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The Role of the Western Lawyer in East-West Transactions

Jeffrey M. Hertzfeld*

When a Western lawyer ventures into a foreign jurisdiction to assist a client, his customary domestic role as an advisor, draftsman, and negotiator takes on a dimension demanding special skills. The lawyer must understand a second legal system which relies on premises different from those of his own legal system, identify the relevant legal issues presented by both systems, and guide the client toward the best resolution of these issues. Moreover, to the extent that the lawyer's role is to explain his client's position to the other party, the lawyer must have some awareness of that other party's operative premises so as to be able to limit the risk of misunderstanding.

This task is difficult when a Western lawyer is working in a foreign country with an economy that operates according to a philosophy similar to the philosophy guiding his own country. It is magnified when dealing in non-market economies.¹ Indeed, in an environment so far removed, not only in legal and economic

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1. "Non-market economies" refers to the state-run economies of the People's Republic of China (P.R.C.) and the members of the Council for Mutual Economic Assistance (COMECON) which are Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Romania, and the Union of Soviet Socialist Republics (U.S.S.R.). Business dealings between these countries and parties located in the member countries of the Organization for Economic Cooperation and Development (OECD) are referred to herein as "East-West" transactions. The OECD is composed of Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, the Irish Republic, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Yugoslavia is a member with special status.

Since the U.S.S.R. provided the structural model for the countries of Eastern Europe as well as for the P.R.C., it is used as the principal focus of this article. There are, however, limits to the validity of generalizations based on this model. First, the Marxist-Leninist background of all the Eastern Euro-

terms, but also in social, political, and ideological terms from that known to Western businesspeople, the lawyer specializing in this field is frequently called upon to play a much broader role than is the case in most other international commercial transactions.²

The exposure of most Western companies to non-market economies is limited in scope and recent in vintage. While certain companies have had a long presence as traders in these markets, often operating through European subsidiaries, most companies only began to consider the potential of doing business with the governments of non-market economy countries in the early 1970s during the period following President Nixon's historic trip to Moscow.³ In the late 1960s, the Union of Soviet Socialist Republics (U.S.S.R.) and Eastern Europe had begun to recognize the need to modernize their obsolescent industrial infrastructure and accelerate their technological development. It was decided that this modernization should be accomplished in part through the acquisition of Western plants, equipment, and technology. European and Japanese companies were the first to supply

pean countries and the P.R.C. only dates to the early 1950s. As a result, this ideology is not as deeply embedded in the mentality of the people of these countries as it is in the citizens of the U.S.S.R. Second, these countries have enacted legislation modifying their economic systems. This trend began in Hungary, which in 1968 implemented the New Economic Mechanism allowing market influences and management initiatives to operate within its centrally planned economy. *See generally* HUNGARIAN STATUTES ON FOREIGN TRADE (I. Szasz compil. 1970). Following the experience of Yugoslavia, a COMECON observer country with joint East-West ventures in its territory since the late 1960s, Hungary, Poland, Romania, and Bulgaria adopted legislation authorizing joint ventures. *See generally* Buzescu, *Joint-Ventures in Eastern Europe*, 32 AM. J. COMP. L. 407 (1984).

2. The information presented in this article applies to straight sales transactions as well as more complicated industrial transactions. Industrial transactions may entail a variety of arrangements including the transfer or exchange of technical knowledge, the sale of complete plants or processes, and the exchange of components, semi-finished goods, and finished products either related or unrelated to the products manufactured by the receiving plants. Industrial transactions may also include the rendering of technical assistance and training programs. In the case of certain Eastern European countries and the P.R.C., they may even involve direct capital investments on a profit sharing basis.

3. President Nixon's May 1972 meeting in Moscow with General Secretary Brezhnev resulted in the signing of the Basic Principles of Relations between the United States of America and the Union of Soviet Socialist Republics. 66 DEP'T ST. BULL. 898 (1972). This document, which is tantamount to a declaration of détente provides in part:

The U.S.A. and the U.S.S.R. regard commercial and economic ties as an important and necessary element in the strengthening of their bilateral relations and thus will actively promote the growth of such ties. They will facilitate cooperation between the relevant organizations and enterprises of the two countries and the conclusion of appropriate agreements and contracts, including long-term ones.

Id. at 899.

complete industrial projects.⁴ Then in 1972, American business, with its entrepreneurial spirit, financial clout, and attractive technology, rushed onto the scene ready to claim its share in the newly-opened territories. A similar scenario occurred in the People's Republic of China (P.R.C.) in the late 1970s following the change of government, the announcement of extensive economic reforms, and overtures by the Chinese Government to foreign companies to participate in the P.R.C.'s industrial modernization.⁵

The legal staffs of Western companies were, for the most part, as unfamiliar with the legal systems prevailing in non-market economy countries as manage-

