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Commercial Arbitration in CMEA Member Countries

by
Vladimir S. Pozdnjakov†

In the Member Countries of the Council for Mutual Economic Assistance (hereinafter CMEA), arbitration has always been recognized as the most acceptable way of settling disputes arising in the field of international trade. Generally this positive approach to commercial arbitration is reflected in the legislation of the countries of the socialist commonwealth and in the activities of their economic organizations. Accordingly, by far the majority of disputes between organizations of CMEA countries, as well as disputes involving such organizations and their clients in other countries, are settled by arbitration. This generalization, of course, refers to disputes which could not be settled through direct negotiation.

The socialist states of the CMEA actively participated in the Conference on Security and Cooperation in Europe, which marked its tenth anniversary in 1985. The Final Act of the Conference placed special emphasis on arbitration as an effective instrument for speedy and just settlement of disputes. The final document of the September 1983 Madrid meeting of the Conference also reflects the member states' appreciation for arbitration and recommends extending its field of application.

The legislation of CMEA Member Countries permits disputes arising in international trade to be settled by ad hoc arbitration. In practice, however, this procedure of dispute settlement is followed quite rarely. The clearly predominant approach is to refer disputes to standing arbitration centers that have been set up in each of the CMEA countries.¹ The doyen of these is the Foreign Trade Arbitration Commission (FTAC), set up in 1932 as a court attached to the USSR Chamber of Commerce and Industry.² Arbitration

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1. See USSR CHAMBER OF COMMERCE AND INDUSTRY, HANDBOOK ON FOREIGN TRADE ARBITRATION IN CMEA COUNTRIES (1983) (Russian and English language editions).

2. The Maritime Arbitration Commission (hereinafter MAC) was set up at the USSR Chamber of Commerce and Industry somewhat earlier (1930) to hear disputes in the field of merchant shipping. The legal status and activities of the MAC are not discussed in this paper. Other organizations beyond the scope of the present paper are specialized arbitration courts in other countries, such as the MAC of Vietnam, the International Court of Arbitration for Marine and Inland Navigation set up at Gdynia, Poland in 1959 under an agreement between the Chambers of Commerce of the German Democratic Republic, Poland and Czechoslovakia, and the Court of Arbitration of the Cotton Association and of the Wool Federation at Gdynia.

courts (commissions) were established in 1949 in Poland and Czechoslovakia, in 1953 in Bulgaria, Romania, and Hungary, in 1954 in the German Democratic Republic (GDR), in 1961 in Mongolia, in 1964 in Vietnam, and in 1965 in Cuba.

The legal status of foreign trade arbitration courts or commissions is determined differently in different CMEA countries. Legal status is determined by acts of supreme legislative authorities in Vietnam, Cuba, Romania, the USSR, and Czechoslovakia, and by decisions of the respective chambers of commerce without legislative approval in Bulgaria, Hungary, the GDR, Mongolia, and Poland. The legal status of the FTAC is currently governed by a statute approved by the Decree of the Presidium of the USSR Supreme Soviet on April 16, 1975. This Decree was subsequently approved by a law adopted at the July 9, 1975 session of the USSR Supreme Soviet.

The common feature of all of these acts is the recognition of arbitration centers as independent legal institutions which do not fall within the judicial or administrative system of the countries concerned. These arbitration bodies are established at chambers of commerce, which are nongovernmental organizations aimed at promoting foreign trade. In most cases, the chambers of commerce approve the procedural rules of the respective arbitration centers and provide the centers with various kinds of support from facilities to accounting and other services.

The acts referred to above determine the competence of the arbitration courts, which extends to disputes arising out of contractual and other civil law relations in international trade. Most arbitration tribunals entertain disputes between organizations of their own country and foreign parties as well as disputes involving only foreign entities. The Arbitration Court at the Hungarian Chamber of Commerce will also hear disputes involving only Hungarian organizations if Hungarian law permits such disputes to be settled by arbitration.

The jurisdiction of a particular arbitration court is determined by an agreement in writing between the contending parties. An agreement to arbitrate may be expressed by the parties' conduct: a claim is brought, following which respondent must answer, accepting the jurisdiction of the arbitration tribunal.

An important exception to this general jurisdictional rule provides that the jurisdiction of arbitration courts in CMEA countries also extends to disputes submitted to those courts by virtue of international agreements. One such agreement is the Convention on the Settlement by Arbitration of Civil Law Disputes Arising Out of Relations of Economic, Scientific and Technological Cooperation, signed on May 26, 1972 in Moscow (hereinafter the 1972 Moscow Convention).³ The signing of the 1972 Moscow Convention was a

3. The Parties to the 1972 Moscow Convention are Bulgaria, Cuba, Czechoslovakia, the GDR, Hungary, Mongolia, Poland, Romania, and the USSR.

result of the implementation by the CMEA countries of the 1971 Comprehensive Program for the Further Extension and Improvement of Cooperation and the Development of Socialist Economic Integration. The Program provided, *inter alia*, for the harmonization of the procedural rules of the respective arbitration bodies.

