

PLAN AND CONTRACT IN THE DOMESTIC AND FOREIGN TRADE OF THE U.S.S.R.

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TABLE OF CONTENTS

I.	INTRODUCTION	30
II.	DOMESTIC TRADE AND THE PLANNED ECONOMY	31
	A. <i>An Overview of the Machinery for Implementing the Plan: The Institutions of Contract and ARBITRAZH</i>	31
	B. <i>Plan, Contract and the Principle of Economic Independence</i>	39
	1. The Scope for Operational Independence	39
	2. Economic Independence and the 1965 Reforms	47
	C. <i>Coexistence Between Plan and Contract Law in the Soviet Union</i>	49
	1. Some Important Substantive and Procedural Principles of Soviet Contract Law	50
	2. Contract Law and <i>Arbitrazh</i> Practice	52
	3. Change of Planning Act and Readjustment of Liability	57
	D. <i>Contract and Plan Under the 1969 Statutes</i>	64
	1. The Nature and Scope of the Change	64
	2. Defective Delivery and Fines	69
	E. <i>Conclusion</i>	73
III.	FOREIGN TRADE AND THE PLANNED ECONOMY	
	A. <i>The Legal and Institutional Framework—An Overview</i>	75
	B. <i>Some Important Principles of Soviet Import-Export Law</i>	79
	1. Operational Principles of Foreign Trade	79

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2.	Formal Requirements for the Conclusion of Foreign Trade Contracts	82
3.	Important Procedural and Substantive Rules of Soviet Foreign Contract Law	83
C.	<i>Some Pertinent Contractual Problems of East-West Joint Ventures within the Planned Economy</i>	85
1.	Introduction	85
2.	The Joint Venture Contract and the National Plan	87
3.	Settlement of Disputes Arising from the Joint Venture	91
D.	<i>Conclusion</i>	93

I. INTRODUCTION

The purpose of this article is to inquire into the nature and function of contract law in a centrally planned economy. The economy chosen here is that of the Soviet Union. This study has been divided into two parts; the first part deals with the role of plan and contract in domestic trade, the second part deals with the place of contract and plan in the foreign trade of the Soviet Union.

The institution of contract in the Soviet Union, for purposes of domestic trade, is but a legal expression of the operational independence of the various state enterprises working to discharge their respective responsibilities under an overall plan. It will be seen that to a large extent the plan itself would be an empty slogan without the mechanism of contract enabling these enterprises to enter into reciprocal money-commodity exchanges on a footing of equality. This promotes economic rationality and calculability within the socialist economy.

An attempt will also be made in Part I to examine the nature of contractual relations between, as well as the limits on the freedom to contract enjoyed by, the various economic units operating within Soviet society. This will be done by examining the most important substantive and procedural principles of contract law relating to the production and sale of producer and consumer goods in the Soviet Union.

Also examined in Part I is the machinery for the resolution of contractual disputes in the Soviet Union. The machinery examined

is the special system of economic courts called the State *Arbitrazh*. Apart from its crucial role in the resolution of economic disputes, the State *Arbitrazh* will also be seen to serve as a watchdog over the plan—implementing process as a whole.

Part II focuses on the legal mechanics of Soviet foreign trade. Special attention is paid to the major procedural and substantive principles of Soviet import-export law. Parallels between the law of domestic contracts and the law of foreign contracts will be drawn where possible, and the role of planning agencies in foreign trade will also be examined. Finally, Part II will examine some pertinent contractual problems of East-West joint ventures in the Soviet Union within the context of the national plan. This part will also be attentive to the special peculiarities of the Soviet foreign trade system and law in the formation and execution of foreign contracts, and in the resolution of contractual disputes—both in the import-export field and in the field of joint ventures.

II. PART I:

DOMESTIC TRADE AND THE PLANNED ECONOMY

A. *An Overview of the Machinery for Implementing the Plan: The Institutions of Contract and Arbitrazh*

During the early revolutionary years of the Soviet Union, an attempt was made to administer the economy without the instrument of contract. On August 30, 1918, a decree ordered enterprises to place their production at the disposal of the state agencies which distributed it. In turn, enterprises were to apply to state agencies for materials needed. These transactions were settled exclusively "by bookkeeping entries without the use of monetary units."¹ Centralized supply and distribution of materials, products and food were carried out, to quote Venediktov, "almost exclusively in the form of administrative legal norms and acts and left almost no place for civil law transactions."²

1. Loeber, *Plan and Contract Performance in Soviet Law. The Impact of Planning Acts on the Performance of Delivery Contracts in the Post-War Practice of the U.S.S.R. State Arbitrazh*, 1964 U. ILL. L.F. 128, 128 (1964).

2. Venediktov, *Grazhdanskoye zakonodatel'stov v period inostrannoy voemoy interventsiyi grazhdenskoy voyny 1918-20 (Civil Legislation in the Period of Foreign Military Intervention and the Civil War 1918-1920)*, in LGU, 210 UCHYONNYYE ZAPISKI (SCHOLARLY NOTES) 70, 96, 117 (1955).

Within a few years this led to a breakdown in the exchange of goods and there emerged in place of the exchange of goods a private market of purchase and sale trade. Lenin himself urged in 1921 that "we must now admit this if we do not want to hide our heads under our wings, if we do not want to be like those who do not realize when they are beaten . . ."³ As a result, contracts were reintroduced and contract law was codified in the then newly enacted Civil Codes.⁴

With the Five-Year Plan of 1928, which introduced large scale planning within the economy, contracts between socialist organizations became planned contracts. The main feature of planned contracts is that planning predetermines the essential conditions of the contract. A planning (or administrative) act called the *nariad* is addressed to the appropriate enterprise which must then implement the plan through a concrete contract.

This integration of political and economic authority is a basic concept of socialism requiring state ownership of the means of production and the direction of economic life by the state economic plan. The Council of Ministers is responsible for making and executing the plan, and is the highest executive and administrative organ of the state. It is served by four main administrative bodies: The State Planning Commission (*Gosplan*), which draws up the Five-Year annual and quarterly plans for the Soviet Union as a whole; the State Bank (*Gosbank*), which supervises the entire credit and financial structure of the national economy; the Economic Council (*Ekonomsoviet*), which coordinates the work of the various economic ministries and controls trade among them; and the Council of Defense. The members of the Council of Ministers are heads of various economic and other ministries.⁵

Plans for distribution begin with the submission of applications by the enterprises to their superior agencies showing the requirements of each enterprise for the coming year. These applications are studied and corrected when necessary by these agencies. They are then forwarded to the Republican and All-Union ministries from which they are forwarded to *Ekonomsoviet* and to

3. V. LENIN, 9 SELECTED WORKS, 288-89 (1937).

4. For further discussion of these early principles of Soviet contract law see V. GSOVSKI, I SOVIET CIVIL LAW 415, 447, 448-84 (1948). For English text of the RSFSR Civil Code see *id.*, Vol. II, at 16 (1949).

5. Berman, *Commercial Contracts in Soviet Law*, 35 CALIF. L. REV. 191-94 (1947) [hereinafter cited as Berman, *Commercial Contracts*].

Gosplan. In this way the applications move up from the immediate producers and consumers to the highest planning organs.⁶

There are many plans; for example, All-Union plans, Republican plans, plans of Councils of National Economy and plans of enterprises. The plans of enterprises, *i.e.*, the plans of those entities which enter into contracts with each other, do not specify to whom the products of the enterprise should be delivered, nor do they lay down who will supply the enterprise with the necessary materials. The plan of an enterprise directs its internal operation and is not concerned with creating relations with buyers or suppliers. Thus, under article 43 of the Statute of the Socialist State Production Enterprise,⁷ an enterprise must draft its own "long-term and annual plans for all types of its activity," and under article 45 an enterprise is specifically required to "work out an expanded annual technical-industrial-financial plan . . . [as well as] quarterly and monthly plans for production and economic activity . . ." Under the same article an enterprise is further required to "establish independently the quantitative and qualitative plan indicators for [its] shops, sections, services . . . and other subdivisions."⁸

The first step in establishing relations *between* enterprises (*e.g.*, between buyer and seller) is taken when the superior agency of the enterprise concerned (*e.g.*, a Council of National Economy) issues its production, delivery and distribution plans. Once the All-Union plan has been approved, each superior agency receives its plan showing the types and quantities of products allocated to it for the given planning year. The superior agency distributes this allocation through its sales organizations among the enterprises under its jurisdiction. The allocation begins with the agency notifying a subordinate enterprise of the types of quantities of the materials and funds (*fondy*) allocated to that enterprise for the planning year. The issuance of *fondy* is technically a certification of the purchaser's right to procure goods subject to delivery under the *nariad*.⁹ This, however, does not give the enterprise the

6. *Id.* at 199. See also Zile, *Law and the Distribution of Consumer Goods in the Soviet Union*, 1964 U. ILL. L.F. 212, 233-34 (1964).

7. Confirmed by Decree of the USSR Council of Ministers, Oct. 1965, [1965], Sob. post S.S.S.E. Nos. 19-20, item 155. For English text see W. BUTLER, *THE SOVIET LEGAL SYSTEM—LEGISLATION AND DOCUMENTATION* 169 (1978).

8. See Loeber, *supra* note 1, at 134.

9. Speer, *Contract Rights and the Planned Economy: Peaceful Co-existence Under the 1969 Soviet Statutes on Deliveries of Goods*, 3 L. & POL. IN INT'L BUS. 510, 513-15 (1971).

right to claim the material either from the superior agency allocating it or from the prospective supplier who is, in any case, assigned only at a later stage. The right of a consumer enterprise to claim the allocated material arises only after the superior agency has issued a delivery or distribution order to a supplier and the supplier and consumer have concluded a contract on the basis of such an order.¹⁰

The function of notification is to enable the consumer enterprise to specify to the superior agency the precise nature of its operational needs in terms of the quantity and quality of the material in question. After receipt of such specification the superior agency forwards the documentation to its sales department, which then issues production and delivery orders to a supplier-enterprise. The issuance of production and delivery orders marks the second stage in which the orders are treated as legally binding administrative orders. These orders are not subject to change or cancellation even by agreement of the parties.¹¹ It also marks an important stage in the planning process, for it is here that plan and contract meet.

Two types of delivery orders must be distinguished. The first is the order naming the supplier and buyer individually and creating an obligation on the part of the named parties to conclude a contract. The second type of delivery order is one which names the supplier but leaves the name of the buyer blank and instead names the superior agency (*e.g.*, a Council of National Economy) as recipient. This type of order creates no obligation to establish contractual relations. The product listed in the delivery order must, however, be distributed in the form of distribution orders among the superior agency's subordinate organizations within fifteen days.¹² A distribution order from a superior agency creates an obligation to establish contractual relations between the sup-

10. Loeber, *supra* note 1, at 136. See also Comment, *The Role of State Arbitrazh Under the New Conditions of Economic Management in the Soviet Union*, 116 U. PA. L.R. 1285, 1290 (1968) [hereinafter cited as *State Arbitrazh*].

11. Zamengof, *Combining Guidance by State Plan and Economic Independence in Contractual Independence and Contractual Relationships*, 2 SOVIET L. & GOV'T 27 (No. 1, 1963).