4. A Japanese consortium, for example, entered into a large scale long-term agreement with the U.S.S.R. for the development of the Siberian wood-processing industry based on the supply of Japanese equipment and the counter-purchase of Soviet lumber. *See, e.g., The first crack in the Siberian ice*, *ECONOMIST*, Sept. 14–20, 1968, at 74; *Soviet and Japan Sign Siberia Pact*, *N.Y. Times*, Aug. 18, 1968, at 10; Anderson, *Soviet Bids Japan Welcome to Siberia*, *N.Y. Times*, Jan. 19, 1968, at 52. The basic agreement defining this project was signed in Tokyo on July 29, 1968. In 1969 and 1970, West German, Italian, and Austrian companies concluded long-term agreements for pipeline construction in the U.S.S.R. and delivery of natural gas to Western Europe. *See, e.g., Switching on the gas*, *ECONOMIST*, Sept. 6–12, 1969, at 64; *Italy to Import Natural Gas from Soviet*, *N.Y. Times*, Dec. 11, 1969, at 93; *Soviet Sets Terms to Sell Gas to West Germany*, *N.Y. Times*, Dec. 1, 1969, at 5; *Soviet Offers to Extend Pipeline to West Germany*, *N.Y. Times*, May 6, 1969, at 2.

5. Since 1979, the legislative and regulatory activity in the P.R.C. has been striking. *See generally* COMMERCIAL LAWS AND BUSINESS REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 1949–1983 (V. Sit ed. 1983) [hereinafter cited as COMMERCIAL LAWS]. Much of that activity concerns business relations with foreigners. *See, e.g.,* The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, *approved* July 1, 1979, *translated in* COMMERCIAL LAWS, *supra*, at 326; Regulations on the Registration of Joint Ventures Using Chinese and Foreign Investment, *approved* July 26, 1980, *translated in* COMMERCIAL LAWS, *supra*, at 329; Regulations on Labour Management in Joint Ventures Using Chinese and Foreign Investment, *approved* July 26, 1980, *translated in* COMMERCIAL LAWS, *supra*, at 331; Provisional Regulations for Providing Loans to Joint Ventures Using Chinese and Foreign Investments from the Bank of China, *approved* Mar. 13, 1981, *translated in* COMMERCIAL LAWS, *supra*, at 83; Regulations on Special Economic Zones in Guangdong Province, *approved* Aug. 26, 1980, *translated in* COMMERCIAL LAWS, *supra*, at 341; Interim Regulations of the People's Republic of China Concerning Their Control of Resident Offices of Foreign Enterprises, *promulgated* Oct. 30, 1980, *translated in* COMMERCIAL LAWS, *supra*, at 311; The Income Tax Law for Foreign Enterprises of the People's Republic of China, *adopted* Dec. 13, 1981, *translated in* COMMERCIAL LAWS, *supra*, at 186; Detailed Rules and Regulations of the People's Republic of China for the Implementation of the Income Tax Law Concerning Foreign Enterprises, *approved* Feb. 17, 1982, *translated in* COMMERCIAL LAWS, *supra*, at 188; Rules for the Implementation of Foreign Exchange Controls Relating to Foreign Institutions in China and Their Personnel, *promulgated* Aug. 10, 1981, *translated in* COMMERCIAL LAWS, *supra*, at 64; Rules for the Implementation of Controls Relating to Carrying Foreign Exchange, Precious Metals and Foreign Exchange Instruments Into and Out of China, *promulgated* Aug. 10, 1981, *translated in* COMMERCIAL LAWS, *supra*, at 65; Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, *adopted* Jan. 12, 1982, *translated in* COMMERCIAL LAWS, *supra*, at 335; The Economic Contracts Law of the People's Republic of China, *adopted* Dec. 13, 1981, *translated in* COMMERCIAL LAWS, *supra*, at 300.

ment was with the business environments there. To fill the gap, many of these companies turned to international lawyers with specialized experience in this field. These legal experts were called upon to educate their clients on a broad range of topics. This article identifies and analyzes the special areas which the Western lawyer must consider when advising a client regarding an East-West transaction. These areas, although interrelated, have been categorized for clarity and ease of analysis. Part I outlines approaches for dealing with the legal and economic environment in which business negotiations are conducted. It describes the practical knowledge that lawyers must possess in order to help clients gain access to non-market countries. It also explains the process of identifying and understanding the roles and duties of various parties in Eastern countries. Part II discusses the structuring of contract negotiations in light of Eastern decision-making criteria and procedures. It focuses on the various factors which the parties must consider during the negotiation process, including the Western party's relationship to the Eastern negotiator. Finally, part III sets forth approaches to settling East-West commercial disputes.

I. THE LEGAL AND ECONOMIC ENVIRONMENT

In order to successfully aid clients engaged in East-West transactions, Western lawyers must possess a thorough understanding of the legal and economic environment in non-market economy countries. This task requires practical knowledge about how non-market countries operate. With this knowledge, lawyers can anticipate problems before they arise and help their clients avoid obstacles that may prevent completion of a transaction.

A. Gaining Access to the Market

The initial task of a Western businessperson contemplating an East-West transaction is to gain access to the Eastern market and establish regularized communications with Eastern decision makers. The experienced East-West lawyer will advise the client on certain logistical matters which vary from the typical West-West transaction.