The Convention provides that all disputes between economic organizations of the Member Countries arising out of contractual and other civil law relations in the course of economic, scientific, and technological cooperation are subject to arbitration and are excluded from the jurisdiction of the courts of law. This provision establishing compulsory arbitration of disputes, represents a departure from the earlier practices of international commercial arbitration.⁴

Generally, disputes arising between Member Countries are brought before the arbitration court established by the chamber of commerce in the defendant's country. The parties, however, are free not to follow this rule. They may agree to submit their dispute to an arbitration court attached to the chamber of commerce or, depending on the nature of the dispute, to a specialized arbitration court in any third country that is a party to the Convention.

The 1972 Moscow Convention provides certain exceptions to the general rule of mandatory arbitration for the above disputes. Specifically, disputes subject to the exclusive jurisdiction of the courts of law under certain international agreements, such as the 1951 Agreement on International Carriage of Goods by Rail, concluded by the socialist states, are not to be referred to arbitration. Moreover, the 1972 Moscow Convention is not applicable to disputes which, under the national law in force at the time of ratification, form part of the exclusive competence of courts or other state agencies, such as disputes relating to certain questions of patent law.

Mandatory arbitration procedures are also provided for in bilateral agreements between the CMEA countries and the People's Republic of China and between the CMEA countries and the People's Democratic Republic of Korea. However, these mandatory procedures apply only to disputes arising out of sales contracts.

In examining disputes, the arbitration centers are governed by national rules which follow the Uniform Rules of Procedure in the Arbitration Courts at the Chambers of Commerce of CMEA countries (hereinafter the Uniform Rules).⁵ The Uniform Rules were approved in 1974 by the CMEA Executive Committee, which recommended that the CMEA countries

take in accordance with the procedure established in the countries such measures which . . . will provide for the application of rules corresponding to the Uniform Rules . . . to disputes between economic organizations of CMEA

4. The Convention exempted the General Conditions of Delivery and some other General Conditions agreed upon by CMEA countries *infra* from the compulsory arbitration requirement.

5. The CMEA rules are reprinted *infra* in the Appendix to this issue of the *International Tax & Business Lawyer*.

countries subject to examination in the arbitration courts at the chambers of commerce.

After the 1972 Moscow Convention, elaboration of the Uniform Rules was the next step in implementing the Comprehensive Program of Socialist Economic Integration in the field of arbitration.

The recommendation of the CMEA Executive Council regarding procedural rules referred only to disputes between organizations of CMEA countries. However, all of the CMEA Member Countries, with the exception of Poland, established uniform national rules applicable both to disputes involving organizations of CMEA countries and to those involving firms and organizations of other countries. Poland adopted the recommended rules of procedure for disputes between economic organizations of CMEA countries and retained the 1968 Rules with the 1974 amendments for disputes involving other entities.

In most countries, it was the respective chambers of commerce that approved the national rules applicable to their arbitration centers. Exceptions to this practice were the adoption of the national rules by legislation in Cuba, by a decree of the State Council in Romania, and by an executive order of the Federal Ministry of Foreign Trade in Czechoslovakia.

The promulgation of the Uniform Rules did not bring about uniform international rules for the settlement of disputes or textually identical national rules in CMEA countries. However, CMEA Member Countries achieved a high degree of substantive uniformity in their national rules⁶ which produced a virtually uniform procedure for contending parties, with only minor differences. Work is presently underway within the CMEA framework to improve the Uniform Rules. Changes will be made which incorporate both the experiences of the CMEA countries in applying their own national rules and the trends in the development of international commercial arbitration which are reflected in the UNCITRAL Arbitration Rules⁷ and in the draft Uniform Law on Commercial Arbitration.

In addition to the national rules of the CMEA countries, arbitration courts are bound by other legal provisions directly related to commercial arbitration in deciding procedural questions.

In most CMEA countries, procedural questions not covered by national rules or these other legal provisions are left to the discretion of the arbitrators. Two CMEA countries, however, substitute their own rules of civil procedure for the discretion of the arbitrators in this situation. Under paragraph 11 of the Statute of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry, the rules of the Bulgarian Code of Civil Procedure apply to issues not governed by the Statute or by the arbitration agreement, to the extent that those rules correspond to the nature of the arbitration. Under

6. Cf. CMEA HANDBOOK, *supra* note 1, at 51.

7. The UNCITRAL Rules are reprinted *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

Article 51 of the Regulations Relating to the Organization and Working of the Arbitration Commission at the Romanian Chamber of Commerce and Industry, these regulations shall be supplemented by the provisions of the Romanian Code of Civil Procedure that are applicable to international arbitrations within the Arbitration Commission's competence.