12. Decree of June 30, 1962, §§ 2-3; [1962], Sob. post. S.S.S.R. No. 12, item 94; Statute on Deliveries of Products, §§ 7 and 70, as amended [hereinafter cited as 1962 SDP], cited in Loeber, *supra* note 1, at 139.

plier and buyer named therein.¹³ Another type of distribution order is the unloading order of a buyer to the supplier, requiring delivery to a third party. That order is based on an already existing contract between the buyer and supplier and therefore does not establish contractual relations between them.¹⁴

The two types of delivery orders and the first type of distribution order are planning acts insofar as they emanate from a superior planning agency. Such acts are issued at monthly or quarterly intervals, but in case of disruptions of the plan or in other cases of need, delivery and distribution orders are issued on an *ad hoc* basis for individual deliveries.¹⁵ In this way the transformation of the plan into individual acts is a continuous process.

The delivery and distribution orders (but not the unloading orders) bind their recipients, but, as Loeber points out, they bind only "administratively, *i.e.*, through administrative channels of subordination."¹⁶ They do not create obligations of delivery or payment, for these can arise only from a contract. Yet while planning acts do not replace contracts, most Soviet jurists, as well as non-Soviet writers such as Berman, affirm that they create a "pre-contract obligation" on the parties to conclude a civil-law contract.¹⁷

Both pre-contract disputes and contractual disputes are adjudicated by a special system of economic courts called the State *Arbitrazh*. The regular courts lack jurisdiction over disputes between socialist enterprises. *Arbitrazh* is an administrative agency, though it acts to a considerable extent in a judicial manner. For example, Point 88 of the *Arbitrazh* Rules requires that

the State *Arbitrazh* agencies . . . set forth in their awards the essence of the dispute, and the statements and explanations of the parties, the experts, and the enterprises, organizations and institutions not parties to the dispute. The award should also state the considerations by which the *Arbitrazh* agency was guided in arriving at it, with reference to the laws, decrees and

13. Instruction of Dec. 18, 1962, § 1, 22 Sbornik 12-15, (1962), *cited in* Loeber, *supra* note 1, at 139.

14. *See* 1962 SDP, *supra* note 12, at § 28 (and 373) and of goods § 15 (and § 76); Instruction of Dec. 18, 1962, § 8, 22 Sbornik 12-15.

15. Loeber, *supra* note 1, at 140.

16. *Id.*

17. *Id.* *See also* Berman, *Commercial Contracts*, *supra* note 5, at 204.

orders of the government, and other normative acts, as well as the principal evidence in the case.¹⁸

Disputes arising between enterprises within a single ministry are decided by Departmental *Arbitrazh*. Contractual disputes between agencies belonging to different ministries are decided by State *Arbitrazh* at Union and Republican levels.¹⁹ Each organ of the State *Arbitrazh* is subordinated to a higher administrative body, e.g., the Council of Ministers of the USSR or the Council of Ministers of the various union and autonomous republics. The administrative body appoints *Arbitrazh* members and has power to reverse or modify State *Arbitrazh* decisions. A case may be brought before State *Arbitrazh* in any one of four ways: first, at the request of the appropriate Council of Ministers; second, at the request of a superior organ of State *Arbitrazh*; third, on its own initiative; or fourth, at the suit of an interested party. In any of the four ways the 1963 Rules for Consideration of Economic Disputes by State *Arbitrazh* Agencies provides that "representatives of the public and of the active membership of the economic unit may participate in meetings of State *Arbitrazh* agencies."²⁰

In every case the Arbiter has broad powers. He may question the parties and come to their aid so that no party gains an unfair advantage over the other due to ignorance of the law, etc. He may decide a case on an entirely new basis, including one not argued by the parties, or he may give judgment beyond the claim or counterclaim of either party.²¹

An order for specific performance is almost always made. This is so regardless of whether or not damages have been ordered to compensate loss arising from a breach of contract.²² This constitutes an important principle of Soviet contract law and is discussed below at a more appropriate stage.

Despite its wide powers, *Arbitrazh* is nevertheless bound by law. Article 4 of its Statute provides that State *Arbitrazh* "shall

18. Shapkina & Petrov, *Commentary on the Rules for the Consideration of Economic Disputes by State Arbitration Agencies*, 3 SOVIET L. & GOVT 38, 43 (No. 2, 1964).

19. Berman, *Commercial Contracts*, *supra* note 5, at 204-05. See also H. BERMAN, JUSTICE IN THE U.S.S.R. 124, *et seq.* (1963); Loeber, *supra* note 1, at 131-32.

20. *The New Rules for Consideration of Economic Disputes by State Arbitration Agencies*, 2 SOVIET L. & GOVT 57, 59 (No. 3, 1963-64). See also Fal'kovich & Barash, *Commentary on the Rules for Consideration of Economic Disputes by State Arbitrazh Agencies*, 2 SOVIET L. & GOVT 55, 56 (No. 4, 1964).

21. See Shapkina & Petrov, *supra* note 18.

22. See Berman, *Commercial Contracts*, *supra* note 5, at 207.

be guided in its activity by laws of the USSR, edicts of the Presidium of the USSR Supreme Soviet, decrees and regulations of the USSR government, other normative acts, and the present statute."²³ As Loeber has observed, however, "[d]isputes before *Arbitrazh* are not necessarily legal in character, they may also involve questions of economic expediency *Arbitrazh* decisions have often an operative rather than a judicial character: they are part of day-to-day economic administration."²⁴

Under the Order of the USSR Council of Ministers of July 23, 1959, "On Improving the Work of State *Arbitrazh*," enterprises are required to present their claims to the other party and take all possible steps to settle controversies *before* submitting an action to an *Arbitrazh* agency.²⁵ Point 8 of the *Arbitrazh* Rules of 1963 also requires prior direct negotiation between the parties within ten days after a pre-contract dispute has arisen.²⁶ *Arbitrazh* cannot consider a case unless this has taken place. If within an additional ten days the dispute cannot be settled by negotiation, the party that proposed the original terms must submit the dispute to *Arbitrazh*. Failure to do so signifies acceptance of the terms proposed by the other party.²⁷

Disputes arising from existing contracts must be submitted within one month of breach and the other party *must* respond to the claim within that time.²⁸ The claim must specify the name of the enterprise against which the claim is being made, the nature of the breach and the legal basis of the claim as well as the nature of the relief sought.

The Rules govern all cases unless otherwise provided for, as for example, in cases involving shipments. Article 76 of the Principles of Civil Legislation of the USSR makes separate provision for shipments.²⁹ The period of limitation laid down under this

23. Statute on State Arbitrazh Attached to the USSR Council of Ministers, Confirmed by Decree of the USSR Council of Ministers, Jan. 18, 1974, [1974], Sob. post. S.S.S.R. No. 4, item 19. For English text see W. BUTLER, *supra* note 7, at 253.

24. Loeber, *supra* note 1, at 146.

25. Fal'kovich & Barash, *supra* note 20, at 55.

26. Point 8 of the Rules of Consideration of Economic Disputes by State Arbitrazhes, Decree No. P-4 of State Arbitrazh of the USSR Council of Ministers, July 1, 1963, 2 SOVIET STATUTES & DECISIONS 26 (No. 1, 1965) [hereinafter referred to as 1963 Rules].

27. Point 9 of the 1963 Rules, *supra* note 26.

28. *Id.*, Point 10.

29. Fundamental Principles of Civil Legislation of the USSR and Union Republics, adopted by law of the USSR Supreme Soviet Dec. 8, 1961 [hereinafter cited as 1961 Principles]. For English text see W. BUTLER, *supra* note 7, at 393.

statute is six months, while claims for fines must be presented within 45 days. The 1963 Rules, therefore, do not apply to such cases.

Disputes are considered in the area of jurisdiction of an *Arbitrazh* agency within which the respondent is located. In cases in which both parties are located in different Republics or regions, the area of jurisdiction is the plaintiff's choice.³⁰

Liberman asserts that *Arbitrazh* agencies can initiate suits against, for example, a supplier if they receive information (through the press or any other source) to the effect that goods shipped are of inferior quality.³¹ Individual cases may be submitted by *Arbitrazh* to the procurator's office for the application of penal sanctions against managers found guilty of mismanagement leading to inferior products.³² Fal'kovich and Barash point out that a superior agency may also initiate an action *on behalf of* a subordinate enterprise.³³

Arbitrazh may join, on its own initiative, one or more parties as respondent[s] to a dispute before it. Likewise, it may sever a respondent from the proceedings.³⁴ As will be discussed later,³⁵ *Arbitrazh* can award costs to either party, although normally costs are levied against the respondent in proportion to the amount of the claim granted.

All awards are binding and must be complied with voluntarily within the period stated for compliance in the award (Point 97 of the 1963 Rules), or if there is no such compliance, the plaintiff may petition to the arbitration agency for an order of compulsory execution.³⁶ If *Arbitrazh* awards are not voluntarily executed in time

30. Fal'kovich & Barash, *supra* note 20, at 59. See Point 14(c) of the 1963 Rules, *supra* note 26.

31. Liberman, *Arbitration Practice in Cases Involving the Quality and Completeness of Production*, 3 SOVIET L. & GOVT 47, 52 (No. 2, 1964).

32. See the case of the Uzbek Tractor Assembly Plant, *id.* at 54, where the procurator's office, after receiving the record of an *Arbitrazh* agency showing mismanagement in a case, decided not to prosecute because the individual concerned had been issued a warning.

33. Fal'kovich & Barash, *supra* note 20, at 60; Point 6 of the 1963 Rules, *supra* note 26.

34. Fal'kovich & Barash, *supra* note 20, at 60.

35. See text accompanying note 212, *infra*.

36. Point 98 of the 1963 Rules, *supra* note 26. Shapkina & Petrov thus regard all awards as having "the force of writs of execution." Shapkina & Petrov, *supra* note 18, at 44. Under point 101 of the 1963 Rules, awards are said to have "the force of documents of execution."

the guilty party may be fined.³⁷ Under Point 101 of the Rules, monetary awards (damages and fines) are executed through banks upon order of an *Arbitrazh* agency. Under Article 58 of the Principles of Civil Procedure of the USSR,³⁸ orders to confiscate property in kind, evictions, *etc.*, can be executed through bailiffs.³⁹

B. Plan, Contract and the Principle of Economic Independence

1. THE SCOPE FOR OPERATIONAL INDEPENDENCE

The Party Program and the resolution of the November, 1962, Plenum of the C.P.S.U. Central Committee called for greater centralization in the planning of the economy as well as for expansion of economic independence of enterprises within the framework of a unified economic plan.⁴⁰ A legal expression of this independence is the contract.

In view of the pervasive effect of planning in a socialist economy, economic "independence" and "freedom" of contract must be understood as operating within the framework of the general plan. In this way, planning cannot but influence contract law. What is officially called "the economic independence and initiative of the enterprise"⁴¹ can, however, be seen to be developing in three directions. First, in that range of contracts concluded between enterprises on their own initiative and in the absence of an obligatory plan assignment, one enterprise selects another party and enters into contractual relations for the delivery of consumer goods or other industrial goods. As will be seen below, in 1969 new statutes were enacted which gave enterprises greater room within which to exercise their initiative in selecting their own suppliers of consumer goods.⁴² With respect to other commodities, the

37. Point 99 of the 1963 Rules, *supra* note 26. See also Shapkina & Petrov, *supra* note 18, at 44; summary statement of the 1963 rules entitled *The New Rules of Consideration of Economic Disputes by State Arbitration Agencies*, *supra* note 20, at 60.