As simple as it may sound, gaining access to non-market economy countries may pose a number of problems. For example, obtaining a business visa for a sales mission to Moscow requires an invitation from the appropriate foreign trade organization. While it is possible to obtain a tourist visa and travel to Moscow without an invitation or business visa, this may result in a considerable loss of time and money. There is a significant likelihood that the Soviet representatives will not make themselves available if they have not approved such a meeting. Therefore, eliciting a business invitation is an essential first step.⁶

6. Requests for invitations should not be phrased in a manner which suggests a "hard sell" or an expectation that the Soviet negotiators will have elaborately prepared for the meeting. Such sug-

To improve access to and communications with local decision makers in a non-market economy, the lawyer may advise the Western company to establish a local representation office. A representation office is normally constituted as a branch of a Western company and is staffed with at least one Western employee as well as local Eastern employees. Representation offices principally serve as liaison offices and, in this connection, maintain regular contact with actual and potential local customers, transmit commercial and technical proposals to their home offices, and assist in obtaining visas, scheduling meetings, and organizing the logistical aspects of negotiations for visiting representatives of their companies.⁷ The major drawback to the establishment of representation offices is cost. The expense may be prohibitive unless a company already enjoys a substantial level of business in the market in which it would like to establish such an office.

An alternative to the establishment of a representation office is the retention of a local Eastern agent. This possibility is available in a number of Eastern European countries, though not in the U.S.S.R. Local agents work on a commission basis and sometimes require a fixed retainer that is credited against commissions earned.⁸ Before retaining an Eastern agent, a company should recognize the drawbacks of such an arrangement. Agents are under the control of their Eastern governments and cannot be expected to take a strong stance in negotiations. Moreover, it is always possible that the person within the agency responsible for representing a particular company will be reassigned to another post without warning. Finally, the divided loyalties of the agent are such that the Western company cannot prudently disclose final negotiating positions to the agent and must, therefore, participate directly in key negotiations. On the other hand, Eastern agents can bring extremely useful knowledge of local languages and business structures to the companies they represent. Moreover, Eastern governments are undoubtedly interested in demonstrating that their agents can be effective. This in turn promotes the reputations of the agents and increases their use by U.S. companies. In some cases, commissions paid to such agents are considered by Western companies to be tantamount to discounts granted to state buyers.

Linked to the difficulty of obtaining access to Eastern markets is the relatively lengthy time frame required for most East-West negotiations as compared to similar transactions between Western parties. This means that the cost of negotia-

gestions can lead to lengthy delays in obtaining invitations. Of course, at advanced stages in negotiations, a firm position expressed in telexes may well become necessary in order to communicate regarding issues then on the table. Furthermore, it is important to remember that telexes to Moscow may remain unanswered for lengthy periods of time. Many Western businesspeople, unaccustomed to such treatment, may interpret this as lack of interest on the part of the Soviets. In fact, it is often due to bureaucratic decision-making procedures. Premature reactions on the part of the Western party are inappropriate and may prove counterproductive.

7. See Hertzfeld, *Setting Up Shop in Moscow*, HARV. BUS. REV., Sept.-Oct. 1974, at 137.

8. In addition to Eastern agents, it should be noted that a number of Western companies operate as commission agents with offices in both the West and the East.

tions tends to be much higher. By making their clients aware of this expense at the outset, lawyers enable them to factor these normally unexpected costs into their pricing.

B. Identifying and Understanding the Role of an Eastern Counterpart

One of the most striking aspects of non-market economy countries is the monolithic appearance of the state. In a context in which all foreign trade is subject to a state monopoly,⁹ many businesspeople assume that when, for example, they deal with the "Soviets," they are dealing directly with the government of the U.S.S.R. Although it is true that Eastern foreign trade organizations are directed by government policy, these agencies have a legal identity separate from the state. Lawyers must advise their clients regarding the legal and practical independence of these organizations.

The ultimate and sole contracting partner in the Soviet context is the foreign trade corporation that has exclusive competence to conclude a transaction for a given category of goods.¹⁰ Each foreign trade corporation is endowed with a legal identity separate and distinct from other foreign trade corporations, domestic enterprises, and the state. Hence, the Soviet State is not legally responsible for the commercial obligations contracted by its foreign trade corporations any more than a foreign trade corporation can be held liable for the debts of the state.¹¹

Despite this legal independence, foreign trade corporations are essentially instruments for implementing state trade policy. Soviet corporations are subordinate to the Ministry of Foreign Trade; the president of each corporation is appointed by the Soviet Government; corporation assets are state property allocated to the corporation as a trust; and corporation import and export objectives are not

9. The principle that foreign trade should be controlled by a state monopoly was decreed by Lenin and enshrined in Soviet constitutional law. KONSTITUTSIA (Constitution) art. 73(10) (U.S.S.R.), translated in 1 COLLECTED LEGISLATION OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE CONSTITUENT UNION REPUBLICS 3 (W. Butler ed. 1981). The communist regimes of Eastern Europe and the P.R.C. adopted this principle in the late 1940s and early 1950s.

