL EXTERIOR IN TARILE SOCIALISTE EUROPENE (1972); Osakwe, *The Soviet Position on International Commercial Arbitration as a Method of Resolving Transnational Disputes*, in *RESOLVING TRANSNATIONAL DIS-PUTES THROUGH INTERNATIONAL ARBITRATION* 184 (T. Carbonneau ed. 1984); Pechota, *Union of Soviet Socialist Republics*, 2A *World Arb. Rep.* (Butter.) 2625 (1987); Pisar, *The Communist System of Foreign Trade Adjudication*, 72 *HARV. L. REV.* 1409 (1959); Pozdnyakov, *Commercial Arbitration in CMEA Member Countries*, 4 *INT'L TAX & BUS. LAW.* 272 (1986); Samuels, *supra* note 1; J.P. WAEHLER, *DIE AUSSENHANDELS—UND SEE—SCHIEDSGERICHTSBARKEIT IN DER UdSSR* (1974).

7. The arbitration courts of those countries are:

- (1) Bulgaria: The Arbitration Court at the Bulgarian Chamber of Commerce and Industry, located in Sofia;
- (2) Czechoslovakia: The Arbitration Court of the Czechoslovakia Chamber of Commerce and Industry, located in Prague;
- (3) German Democratic Republic (GDR): The Arbitration Court of the Chamber for Foreign Trade of the G.D.R., located in Berlin;
- (4) Hungary: The Court of Arbitration attached to the Hungarian Chamber of Commerce, located in Budapest;
- (5) Poland: The Court of Arbitration at the Polish Chamber of Foreign Trade, located in Warsaw;
- (6) Rumania: The Arbitration Commission of the Chamber of Commerce and Industry of the Socialist Republic of Rumania, located in Bucharest; and
- (7) USSR: The Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry, located in Moscow.

In December, 1987, the Commission was renamed the Court of Arbitration at the USSR Chamber of Commerce and Industry. See Decree of the Presidium of the USSR Supreme Soviet of Dec. 14, 1987, *Ved. Verkh. Sov. SSSR* (1987) No. 50, item 806.

8. The Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry, Moscow. The Commission was created in 1930. See generally Jarvis, *The Soviet Maritime Arbitration Commission: A Practitioner's Perspective*, 21 *TEX. INT'L L.J.* 341 (1986); Lebedev, *La Commission d'arbitrage maritime près de la Chambre de commerce de l'URSS*, 1971 *REVUE DE L'ARBITRAGE* 137; Timmermans, *The USSR Maritime Arbitration Commission*, 1987 *LLOYD'S MAR. & COM. L.Q.* 350, 468.

9. The International Court for Marine and Inland Navigation, sitting in Gdynia, was created in 1959 by the chambers of commerce of Czechoslovakia, the German Democratic Republic, and Poland. See Przetacznik & Pechota, *Rules of the International Court of Arbitration for Marine and Inland Navigation at Gdynia*, 3 *WORLD ARB. REP.* (Butter.) 3728 (1986).

10. See Lisowski, *Establishing a New Permanent Court of Arbitration in Interna-*

the exception of the Gdynia maritime arbitration tribunal, which was set up jointly by the chambers of commerce of Czechoslovakia, the German Democratic Republic and Poland, all other CMEA arbitration courts are national institutions created under their nation's laws and composed of their nationals.

All arbitration courts for foreign trade are permanent institutions that possess independent authority to settle disputes arising from international commerce. The arbitration courts' jurisdiction is established either by an international treaty or by agreement of the parties, and the caseload is relatively heavy. For example, the Arbitration Court of the Czechoslovak Chamber of Commerce and Industry in Prague hears more than 200 cases annually.<sup>11</sup> Approximately three-fourths of these cases are between foreign trade organizations of CMEA member countries<sup>12</sup> and the remaining one-fourth involve parties of other nations.<sup>13</sup> Both categories of cases—those between parties from countries with socialist economies and those involving parties from countries with free-market systems—are dealt with in proceedings governed by identical rules of procedure. Only the Polish Arbitration Court applies separate rules to each category of dispute.

Even though functionally independent, the arbitration courts in the USSR and Eastern Europe are parts of the mechanism created by the state for enforcing the monopoly of foreign trade. The chambers of commerce, to which the arbitration courts are attached, are under the direct supervision and control of the governmental department responsible for foreign trade. That department, of course, influences in varying degrees the organization, funding and recruitment of arbitration court personnel. Apparently, each arbitrator's name must be informally approved by the foreign trade ministry. In addition, the actual rules under which the arbitration tribunal is organized and conducts its activities must be approved by the governing body of the national chamber of commerce.<sup>14</sup> Since the tribunals are independent, no supervision or control extends over their proceedings.<sup>15</sup> There does not appear to

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*tional Wool Commerce at Gdynia Wool Federation*, 10 RASSEGNA DELL'ARBITRATO 31 (1970); Lisowski, *Specialist Arbitration Courts in Poland and Their Role in the International Cotton and Wool Trade*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, FOURTH INTERNATIONAL ARBITRATION CONGRESS: PROCEEDINGS 738 (1972).

11. V. SEDLACEK, *ARBITRATION IN CZECHOSLOVAK FOREIGN TRADE* 89 (1982).

12. As of this writing, the full members of the CMEA are Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Rumania, the USSR, and Vietnam. See Samuels, *supra* note 1, at 418 n.7.

13. V. SEDLACEK, *supra* note 11, at 89.

14. Comp & Lew, *The Structure and Role of Arbitration in Eastern Europe*, 44 *ARB.* 213 (1978).

15. See Hanák, *Otazky prislusnosti ve svetle judikatury Rozhodciho soudu Ceskos-*

be any evidence that the proceedings are tainted by the tribunals' proximity to the government, however.<sup>16</sup> Impartiality stems from the specific mandate given to the arbitration courts by their respective statutes. When cases involve parties from Western countries, impartiality is regarded as a specific contribution that a socialist arbitration court can make towards peaceful coexistence and cooperation between nations. This partly explains why the Soviet Union and its allies insisted that the 1975 Final Act of the Conference on Security and Cooperation in Europe include an endorsement of international commercial arbitration as a means of promoting economic cooperation.<sup>17</sup> International commercial arbitration is one of the few areas where Soviet legal doctrine does not stress the need for ideological approval.

## II. ARBITRATION AS A FUNCTION OF SOCIALIST ECONOMIC INTEGRATION

In 1971 the member-nations of the CMEA adopted a comprehensive program of socialist economic integration.<sup>18</sup> This program envis-

*lovenske obchodni komory (Problems of Competence in the Jurisdiction of the Arbitration Court at the Czechoslovak Chamber of Commerce)*, 1 *STUDIE Z MEZINARODINIHO PRAVA* 165 (1955).