38. 1961 Principles, *supra* note 29. For English text see W. BUTLER, *supra* note 7, at 393.

39. Shapkina & Petrov, *supra* note 18, at 44. See also *The New Rules for Consideration of Economic Disputes by State Arbitration Agencies*, *supra* note 20, at 60.

40. For text of the November 1962 resolution, see 14 CURRENT DIG. SOVIET PRESS 12 (No. 48, 1962).

41. Statute on the Socialist State Production Enterprise, art. 1, para. 1, Confirmed by Decree of the USSR Council of Ministers, Oct. 4, 1967 [1965], Sob. post. S.S.S.R. Nos. 19-20, item 155. For English text see W. BUTLER, *supra* note 7, at 169.

42. See 18 EKONOMICHESSKAIA GAZETA (1969) for text of the Statute on Deliveries of Products Intended for Production and Technical Use [hereinafter cited as 1969 SDP]. See

market quotas of which are not covered by the plan, decrees were passed in 1957 and 1960 by the Russian Soviet Federated Soviet Republic (RSFSR) Council of Ministers granting trade agencies the right of unrestricted purchase of such commodities.⁴³

Similarly, Article 84 of the Regulations on the Economic Council of the Economic Administrative District (1957) granted the Council the power to permit its subordinate enterprises to sell at will, to state enterprises, industrial products for which no market quota was provided under the plan.⁴⁴ Another decree entitled the "Enlargement of the Rights of Enterprise Directors" conferred on these officials the power to accept orders from other enterprises for the production of castings, forgings, stampings, machine parts, *etc.*, made from a customer's materials, provided that this did not negatively affect fulfillment of the plan for production of products for sale in the models approved for the factory. They were also granted the power to enter into construction and erection contracts with other enterprises.⁴⁵

Berman reports that with the increase of directors' authority, there has been a corresponding increase of personal liability for failure to perform assigned duties. This has given rise to the concept of "economic crime" for which a director may be punished. Examples of "economic crime" include: "breach of technological discipline," production of goods of inferior quality, and malicious non-fulfillment of contracts.⁴⁶

The scope of these initiatives is always limited, and any freedom of initiative, if such freedom exists at all, is usually created by a prior enabling decree or law.⁴⁷ The official view is that with the consolidation of communism, greater freedom of contract will emerge: "As the material and technical base for communism is

18-19 *ECONOMICHESSKAIA GAZETA* (1969) for text of the Statute on Deliveries of Consumer Goods [hereinafter cited as 1969 SDG].

43. Decrees of the RSFSR Council of Ministers, Dec. 19, 1957, and Dec. 5, 1960. Sob. post. R.S.F.S.R. [1958], No. 6, item 62; [1960], No. 42, item 207, *cited in* Zamengof, *supra* note 11, at 27 n.1.

44. [1957], Sob. post. S.S.S.R., No. 12, item 121, *cited in* Zamengof, *supra* note 11, at 32 n.1.

45. Decree of the Council of Ministers of the USSR on Enlargement of the Rights of Enterprise Directors, Aug. 9, 1955, [1955], *Postanovleniia TsK KPSS i Soveta Ministrov S.S.S.R. po voprosam promyshlennosti i stroitel'stva za 1952-1955 gg.*, *Gozpolitizdat*, 91 (Moscow 1956), *cited in* Zamengof, *supra* note 11, at 32 n.2.

46. Berman, *Commercial Contracts*, *supra* note 5, at 194-195.

47. *See* Zamengof, *supra* note 11, at 27.

strengthened, as the country's productive forces develop and the shortage of industrial production is reduced, the range of such relationships will expand."⁴⁸ Freedom of contract in this sense is not to be regarded as a natural right but rather as a right emerging from progressing social conditions.⁴⁹

The second trend revealing some freedom of initiative among enterprises is found in "the expansion of the range of items arrived at by agreement between the parties in compulsory relationships arising out of plan assignments that are obligatory for both parties and out of contracts based thereon, with a corresponding diminution in the items determined by plan."⁵⁰ Again, the scope for such initiative is limited and has been described by Zamengof as being dependent on "further improvement in the planning process."⁵¹ One such improvement was the 1965 Statute, described below.

The third area of initiative lies in the general reduction of detailed mandatory instructions from planning agencies to their subordinate agencies. This reduction has left the subordinate agencies greater overall discretion to delimit their own conditions and terms of contract. Some progress has been made in this direction by the 1965 and 1969 statutes, as will be discussed below.⁵² The three areas discussed, however, merely describe the degree of *potential* freedom—actual freedom being possible only where there are enabling statutes (such as the 1965 and 1969 statutes).

It is also clear that where a planning act imposes conditions (*e.g.*, regarding the subject-matter of the contract or the time for fulfillment) the parties cannot contravene those conditions either by agreement or by arbitration.⁵³ In the event of conflict between contract and plan, the latter prevails.⁵⁴

The parties to a contract cannot rescind that contract or modify its terms if such rescission or modification conflicts with

48. *Id.*

49. H. BERMAN, *JUSTICE IN THE U.S.S.R.*, *supra* note 19, at 141.

50. *See* Zamengof, *supra* note 11, at 27.

51. *Id.*

52. *See* Section B sub-section 2 and Part A Section D of this study, *infra*.

53. Loeber, *supra* note 1, at 150; Zamengof, *supra* note 11, at 29.

54. Point 15 of the Decree of the USSR Council of People's Commissars, Dec. 19, 1933, [1933], *Sots. Zak. S.S.S.R.*, No. 73, art. 445; art. 52 of the Statute on Deliveries of Products for Equipment and Production; art. 48 of the Statute on Deliveries of Consumer Goods, *cited in* Zamengof, *supra* note 11, at 29 n.18.

the plan.⁵⁵ If, however, the contract is a voluntary one, rescission should be possible and, likewise, if any of the terms of an obligatory contract have been left to the discretion of the parties, those terms may be modified or cancelled by agreement although the contract itself cannot be terminated.

At least one Soviet writer has suggested that the right of cancellation of contracts should be given to enterprises even if this cancellation conflicts with the plan, provided that cancellation is required by changed circumstances and that its overall aim is the better implementation of the plan:

However, since [the contract] is conditioned in the final analysis by the requirements of the economic law of planned, proportional development of the economy, and since the role of the contract is that of an auxiliary to the plan, this rule [concerning the inability of parties to cancel an obligatory contract], it would seem, would be subject to exception specifically in cases in which, as a consequence of various circumstances, further maintenance of the contract might become an obstacle to proper execution by economic organizations of the plans established for them. This would apply when cancellation or modification, if it does not threaten disruption of proportions established by plan, could at the same time promote the most successful fulfillment of these plans, reinforcement of cost-accounting, economy, and more rational and effective utilization of resources in money and materials. Specifically, it would seem that cancellation of a contract would be entirely permissible, regardless of whether or not the plan assignment on which it was based has been cancelled, if, as a consequence of change in the line of production or introduction of efficiency measures the purchaser no longer needs the products assigned him under the plan and provided for by the contract, or if as a consequence of consistent failure on the part of the contracted supplier, an economic organization seeks other sources for satisfaction of its needs⁵⁶

This exception has not been embodied in any legislation and its status is therefore uncertain. In fact, Article 33 of the 1961 Principles of Civil Legislation⁵⁷ forbids a "unilateral refusal to fulfill an obligation . . . except in cases provided by law." It is of

55. Loeber, *supra* note 1, at 159; Zamengof, *supra* note 11, at 30.

56. Zamengof, *supra* note 11, at 30.

57. 1961 Principles, art. 33, para. 4, *supra* note 29. For English text see W. BUTLER, *supra* note 7, at 393, 404.

course possible to argue that a *mutually agreed* decision to rescind is not "unilateral" and, therefore, not covered by Article 33. The general rule is that contracts cannot contravene the plan, as provided by Article 34 of the 1961 Principles. Loeber, however, states that *Arbitrazh*, in the exercise of its power of day-to-day economic administration, can consider questions of "economic expediency, such as the refusal to buy unwanted products."⁵⁸ *Arbitrazh* can therefore exempt a party from taking delivery of (unwanted) goods.

Furthermore, the parties need not even stipulate the plan conditions in the contract, though the contract is always deemed to be regulated by the conditions specified in the planning act. Thus, for example, if the supplier and purchaser carried out the delivery and acceptance of goods specified in the planning act before the time ordained for concluding the contract, that contract need not even have been entered into.⁵⁹

Point 4 of the decree of the USSR Council of Ministers, "On Further Improvement of the Procedure For Conclusion of Contracts for Delivery of Equipment and Materials for the Use of Enterprises and Organizations" (1962), provides that when delivery orders issued to a supplier and purchaser contain all the data needed for shipment (*e.g.*, quantity, items, quality, delivery dates), and if no further agreement between the parties upon other conditions is required, contractual relations are established upon receipt and acceptance of the order.⁶⁰ On the other hand, cancellation or amendment of the plan assignment or the plan itself leads to the automatic cancellation or modification of the corresponding contract or its terms, as the case may be. This is followed by an *automatic substitution* of the relevant plan conditions, even if no further agreement has been made incorporating the plan changes.⁶¹

The "brooding omnipresence" of the plan (to use Holmesian phraseology) not only guides contractual relations but also establishes the range of permitted leeway. It further serves as a

58. Loeber, *supra* note 1, at 146.

59. Decree of May 22, 1959, Sob. post. S.S.S.R. No. 11 item 68; Statute on Delivery of Consumer Goods § 6(4) [hereinafter cited as 1959 SDG]; Statute on Delivery of Products § 10(2) [hereinafter cited as 1959 SDP].

60. Decree cited by Zamengof, *supra* note 11, at 28. Article 4 of the 1961 Principles, *supra* note 29 provides that civil rights and obligations arise "from administrative acts . . . and from planning acts." See also 1959 SDP § 5(3), and 1959 SDG § 6(4), *supra* note 59.

61. Zamengof, *supra* note 11, at 30-31; see also Loeber, *supra* note 1, at 146-47.

reminder that contract is an auxiliary tool in the implementation of the plan and cannot be used as an instrument for monitoring the plan, for correcting planning errors or for exercising economic or contractual independence contrary to the plan.

It is however, noteworthy that Point 8 of the 1962 decree mentioned above, as well as Article 62 of the 1965 Statute on the Socialist State Economic Enterprise⁶² gives enterprises the right to refuse to sign contracts for the supply to them of products that are either "superfluous," "unneeded," or in excess of their needs. The refusal must be made within ten days of the receipt of a delivery order. If the refusal is not communicated to the supplier within the time limit, delivery, generally, must take place as required in the planning act.⁶³

Speer is of the view that it was to be left to the enterprise rejecting the goods to determine whether they were "unneeded." He cites a State *Arbitrazh* holding of 1963 that a purchaser's rejection of the goods allocated was the exercise of a right and that the fine for failure to contract was not applicable in such cases.⁶⁴ *Arbitrazh* practice on this issue, however, is not uniform. In the 1968 case, a State *Arbitrazh* held that even if the purchaser had failed to give notice of rejection within ten days he was not bound to conclude a contract for unwanted goods.