10. Although the other Eastern European countries once conducted all trade through foreign trade corporations, this system no longer rigorously applies outside the U.S.S.R. Consequently, the task of identifying the appropriate contracting partner in other Eastern European countries is sometimes more difficult than it is in the U.S.S.R. The broader range of possible partners in these other countries, however, enhances both the opportunity for access to the market and the bargaining power of Western sellers.

11. Applying conventional rules of international conflicts of law, U.S. courts have upheld the independence of the Soviet Government from its foreign trade corporations and have set aside attachments of Soviet vessels in U.S. ports in actions brought against the government of the U.S.S.R. or foreign trade corporations. See, e.g., *Prelude Corp. v. F/V Atlantic*, No. C-71-1123 (N.D. Cal. June 15, 1971) (order granting claimant's motion to vacate writ of foreign attachment brought against the government of the U.S.S.R. as owner of a Soviet fishing vessel because the ship was found to belong to the Far East Steamship Company, a separate legal entity charged under Soviet law with independent responsibility for its obligations).

freely determined but rather are dictated by the government's foreign trade plan.¹² While foreign trade corporations act as the principals in trade transactions, they are not the end-user of their purchases nor the manufacturer of the products they sell. They serve instead as intermediaries for domestic enterprises. As such, they realize planned purchases and sales within their respective hard currency budgets. On technical questions, they normally defer to the domestic enterprise for which they act. Foreign trade corporations rarely perceive their role as one of initiating projects not contemplated by the state foreign trade plan. Such initiatives are left to the Soviet industrial ministries and enterprises, as well as to the State Committee for Science and Technology.

The independence of the trade corporations from the Soviet Government is, thus, of greater legal than commercial importance. This fact should influence the negotiating strategy of Western companies as well as the substantive contractual terms they are willing to accept. Contracts between Western companies and Soviet trade corporations must cope with Soviet commercial policy yet resolve the legal problems that may arise from the separate legal identity of the foreign trade corporation.¹³

Attention must be given not only to the drafting of export and import license clauses, but also to clauses giving rise to the dependence of the Western company on Eastern organizations. These clauses may cover areas such as state-sponsored quality control inspections, tax obligations, chamber of commerce certificates attesting to force majeure, and the provision of arbitration facilities. In all of these cases, the independence of the relevant Eastern organizations from their

12. The Soviet Government's foreign trade plan is part of the overall economic plan approved by the State Planning Commission (GOSPLAN), the central planning committee attached to the Council of Ministers. See generally Statute on the State Planning Committee of the U.S.S.R. Council of Ministers, translated in THE SOVIET LEGAL SYSTEM 123 (W. Butler compil. 1978). Investment decisions in industrial projects are made by the Council of Ministers, the highest administrative organ in the Soviet system, on the basis of advice from the affected ministries and priorities developed by GOSPLAN. Once approved by the Council of Ministers, the national plan takes on the force of law.

13. Such was the hard-learned lesson of Jordan Investments Ltd. This Israeli company was surprised to find that the denial of an export license by the Soviet Foreign Trade Ministry resulted in cancellation of its long-term oil purchase contract with a Soviet foreign trade corporation without any liability on the part of the Soviet exporter. The decision was based on the act of state doctrine. For an excellent discussion of the issues raised, see Berman, *Force Majeure and the Denial of an Export License under Soviet Law: A Comment on Jordan Investments Ltd. v. Soiznefteksport*, 73 HARV. L. REV. 28 (1960).

Recently, a similar case involving the government of Poland was heard before an arbitration panel appointed by the London Refined Sugar Association. A Polish Government export ban on sugar was asserted by Rolimpex, the Polish foreign trade corporation, as excusing its performance of large scale supply contracts with major Western European sugar refineries. Applying principles reminiscent of *Jordan Investments*, the arbitrators held for Rolimpex on grounds of *force majeure*, and rejected, among other arguments, the claim that the state and its foreign trade corporation should be treated as one entity. The decision was affirmed by the British courts. *C. Czarnikow Ltd. v. Centralia Handlu Zagranicznego 'Rolimpex,'* [1978] 2 All E.R. 1043 (H.L.).

governments may be more apparent than real, thereby presenting risks which companies operating in a West-West context would not expect to encounter. Eastern chambers of commerce are attached to the same foreign trade ministries to which foreign trade corporations are subordinate. These chambers of commerce house the quality control inspectors, the Eastern foreign trade arbitration facilities, and the experts who certify the existence of *force majeure* circumstances. While there is no basis for alleging systematic partiality, the risk of partiality is inherent in the relationship between these entities.