16. See generally Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations*, 21 *TEX. INT'L L.J.* 291 (1986).

17. The Final Act contains a special provision on arbitration which reads as follows:  
The participating States,

Considering that the prompt and equitable settlement of disputes which may arise from commercial transactions relating to goods and services and contracts for industrial co-operation would contribute to expanding and facilitating trade and co-operation,

Considering that arbitration is an appropriate means of settling such disputes,

recommend, where appropriate, to organizations, enterprises and firms in their countries, to include arbitration clauses in commercial contracts and industrial co-operation contracts, or in special agreements;

recommend that the provisions on arbitration should provide for arbitration under a mutually acceptable set of arbitration rules, and permit arbitration in a third country, taking into account existing intergovernmental and other agreements in this field.

73 *DEP'T ST. BULL.* 333 (1975).

18. The program defines "socialist economic integration" as

A conscious process planned and controlled by the communist and workers' parties and governments of the CMEA member countries, fostering the international socialist division of labor, closer harmony of their economies and the establishment of a modern, highly effective economic structure, a gradual harmonization and evening-out of their levels of economic development, the establishment of deep and lasting ties in the basic economic, scientific and technological branches, the extension and strengthening of their international mar-

aged, *inter alia*, mandatory settlement of all intra-bloc commercial disputes by permanent arbitration courts, unification of the rules of arbitral procedure, and the coordination of national arbitral institutions in an effort to achieve uniformity in the application of community rules regulating economic cooperation and relations in the fields of science and technology.

The first of these objectives was achieved through international agreement. Two multilateral instruments, both legally binding upon the enterprises and economic organizations of CMEA countries, have provided the legal basis for compulsory arbitral jurisdiction. One agreement, the CMEA General Conditions for the Delivery of Goods,<sup>19</sup> is a comprehensive uniform law directly regulating most matters relating to commercial contracts. Adopted in 1958 and substantially amended in 1968 and 1975, Section 90(1) stipulates that:

[a]ll disputes which may arise from or in connection with the contract shall be subject, without recourse of law, to consideration by arbitration in an arbitration tribunal established for such disputes in the country of the defendant or, by agreement of the parties, in a third member-country of the CMEA.<sup>20</sup>

The other agreement, the Moscow Convention of May 26, 1972 on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation,<sup>21</sup> laid the foundation for a regional system of commercial arbitration that is unparalleled elsewhere.<sup>22</sup> This Convention is, in fact, a treaty on jurisdiction in interna-

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ket and improved trade and monetary relations.

Morozov, *The Socialist Conception of International Organization*, in *THE CONCEPT OF INTERNATIONAL ORGANIZATION* 188 (Abi-Saab ed. 1981).

19. General Conditions for the Delivery of Goods Between Organizations of Member-Countries of CMEA, reprinted in T.W. HOYA, *EAST-WEST TRADE: COMECON LAW, AMERICAN SOVIET TRADE* 384 (1984).

20. *Id.* at 432. For a commentary on the arbitration provisions of the General Conditions, see Pechota, *Council for Mutual Economic Assistance: General Conditions of Delivery of Goods 1968/1975*, 1 *WORLD ARB. REP.* (Butter.) 211 (1986).

21. Convention on Settlement by Arbitration of Civil Law Disputes Resulting From Economic, Scientific and Technical Cooperation, May 26, 1972, reprinted in 13 *I.L.M.* 5 (1974) [hereinafter *Moscow Convention*]. The Moscow Convention was adopted by Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Rumania and the USSR. *Id.*

22. See Capatina, *L'arbitrage du commerce exterieur selon la Convention de Moscou de 1972*, 102 *J. DROIT INT'L* 503 (1975); Lebedev, *supra* note 6, at 117; *HANDBOOK COM. ARB.*, *supra* note 6, at 103; Pechota, *Moscow Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific, and Technical Cooperation, 1972*, 1 *WORLD ARB. REP.* (Butter.) 217 (1986); Trammer, *La Convention de Moscou sur l'arbitrage du 26 mai 1972*, in *ASSOCIAZIONE ITALIANA PER ARBITRATO, ESSAYS IN*



tional relations, which excludes the ordinary courts from dealing with commercial and other economic cases.<sup>23</sup> The Convention also confers exclusive jurisdiction over such disputes on permanent arbitration bodies. Article I(1) of the Moscow Convention substantially extended the duty to arbitrate, beyond Section 90(1) of the CMEA General Conditions, by requiring that:

[a]ll disputes between economic organizations resulting from contractual and other civil law cases arising between them in the course of economic, scientific and technical cooperation of the countries-parties to the present Convention shall be subject to arbitration proceedings with the exclusion of the above disputes from jurisdiction of the courts of law.<sup>24</sup>

Unlike in domestic economic arbitration, however, claims disputing the obligation to conclude a contract or to accept special contractual clauses are declared unarbitrable.<sup>25</sup> Forum shopping is severely limited by a rule establishing jurisdiction in the tribunal of the defendant's country, unless the parties agree to arbitrate in a third CMEA country.<sup>26</sup> Detailed provisions deal with the recognition and enforcement of arbitral awards. These awards are given full faith and credit and are subject to enforcement in all other CMEA countries.<sup>27</sup> Enforcement is subject to the condition that the award has been brought to execution within two years from its issue.<sup>28</sup> Recognition and enforcement may be refused only on one of the following grounds: (a) when the award was rendered by a tribunal that lacked jurisdiction; (b) when the unsuccessful party furnishes proof that it was deprived of the possibility of defense owing to violations of procedural rules; or, (c) when the unsuccessful party shows that the award has been set aside or suspended under the law of the country in which it was made.<sup>29</sup> Except in cases where the award has been set aside or suspended, the refusal to enforce an award does not preclude the winning party from instituting a new proceeding before the competent arbitral body within three months of the date of refusal.<sup>30</sup> It is no surprise that

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MEMORIAM EUGENIO MINOLI 517 (1974); Ustor, *Arbitration in CMEA Countries*, in *COMUNICAZIONE E STUDI DELL'ISTITUTO DI DIRITTO INTERNAZIONALE E STRANIERO DELLA UNIVERSITA DI MILANO* 957 (1975).

23. See Samuels, *supra* note 1, at 425 n.37.

24. Moscow Convention, *supra* note 21, § I(1).

25. *Id.* § III(1).

26. *Id.* § II(1).

27. *Id.* § IV(2).

28. *Id.* § IV(5).

29. *Id.* § V.

30. *Id.* § V(1)-(2).

the public policy defense is not admissible under the Moscow Convention. According to socialist legal doctrine, awards rendered in accordance with the laws of one socialist country cannot be contested in another socialist country on the ground that they violate the latter's public policy. Based on the same class foundations and pursuing the same social and political objectives, the legal systems of all socialist countries are said to be in harmony, and thus no conflicts can arise when they interact. In contrast, the defense of public policy applies where antagonistic interests, as embodied in the law, come into conflict, as is often the case when awards rendered by capitalist tribunals are to be enforced in a socialist country.