There appears to be no legislation regarding notification of changes in the plan. In particular, there is no allocation of responsibility for notification. The question appears to have been left for *Arbitrazh* agencies to determine on an equitable basis. *Arbitrazh* have freed innocent parties from liability for the non-fulfillment of changed plan assignments where such parties were either unaware of the changes or informed of the changes too late. In some instances, when one of the parties has been held responsible for not informing the other of the change, the suit was dismissed with costs against the party responsible, particularly if the latter had itself brought the suit.⁶⁵ This practice involves a principle analogous to the common law maxim that "he who comes to equity must come with clean hands." Zamengof goes further and advocates

62. See Section B(2), *infra*.

63. Zamengof, *supra* note 11, at 29. See also Maggs, *Soviet Corporation Law: The New Statute on the Socialist State Production Enterprise*, 14 AM. J. COMP. L. 478, 487 (1965-66); Speer, *supra* note 9, at 526-27.

64. Speer, *supra* note 9, at 527.

65. Zamengof, *supra* note 11, at 32.

that the party "guilty" of withholding information must be held liable for financial and economic loss resulting from failure to notify.⁶⁶

The case of *Myshega Armature Work v. Venikov Armature Works*⁶⁷ illustrates the subordinate position of contract *vis-a-vis* the plan. A contract between two enterprises provided for the delivery of 1,230 electric drives by the Venikov Plant to the Myshega Plant. A planning act was issued which necessitated a change in the number of electric drives required. A local arbitration board determined that 1000 drives were necessary. When this number of drives was not delivered in full, the Myshega Plant filed a suit before the State *Arbitrazh* Commission of the RSFSR Council of Ministers. The Commission found that the local *Arbitrazh* agency had erred in fixing the number of drives at 1,000 and that the correct figure, under the planning act, should have been 587. Since the respondent had delivered this number in full the suit was dismissed.⁶⁸ The State *Arbitrazh* Commission proceeded on the principle that the change required by the planning act was automatically written into the contract regardless of the agreement between the parties. The case also shows that even *Arbitrazh* decisions are subject to review by superior *Arbitrazh* agencies in the event of a nonconformity of an award to the plan.

While fully acknowledging the overall superiority of the plan, Bratus and Alekseev argue that planning agencies should not be allowed to exercise "excessive tutelage" over the enterprises so that the latter are assured of at least a minimum degree of independence or autonomy. To this end, they advocate the maintenance of a strict division of functions between planning agencies and economic enterprises common between directors of enterprises and the enterprise themselves. Planning agencies are those agencies which approve plan assignments, allocate raw materials and other resources, and assign equipment and funds to enterprises. They do not enter into direct productive or other economic activity, do not buy or sell goods, and do not acquire or operate the means of production. Bratus and Alekseev are of the view that the division of function will minimize excessive control of industrial enter-

66. *Id.*

67. *Id.* at 35 n.24.

68. The *Myshega Armature Works* case is summarized in Zamengof, *supra* note 11, at 35 n.24.

prises by planning agencies, and suggest that this division must be sanctioned by law:

Therefore, there is needed not only a precise delimitation, formulated in law, of the competence of the various planning and regulatory agencies, but a similar delimitation of the rights and duties of the agencies in question, on the one hand, and of the rights and duties of socialist enterprises and other cost accounting organizations, on the other. It is necessary to protect the enterprise against excessive tutelage and administrative zeal on the part of the planning and regulating agencies.⁶⁹

The foregoing shows that planning affects contracts and sets the limits of contractual freedom and operational independence of socialist enterprises. Contracts and the relative ease or freedom to conclude contracts show the degree of operational independence present. At the same time contracts appear to serve as the chief instrument for the detailed implementation of the plan itself. Furthermore, the official view is that freedom of contract and operational independence emerge with the consolidation and improvement of the socialist mode of production.

In the meantime, the planning process utilizes what Bratus and Alekseev have called "the principle of democratic centralism."⁷⁰ This principle, in their opinion, manifests the economic independence of enterprises and involves not only the working out of details and specifications for the execution of the plan, but also a say in the planning process itself. Such input is facilitated by providing for the submission of requests and drafts of plans to planning agencies and by providing procedures by which planning agencies may be asked to withdraw or modify specific plan assignments.⁷¹

Berman writes that the modification of plans in compliance with requests from enterprises is a "common practice." "In fact," he observes, "one sometimes gains the impression from reading Soviet legal literature and from talking with Soviet factory direc-

69. Bratus & Alekseev, *The Treatment of Legal Problems Involved in the Management of the Economy*, 3 SOVIET L. AND GOVT 23, 28 (No. 1, 1964-65). On the definition of "cost accounting" the writers observe: "Actual cost accounting is possible only where material values are produced and sold on the principle of recoupment (*Vozmezdnie*) of costs . . ." *Id.*

70. *Id.* at 26. See also H. BERMAN, JUSTICE IN THE U.S.S.R., *supra* note 19, at 123.

71. Bratus & Alekseev, *supra* note 69, at 26.

tors and economic officials, that plans are ultimately adapted to the needs, capacities, and desires of the enterprises, despite the overwhelming weight of bureaucratic controls."⁷²

A further factor in the direction of economic independence is the principle of *khozraschet*,^{72a} or "business accountability." The principle implies that business enterprises are responsible for their debts, have to keep accurate accounts, and that their success is measured largely in terms of their profits.⁷³ To give legal expression to the principle of business accountability, state enterprises have come to be regarded as juridical persons who are liable for their debts to the extent of their turnover capital, and whose property cannot be acquired except by contractual agreement.⁷⁴

2. ECONOMIC INDEPENDENCE AND THE 1965 REFORMS

On October 4, 1965, the Statute on the Socialist State Economic Enterprise⁷⁵ was passed. Article 1 declares that the socialist state production enterprise shall be the basic link in the national economy of the USSR, and that its activity shall be based upon the combination of centralized guidance with economic independence and initiative of the enterprise. Article 2 provides that the enterprise shall work "under the direction of the superior agency in accordance with a national economic plan on the basis of economic accountability [and] shall fulfill its duties and shall enjoy the rights connected with such activity, shall have an independent balance, and shall be a juridical person."⁷⁶ This was the first instance of legislative recognition of the socialist enterprise as a juridical person.

Under the Statute rights are stated as belonging to enterprises rather than to managers as had tended to be the case previously.⁷⁷

72. H. BERMAN, *JUSTICE IN THE U.S.S.R.*, *supra* note 19, at 103, 140. See also text accompanying notes 5 and 6, *supra*.

72^a. A term used to describe the basis on which state business enterprises enter into relations with each other.

73. Zile, *supra* note 6, at 218.

74. Berman, *Commerical Contracts*, *supra* note 5, at 196; see also D. GRANICK, *MANAGEMENT OF THE INDUSTRIAL FIRM IN THE U.S.S.R.* 24 (1959).

75. Statute on the Socialist State Production Enterprise, *supra* note 41. For English text see W. BUTLER, *supra* note 7, at 169.

76. *Id.* at art. 2. For English text see W. BUTLER, *supra* note 7, at 169.

77. The statute makes detailed provision for the property and assets of the enterprise, Part II, §§ 11-40, as well as a host of other rights pertaining to its activities, Part IV §§ 41-42. Under § 90 the director acts "in the name of [the] enterprise" rather than independently.

Maggs suggests that this is significant because the manager was "merely a subordinate bureaucrat in a long hierarchy of government officials The new law, by granting . . . rights to the enterprise itself, opens the way for future procedural reform which would provide real avenues for the enforcement of the rights."⁷⁸

Article 47 of the Statute provides that if changes in planned tasks are necessary, prior consultation with the enterprise's management must be carried out. Maggs views this as mere "empty language" however, since it cannot be enforced by any impartial adjudicative body.⁷⁹ This implies that there are no procedural safeguards for enforcement and also that perhaps *Arbitrazh* agencies are not considered by Maggs to be an "impartial adjudicative body." In contrast to this view, Hazard regards *Arbitrazh* agencies as providing sufficient protection for the rights of enterprises: "[T]he arbitration tribunals have been moving away from the position given them when they were brought into being in their present form in 1931 They have come nearer to the position of a court charged with the protection of 'rights' through the stable application of law."⁸⁰

In the area of planning the most significant moves by the 1965 laws in favor of independence from the plan are the reduction of the number of plan "indicators" by the Statute, and the shift of emphasis toward profitability and output sold rather than gross output. Prior to this, under a 1954 decree,⁸¹ a superior organization could set the following plan indicators for the enterprise: (a) output in monetary and physical terms; (b) the basic technical and economic indicators of the use of raw materials and equipment; (c) number of workers, total wages bill, labor productivity; (d) expenses of production; (e) costs of goods produced; (f) cost of the most important man-produced items, and (g) receipts and expenditures.

78. Maggs, *supra* note 63, at 485; see also D. GRANICK, THE RED EXECUTIVE 318 (1960), where the manager is described as an "organization man, filling a slot in an industrial bureaucracy."

79. Maggs, *supra* note 63, at 486.

80. Hazard, *Flexibility of Law in Soviet State Arbitration*, INTERNATIONAL ARBITRATION 120, 129-30 (P. Sanders ed. 1967).

81. Decree of August 2, 1954. 4 Direktivy KPSS i Sovetskogo pravitel'stva po khozyastvennym voprosam. Sbornik Dokumentov 1917-1957 gg. [Directives of the Communist Party of the Soviet Union and the Soviet Government on Economic Matters] (1958) 451. Collection of documents for the years 1917-1957 compiled by Malin & Korobov in 4 vols. (Moscow 1957-58). Decree cited in Maggs, *supra* note 63, at 485.

After the Reforms of 1965, this list was reduced to the following indicators: (a) the volume of sales output; (b) the basic types of output; (c) the wages fund; (d) the amount of profit; and (e) payments to and appropriations from the budget.⁸² The reduction has meant that enterprises fulfill their production on the basis of completed contracts. Thus, contract terms as to quality, quantity, and assortment have replaced many of the commanded indicators previously imposed from above.⁸³

In fact, very often it was this predominance of plan over contract which resulted, in Maggs' opinion, in a lack of flexibility, an indifference to the needs of industry, consumers, and the public, and an overemphasis on gross output at the expense of quality and economy.⁸⁴ Attempts were made in the 1950's to introduce the reduction of operating costs rather than gross output as the primary measure of enterprise success. One of the changes which has been incorporated in the 1965 Statute has been the creation of the right of enterprises to reject unneeded goods.⁸⁵ The Statute also seeks to prevent the production of unwanted goods by providing that orders from trade organizations shall form the basis of contracts for the purchase of consumer goods and by prohibiting above-plan production. This shows a shift away from "production for production's sake" toward an emphasis on quality, economy and more contractual freedom.⁸⁶

Since the goal of the reforms has been to minimize interference from planning agencies, the quick settlement of pre-contract disputes has assumed greater importance. Thus, disputes over items which would previously have been governed by plan indicators must now be decided by the parties in pre-contract bargaining. If irreconcilable differences arise during pre-contract negotiations, such differences are to be settled in *Arbitrazh*-ordered pre-contract settlements.

C. *Coexistence of Plan and Contract Law in the Soviet Union*

Since contracts appear to play a crucial role in the Soviet economy, this paper will now examine briefly the important provisions

82. Maggs, *supra* note 63, at 486.

83. *State Arbitrazh*, *supra* note 10, at 1307.