II. STRUCTURING AND NEGOTIATING TRANSACTIONS

When a client contemplates a complex East-West industrial transaction, the lawyer must be prepared to become extensively involved not only in the structuring but also in the negotiation of the transaction.¹⁴ An experienced East-West transactions lawyer will guide the client through a number of problems peculiar to that situation. For example, complex financial arrangements, including counterpurchase, compensation, and switch arrangements are often necessary.¹⁵ In addition, the experienced lawyer will guide the Western company through the complex forms and the unusual negotiating practices used by Eastern negotiators. Moreover, he or she will be able to advise the client regarding legal constraints imposed by both Western and Eastern governments.

A. Documentation in Negotiations

Both Eastern and Western parties prefer that their negotiations and contractual relations be carefully and extensively documented. From the Eastern standpoint, the conclusion of protocols, cooperation agreements, and similar documents of intention facilitates internal discussion of a proposed project before the formulation of a binding legal commitment to the Western party. From the Western standpoint, such preliminary documentation helps to give focus and momentum to the negotiations. Although preliminary documentation is not of binding legal force,¹⁶ it sets forth important policy considerations

14. In sales transactions, it is sometimes sufficient for the lawyer to impart a basic knowledge of the role of the foreign trade corporation, to advise on contract terms and conditions, and to identify the particular corporation which exercises the state foreign trade monopoly for the client's line of goods.

15. See Razoumov, *Les contrats sur la base de compensations entre organismes soviétiques et firmes étrangères*, 1 JOURNAL DU DROIT INTERNATIONAL 81 (1984); see also Hertzfeld, *New Directions in East-West Trade*, HARV. BUS. REV., May-June 1977, at 93. The system of non-convertible currency and the shortages of hard currency experienced by Eastern European countries make the resolution of financial issues critical to successful completion of an East-West transaction.

16. The binding contract dealing with all commercial, legal, financial, and technical aspects of a project is only negotiated and concluded after a basic agreement has been obtained on the key technical aspects of the contemplated transaction.

relating to the particular project and enables clients to determine quickly the feasibility of the project.¹⁷

Contracts used in East-West transactions tend to be long and detailed: Eastern parties often seek to impose their well-established commercial forms. Expert counsel normally try to anticipate the Eastern form contract by preparing their own draft which will, in form if not in substance, either be similar enough to Eastern habits that it may be accepted as the basis for negotiation or at least be likely to lend itself to integration into the Eastern form. In Eastern practice, formalism sometimes takes priority over substance. Concessions are more readily obtainable from Eastern negotiators when they are formulated so as not to appear to be a major deviation from standard practice.

East-West transactions lawyers must be able to predict those commercial terms which are within negotiating reach and those which are likely to lead to an impasse. For example, Soviet standard penalty clauses applicable in case of late delivery of goods usually place an obligation on the Western party amounting to as much as ten percent of the value of the goods. Through negotiation, it is frequently possible to significantly reduce both the amount of such exposure and the exposure itself. It is sometimes possible to obtain grace periods, particularly when the buyer is pressing for early delivery. A lawyer can also help to narrow the risk to a Western company by excluding any penalty when the company is not directly or solely at fault, a notion which is not limited to events of *force majeure*. However, a frontal attack on the inclusion in the contract of a penalty clause to deal with the late delivery issue will stand little chance of success in light of the Soviet policy in this regard, and may create a pointless deadlock in the negotiations.

In the U.S.S.R., form contracts are usually in two languages, Russian and the Western party's language. Both versions are equally authentic. The Soviet insistence on equally authentic texts can give rise to ambiguities and difficulties of contract interpretation in the event of a dispute. When the two texts do not accord

17. Western negotiators should try to obtain, at as early a stage as possible, a statement of agreement on issues of basic policy. For example, a negotiator might attempt to establish whether the Eastern party will expect the Western supplier to assume prime contractor responsibility for a plant project. In addition, it is helpful to establish whether the Eastern party intends to impose the counterpurchase of some of the plant production as a precondition for the project, a demand increasingly advanced throughout the East as a result of chronic hard currency deficits. Western negotiators are in a better bargaining position if they know about these issues early in the negotiating process.

Often, a Western supplier is not in the business of dealing with the counterpurchase goods offered to it. For example, a company which supplies plant and equipment for producing tomato paste may have no experience selling tomato paste. Moreover, if the company were to try to deal with these goods, it might find itself in competition with its own equipment customers elsewhere in the world. Such considerations may be so overriding that the company would choose not to pursue a supply project if it became clear that it would have to be realized on a so-called compensation or counterpurchase basis.

or when there is an ambiguity in the English version, an unexpected resolution may be dictated by the Russian version. For example, in English language contracts, the term "execution" can be interpreted as either "signature" or "performance." In the U.S.S.R., however, two distinct and unambiguous terms are used for signature (*podpisanie*) and performance (*vijpolnenie*). Thus, when a guarantee clause provides that the Western seller is obliged to provide the latest technology as of the date of "execution" of the contract, the language of the Russian version may be of considerable importance. Western lawyers competent in the Russian language are, of course, well situated to assist in verifying the clarity and lack of ambiguity of both texts.