The Moscow Convention seems to displace the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which the USSR and other CMEA members have signed and ratified.<sup>31</sup> This follows from the provision of the Moscow Convention that precludes the application of previously concluded treaties, bilateral or multilateral, on the subject (Section VI(1)).<sup>32</sup> Whether the New York Convention is excluded under the ideologically motivated doctrine that "socialist" international law is superior to general international law and, therefore, takes priority over the latter, or whether the New York Convention is rendered inapplicable because the Moscow Convention's *lex specialis* supersedes the New York Convention's *lex generalis* is of little consequence. The fact remains that since the adoption of the Moscow Convention, there has not been a case in which the court of a CMEA country has applied the New York Convention to enforce an award rendered by the arbitral tribunal of another CMEA country.

The second common CMEA objective, unification of the rules of arbitral procedure, was achieved in 1974 when the Executive Committee of the CMEA adopted the Uniform Rules of Procedure for Arbitration Courts of the Chambers of Commerce of Member States and the Schedule of Arbitration Fees, Costs and Expenses of the Parties (Uniform Rules).<sup>33</sup> The CMEA Uniform Rules were developed after a com-

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31. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter N.Y. Convention].

32. See Moscow Convention, *supra* note 21, at 9.

33. For the original Russian text of the Uniform Rules, see SOVIET EKONOMICHESKOI VZAIMOPOMOSHCHI, SEKRETARIAT, REGLAMENTY ARBITRAZHNYKH SUDOV PRI TORGOVYKH PALATAKH STRAN-CHLENOV SEV 5 (1976). For an English translation, see 3 WORLD ARB. REP. (Butter.) 3576 (1987); 1 Y.B. COM. ARB. 147 (1976). For commentaries see Lebedev, *supra* note 6, at 125-26; Lunts, *Unifikatsia pravil proizvodstva del vo vneshnetorgovykh arbitrazhnykh sudakh pri torgovykh palatakh strachlenov SEV*, SOVIET Y.B. INT'L L. 226 (1975); Pechota, *Council for Mutual Economic Assistance: Uniform Rules of the*

parative study of the existing rules in different socialist countries, the 1966 Rules of Arbitration of the United Nations Economic Commission for Europe, and, in particular, the proposed set of international rules of arbitral procedure drafted by the United Nations Commission for International Trade Law (UNCITRAL) under the name of UNCITRAL Arbitration Rules were most carefully studied.<sup>34</sup> The drafters of the CMEA Rules were not only informed of the UNCITRAL work, but some of them also took part in it. A comparison of the two sets of rules leads one to believe that the CMEA Rules were drafted with a view to attaining a common denominator on a number of subjects. The accompanying resolution recommended that the Uniform Rules be used as a model for adopting the rules of procedure of national arbitration courts.<sup>35</sup>

Based upon this recommendation, the national chambers of commerce have revised their rules.<sup>36</sup> The new rules generally embody the

*Arbitration Tribunals Attached to the Chambers of Commerce of the CMEA Countries*, 3 WORLD ARB. REP. (Butter.) 3573 (1987); Strohbach, *New Aspects of Arbitral Jurisdiction in the Member Countries of the Council of Mutual Economic Aid (CMEA)*, in INT'L COUNCIL FOR COM. ARB., FIFTH INT'L ARB. CONGRESS: PRO. C Ij 1-6 (1975); Strohbach & Völter, *Die neuen Rechtsgrundlagen der sozialistischen Aussenhandelsschiedsgerichtsbarkeit*, 1976 DDR-AUSSENWIRTSCHAFT 37 (Annex).

34. For a discussion of the salient features of the 1976 UNCITRAL Arbitration Rules, see I.I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* (1986); Glossner, *Die UNCITRAL-Schiedsordnung in der Praxis*, 23 RECHT DER INTERNATIONALEN WIRTSCHAFT 141 (1978); JENARD, *Le règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international*, 54 R. DR. INT. DR. COMP. 201 (1977); McClelland, *Toward A More Mature System of International Commercial Arbitration: The Establishment of Uniform Rules of Procedure and the Elimination of the Conflict of Laws Questions*, 5 N.C. J. INT'L L. & COM. REG. 169 (1980); Pechota, *UNCITRAL Arbitration Rules*, 3 WORLD ARB. REPORTER (Butter.) 3083 (1987); Pirrung, *Die Schiedsverfahrensordnung der UNCITRAL*, 23 RECHT DER INTERNATIONALEN WIRTSCHAFT 513 (1977); Sacerdoti, *The New Arbitration Rules of ICC and UNCITRAL*, 11 J. WORLD TRADE L. 248 (1977); Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977); Sanders, *Procedures and Practices under the UNCITRAL Rules*, 27 AM. J. COMP. L. 453 (1979); Note, *The UNCITRAL Arbitration Rules*, 17 HARV. INT'L L.J. 141 (1976).

35. Lebedev, *supra* note 6, at 125-26.

36. The following courts amended their rules in the following years: Bulgaria in 1974 (the rules were further amended in 1979); Czechoslovakia in 1975; the German Democratic Republic in 1975; Hungary in 1975; Mongolia in 1975; Rumania in 1976; and the USSR in 1975 and 1988. The above-mentioned arbitration courts apply the adapted rules to all cases, whether CMEA-related or not. The Court of Arbitration at the Polish Chamber of Foreign Trade adopted the Uniform Rules in 1975 for disputes between economic organizations of CMEA countries only, and continues to use its previous Rules of Procedure (adopted in 1970 and amended in 1974) in arbitrations between Polish and non-CMEA parties. A third set of rules was adopted by the Polish Court of Arbitration in 1985 for *ad hoc* arbitrations administered by the court. See Szurski, *Comments on*

following common principles:

- (a) The arbitration courts are permanent institutions attached to the chambers of commerce and composed of a Presidium, a college of at least fifteen arbitrators, and a secretary;
- (b) The arbitration courts are competent to consider all disputes arising out of, or in connection with, contracts or other civil law relations in foreign trade and other matters of economic, scientific, and technical cooperation between parties of different nationality;
- (c) Jurisdiction is derived from either international treaties or the consent of the parties;
- (d) Only a member of the college of arbitrators of the court which has jurisdiction over the matter may be appointed by each party as an arbitrator. Where a party fails to make its appointment, the Presidium of the arbitration court has the power to make the necessary appointment. And, the Presidium also appoints the presiding arbitrator when the two arbitrators fail to agree.
- (e) The proceedings are conducted in the language of the country of the court. The costs of interpretation and translation of documents are borne by the party requesting such services;
- (f) As a rule, a case should be disposed of within six months;
- (g) Detailed uniform rules govern service of process, the submission of claims and counter-claims, evidentiary issues, awards, and the discontinuance of proceedings without award;
- (h) There is a uniform schedule of arbitration fees and expenses.