84. Maggs, *supra* note 63, at 484-85.

85. Statute on the Socialist State Production Enterprise, art. 62, *supra* note 41. For English text see W. BUTLER, *supra* note 7, at 169.

86. Maggs, *supra* note 63, at 484-85.

of Soviet contract law as declared by statute and contract principles that have emerged in the resolution of pre-contract and post-contract disputes before *Arbitrazh*.⁸⁷

1. SOME IMPORTANT SUBSTANTIVE AND PROCEDURAL PRINCIPLES OF SOVIET CONTRACT LAW

First, some introductory remarks concerning the general principles governing purchases and sales are appropriate. Some of these principles are similar to the Anglo-American law on the sale of goods. Under Soviet law, the seller undertakes to transfer property to the purchaser and the latter agrees to accept such property and to pay therefore an agreed upon price. Ownership passes at the time of the delivery of perishable goods, and, in the case of nonperishable goods, on completion of the contract. Risk passes with ownership unless the parties agree otherwise, but if the goods deteriorate or are destroyed due to delayed delivery, the party responsible for the delay bears the responsibility.⁸⁸

The Soviet Constitution places a limitation on what goods may be purchased and sold, however, by declaring certain kinds of property to be *res extra commercium*. Property that is not subject to sale or purchase because of constitutional prohibitions includes land and its natural deposits, waters, forests, railroads, business enterprises of all kinds, and buildings.⁸⁹ A further limitation is imposed by the plan itself, which prescribes that certain types of goods shall be bought and sold by certain types of enterprises. A necessary consequence of this rule is that an enterprise cannot unilaterally change its own production plan.

Payments for goods bought under contract are based on the principle of strict business accountability under which each enterprise is liable for its own debts.⁹⁰ Most payments are made through banks so that the entire system operates on the basis of what Berman calls "bookkeeping deductions." The chief form of payment involves the buyer's acceptance of the payee's demand

87. Some of these principles have already been discussed or alluded to in the previous section. In this section it is therefore appropriate to focus primarily on those rules which have either not been covered yet or which require more detailed exposition.

88. Berman, *Commercial Contracts*, *supra* note 5, at 213.

89. USSR Const. Art. 6. *cited in* Berman, *Commercial Contracts*, *supra* note 5, at 215. *See also* Cases 6 and 9, *Id.* at 227-28.

90. Art. 2, Statute on the Socialist State Production Enterprise, *supra* note 41. For English text see W. BUTLER, *supra* note 7, at 169.

made through the payee's bank. The latter bank then makes the demand to the payor's bank. If the buyer does not notify his bank of nonacceptance, his bank will debit the buyer's account and pay the seller's bank. Other forms of payment take place through letters of credit, checks, or a periodic settlement of accounts called "planned payments."⁹¹

The 1961 Principles⁹² contain some of the most important principles of Soviet contract law. Article 4 provides, as indicated above, that rights and obligations arise not only from contracts but also from planning acts. Article 34 affirms the general principle that the "content of a contract concluded on the basis of a planned task must conform to this task." The article also provides that differences arising during the conclusion of the contract (*i.e.*, in the "pre-contract" stage) should be resolved by *Arbitrazh*. Article 36 provides that fines, penalties and forfeitures be awarded in the event of the nonfulfillment of a contract, and forbids agreements limiting liability. Agreements limiting liability for delivery of goods of inferior quality have consequently been held by *Arbitrazh* to be invalid.⁹³

Two more principles should be noted. The first is that a breach of contract creates a right to damages for the aggrieved party.⁹⁴ Monetary awards are not only compensatory but also punitive, and the enforcement of such awards is the right of the injured party as well as that of the State. The second principle under Article 36 is that payment of a fine, penalty or compensation does not release the defaulting party from specific performance of the contract. Liberman calls this "the principle of real fulfillment of obligation."⁹⁵

The principle of specific performance has been described as one of the characteristics of Soviet contract law that distinguishes it from Western law on the subject.⁹⁶ One of the principle's chief

91. Berman, *Commercial Contracts*, *supra* note 5, at 220-24.

92. 1961 Principles, *supra* note 29. For English text see W. BUTLER, *supra* note 7, at 393.

93. Liberman, *supra* note 31, at 48.

94. *Eletskii Plant v. Division of Sales of Chief Administration of Metal Industry Arbitrazh* [1938] No. 5 (in Russian) 21, *cited in* Berman, *Commercial Contrats*, *supra* note 5, Case 24, at 234.

95. Liberman, *supra* note 31, at 52.

96. Loeber, *supra* note 1, at 160. Under the RSFSR CIVIL CODE the injured party has the alternative of rejecting performance and suing for damages alone, although *Arbitrazh* practice has been to award performance where to do so would accord with the plan of distribution issued for the parties. Berman, *Commercial Contracts*, *supra* note 5, at 213-14.

purposes is to emphasize the primacy of the plan over contracts. Another purpose is to discourage the practice of what has been called "mutual amnesty," whereby the parties to a contract both agree to waive their rights under it. Such practice, although it may be expedient for the parties in the short term, is regarded by State *Arbitrazh* as a long-term threat to the plan and, ultimately, to the economy as a whole.⁹⁷ Thus, a purchaser cannot relieve the supplier from his obligation to deliver, regardless of whether or not the supplier has paid a fine for late delivery or for nondelivery. Nor can the purchaser relieve the supplier from the fine itself, for as State *Arbitrazh* asserted in 1962, "[a]ssessing fines from the supplier is not only a right of the consumer, but also a duty to the State."⁹⁸ This is another principle of Soviet contract law distinguishing it from nonsocialist systems.

The Fundamental Principles of Civil Law adopted by the Supreme Soviet of the USSR in 1961 also provide that liability for breach of contract must be founded on fault, unless otherwise provided by law or by contract. This embodies a principle not supported by Anglo-American doctrine, which imposes liability for breach of contract regardless of fault unless otherwise provided by law or by contract. As will be seen later, however, the Soviet principle has two important exceptions.⁹⁹

The Principles of 1961 also provide that a contract is deemed to have been concluded when the parties thereto have reached agreement on all its essential points, and that in the event of a breach the obligor is obliged to compensate the obligee for all resultant loss including loss of "income" (*i.e.*, profits).¹⁰⁰

2. CONTRACT LAW AND *Arbitrazh* PRACTICE

In a planned economy, the delivery contract is the most commonly found.¹⁰¹ There are three ways of concluding such a contract:¹⁰² first, the supplier after receiving the delivery (distribu-

97. Loeber, *supra* note 1, at 169.

98. *Id.* See also Liberman, *supra* note 31, at 52.

99. See text accompanying notes 148-53, *infra*.

100. See Berman, *Commercial Contracts*, *supra* note 5, at 213-14 n.78.

101. Loeber, *supra* note 1, at 143. Other contracts are for the purchase of farm products — arts. 51-52 of the 1961 Principles, *supra* note 29; contracts for capital construction — arts. 67-71; and shipment contracts — arts. 72-77. For English text of these Articles see W. BUTLER, *supra* note 7, at 393.

102. See Articles 44-50 of the 1961 Principles, *supra* note 29. For English text of these Articles see W. BUTLER, *supra* note 7, at 393.

tion) order, *i.e.*, the *nariad*, drafts a contract and sends it to the buyer named in the *nariad*.¹⁰³ If the buyer agrees with the draft he returns it with his signature and the contract is concluded. In the event of disagreement on the part of the buyer, the buyer must draw up a "Protocol of Disagreement" and forward it to the supplier.¹⁰⁴ It would appear that the buyer may disagree only on the grounds that the proposed contract conflicts in one way or another with the plan instructions, or that the instructions leave the point in question to be worked out by the parties themselves. If the disagreement cannot be resolved by the parties, the supplier must file the Protocol with *Arbitrazh* within ten days.¹⁰⁵ Failure to act within ten days would lead to the assumption that the supplier had accepted the buyer's version of the contract as stated in the Protocol.¹⁰⁶ In *Pavlodarsky Tractor Factory v. Armmashsnabsbita*,¹⁰⁷ the buyer refused to pay for goods on grounds the goods were incomplete. A lower *Arbitrazh* agency awarded the purchase price to the seller, but State *Arbitrazh* of the USSR Council of Ministers reversed the decision when it became clear that the buyer had filed a Protocol of Disagreement describing the type of goods it wanted. State *Arbitrazh* held that the seller, having received the Protocol without objecting, was assumed to have accepted the buyer's proposals.¹⁰⁸

Second, a simplified procedure exists for contracts involving products of a value less than 7,500 rubles. Upon receipt of a delivery order the buyer forwards the order to the seller, who is deemed to have accepted it if he does not raise any objections within ten days. If objections are raised the matter can go to *Arbitrazh*.¹⁰⁹

The third and the simplest form is used if the delivery order contains all necessary data (*e.g.*, quality, quantity, time for delivery). The parties named are deemed to have accepted if neither objects within ten days, and the order becomes binding on both even

103. 1959 SDP, *supra* note 59, at § 72; 1959 SDG, *supra* note 59, at § 12. See also *State Arbitrazh*, *supra* note 10, at 1289.

104. 1959 SDP, *supra* note 59, at § 16(1); 1959 SDG, *supra* note 59, at § 12(3). See also H. BERMAN, *JUSTICE IN THE U.S.S.R.*, *supra* note 19, at 122-24.

105. *State Arbitrazh*, *supra* note 10, at 1290. See also Fal'kovich & Barash, *supra* note 20, at 56.

106. 1959 SDP, *supra* note 59, at § 16(2); 1959 SDG, *supra* note 59, at § 12(4)-(5).

107. *State Arbitrazh*, *supra* note 10, at 1298.

108. *Id.* at 1298-99.

109. 1959 SDP, *supra* note 59, §§ 10, 11, 16; 1959 SDG, *supra* note 59, § 11(8). See also Loeber, *supra* note 1, at 144.

if no subsequent contract is concluded on the basis of the order.¹¹⁰ Any objections must be communicated by the party raising them to the agency which issued the order and to the other party. If the objections are found to be groundless by the issuing agency, a contract should be entered into by the parties or the matter may go to *Arbitrazh*.¹¹¹

Arbitrazh procedure is thus available to resolve two types of "pre-contract" disputes. *Arbitrazh* procedure may be used to compel a party to conclude a contract, as well as to settle disputes over the terms of a draft contract. Not all disputes before *Arbitrazh* however are legal in character; there may, for example, be a question involving the economic expediency of a particular decision, such as the refusal to buy unwanted goods.¹¹²

Another important principle embodied in Soviet contract law is that enterprises cannot plead defects in planning as a means of avoiding contractual obligations. In *Stalingrad Office v. Alchevsk Metallurgical Plant*,¹¹³ the buyer office of the RSFSR Ferrous Metal Sales and Supply Administration sued for a forfeit, alleging that the seller had not completed a delivery of cast iron. The producer, a metallurgy factory in the Ukrainian Republic, claimed to be released from liability on the ground that the planning agency (the Council of National Economy) had not allocated it enough iron. Incomplete delivery was not, it was argued, the producer's fault. *Arbitrazh* held the producer liable on the ground that it was the producer's responsibility to ensure an adequate supply and that underestimation by the planning agency of the producer's needs was not sufficient grounds for release from contractual obligations.¹¹⁴

110. 1959 SDP, *supra* note 59, § 10(3); 1959 SDG, *supra* note 59, § 11(8). See also Zamengof, *supra* note 11, at 28.