B. Negotiating Techniques and Issues

There is a notable uniformity of contractual terms and negotiating tactics used in East-West transactions even in very different industrial and commercial sectors. This uniformity is particularly striking as regards the U.S.S.R. It results from the monopolistic control exercised by the Ministry of Foreign Trade over trade practices, and the conservative attitude of Eastern negotiators. The Western lawyer or businessperson who has participated in several negotiations will be able to anticipate with a high degree of accuracy the evolution of each new negotiation.

It is essential for Western lawyers to provide their clients with an appreciation of the scope of authority of the Eastern negotiator. Many Western businesspeople assume that the person on the opposite side of the table in a negotiation has full power to make decisions or at least substantial weight in the decision-making process. In fact, affirmative commitments are usually a matter for collective decision within the bureaucracy, and are not left to a single individual no matter what impression of importance he may give or his title may suggest. A Western lawyer must convey to his client the limits of an Eastern negotiator's authority so that the client can avoid premature concessions and unrealistic expectations that may prove an obstacle to future negotiations.

The question regarding the scope of an Eastern negotiator's authority is further complicated by the fact that Eastern foreign trade organizations employ tiers of negotiators. In the preliminary rounds, the representatives of the Western company may be negotiating with relatively junior representatives of the Eastern organization whose task is to extract the greatest number of concessions while giving up little in return. Only when they have arrived at an impasse does the negotiation pass to the next level where additional progress can be made. To the uninitiated, the first-tier negotiator conveys an impression of full authority to conclude an agreement on all issues. This is not the case. The Western negotiator must not expect the Eastern side to make major concessions at this level nor should he concede too much himself, since he will need to reserve flexibility for

the next level of negotiation. Issues such as final price, discounts, scope of delivery, and penalty or liquidated damage clauses often remain unresolved until the final stage of negotiations. If the Western party has not retained a margin for movement, the negotiations may reach an impasse that could have been avoided.

By the same token, there is also a tendency on the part of Western businesspeople to attribute to their negotiating counterpart the same kind of business motivations that they themselves have. This can be a serious error. The Eastern negotiator is a civil servant with a specifically defined responsibility. He has no entrepreneurial interest in the outcome of any negotiation which he may be conducting and is unlikely to share in any profit that may be realized from the transaction. He will, however, be judged by his superiors on his ability to fulfill, within the allotted budget, the objectives assigned to him under the foreign trade plan. This must be done while adhering as closely as possible to the Ministry's norms of commercial practice. The Eastern negotiator invariably stands to lose more by his mistakes than he stands to gain by taking risks. This makes him both cautious and conservative, particularly in dealing with companies he does not know well through prior experience or reputation.

The presence of a Western lawyer experienced in East-West transactions is highly beneficial during negotiations. Even an experienced Western negotiator with a solid grounding in Western commercial and legal principles may not be sensitive to the aberrations that can result from applying those principles to an Eastern context.¹⁸ The Western lawyer can also be used to play a variety of different roles in face-to-face negotiations. The lawyer can, for example, raise technical objections to the endless demands of the Eastern negotiator without undermining the personal good will which the chief Western negotiator should seek to maintain. The Western negotiator can explain that his hands are tied since he is bound to listen to the advice of counsel in these matters.

The lawyer can also contribute constructively to commercial negotiations by identifying inadequately defined issues and drafting points, and by raising legal questions which are otherwise likely to pass unnoticed. For example, without knowledge of how to negotiate and draft appropriate clauses regarding dispute settlement, applicable law, *force majeure*, and tax exoneration, Western business negotiators may be ill-equipped to react effectively when faced with Eastern proposals pertaining to these issues. The negotiators for Soviet foreign trade corporations usually do not bring their own counsel to the negotiating table. It should be understood, however, that Eastern negotiators are highly experienced professionals, skilled in East-West transactions. They are aware of the legal

18. For a discussion of the *Jordan Investments* case, where conventional principles of international law were applied to absolve a Soviet state trade organization from liability for action taken by the Soviet Government, see Berman, *supra* note 13.

issues underlying the types of contracts which they are called upon to conclude and are knowledgeable about the consequences of any concessions they might make.¹⁹

C. Legal Constraints on the Agreement

1. The Impact of Western Law on the Agreement

The political overtones of East-West trade and industrial cooperation render East-West transactions particularly susceptible to legislative and regulatory controls. Such controls in the United States and other Western nations include regulations on the export of technical knowledge, high technology equipment, and other strategic goods to communist countries;²⁰ restrictions on credit facilities;²¹ the requirements of the Foreign Corrupt Practices Act (which may pose special problems when dealing with officials of state-trading countries);²² and the possible application of U.S. or Western European antitrust laws to contract provisions aimed at preventing re-exports and to other restrictive provisions.²³

19. Occasionally, as a tactic to neutralize the participation of Western counsel, Soviet negotiators may ask their own lawyers to assist in the discussions. In such cases, the advice of the Eastern lawyer tends to be limited to narrow questions of law, about which his opinion will often be highly inflexible. Dealing with this tactic can prove to be a difficult challenge for the Western lawyer. The author, however, has also encountered cases in which the Eastern lawyer participated in a creative way and not merely to block negotiations. In such cases, the Eastern lawyers demonstrated a high degree of professional competence on questions of law and draftsmanship.