Achieving uniformity in the application of community rules by the national arbitration courts, the third objective proclaimed by the CMEA in 1971, has not been neglected. Periodic conferences of the presidents of arbitral institutions and the regular exchange of reported cases have effectively furthered this objective.<sup>37</sup> Moreover, the CMEA Conference on Legal Matters has embarked upon a study of the practical application of the Moscow Convention and the Uniform Rules, with the objective of preparing recommendations on the methods of coordinating the work of national institutions.<sup>38</sup> In an arbitration scheme where international provisions and uniform rules determine essential aspects of the arbitral process, national institutions necessarily comple-

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*"Comparative Arbitration Practice" as Presented in Four Reports*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 169, 171 (1987).

37. See Hanák, *Arbitration in the Socialist Countries*, in *INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, SIXTH INTERNATIONAL ARBITRATION CONGRESS PROCEEDINGS* 51 (1978).

38. *Unification of International Trade Law: Report of the Secretary-General*, U.N. GAOR Comm. on Int'l Trade (16th Sess.) at 13, U.N. Doc. A/CN.9 Add.2 (1983).

ment the international system.

Arbitration, as a method of settling transnational economic disputes, is preferable to court adjudication principally because arbitration is more readily "internationalized." Court adjudication, on the other hand, relies on the domestic laws of the respective country. The process of internationalization has already reached the point where arbitration, at least in disputes between state enterprises of different socialist countries, can be regarded as an *international* procedure that makes use of *national* institutions which function as local outposts of the international system.

### III. THE ROLE OF NATIONAL LEGISLATION

The relationship between the increasingly unified system of international commercial arbitration and municipal legislation raises a significant question: To what extent does municipal law actually control the arbitral process in CMEA countries?

Like other countries whose legal institutions stem from civil law, most CMEA nations regulate private arbitration, either totally or partially, in their codes of civil procedure.<sup>39</sup> Two countries, Czechoslovakia and the German Democratic Republic, have also enacted separate statutes that deal exclusively with international commercial arbitration.<sup>40</sup> Rules of general application that envisage recourse to arbitration are also contained in the laws and regulations concerning economic cooperation among foreign entities, joint ventures and foreign investment.<sup>41</sup>

39. BULGARIAN CODE OF CIVIL PROCEDURE, arts. 9(1), 237 and 242; CZECHOSLOVAK CODE OF CIVIL PROCEDURE, §§ 106, 251-271; GDR CODE OF CIVIL PROCEDURE, art. 208; HUNGARIAN CODE OF CIVIL PROCEDURE, arts. 360-364; POLISH CODE OF CIVIL PROCEDURE, arts. 695-715; RUMANIAN CODE OF CIVIL PROCEDURE, arts. 341-370; FUNDAMENTAL PRINCIPLES OF CIVIL PROCEDURE of the USSR and Union Republics, arts. 58 and 63 [hereinafter Fundamental Principles]; RSFSR Code of Civil Procedure, arts. 23, 46, 129, 155, 219, 338, 437 and Supplement No. 3 to the Code, and corresponding provisions of the codes of civil procedure of other Soviet republics.

40. Czechoslovakia: Act Relating to Arbitration in International Trade and to Enforcement of Awards, 1963 (No. 68/1963 Coll. of Laws) [hereinafter Czechoslovakia Act of 1963]. For an English translation, see 7 BULL. CZECH. L. 269 (1963); German Democratic Republic: Ordinance on Arbitration Proceedings, 1975, GB1. I DDR8 (1976) (English translation by the GDR Court of Arbitration).

41. Bulgaria: Decree No. 533 of 1980, On Economic Cooperation Between Bulgarian Juridical and Physical Persons, arts. 6, 27; Czechoslovakia: Act Concerning Economic Contacts with Foreign Countries, 1980 (No. 42/1980 Coll. of Laws), §§ 47-48; Rumania: Decree No. 424 of 1972, On Joint Companies, art. 38; USSR: Decree of the Presidium of the USSR Supreme Soviet of Jan. 13, 1987 on Questions Connected with the Creation on the Territory of the USSR and the Activity of Joint Enterprises, International Associations, and Organizations with the Participation of Soviet and Foreign Organizations,

Although there is considerable diversity among the CMEA countries regarding the legislative regulation of arbitral proceedings, no serious attempt has been made to harmonize provisions of the codes of civil procedure in this area. In fact, there is hardly any need for such harmonization, since these general provisions are of little practical significance to arbitration within the CMEA.

The principal purpose of the codes of civil procedure is to provide legal rules applicable to the arbitral process in its traditional, pre-socialist form, as it is generally known and practiced in international commercial relations. These codes are maintained in the national legislation of socialist countries since approximately twenty to forty percent of their foreign trade (the proportion varies depending on the economic policy of the respective country) is with non-socialist countries and is carried on in accordance with general international standards. A typical case in which the codes of civil procedure apply is where the settlement of a dispute is an *ad hoc* arbitration proceeding involving a party from a Western or Third World country and taking place in the respective socialist country. Such proceedings, however, are extremely rare. When a Western firm agrees to arbitrate in a CMEA country, it usually does so for particular reasons and generally accepts the jurisdiction and rules of procedure of a permanent arbitration body. In such a case, the code of civil procedure is not controlling.<sup>42</sup>

Why are the codes of civil procedure given so little leeway in matters of international commercial arbitration? The main reason is that in this area, specific rules and regulations have replaced more general provisions of the codes of civil procedure. As a general legal regulation, the code of civil procedure applies only in the absence of special regulation. Where special provisions have been enacted, they take prece-

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Firms, and Agencies of Administration, para. 5, *reprinted in* 26 I.L.M. 759 (1987); Decree of the USSR Council of Ministers of Jan. 13, 1987 on the Procedure for the Creation on the Territory of the USSR and the Activities of Joint Enterprises with the Participation of Soviet Organizations and Firms of Capitalist and Developing Countries, para. 20, *reprinted in* 26 I.L.M. 749 (1987).