111. Loeber, *supra* note 1, at 144-45.

112. *Id.* at 146; *State Arbitrazh*, *supra* note 10, at 1292. Under art. 2 of the Statute on State Arbitrazh Attached to the USSR Council of Ministers *supra* note 23, *arbitrazh* has a wide range of administrative powers. Included among those powers are those associated with "socialist legality and state discipline in the fulfillment of plan assignments and contractual obligations" (para. 3), the elimination of "shortcomings in the activity of enterprises" (para. 5) and the development of "rational economic links between enterprises" (para. 2). Such a power is clearly aimed at providing a legal basis for *arbitrazh* decisions on grounds of economic expediency. For English text of the Statute see W. BUTLER, *supra* note 7, at 253.

113. Loeber, *supra* note 1, at 148.

114. *Id.*

In *Bobrovsk Insulation Factory v. Khar'kov Factory "Elektroyazhmash,"*¹¹⁵ the producer could not deliver insulating materials under a contract because the permit for its own supply of raw materials did not cover the particular raw materials needed to make the insulating materials required by the purchaser. State *Arbitrazh* of the Council of Ministers of the U.S.S.R. criticized an earlier pre-contract *Arbitrazh* decision which had compelled the producer to enter into a contract with the buyer, and held in favor of the producer because of special circumstances which showed that "the failure to supply the goods occurred through no fault of the Bobrovsk factory (the producer)."¹¹⁶ It was, however, clear that *Arbitrazh* was not abandoning the general principle that a supplier is not relieved from responsibility for not delivering goods merely because it failed to receive raw materials. The exception in this case was due to certain "special features," including the fact that the raw materials received for one of the items were four times less than the quantity required, and the fact that the buyer had not done all it could to adapt insulating materials manufactured from other materials. The crucial finding in the case appears to be that the initial supply of raw materials did not provide the materials actually required for the production of the insulating materials. This interpretation of the case is supported by the State *Arbitrazh's* disapproval of the pre-contract *Arbitrazh* decision which compelled the producer to enter into the contract. The case must therefore be taken as affirming not only the general rule that inadequate allocation by planning agencies of raw materials is not a ground for release from contractual obligations, but also that an exception to the rule may be permitted in certain narrowly defined circumstances. In the following year State *Arbitrazh* ruled that in case a delivery order demands delivery of products for which raw materials are not provided, *Arbitrazh* agencies may "raise the question of eliminating planning mistakes that had been made."¹¹⁷

The USSR State *Arbitrazh* also issues "Instructive Letters" and "Informative Letters." The former are directed to lower *Ar-*

115. *Id.* at 149 n.95; H. BERMAN, *Justice in the U.S.S.R.*, COMMERCIAL CONTRACTS *supra* note 5, at 137-38

116. First reported in SOTSIALISTICHESKAIA ZAKONNOST (SOCIALIST LEGALITY) (No. 10, 1960). A more complete report later appeared in No. 12 at 77. The latter report is translated in J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM 127-28 (Vol. II 1962).

117. Instructive Letter of Dec. 23, 1961, 19-20 Sbornik 8 (1961), Instructive Letter of Sept. 23, 1960, 15 *id.* 79; 12 *id.* at 7, cited in Loeber, *supra* note 1, at 153 n.116.

bitrazh agencies for guidance on matters of substantive law and procedure. The latter are answers to inquiries from enterprises. The USSR State *Arbitrazh* has issued a vast body of Instructive Letters. One such letter issued in 1958 declared that if a buyer personally selects goods from the supplier knowing that the goods are different from those specified in the contract, the buyer cannot later bring an action against the supplier for breach of contract.¹¹⁸ Another Instructive Letter states that *Arbitrazh* agencies are generally not allowed to free the debtor from payment of fines or penalties, though such agencies may do so "in extraordinary cases if there are legal reasons."¹¹⁹ The "legal reasons" were not defined. In yet another Letter, State *Arbitrazh* ruled that a new agreement reached between a buyer and seller to delivery by the due date does not relieve the seller from fines and penalties for nondelivery.¹²⁰

In 1962 an Instructive Letter¹²¹ was issued which should, in part, solve the difficulty that arose in the *Bobrov* case (1960) discussed above. In that case, it will be recalled, State *Arbitrazh* criticized the solution of the pre-contract dispute by an arbitral agency whereby the producer was compelled to enter into a contract even though its own raw materials permit did not cover the particular raw materials needed for discharging the delivery order which was the basis of the contract. The Instructive Letter of 1962 ruled that *Arbitrazh* agencies should not force parties to enter into a contract if the delivery order does not correspond to the production plan of the supplier enterprise.¹²² An argument can be made that it should follow from this rule that a contract should not be forced on an enterprise whose allocated raw materials do not meet the requirements for the effective discharge of the contract.

It is possible that in some instances a planning act may itself be issued in violation of the procedure or plan of a higher agency. In such instances the 1962 Letter provides that *Arbitrazh* may rule that contracts should be concluded in compliance with their respective delivery orders. In so ruling, the *Arbitrazh* would be

118. Letter of Jan. 16, 1958, 6 Sbornik 35 (1958), cited in Loeber, *supra* note 1, at 151.

119. Instructive Letter of July 22, 1950, 3 Sbornik 183 (1950), cited in Loeber, *supra* note 1, at 151 n.107.

120. Letter of Aug. 29, 1959, 6 Sbornik 31 (1959). See also Sots. Zak. No. 12, p. 82 (1957); *id.* No. 12, p. 78 (1958), *id.* No. 9, p. 92 (1963), cited in Loeber, *supra* note 1, at 151 n.108.

121. Instructive Letter of Oct. 6, 1962, 21 Sbornik 97 (1962), cited in Loeber, *supra* note 1, at 152 n.115.

122. Loeber, *supra* note 1, at 152.

preserving consistency between the planning act and the delivery order.¹²³

Although, as pointed out above, contracts cannot be used to correct planning errors, the State *Arbitrazh* has often exercised its jurisdiction in a way that mitigates hardship arising from bad planning. This is often done at the pre-contract stage. In one case, a producer was ordered to deliver goods which he was to start producing only in the following year. The planning agency, upon advice from State *Arbitrazh*, freed the producer from its obligation to contract and deliver, and assigned the order to another producer.¹²⁴

In *Libknekht Plant v. Kuz'min Plant*,¹²⁵ the producer received a delivery order from his superior agency which exceeded his production program. He informed the other party of his refusal to enter into a contract and also notified the superior agency as required by internal regulations. The other party sued for nondelivery and asked that a fine be imposed. *Arbitrazh* dismissed the suit because the producer had not accepted the delivery order and had informed all parties concerned of his nonacceptance. *Arbitrazh* held that the party suing should have applied to the superior agency for allocation of another supplier.¹²⁶

The above instances show that planning errors are usually corrected in the pre-contract stages either by decision of *Arbitrazh* or by informal administrative procedures. Such informal administrative procedures are often adopted upon recommendation from *Arbitrazh* to a superior planning agency.¹²⁷ It has also been established that correction is possible by *Arbitrazh* even after the contract has been concluded.¹²⁸

3. CHANGE OF PLANNING ACT AND READJUSTMENT OF LIABILITY

Correction is, of course, always possible through the issuance of new planning acts. Upon the issuance of new planning acts, as

123. Instructive Letter of Oct. 6, 1962, 21 Sbornik 97 (1962), cited in Loeber, *supra* note 1, at 152 n.115.

124. Instructive Letter of Sept. 23, 1960, 15 *id.* at 83, cited in Loeber, *supra* note 1, at 153 n.118.

125. [1957] 6 Sbornik 40 Loeber, *supra* note 1, at 153 n.119.

126. *Libknekht Plant v. Kuz'min Plant*, 6 Sbornik 49 (1957), cited in Loeber, *supra* note 1, at 153.

127. Instructive Letters of 1960, *supra* note 124; 1962, *supra* note 123; see text accompanying notes 122-25, *supra*.

128. The Bobrovsk Insulation Factory Case, cited in Loeber, *supra* note 1, at 149 n.95.

indicated in the previous section, the new plan instructions are not only to be incorporated by new agreements into existing contracts, but several Soviet writers such as Zamengof, Ioffe, Krasnov and Mints are of the view that new plan instructions are automatically substituted into existing contracts, even if new agreements for their incorporation have not been concluded.¹²⁹

In the case of *Warehouse of the Latvian SSR v. Penza Warehouse*,¹³⁰ the supplier was under an obligation to deliver a certain quantity of watches to the buyer. After the specifications had been agreed upon, the All Union Chief Trade Administration changed the delivery plan and the specifications. The parties failed to incorporate this change into their contract, but the supplier delivered a smaller quantity of watches in compliance with the new plan. The buyer sued under the original contract for delivery of the balance. State *Arbitrazh* dismissed the claim, holding that insofar as the supplier had performed in compliance with the corrected plan he was not guilty of nondelivery.¹³¹ This holding suggests that new planning instructions supersede the old and are *automatically* incorporated into existing contracts even without a new agreement.

Such automatic incorporation of new planning instructions takes place only in cases involving parties that are both under the jurisdiction of the agency issuing the new plan. In cases involving plan changes ordered by an authority to which only one of the contracting parties is subordinate, the change does not affect the original contract rights of the other partner. In such cases State *Arbitrazh* emphasizes the duty of the planning agency to assign a new buyer to the other party to the contract. For example, the State *Arbitrazh* Instructive Letter of February 18, 1959 describes a case in which the supplier delivered goods to wholesale warehouses of the RSFSR Trade Administration, which at the request of its warehouses unilaterally changed the quantity of goods to be delivered. *Arbitrazh* ruled that the RSFSR Trade Administration was obliged to inform the supplier of other buyers willing to purchase the balance.¹³²

129. Zamengof, *supra* note 11, at 30-31 n.22. See also Loeber, *supra* note 1, at 155; Instructive Letter, July 6, 1955, 3 Sbornik 194, cited in Loeber, *supra* note 1, at 126 n.132.

130. 14 Sbornik 58 (1960).

131. *Id.*

132. Instructive Letter of Feb. 18, 1959, 9 Sbornik 19 (1959).

If, however, the superior agency of the party ordering the change of a planning act seeks and reaches agreement with the superior agency of the other contracting party, the change of plan becomes binding on both parties.¹³³ In *Novo-Kramatorskiy Machine-Building Plant v. Izhorskiy Plant*,¹³⁴ the seller contracted to deliver three sets of equipment to the buyer. Two more sets were ordered by the superior agency of the buyer, and the buyer was informed of the new order by the seller. The buyer refused to accept delivery of the two additional sets. The seller sued for recovery of his costs, for which *Arbitrazh* held the buyer liable.¹³⁵

The rule allowing a party to reject delivery orders within ten days¹³⁶ also applies to plan changes affecting contracts that are concluded by the mere acceptance of a delivery order. In such cases, a plan change is deemed to be accepted by the parties if neither raises objections or demands an additional agreement within ten days.¹³⁷ Zamengof asserts that the cancellation or amendment of a plan assignment on the basis of which a contract has been concluded would automatically involve cancellation or a corresponding amendment of the obligation itself.¹³⁸

Moreover, if account be taken of the shortcomings that still exist in the day-to-day functioning of the planning agencies, as a consequence of which changes in plans are not always transmitted to economic organizations in ample time and simultaneously to all concerned, and the very notifications of such changes so often contain inaccuracies and uncoordinated elements, the achievement of such agreement is highly desirable for purposes of defining mutual rights and obligations of the parties and for rendering their relations precise and definite However, in actuality what happens here is not cancellation or amendment of the contract in the true sense of the word, but merely a correction in the text of the plan assignments incorporated into the contract, or else a recording of the fact that the obligations have been cancelled and the contract has lost its force as a consequence of the changes which these instructions have undergone and which are obligatory for the parties regardless of whether they enter the

133. Loeber, *supra* note 1, at 157.

134. 6 Sbornik 38 (1957).