20. A list of goods restricted for reasons of common security is formulated by the Coordinating Committee of the Consultative Group on Export Controls (COCOM), an organization composed of Japan and the NATO member countries (except Iceland and Spain). COCOM, an informal group established in 1949 without a charter, is not based on any treaty arrangement. Compliance with its embargo list is on a voluntary basis as the group has no enforcement powers. *See generally Transfer of United States High Technology to the Soviet Union and the Soviet Bloc Nations: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 97th Cong., 2d Sess. (1982); Shillinglaw & Stein, *Doing Business in the Soviet Union*, 13 LAW & POL'Y INT'L BUS. 1, 48-49 (1981).

21. *See, e.g.*, Export-Import Bank Act Amendments of 1974, § 8(3), 12 U.S.C. § 635e(b) (1982).

22. 15 U.S.C. §§ 78dd-1, 78dd-2 (1982).

23. *See* COMM'N OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 80 (1980). For this reason, special care should be taken in drafting restrictions on re-export of finished products manufactured in the East, particularly in the case of a license granted by a Common Market company.

While, in principle, the U.S. antitrust rules set forth in the Sherman Act and the Clayton Act are also applicable, U.S. law appears to be somewhat more lenient than European Community law in its treatment of ancillary territorial restraints affecting re-export of goods produced abroad. *See* 15 U.S.C. §§ 1-7, 12-27 (1982); *see also* Antitrust Div., U.S. Dep't of Justice, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (rev. ed. Mar. 1, 1977).

These controls are particularly problematic because they can arise unexpectedly in response to political situations, sometimes even independently of national security and economic considerations. One relatively recent example is the U.S. reaction to the disbanding of the Solidarity movement in Poland. In response to this political situation, the United States applied a series of extensive export restrictions to the U.S.S.R. and Poland, including some on an extraterritorial and retroactive basis.²⁴ This action encountered strong opposition from European governments which considered it an unacceptable interference by the United States in their own foreign policies.²⁵ They considered such interference detrimental to European companies which were licensees and subsidiaries of U.S. corporations. These companies were prevented from fulfilling large-scale existing contractual obligations, thereby creating a situation with potentially dire consequences for the companies and their employees. At the same time, U.S. business circles also criticized these restrictions as counterproductive to U.S. interests.²⁶ Indeed, because U.S. companies and their affiliates were prevented from fulfilling existing contract obligations, they were stigmatized as unreliable suppliers.

Some of these restrictions have now been relaxed,²⁷ but they typify the kind of unpredictable political occurrences to which East-West trade is particularly vulnerable. Indeed, the political risks at times have been so great as to be uninsurable except at prohibitive cost, and more than one company has been distressed to find how exposed it was under the contract it drafted.

2. *The Impact of Eastern Law on the Agreement*

It is essential that the parties to a contract appreciate the impact of Eastern law upon the contemplated agreement. Under Soviet law, for example, the law governing a foreign trade contract is the law of the place of signature unless the

24. Sanctions taken against the U.S.S.R. on December 29, 1981 by President Reagan consisted, *inter alia*, of the following: suspension of issuance of validated export licenses; broadening of the oil and gas equipment controls; and non-renewal of U.S.-U.S.S.R. exchange agreements. The U.S. Commerce Department issued special export control regulations on December 30, 1981 and June 22, 1982. See 47 Fed. Reg. 141 (1982); 47 Fed. Reg. 27250 (1982).

25. See *Europeans Protest U.S. Curbs on Steel Imports and Gas Line*, N.Y. Times, June 23, 1982, at D3.

26. See, e.g., *Economic Relations with the Soviet Union: Hearings on the Implications of U.S. Export Controls Related to the Soviet Gas Pipeline Before the Subcomm. on International Economic Policy of the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 37 (1982) (statement of Hugh P. Donaghue, Vice-President, Control Data Corporation).

27. On direction of the President, the Commerce Department rescinded both the December 30, 1981 and June 22, 1982 regulations on November 13, 1982. See 47 Fed. Reg. 51858 (1982) (to be codified at 15 C.F.R. §§ 379, 385, 390, 399).

parties provide otherwise in the agreement.²⁸ Most Soviet foreign trade contracts are concluded in Moscow. If a contract is silent on the choice of substantive law, any tribunal, even one in a neutral third country, could well conclude that Soviet law should determine the rights and obligations of the parties.

The results of such a decision may be harmful to a Western party. Since there is no unified body of foreign trade law in the U.S.S.R., the application of Soviet law would mean the application of the domestic civil code of the U.S.S.R. as well as enactments created especially for international dealings such as foreign trade contract signature requirements and tax regulations. Domestic Soviet principles created to govern relations between state-owned enterprises within a single state are not the most suitable for the regulation of dealings between a state enterprise and a private party in an international context.