The national rules require that arbitration courts use applicable provisions of substantive law to settle disputes. In this context, the provisions of international treaties have overriding application. Such provisions are extremely important in relations between organizations of the countries of the socialist commonwealth. Of primary importance are the CMEA General Conditions of Delivery, as revised in 1979.

The economic relations between organizations of the CMEA countries are governed for the most part by mutually agreed upon uniform civil law provisions. Similar provisions govern relations with organizations of some other countries, including the People's Republic of China and the People's Democratic Republic of Korea.

Issues not covered by these uniform civil law provisions are resolved in accordance with provisions of the laws of the forum state under the conflict of laws rules. For example, paragraph 110 of the CMEA General Conditions of Delivery makes reference to the seller's national law on issues which the General Conditions do not regulate. In the absence of a conflicts rule in the uniform civil law provisions, arbitration courts in most CMEA countries apply the conflict of laws provisions of their own national law. For example, Article 126 of the Fundamentals of Civil Legislation of the USSR and the Union Republics makes reference to the law of the place where the foreign trade transaction was concluded. Under the conflicts rules of Bulgaria, the GDR, and Czechoslovakia, international sales contracts are governed by the law of the seller's country. Under paragraph 29 of the 1968 Polish Rules, the applicable national law is that of the country which, in the arbitrators' view, has the closest connection to the relations in dispute.

The CMEA countries recognize the principle of party autonomy in the selection of the law of a particular country to govern their relations. The conflict of laws provisions mentioned above regarding the laws of specified countries are applied only in the absence of such agreement between the parties.

The arbitration courts are directed by a president who is assisted by vice presidents. In Bulgaria, Vietnam, and the USSR, the president is chosen by the arbitrators from amongst themselves. In Czechoslovakia, the president is elected by the members of the Presidium of the court. In Hungary, the president of the Hungarian Chamber of Commerce is, *ex officio*, the president of the arbitration court. Elsewhere the chairperson is appointed by the particular chamber of commerce.

Each case is heard by three arbitrators or by a single arbitrator. If a case is heard by three arbitrators, as is most often the case, each of the contending

parties nominates one arbitrator. The arbitrators then nominate the chairperson of the arbitration tribunal. Should the defendant fail to nominate an arbitrator within the prescribed time period, or the arbitrators fail to nominate a chairperson, the president of the arbitration court will nominate the arbitrator or the chairperson of the tribunal.

Only those people whose names appear on the list of arbitrators of the arbitration court may be nominated. The list is composed of specialists having the necessary expertise and experience to hear and settle disputes that fall within the arbitration court's jurisdiction. The list is usually approved by the governing body of the chamber of commerce to which the arbitration court is attached. The FTAC list of arbitrators is approved by the Presidium of the USSR Chamber of Commerce and Industry. In Czechoslovakia, the arbitrators' list is reviewed by the Presidium of the Arbitration Court.

The rules of the arbitration courts of some countries specify a minimum number of arbitrators to be included on the arbitrators' list. Other countries do not specify such a number. Under the Rules of Procedure of the FTAC, the list of arbitrators is required to include at least fifteen names. At this time, there are twenty-six on the FTAC list. As of 1983, there were thirty-nine arbitrators on the Bulgarian Arbitration Court, forty-two on the GDR court, fifteen on the Cuban court, fifteen on the Mongolian court, sixty-four on the Polish court, and thirty-five on the Romanian Arbitration Commission.

In most countries, arbitrators are put on the list for a specified period, usually two to four years, with the possibility of an extension for successive periods. The FTAC list of arbitrators is approved for a four-year period. When this period expires, the arbitrators on the list can be approved for a new four-year period so that, in practical terms, their time on the list is not limited. Approximately two thirds of the arbitrators have been on the FTAC for more than ten years. A solid theoretical background and many years of experience allow FTAC arbitrators to competently decide highly complex disputes. The same is true of arbitrators belonging to the arbitration courts of other CMEA countries.

The rules of arbitration courts in most countries impose no requirements with regard to the nationality of the arbitrators. An exception to this is found in the Bulgarian Rules, which provide that only Bulgarian citizens may be put on the arbitrators' list. The Hungarian Rules (paragraph 4) impose the following limitation with respect to the nationality of arbitration: "A foreign party may nominate as its arbitrator a foreign national who is not on the arbitrators' list provided a Hungarian citizen may be nominated arbitrator for a Hungarian party in the country of such foreign party." As a practical matter the arbitrators in most CMEA countries are usually citizens of the country of the tribunal.