135. See *State Arbitrazh*, *supra* note 10, at 1295-96.

136. 1959 SDP, *supra* note 59, § 10; 1959 SDG, *supra* note 59, § 12.

137. Instructive Letter of Dec. 18, 1962, § 11, 22 Sbornik 12-15 (1962).

138. Zamengof, *supra* note 11, at 30.

corresponding changes into the wording of the contract. Therefore, even if no such changes are entered, the content of the obligations will be determined by the new plan assignment, and not by the instructions reproduced in the contract.¹³⁹

If this is the correct view, and it is a view which is supported by other Soviet writers,¹⁴⁰ as well as by *State Arbitrazh* practice, it should follow that a new planning act, if it effects a major change, may require complete dissolution of existing contracts. In such cases Loeber is of the view that the old contract must be treated as having been rescinded, a party disagreeing with such a result being free to seek a decision of *Arbitrazh*.¹⁴¹ Neither the 1961 Principles nor the 1959 and 1969 Statutes on Deliveries make any provision regarding the dissolution of contracts. Zamengof has cited two unpublished cases, however, showing that *Arbitrazh* supports the principle that new planning acts can lead to automatic termination of old contracts.¹⁴² This must be understood to imply a *simultaneous substitution* of a new agreement in accordance with the new plan even if no new agreement has been concluded. The *Myshega Armature Works*¹⁴³ case and the case concerning the *Warehouse of the Latvian SSR*¹⁴⁴ are additional cases confirming the view that *State Arbitrazh* practice favors this principle.

In practice, if the new planning act requires dissolution of contract, it raises the question of whether the party urging dissolution is liable to pay a fine or penalty to the other party for nonperformance. In a 1962 case¹⁴⁵ it was held that a change in plan frees the customer from fines, although in Loeber's view the tendency is to subject that party whose superior agency issued the new planning act to a fine. For example, in a 1948 case¹⁴⁶ the

139. *Id.* at 31.

140. Ioffe, Mints, and Krasnov; see text accompanying note 129, *supra*.

141. Loeber, *supra* note 1, at 162.

142. Zamengof, *supra* note 11, at 34-35 nn.23-24.

143. See text accompanying note 67, *supra*.

144. See text accompanying note 130, *supra*.

145. SOTSIALISTICHESKAYA ZAKONNOST (SOCIALIST LEGALITY) 92 (No. 11, 1962).

146. Isanora, *Nekotoryye voprosy vliyaniya aklov planirovaniya na izmeneniye i prekrashcheniye dogovora postavki* (Some Questions of the Impact of Planning Acts on Arbitration and Cessation of a Contract of Delivery) in VYUZI, VOPROSY SOVETSKOGO GRAZHDANSKOGO PRAVA (QUESTIONS OF SOVIET CIVIL LAW) 58-61 (Moscow 1955), cited in Loeber, *supra* note 1, at 163 n.163.

supplier delivered certain products to the purchaser, a factory subordinate to the Ministry of Transport-Machine Building, in compliance with the Ministry's orders. The purchaser refused payment on the grounds that prior to delivery the purchaser had become subordinate to another ministry, which changed the purchaser's industrial profile in such a way that the purchaser now no longer needed the products. The purchaser argued that upon becoming subject to the other ministry's jurisdiction, it (*i.e.*, the purchaser factory) had requested that its previous ministry not to effect delivery. State *Arbitrazh*, however, held the factory liable to pay the purchase price.¹⁴⁷

It seems that this principle is applicable only in cases where loss is *as a result of a new planning act*. In other cases it would seem that the following general rule embodied in article 37 of the 1961 principles applies: "[A] person who has not executed an obligation . . . shall be financially liable [Article 36 of the present Fundamental Principles] only if there is fault [intention or negligence] . . ." ¹⁴⁸

Article 36 of the Principles appears to support the proposition that the above exception is applicable only in cases where loss arises as a result of a new planning act. Article 36 provides that "losses caused by improper performance shall not release the debtor from specific execution of the obligation, except for instances when a planning task on which the obligation between socialist organizations is based has lost force."¹⁴⁹ Thus for example, if a supplier is unable to meet his contractual obligation to deliver a certain product because his production plan is altered by a planning order of a superior agency to whose jurisdiction the producer has been newly subjected, the producer may be subject to a fine for non-delivery under the principle of the 1948 case cited above. Under Article 36, however, the producer would be exempt from specific performance ("specific execution of the obligation")

147. Isanora, *supra* note 146, at 61, *cited in* Loeber, *supra* note 1, at 163-64.

148. Art. 37, para. 1 of the 1961 Principles, *supra* note 29. "Person" here includes the enterprise as a legal person. See *State Arbitrazh*, *supra* note 10, at 1309. If an individual manager appears responsible for a breach, *Arbitrazh* may refer him to the Procurator General for possible criminal sanctions. Procedure for Forwarding to Agencies of the Procurator General Instances of Delivery of Incomplete Products (1964), *id.* at nn.9,128. See also Zile, *supra* note 6, at 219, 239-40.

149. This principle is also expressed in 1959 SDP, *supra* note 59, § 80, and 1959 SDG, *supra* note 59, § 81.

because the old plan, *i.e.*, the source of the obligation, would have "lost force."

A second exception to the general rule that liability arises solely through fault is the principle that defects in planning cannot serve as a release from contractual obligations. In *Moscow Woolen Base v. Troitksy Cloth Factory*,¹⁵⁰ the purchaser sued for damages resulting from the nondelivery of cloth. The supplier's defense was that its superior did not allocate sufficient raw materials to enable the supplier to fulfill its contract with the purchaser. State *Arbitrazh* held the supplier liable on the ground that the absence of raw materials does not serve to relieve a supplier from liability unless the supplier shows that it had done all that it could to secure materials from the superior. In *Stalingrad Office v. Alchevsk Metallurgical Plant*,¹⁵¹ the buyer brought an action on the incomplete delivery of cast iron. The producer's defense was that its Council of National Economy did not allocate the producer enough *fondy*. *Arbitrazh* held the producer liable because it was the latter's responsibility to see to it that the producer was supplied with adequate *fondy*.

Berman observes that "[d]espite the general requirement that there is no liability for breach of contract without fault, the failure of the supplier's own sources of supply is not considered to be a valid excuse for his nonperformance; in such cases a fictitious fault is assumed to exist."¹⁵² Loeber makes the following comment on the stated exception:

It seems harsh to hold a producer liable for nonperformance if his requests for necessary materials were not acted upon by planning agencies. But to decide otherwise would allow producers to use shortcomings of planning authorities as a welcome excuse for their own failures . . . and to rely passively on the mechanism of planning.¹⁵³

To minimize the liability of enterprises for planning errors of superior agencies and to encourage efficient planning, a radical proposal has been made. It has been suggested by one Soviet writer that enterprises be given the right to challenge planning

150. 11 SOV. IUST. 31 (1966); see also *State Arbitrazh*, *supra* note 10, at 1292.

151. Note 113, *supra*.

152. H. BERMAN, *JUSTICE IN THE U.S.S.R.*, *supra* note 19, at 136.

153. Loeber, *supra* note 1, at 148. See *Stalingrad case*, *supra* note 113; cf. *Bobrovsk Insulation Factory v. Khar'kov*, cited in Loeber, *supra* note 1, at 149 n.95.

acts before State *Arbitrazh*.¹⁵⁴ It is presently impossible for an enterprise to challenge or even "sue" a superior agency before *Arbitrazh*. An enterprise may not, for example, sue to rescind an unrealistic delivery order or to recover damages from a superior agency for failure to supply it with the raw materials necessary for the fulfillment of the enterprise's contractual obligations. Currently such disputes are settled by administrative instructions, and such contractual relationships are treated as matters of administrative law rather than matters governed by the civil law of obligations.¹⁵⁵

Some have argued that ever since enterprises have been conferred the right to refuse to conclude contracts for the delivery of unwanted goods,¹⁵⁶ State *Arbitrazh* has had a right to refuse to compel such enterprises to enter into contracts that do not correspond with the economic activity of those enterprises.¹⁵⁷ This argument has been accepted by The Institute of Government and Law of the Academy of Sciences of the USSR, which has asserted that to deny this right to enterprises "would be to nullify the independence of the contracting enterprises . . ."¹⁵⁸

The other circumstance in which specific performance is not compulsory is not connected with new planning acts, but may be mentioned here for the sake of completeness. This involves instances in which one party is allowed to rescind a contract in the event of a unilateral breach by the other. In *Moscow Office v. Power Institute*,¹⁵⁹ the producer was ordered to deliver pipes to the purchaser by February 1958. The producer was not able to fulfill the order in time. In March 1958 the purchaser notified the producer that, in view of the delay, he had managed without pipes. Despite such notification the producer delivered the pipes in May 1958. *Arbitrazh* held that the purchaser was entitled to refuse acceptance of the pipes because the delivery of those pipes was delayed.

154. Kleyn, *Arbitration and the Consolidation of Legality in the National Economy*, U.S. DEPT. OF COMMERCE, U.S.S.R. ECONOMY AND INDUSTRY, GENERAL INFORMATION I, 12 (Pub. No. 42, 813, trans. Joint Publications Research Service, 1967).

155. Loeber, *supra* note 1, at 152-54.

156. See text accompanying notes 62 and 85, *supra*.

157. Kleyn, *supra* note 154.

158. Institute of Government and Law, *quoted in State Arbitrazh*, *supra* note 10, at 1309.

159. 8 Sbornik 47 (1958); see also Loeber, *supra* note 1, at 160 n.148.

D. Contract and Plan Under the 1969 Statutes

In 1965 the Central Committee of the CPSU and the USSR Council of Ministers introduced a program of economic reform designed to stimulate Soviet enterprises to meet demands for a variety of high quality goods. Resolutions adopted by those bodies began a movement toward the decentralization of planning and granted individual enterprises greater freedom of action in the production and distribution of their own goods. In a major policy shift it was directed that the individual contract rather than the centralized plan was to become the basic document determining the rights and obligations of suppliers and purchasers in the delivery of all types of goods.¹⁶⁰ To implement this directive in 1969 Statutes on Deliveries of Producer and Consumer Goods were passed.

1. THE NATURE AND SCOPE OF THE CHANGE

The movement away from central planning and the conferring of greater operational autonomy on enterprises did not, on the whole, introduce very drastic changes. Still less can the new Statutes be interpreted as a return to a free market. The most important changes are outlined below and the extent of their departure from the pre-1969 Statutes will be noted.