It is possible to avoid complete governance by Soviet law through a properly negotiated clause requiring application of a third country's substantive law. The effectiveness of negotiated choice of law clauses is limited, however. Certain principles of Eastern law have mandatory effect and any contract provision to the contrary is void. Thus, for instance, statutes of limitation periods are imperative and cannot be altered by the parties or arbitrators.²⁹ In the P.R.C. and in those Eastern European countries where the establishment of joint equity companies with foreign investment is possible, the Western investor is bound to observe the national laws and regulations applicable to economic activity.

III. APPROACHES TO SETTLING EAST-WEST COMMERCIAL DISPUTES

Once a contract is signed, the lawyer's role decreases. Eastern contracting parties tend to live by the letter of their contracts and for the most part have a good performance record.³⁰ Most minor disputes and difficulties can be resolved through amicable negotiation with little if any legal intervention.³¹

28. Civil Code of the Russian Soviet Federated Socialist Republic art. 566, *translated in SOVIET CIVIL LEGISLATION I* (W. Gray ed. 1965) [hereinafter cited as R.S.F.S.R. Civil Code]. It should be noted that the form of Soviet foreign trade transactions and the procedure for their signing are determined by Soviet law irrespective of where the contract is entered into. *Id.* at art. 565. To be valid, foreign trade contracts and commercial paper must be in writing and must bear two signatures. Authorized signatories for foreign trade contracts include the president (or general director) of the foreign trade corporation, the deputies, the directors of firms, and any other persons who have been issued proper powers of attorney. Since 1978, the distinction between the first and second signatures has been eliminated. Decree of February 14, 1978.

29. R.S.F.S.R. Civil Code, *supra* note 28, at arts. 80, 82.

30. The principal exception to this excellent performance record is the problem of late payment. Late payment has posed increasing difficulties in dealings with many Eastern European countries in recent years and has led to a greater need for terms of payment based on letters of credit or telex authorizations.

31. It is important for a Western party to realize that in planned economies, non-delivery of goods or non-performance of other contractual obligations can be particularly disruptive. The economic

When compromise is not possible, East-West commercial disputes are normally referred to contractually stipulated arbitration. Although the Eastern European countries all maintain permanent foreign trade arbitration tribunals attached to their respective national Chambers of Commerce and Industry, companies usually opt for arbitration in a neutral third country before either an ad hoc or an institutionalized court of arbitration. In Soviet practice, the preferred neutral forum is Stockholm, with the Stockholm Chamber of Commerce acting as the appointing authority. Most other Eastern European countries accept the jurisdiction of the International Chamber of Commerce Court of Arbitration, whose secretariat is in Paris. The Chinese have accepted the rules of the United Nations Commission for International Trade Law and a variety of neutral places of arbitration including London, Stockholm, and Geneva.

Eastern European contracting parties are generally reluctant to commence arbitration proceedings. This attitude results in part from the cost in hard currency, the risk of loss and resulting personal embarrassment, and the fact that money damages are not an adequate remedy in a planned economy. Once Eastern parties decide to begin proceedings, however, they tend to pursue them tenaciously and resist settlement out of a need to prove to their superiors that they were right. Even so, the number of arbitrations appears to have increased over the last decade, although this may be largely a reflection of the increased number of long-term and short-term contracts in effect. The ability of counsel to understand the motivations of the Eastern party can sometimes help bring arbitration disputes to early settlement.³²

IV. CONCLUSION

Although providing legal services for companies involved in East-West transactions can be frustrating, it is always challenging. The range of matters on which guidance is required is particularly broad in East-West industrial transactions. Moreover, such transactions are long to gestate and are sensitive to the shifting winds of a volatile political climate. To be effective, the lawyer must understand the legal regimes of non-market economies, the non-market economic environ-

system does not allow for rapid response in such situations. Therefore, when a Western company is unable to perform properly, a creative attorney may be able to work out compromise solutions which minimize disruptive effects and avoid claims for penalties or damages. Frequently, claims for penalties can be resolved through further negotiations.

32. For example, in one dispute in which the author was involved, an Eastern party had purchased goods of South African origin through a controlled foreign intermediary. When the goods were found to be defective, the Eastern party had the intermediary bring a claim before the International Chamber of Commerce. The Eastern party decided to settle when Western counsel insisted that the Eastern party participate directly in the arbitration. As anticipated, the Eastern party did not want it to become generally known that it was a business partner with a politically unacceptable country.

ment, and the international political context in which East-West business is conducted.

Understanding the motivations and *modus operandi* of Eastern negotiators is a key aspect of the role of the lawyer in this context. Ideological differences, mistrust, and misunderstanding can interfere with the negotiating process if the lawyer is not quick to recognize and defuse such situations. In this regard, the lawyer's talents not only as a draftsman but also as a diplomat are often called into play. For all these reasons, the satisfaction can be great, for client and attorney alike, when a transaction is successfully concluded.