42. See generally Chew, *supra* note 16; Domke, *The Israeli-Soviet Oil Arbitration*, 53 AM. J. INT'L L. 787 (1959); Hobér, *Arbitration in Moscow*, 3 ARB. INT'L 119 (1987); Leff, *The Foreign Trade Arbitration Commission of the USSR and the West*, 24 ARB. J. 1 (1969); Lunts, *Arbitrazh po sporam sovetskikh khozaistvennykh organizatsii s kapitalisticheskimi predpriatiami*, 1979 SOVETSKOE GOSUDARSTVO I. PRAVO 50; Orlov, *Arbitration Procedure in East-West Trade*, 55 NORDIC J. INT'L L. 310 (1986); Pfaff, *Neuerungen der internationalen Schiedsgerichtsbarkeit im Ost-West-Handel vor den ständigen Aussenhandelsschiedsgerichten der GRW-Länder*, 23 RECHT DER INTERNATIONALEN WIRTSCHAFT 125 (1977); Note, *The Case for FTAC Arbitration of Disputes Between Soviet Enterprises and American Firms*, 14 COLUM. J. TRANSNAT'L L. 302 (1975); Strohbach, *Arbitration between Foreign Trade Organizations of Socialist Countries and Parties from the Capitalist Economic Sphere*, 4 PACE L. REV. 607 (1984).

dence over the general regime. Such special provisions generally are of two kinds: they either emanate from an international treaty, such as the Moscow Convention of 1972, or they may be embodied in an institutional arrangement and the rules of procedure of a permanent arbitration body.

The preeminence of an international treaty over national legislation in matters of arbitration is established by various statutes.<sup>43</sup> Likewise, the statutory instruments and rules of procedure of most arbitration institutions in the CMEA countries, which—unlike similar institutional arrangements and rules in the West—constitute genuine legal norms emanating from public bodies authorized to legislate,<sup>44</sup> have the effect of superseding more general legal rules in the areas of their application. These procedural rules are given priority on the theory that, as particular legal norms, they constitute a *lex specialis* that overrules the *lex generalis* on the same subject.<sup>45</sup>

As we have seen, these statutory instruments and rules of procedure are the prime targets of unification within the CMEA, while the codes of civil procedure remain relatively free from such influence. As a result of the harmonizing of CMEA arbitration rules, the national codes of civil procedure have lost a great deal of control over the arbi-

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43. See Czechoslovakia Arbitration Act of 1963, *supra* note 40, § 35, which provides that "This Act shall apply, unless an international treaty, binding on the Czechoslovak Socialist Republic, contains a different provision." See also GDR Arbitration Ordinance, *supra* note 40, art. 33, which provides that "The provisions of this Ordinance shall not apply if international treaties to which the German Democratic Republic is a party provide otherwise;" and Fundamental Principles, *supra* note 39, art. 64, which provides that "In those instances when other rules are established by an international treaty or international agreement in which the USSR participates than those which are contained in the present Fundamental Principles, the rules of the international treaty or international agreement shall be applied."

44. Thus, the new Statute of the Court of Arbitration at the USSR Chamber of Commerce and Industry was approved by the Decree of the Presidium of the USSR Supreme Soviet of Dec. 14, 1987; the Rules of Procedure of the Arbitration Court of the Czechoslovak Chamber of Commerce and Industry [hereinafter Czechoslovak Rules] were promulgated by Decree No. 47 of 1974 (later revised by Decree No. 104 of 1981) and were published in the Collection of Laws; the Regulations Relating to the Organization and Working of the Rumanian Arbitration Commission (Rules of Procedure) [hereinafter Rumanian Rules] were approved by the Decree of the State Council of 1976 (No. 18 of 1976). With the exception of Czechoslovakia and Rumania, the procedural rules for arbitration courts in Eastern Europe have not been published in statutory form. The Bulgarian, GDR, Hungarian, Soviet and Polish non-CMEA procedural rules [hereinafter Bulgarian Rules, GDR Rules, Hungarian Rules, Soviet Rules, Polish non-CMEA Rules] may be obtained by writing to a particular court, and a compilation of the procedural rules of national institutions in various countries was published in 4 WORLD ARB. REP. (Butter.) (1989).

45. See V. SEDLACEK, *supra* note 11, at 91.

tral process. The few areas in which the codes of civil procedure are still influential include *ad hoc* arbitration (a procedure that is almost extinct), judicial recognition of arbitration agreements, and the enforcement of arbitral awards.

Like domestic economic arbitration, international commercial arbitration has undergone an almost complete separation from the general procedural law of each country in favor of a distinct organizational and procedural format. There is no indication that any CMEA country presently contemplates a revision of its arbitration legislation, taking into account the provisions of the UNCITRAL Model Law on International Commercial Arbitration.<sup>46</sup> However, such revision may become desirable when the value of uniformity is underscored by increased economic contacts with the rest of the world.

#### IV. INSTITUTIONAL FRAMEWORK

Whether seen as an adjudicator of transnational disputes arising between enterprises of the CMEA countries, or as a forum for resolution of controversies in the broader context of foreign trade, arbitration in the USSR and Eastern Europe rests on the bedrock of permanent institutions.

Permanent courts of arbitration operate within the chambers of commerce, and like their sponsoring institutions, are public organizations. The arbitration courts' public character implies a measure of political control, especially with regard to the political screening of professional personnel, including arbitrators.

The structure of these permanent courts consists of a Presidium (or president), a college of arbitrators and a secretary (or secretariat). The powers and responsibilities of each institutional component are

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46. The Model Law was adopted by the U.N. Commission on International Trade Law in 1985. For the text and commentary, see Shifman, *UNCITRAL Model Law on International Commercial Arbitration*, 1 *WORLD ARB. REP.* (Butter.) 135.2 (1986). See also Fleischhauer, *UNCITRAL Model Law on International Commercial Arbitration*, 41 *ARB. J.* 17 (1986); Herrmann, *UNCITRAL Adopts Model Law on International Commercial Arbitration*, 2 *ARB. INT'L* 2 (1986); Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20 *INT'L L.* 327 (1986); Lucio, *The UNCITRAL MODEL Law on International Commercial Arbitration*, 17 *U. MIAMI INTER-AM. L. REV.* 313 (1986); McNerney & Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 9 *B.C. INT'L & COMP. L. REV.* 47 (1986); Paulsson, *Report on the UNCITRAL Model Law on International Commercial Arbitration as Adopted in Vienna on 21 June 1985*, 52 *ARB.* 98 (1986); Strohbach, *Mustergesetz über die internationale Handelsschiedsgerichtsbarkeit: UNCITRAL-Modelgesetz 1985*, 93 *RECHT IM AUSSENHANDEL I* (No. 93); Szasz, *Introduction to the Model Law of UNCITRAL on International Commercial Arbitration*, 24 *RASSEGNA DELL'ARBITRATO* 5 (1984).



precisely defined in the rules pertaining to the organization and procedure of the courts of arbitration. Thus, the Presidium decides questions of policy, appoints arbitrators and performs its other delegated responsibilities.<sup>47</sup> The arbitrators, either individually or in panels of three, conduct proceedings and issue decisions. The Secretary is the administrative officer of the arbitration court and performs various responsibilities on behalf of the court.<sup>48</sup>

The organizational framework and distribution of duties among the three structural elements permits the arbitration court to effectively administer its affairs and develop the public support required to secure adequate resources. It also ensures functional continuity and contributes to the consistency and predictability of arbitral adjudication.<sup>49</sup>

Most of the permanent courts have been in existence for a long time. The Foreign Trade Arbitration Commission in Moscow (since January 1, 1988, the Court of Arbitration at the USSR Chamber of Commerce and Industry), for instance, was established in 1932 and has evolved into a major arbitral center.<sup>50</sup>

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47. For example, the Board (Presidium) of the Czechoslovak Arbitration Court has nine members elected by the Chamber of Commerce and Industry for a period of three years. The Board: (1) supervises the conduct of arbitration proceedings as authorized by § 3(3) of the Czechoslovak Rules, *supra* note 44; (2) approves the inclusion of qualified candidates in the list of arbitrators, and decides on a removal from the list, *id.* § 5(2); (3) decides on the challenge of arbitrators, *id.* § 24(2); and (4) resolves issues of jurisdiction, *id.* § 25.