Arbitrators have a duty to act impartially in carrying out their mandate. This requirement is set out in the law or in the arbitration court rules of every

CMEA country. For example, the FTAC statute specifies that arbitrators of the Commission shall be independent and impartial in administering their duties. Consistent with the impartiality requirement are provisions in each country's rules that arbitrators do not represent the parties. The impartiality of arbitrators is further ensured by the right of any of the parties to challenge the arbitrators or arbitrator.

Legal representation is often employed at hearings in the arbitration courts of the CMEA countries. Legal representatives may act on behalf of foreign nationals and organizations as well. In some countries there are associations of lawyers specializing in providing foreign clients with legal assistance. The organization *injurcollegia* is one such association in the USSR.

When a claim is filed, the claimant must pay an arbitration fee intended to cover general expenses, including the arbitrators' fees, and remuneration for the secretarial staff and technical support personnel. In most cases, the parties have no other costs associated with the arbitration except for their own legal fees.

The arbitration fee is set in each case according to established rates. The rates charged by arbitration courts in CMEA countries are reasonable by international standards. If the amount of a claim is 5000 rubles or less, the amount of the arbitration fee is a mere 150 rubles. The arbitration fee for a claim for 100,000 rubles is 2100 rubles. The fee for a claim for 1,000,000 rubles is 7100 rubles. In special circumstances, such as when the dispute is heard by a single arbitrator, or when the dispute is withdrawn before notice of the date of the hearing has been given, or after such notice has been given but before the first hearing, the established arbitration fee is either reduced or partially refunded.

An award or ruling at the completion of the arbitration proceedings may provide for partial or full reimbursement to the claimant for the costs of the arbitration. As a general rule, these costs are paid by the losing party. If the defendant is required to pay only a portion of the amount demanded by the claimant, the costs are allocated to the defendant only in proportion to the amount of the satisfied part of the claim. The balance of the costs is paid by the claimant.

In some cases, in addition to the established expenses paid out of the arbitration fee, special expenses such as fees for expert examination or translation may be incurred. Such expenses are allocated to the parties in accordance with the same rules applied with regard to the allocation of the arbitration fees. The parties are generally not entitled to reimbursement for expenses incurred for legal representation, travel, and so forth.

Exceptions to the rules governing the allocation of arbitration fees, special expenses, and the parties' expenses are made if expenses are incurred by one party in consequence of unwarranted or bad faith actions of the other party. In such a case, the fees or expenses may be reimbursed to the former party.

Arbitration courts (commissions) are engaged in a broad program of international cooperation. Pursuant to an agreement between the chambers of commerce of the CMEA Member Countries and Yugoslavia, the presidents of the arbitration courts and the commissions attached to such chambers hold meetings every two years. The first of these meetings was held in Prague in 1959. This was followed by meetings in Moscow, Berlin, Warsaw, Varna, Bucharest, Budapest, Ulan-Bator, Havana, Bratislava, Tashkent, and Berlin. The next meeting, at Gdynia, is scheduled for late September. These meetings provide a forum for the exchange of information regarding the application of uniform rules of substantive and procedural law and for the discussion of current arbitration problems of common interest to the participants.

Information is exchanged in other ways as well. For example, bilateral meetings between the heads of arbitration courts (commissions) of some countries are held. One special and effective form of cooperation has been the joint work of the arbitration specialists from the CMEA Member Countries in the working groups of the CMEA Conference on legal questions. It was through the efforts of the Conference that the 1972 Moscow Convention and the 1974 Uniform Rules of Procedure for the arbitration courts at the chambers of commerce of the CMEA countries were drafted. The many years of joint work made it possible to draft these instruments and to identify the similarities and differences in national legislations with respect to international arbitration.

Cooperation with arbitration centers in non-socialist countries continues primarily through participation in discussions of various aspects of arbitration management and practice at seminars, symposia, and bilateral meetings. The most effective cooperation admittedly is achieved by seminars on arbitration organized by the International Chamber of Commerce with the participation of CMEA arbitration centers. Another useful contribution is made through the regularly held meetings of arbitration experts within the framework of the East-West Committee.

Participation in international arbitration congresses is also an important form of cooperation. The fourth such Congress was held in Moscow in 1972. A regular international conference on arbitration was held in Warsaw in 1980. Experts from a number of CMEA countries are also involved in the work of the International Council for Commercial Arbitration. This council is responsible for promoting cooperation between arbitration bodies of different parts of the world.