The President of the Board has the power to: (1) issue letters rogatory to foreign courts and other authorities, *id.* § 11(7); (2) stay arbitration proceedings pending completion of the process of appointing arbitrators, *id.* § 12; (3) appoint arbitrators at the request of respective parties, *id.* §§ 19(1)(e), 22(3) or, when the parties fail to appoint a sole arbitrator or the defendant fails to appoint his arbitrator, *id.* § 23 or when appointed arbitrators fail to elect the presiding arbitrator, *id.* § 23(2); (4) take necessary procedural actions pending constitution of a tribunal, *id.* § 23(5); (5) co-sign arbitral awards, *id.* § 37(2); and (6) issue decrees of discontinuance pending constitution of a tribunal, *id.* § 42(3).

48. The Secretary, under the Czechoslovak Rules, organizes the work of the court and performs specific functions which include assistance in conducting arbitral proceedings, keeping records of each proceeding, co-signing arbitral awards, and certifying decisions and other official documents of the Arbitration Court. *Id.* §§ 6(1), 37(2).

49. "The decisions [of the Foreign Trade Arbitration Commission], unlike the decisions of *ad hoc* tribunals, establish a consistent practice known to all parties to future disputes." VNESHNETORGOVYI ARBITRAZH 5 (Moscow 1941).

50. See Pozdnyakov, *50 let Vneshnetorgovoi arbitrazhnoi komissii*, 7 VNESHNIAYA TORGOVLIA 39 (1982).

## V. THE ARBITRATORS

An arbitrator in the CMEA system has a permanent status and clearly defined rights and duties. An arbitrator cannot be validly appointed to hear a case unless he is a member of the college of arbitrators at the court with jurisdiction over the matter.<sup>51</sup> His name must appear on the list or roster which also specifies the profession and occupation of the arbitrator, academic degree or title, specialization and place of residence.<sup>52</sup> The list from which arbitrators are chosen must contain a minimum of fifteen names. The members of the college receive their commission from the executive body of the chamber of commerce, or in some cases, from the Presidium of the arbitration court. The same body which authorizes their inclusion on the roster may also order their deletion from the list. In most countries the college of arbitrators is little more than a pool of available adjudicators. Bulgaria is the only country where the college functions as a deliberative and decision-making body; it elects the president and vice-president of the arbitration court, decides matters concerning the conduct of arbitrators, analyzes the court's practice, examines important legal problems and approves annual reports on the court's activities.<sup>53</sup>

## VI. THE NATIONALITY OF ARBITRATORS

In view of the fact that, with the exception of Hungary, the parties to a dispute are bound to select their arbitrators from a list established by the arbitral institution, the traditional freedom to appoint arbitrators possessing particular skills and expertise is somewhat limited. That freedom is further curtailed by the prevailing requirements regarding the eligibility of a person to be included on the roster of arbitrators. An important question is whether a foreign national can appear on the list. The CMEA Uniform Rules, as well as those of the German Democratic Republic, Romania and the USSR, are silent on this matter. The practice of these countries, however, has been not to

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51. Only Hungary permits a foreign party to appoint a foreign arbitrator whose name is not included in the roster kept by the Hungarian Arbitration Court. See Hungarian Rules, *supra* note 44, § 4(2).

52. See Uniform Rules, *supra* note 33, § 4(1); Bulgarian Rules, *supra* note 44, § 4; Czechoslovak Rules, *supra* note 44, § 5; see also GDR Rules, *supra* note 44, § 4; Hungarian Rules, *supra* note 44, § 4; Rumanian Rules, *supra* note 44, § 8; Soviet Rules, *supra* note 44, § 4. The Polish non-CMEA Rules require that the list also show the nationality of the arbitrator, if he is not a Polish citizen. Polish non-CMEA Rules, *supra* note 44, § 4(3).

53. Bulgarian Rules, *supra* note 44, § 5.

appoint foreigners as arbitrators. And, Bulgaria's arbitration court expressly prohibits the choice of a non-citizen.<sup>54</sup>

Conversely, several arbitration courts allow, in principle, the entry of foreign nationals on the list of arbitrators. The Czechoslovak Rules contain an explicit provision that Czechoslovak citizenship is not a requirement of being an arbitrator.<sup>55</sup> Similarly, the Polish non-CMEA Rules appear to admit foreign nationals to the college of arbitrators.<sup>56</sup> The Hungarian Rules, however, offer a different solution. While silent on the question of whether a foreign national may enter the Hungarian list of arbitrators, the rules permit the appointment of a foreigner as an arbitrator even though the person is not a member of the college of arbitrators, provided that: (1) only a foreign party to the arbitration proceedings may appoint a foreign national as its arbitrator; and (2) the foreign party's home country must be one that allows a Hungarian citizen to act as an arbitrator within its jurisdiction.<sup>57</sup>

Commentators in the West are often surprised that a tribunal, sitting in Moscow and settling a dispute between a Bulgarian and a Soviet foreign trade organization, for example, cannot include a Bulgarian national as one of the arbitrators and, conversely, why a panel resolving a controversy between a Soviet and a Bulgarian enterprise in Sofia cannot have as a member a Soviet national. The rigidity of this seemingly nationalistic principle can perhaps be explained by the traditional Soviet reluctance to open up its institutions to foreign influence. The notion that the participation of foreigners in the decision-making processes of a Soviet institution would encroach upon national sovereignty is apparently still very much part of Soviet bureaucratic psychology. Although international treaties binding upon the USSR and most other members of the CMEA provide that foreign nationals may be appointed as arbitrators,<sup>58</sup> the drafters of the CMEA Uniform Rules chose to ignore them. The silence of the Uniform Rules may be interpreted as non-recognition of the right of a foreign party to appoint a foreign national as its arbitrator.

It is encouraging, however, that the issue is hotly debated among Soviet jurists. I.O. Khlestova, author of a monograph on international commercial arbitration within the CMEA, calls for a change in both The Court of Arbitration Rules and the CMEA Uniform Rules, that would enable foreign parties to choose foreign nationals whose names

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54. "The arbitrators included in the list shall be Bulgarian citizens. . . ." *Id.* § 4(3).

55. Czechoslovak Rules, *supra* note 44, § 5(3).

56. Polish non-CMEA Rules, *supra* note 44, § 4(3).

57. Hungarian Rules, *supra* note 44, § 4(2).

58. See European Convention on International Commercial Arbitration, Apr. 21, 1961, art. III, 484 U.N.T.S.

are on the list of arbitrators of their respective arbitration court. Aware that the lists presently include only nationals of the country of that forum, Khlestova proposes either adding foreign arbitrators to the existing lists or inviting national arbitration institutions to establish combined lists for two or more countries.<sup>59</sup>

## VII. QUALIFICATIONS

A person cannot be included in the list of arbitrators unless he possesses the qualifications required by the rules of the arbitral institution. The Uniform Rules are intentionally general, stating in section 4 that the lists will include only those persons who possess the necessary knowledge and capabilities to resolve disputes arising in foreign trade and technical and industrial cooperation. The general nature of this provision, which mirrors Section 4(1) of the Soviet Rules, enables the screening body to apply policy-oriented criteria during the selection process for positions within the *nomenclatura*.<sup>60</sup> Nonetheless, some national rules require additional qualifications, often including the requirement of "necessary knowledge" and "capabilities" in areas germane to international commercial arbitration. Additional criteria also include the absence of any prior convictions<sup>61</sup> and a knowledge of law.<sup>62</sup>

In principle, the parties to an arbitration agreement may prescribe the qualifications that their arbitrators must possess. The adversaries cannot, however, invoke their agreement as a ground for refusing the appointment of an arbitrator from the list established by the arbitral institution. The parties are required to make every effort to choose arbitrators from the list who possess the stipulated qualifications, and under no circumstances may the parties appoint an outside arbitrator even if the outsider is more qualified. This raises an issue which is not

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59. I.O. KHLESTOVA, *supra* note 6, at 119-21.

60. The *nomenclatura* in the USSR and elsewhere in Eastern Europe is the category of positions that can be filled only with prior approval of the candidate by a competent Party organ. Typical requirements are the political reliability of the applicant, absence of commitments to religion or non-Marxist political ideologies, and active involvement in public causes. A candidate who is a member of the Party is deemed to meet these requirements automatically. Non-members have to offer proof that they qualify for a *nomenclatura* position. The office of arbitrator undoubtedly falls within the *nomenclatura*.

61. Bulgarian Rules, *supra* note 44, § 4.

62. *Id.* See also Czechoslovak Rules, *supra* note 44, § 5(3); Hungarian Rules, *supra* note 44, § 4(1); Polish non-CMEA Rules, *supra* note 44, § 4(3); Rumanian Rules, *supra* note 44, art. 8.

regulated by the Uniform Rules, namely, whether liability may exist based on the negligence or inability of the arbitrator, and if so, to whom this liability extends. In the West, an arbitrator may be liable if he or she does not perform with due diligence, although the parties bear some of the responsibility if they have not chosen an honest or qualified arbitrator.<sup>63</sup> In the USSR and Eastern Europe, liability should probably fall on the arbitral institution that screened the arbitrator before placing his name on the list. By requiring the parties to select their arbitrators from a prescribed list, the arbitral institution implicitly guarantees that the arbitrators on the list meet the criteria established by the rules and the arbitration agency must assume responsibility if an arbitrator's qualifications fall short of those demanded and expected.

Impartiality and the absence of bias are two principles upon which both the Uniform Rules and the national rules place special emphasis. The relevant provisions explicitly state that the arbitrator does not represent the interests of either of the parties.<sup>64</sup> Some of the national rules also stipulate that the arbitrators are bound to secrecy.<sup>65</sup>

CMEA arbitrators usually do not maintain personal contacts with the adverse parties. In Western arbitration, however, *ex parte* communication between the arbitrator and the party that appointed him is, in many instances, specifically permitted. That the three arbitrators in a CMEA case are members of the same college of arbitrators, and that their links to the arbitral institution are stronger than those to the parties that have chosen them, ensure a proper degree of detachment. Only in exceptional circumstances, particularly when higher interests than those of a particular party are involved, may the principle of independence be broken. These factors explain why there has been little need for a code of ethics governing the personal conduct of CMEA arbitrators.

There are detailed provisions in the Uniform Rules governing the challenge and removal of arbitrators. In order to challenge an arbitrator's impartiality, one must show that an arbitrator is personally interested in the outcome of the proceedings.<sup>66</sup> Typical cases are those where the arbitrator is the officer of an organization or agency to which

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63. R. DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 274 (1985).

64. Uniform Rules, *supra* note 33, § 4(2); Bulgarian Rules, *supra* note 44, § 4(4); Czechoslovak Rules, *supra* note 44, § 4(1); GDR Rules, *supra* note 44, § 4(3); Hungarian Rules, *supra* note 44, § 4(4); Polish non-CMEA Rules, *supra* note 44, § 16(1); Rumanian Rules, *supra* note 44, art. 8; Soviet Rules, *supra* note 44, § 4(2).

65. GDR Rules, *supra* note 44, § 4(3); Polish non-CMEA Rules, *supra* note 44, § 16(1).

66. Uniform Rules, *supra* note 33, § 20(1).

the party that appointed him is affiliated. As a safeguard, the Uniform Rules and most of the national rules require an arbitrator to disqualify himself if, as a result of the relationship with the appointing party, the arbitrator's impartiality might be compromised.<sup>67</sup> The challenge of an arbitrator is decided by the other members of the tribunal. If they are unable to agree, the matter is removed to the Presidium of the arbitration court.

### VIII. THE CONSTITUTION OF A TRIBUNAL

A case may be assigned either to a sole arbitrator or to a tribunal of three arbitrators. In general, arbitrators are appointed in a manner similar to that used in the West. The sole arbitrator is chosen, by mutual agreement of the parties, from the list of arbitrators of the arbitration court that has jurisdiction in the matter. If the parties fail to agree on an arbitrator within the prescribed period of time, the sole arbitrator is appointed by the president of the arbitration court.<sup>68</sup> To establish a three member CMEA tribunal, the plaintiff may initially include the name of an arbitrator in his statement of claim. Alternatively, the plaintiff may request the president of the arbitration court to make the appointment.<sup>69</sup> Given the limited choice, there is little practical difference between the two alternatives. Thus, the latter course of action is chosen more frequently by plaintiffs than the former.

Within thirty days after receiving the statement of claim, the defendant is required to appoint his arbitrator or to assign the task to the president of the arbitration court. Neither procedure, as practice demonstrates, places the defendant at an advantage. Should the defendant fail to exercise his option, the second arbitrator is chosen by the president of the arbitration court.<sup>70</sup> Thus, under the CMEA system of arbitration, it is virtually impossible for a defendant to obstruct the make-up of the tribunal.

As in other systems, the presiding arbitrator is chosen by the two appointed arbitrators. If they disagree, the presiding arbitrator is chosen by the president of the arbitration court.<sup>71</sup> Significantly, the presi-

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67. *Id.*; Bulgarian Rules, *supra* note 44, § 25(1); Polish non-CMEA Rules, *supra* note 44, § 16(1); Rumanian Rules, *supra* note 44, § 26; Soviet Rules, *supra* note 44, § 22.

68. Uniform Rules, *supra* note 33, § 19; Bulgarian Rules, *supra* note 44, § 23; Czechoslovak Rules, *supra* note 44, § 23(4); GDR Rules, *supra* note 44, § 19; Hungarian Rules, *supra* note 44, § 19; Rumanian Rules, *supra* note 44, § 23; Soviet Rules, *supra* note 44, § 19.

69. Uniform Rules, *supra* note 33, § 14(2)(e); see also corresponding provisions of the national rules.

70. *Id.* § 17(3).

71. *Id.* § 18.

dent's power of appointment in selecting an arbitrator or the presiding arbitrator is exclusive. No third party, not even a court of justice, can make such appointments.

An interesting feature of the arbitration system is the procedure for the appointment of substitute arbitrators. These are appointed at the same time and in the same manner as primary arbitrators; the parties, however, are free to forego the appointment.<sup>72</sup> This is a facultative procedure designed to ensure the smooth replacement of a resigning or incapacitated arbitrator during the proceeding.

## IX. POWERS OF ARBITRATORS

The powers of CMEA arbitrators are not dependent upon the agreement of the parties, but are conferred on them by the rules of the arbitration court. The powers may be generally classified as follows:

- (a) *The power to decide on jurisdiction.* Surprisingly, there is no uniform rule on this issue. Some national rules vest the power in the arbitrators that hear the case.<sup>73</sup> Other rules introduce a two-tier system: the tribunal decides on its jurisdiction, but the dissatisfied party may appeal the decision. The power to decide the appeal vests in the Presidium of the arbitration court.<sup>74</sup> Other rules, however, confer the power to determine jurisdiction on the Presidium.<sup>75</sup>
- (b) *The power to determine the value of the claim.* When the plaintiff fails to state the value of the claim, or states it incorrectly, the arbitration court has the duty to determine the value, either on its own initiative or at the request of the defendant.<sup>76</sup> The national rules specify how this power is exercised.<sup>77</sup>
- (c) *The power to decide the case.* This power is vested exclusively in the arbitrators who have heard the case. Their decision may be in the form of an award or ruling. An award is made when the case is decided on its merits or when the parties reach a settlement in the course of the arbitration proceedings and ask for an award confirming its terms.<sup>78</sup> A ruling terminates the proceedings when the

72. *Id.* §§ 14(2)(e), 17(3).

73. Bulgarian Rules, *supra* note 44, art 8(4); Soviet Rules, *supra* note 44, § 1(3).

74. Polish non-CMEA Rules, *supra* note 44, § 17.

75. Czechoslovak Rules, *supra* note 44, § 25.

76. Uniform Rules, *supra* note 33, § 15(4).

77. Bulgarian Rules, *supra* note 44, § 20(4); GDR Rules, *supra* note 44, § 15(1); Hungarian Rules, *supra* note 44, § 15(5); Rumanian Rules, *supra* note 44, § 12; Soviet Rules, *supra* note 44, § 15(4).

78. Uniform Rules, *supra* note 33, § 30; see also corresponding provisions of the na-

plaintiff withdraws his statement of claim, when the parties reach settlement and ask for an award to confirm its terms, or when, owing to the parties' inaction, it is impossible to decide the case.<sup>79</sup>

As an exceptional remedy, the Rumanian Rules permit a party to request a reexamination of the tribunal's decision.<sup>80</sup> Unless the parties select other arbitrators, the petition is considered by the same panel that made the decision. If the arbitrators decide in favor of reexamination, the original award is suspended and, if granted, the appellate award replaces the original award.<sup>81</sup>

### CONCLUSIONS

Similar to the courts of justice, the arbitration system in the USSR and Eastern Europe is an institution of public, not private, law. The arbitrator is not an agent of the party that appointed him, nor does he follow its directives. All members of an arbitration tribunal, not just the presiding arbitrator, are neutral arbitrators using their own judgment.

The strict separation of international commercial arbitration from domestic economic arbitration makes it possible to grant arbitrators a great measure of autonomy from national law, resulting in better integration of arbitration within the regional system.

Arbitration proceedings in the USSR and Eastern Europe are free from judicial control. The powers of the courts of justice are limited almost entirely to the declaration and the enforcement of awards. Judicial intervention to compel arbitration, appoint arbitrators, assist in procedural matters and grant remedies during arbitration proceedings is generally unavailable. The appointment of arbitrators and general control over the proceedings are entrusted to the Presidium of the arbitration court.

As a rule, arbitration proceedings are public matters, and as a result, there is no reason to withhold the reporting and publication of arbitral awards. Accordingly, reports on selected cases are released for publication by most institutions. To this end, the CMEA arbitration system seems to be reaping the fruits of publication described in recent literature.<sup>82</sup>

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tional rules.

79. Uniform Rules, *supra* note 33, § 36; see also corresponding provisions of the national rules.

80. Rumanian Rules, *supra* note 44, § 49.

81. *Id.*

82. As one commentator notes:



The arbitral systems continue to evolve in response to society's needs and new developments are anticipated in several key areas. One of the expected reforms is the recognition of the right to designate foreign nationals as arbitrators. Such a change is long overdue and there seems to be a growing awareness of this need. This would involve a revision of the existing Uniform Rules and, more importantly, the adoption of practical steps toward implementation. Another issue which requires attention is the procedure for setting aside arbitral awards. Several commentators favor an arbitral, rather than judicial, mechanism that would enable the arbitration court to revert to its position before rendering the award. A third possible area of future development is the unification of rules concerning the enforcement of awards, hopefully to be adopted by a regional convention on the extra-territorial validity and enforcement of arbitral awards.

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Publication of arbitral awards can serve numerous beneficial purposes. First, it will greatly improve the selection process. One of the most effective ways of judging the qualities of a prospective arbitrator is to study the awards he has rendered. Second, it will contribute to the quality, consistency, and predictability of arbitral adjudication. Arbitrators frequently expend considerable efforts in providing proper reasoning for their awards. Their analysis may contribute significantly to the development of the law and be authoritative sources of law in the steadily developing field of international commerce. Third, the knowledge that their awards will be published and read by others will encourage arbitrators to be most diligent in the discharge of their tasks. Fourth, the publication of awards will add greatly to the acceptability and status of international commercial arbitration.

Smit, *The Future of International Commercial Arbitration*, 2 WEST'S INT'L L. BULL. 6 (1984).