Under the old system the supremacy of plan and the subordination of contract to plan was beyond question. In fact, delivery of goods could be carried out even without the conclusion of any contract.¹⁶¹ The purpose of the new statutes is to provide for a combination of centralized state planning with broad economic initiatives for individual enterprises. The statutes were designed to develop rational economic ties between enterprises, promote the further development of economic accountability, heighten the role of the delivery contract in the national economy, and intensify the mutual material responsibility of enterprises.¹⁶²

The feature which is novel in the 1969 legislation is contained in the Statute on Deliveries of Consumer Goods.¹⁶³ The Statute on Deliveries of Consumer Goods permits contracts to be concluded

160. Resolution of the C.C. of the CPSU and the USSR Council of Ministers, Oct. 4, 1965, Res. 4/10/65, § 10(1) (1965).

161. See text accompanying notes 60 and 61, *supra*; 1959 SDP, *supra* note 59, § 5(3); 1959 SDG, *supra* note 59, § 6(4).

162. 1969 SDP, *supra* note 42, § 1; 1969 SDG, *supra* note 42, § 1.

163. 1969 SDG, *supra* note 42, §§ 8(1), 6(2).

on the basis of a purchaser's order to a supplier *prior* to the issuance of planning acts. In this way, the contract is regarded as an instrument not for ending the planning process but for beginning it. The individual supplier's production plan, on the basis of which the state production plan is drafted, is therefore itself based on the contracts it has concluded.

Before an enterprise contracts with another, however, it must first be "attached" to that enterprise by a "plan of attachment" of a superior agency. Upon notification of attachment the parties may enter into contractual relations. The notification of attachment includes a specification of the overall volume and assortment of goods to be delivered during the year.¹⁶⁴ The specifications comply with the long-range plan for the development of the national economy. With the information in the notice of attachment, the purchaser presents its order to the supplier, specifying the desired goods by name, type, *etc.*, as well as their quality, quantity and the time period for delivery.¹⁶⁵ The order becomes a contract for delivery upon acceptance in writing by the supplier.¹⁶⁶

As for producer goods, the 1969 Statute on Deliveries of Producer Goods retains with some modification the old system under which contractual relations between supplier and purchaser are established; *i.e.*, contracts are concluded after the issuance of a *nariad*. The purchaser, however, has an unrestricted right to refuse to enter into the contract, and the supplier can do the same if he believes that the *nariad* does not conform to the production plan. The issuing agency must decide the matter within ten days of notification of the refusal. If that agency fails to make a ruling within ten days it is deemed to have accepted the refusal.¹⁶⁷ The matter can ultimately go to *Arbitrazh*. Either party can take the initiative to seek an *Arbitrazh* decision,¹⁶⁸ unlike the old system under which it was the supplier's responsibility to submit a pre-contract dispute to *Arbitrazh*.

It will be recalled that, even prior to 1969, under Point 8 of the 1962 Decree of the USSR Council of Ministers,¹⁶⁹ enterprises

164. 1969 SDG, *supra* note 42, § 8(1).

165. *Id.*, § 9(2).

166. *Id.*, § 13(1)(a).

167. 1969 SDP, *supra* note 42, §§ 9(3), 13(1)-(2).

168. *Id.*, § 26(4); 1969 SDG, *supra* note 42, § 22(4).

169. Decree of the Council of Ministers of the USSR, "On Further Improvement of the Procedure for Conclusion of Contracts of Delivery of Equipment and Materials for the Use of Enterprises and Organizations," June 30, 1962, 5 RESHENIYA PARTII PRAVITEL'STVA PO KHOZIAISTVENNYM VOPROSAM 1917-67 gg., 658 at 127 (Moscow 1968).

had the right to refuse to sign contracts for the supply of unwanted goods. Under both the 1962 Decree and the new statutes, the period for refusal is ten days. Furthermore, in the pre-1969 period, *Arbitrazh* could relieve a party of the obligation to take delivery on grounds of "economic expediency."¹⁷⁰

As pointed out above, the purchaser's right to refuse was exercisable under the old system for "superfluous" or unneeded goods. Under the 1969 Statute on Deliveries of Producer Goods such qualifying adjectives have been omitted. Speer regards such omission as conferring an unrestricted right of refusal.¹⁷¹ The 1969 Statute on Consumer Goods, however, retains the words "superfluous" and "unneeded." It seems anomalous that a wider right should be conferred with respect to producer goods when in fact it is the Statute on Deliveries of Consumer Goods which seeks to confer greater operational autonomy on enterprises than the Statute on Deliveries of Producer Goods. It seems better to view the post-1969 law as introducing no change from the previous system, under which State *Arbitrazh* practice suggests that regardless of words such as "superfluous" or "unneeded," the purchaser has an unfettered discretion to reject such goods.

Under the new Statutes a *nariad* "accepted for execution" can itself acquire the force of a contract without the need for a new agreement.¹⁷² Just as under the pre-1969 Statutes, *nariady* accepted and executed before the conclusion of a contract, or planning acts defining all the details of the contract, could automatically be substituted to govern the rights and duties of the parties concerned regardless of the existence or nonexistence of a contract between them.¹⁷³ Under the 1969 legislation, however, either party may now require that the contract formed through acceptance of a *nariad* be formalized by a separate contract between the parties.¹⁷⁴ The supremacy of plan over contract in these questions, therefore, remains unaffected.

Further evidence of the supremacy of plan over contract can be found in the provisions concerning the amendment and dissolution of contracts in the light of planning acts. If a contract is con-

170. Zamengof, *supra* note 11, at 29; Loeber, *supra* note 1, at 146; Speer, *supra* note 9, at 527.

171. Speer, *supra* note 9, at 528.

172. 1969 SDP, *supra* note 42, §§ 19(b), 24(1); 1969 SDG, *supra* note 42, § 20(1), (2).

173. See text accompanying notes 59-61, *supra*.

174. 1969 SDP, *supra* note 42, § 24(3); 1969 SDG, *supra* note 42, § 20(3).

cluded prior to the issuance of the plan and the details of a subsequently issued plan require an amendment or dissolution of the contract, such amendment or dissolution must be formalized in writing in a supplementary agreement signed by both parties.¹⁷⁵ This applies to *all* contracts, including those contracts involving consumer goods, concluded prior to the issuance of planning acts. Not only does this legislation reaffirm the old principle that changes in planning acts require corresponding modifications in and, if necessary, dissolution of existing contracts,¹⁷⁶ but this legislation also reflects the ultimate supremacy of the plan. The view that was dominant among Soviet as well as Western writers before 1969,¹⁷⁷ that failure to incorporate necessary changes in contracts leads to the automatic substitution of the relevant provisions of the new planning act, would therefore still apply. The *Arbitrazh* practice holding that party whose superior agency issued the new plan responsible for loss arising from such change would likewise still apply.¹⁷⁸

In *Armatura v. Bezostroi*, the plaintiff, pursuant to a contract, sold ventilators and cranes to the defendant in 1934. In November of the same year the defendant gave the plaintiff an application for the purchase of more of the same products in 1935. The plaintiff subsequently manufactured the products, but the defendant refused to execute a contract because its fund for 1935 had been reduced. In the lawsuit that resulted, *Arbitrazh* held that "an application regarding requirements for the following year is a document subject to be corrected and made detailed . . . by planning and regulating organs and cannot be viewed as creating an obligation in the maker . . . to accept and pay for the product mentioned in the application."¹⁷⁹ The principle thus embodied in *Armatura* is that existing contracts must be modified to reflect subsequent changes in plans. But this principle may similarly apply to post-1969 cases if, for example, a *nariad* for producer goods is at variance with a pre-contract arrangement between two enter-

175. 1969 SDP, *supra* note 42, §§ 26(3), 27(4); 1969 SDG, *supra* note 42, § 22(3), 23(4).

176. See Section III, C, *supra*.

177. Zamengof, *supra* note 11, at 30; Dozortsev, *id.*, at 34 n.22; Loeber, *supra* note 1, at 155, 159; and Ioffe, *id.*, at 155 n.128.

178. See text accompanying notes 145-46, *supra*.

179. *Armatura v. Bezostroi*, Shkundin, *Planned Task and Contractual Obligation*, SOVIET STATE AND LAW 84-85 (No. 7, in Russian, 1940), cited in Berman, *Commercial Contracts*, *supra* note 5, at 225-26, Case 1.

prises, or if a new planning act is issued modifying relevant specifications.

Speer argues that a purchaser's order to a supplier constitutes an "offer" under the 1969 Statutes, but that such an order under the pre-1969 Statutes was not an "offer" but a "pre-plan contract through which an individual enterprise's projected production plan for the forthcoming year could be drafted and the state production plan drawn up."¹⁸⁰ Since the contract could be drawn up only after the issuance of the plan, the purchaser's order could not, in his opinion, be an "offer." This, however, is not of much *practical* significance for three reasons. Firstly, even in the pre-1969 period there was a widespread practice showing purchasers and suppliers concluding contracts *prior* to the issuance of *nariady* by simply referring to the as yet unissued *nariad* as the indicator of the contract terms.¹⁸¹ Secondly, as pointed out by Berman, Bratus and Alekseev, the plans of superior agencies were, in practice, concluded in the light of draft plans and requests submitted to them by lower enterprises.¹⁸² Thirdly, Speer himself points out that a purchaser's pre-plan order "did have the essential characteristics of an 'offer,' which, if accepted, bound purchaser and supplier to conclude a corresponding contract if the plan, when issued, so permitted."¹⁸³ Speer further points out that this was often supported by *Arbitrazh* practice. Speer thus stipulates two additional conditions for his "offer": acceptance, and permission by plan. One may justifiably ask whether Speer is not confusing the concept of offer with that of the contract itself. It would indeed be a novel definition which asserts that an offer is only an "offer" after it has been "accepted."

For these reasons the argument that under the 1969 Statutes a purchaser's order is an "offer," while under the previous statutes it was a "pre-plan contract" is really academic. Legal niceties such as the distinction between an "offer" and a "pre-plan contract" did not affect the actual freedom enjoyed under the old statutes. It must, however, be pointed out that under the previous statutes the supplier could ignore a pre-plan purchaser's order, while under

180. Speer, *supra* note 9, at 522.

181. *Id.* at 520.

182. H. BERMAN, JUSTICE IN THE U.S.S.R., *supra* note 19, at 139-40; Bratus & Alekseev, *supra* note 69, at 26; see also notes 69-72, *supra*, and accompanying text.

183. Speer, *supra* note 9, at 522-23.

the 1969 Statutes the supplier *must* reply to the order, either by accepting the order or by sending to the purchaser a draft contract setting forth its own terms.¹⁸⁴ This procedure is similar to the process of filing a protocol of disagreement under the old statutes.¹⁸⁵

It must also be emphasized that in concluding a pre-plan delivery contract under the present law the parties have considerably greater freedom in establishing their contract terms than they enjoyed previously. Guided by the overall volume of goods projected for production and distribution in the forthcoming year and the long-range plan for the development of the national economy, the parties determine the quantity of goods to be delivered, the detailed assortment of the goods, and the time of their delivery.¹⁸⁶ Free agreement as to such details and other contractual terms is always subject to conformity with the plan when it is issued. Any discrepancy between the contract and the plan must be rectified by modification of the contract.¹⁸⁷

With regard to the disposal of non-plan goods, the pre-1969 law allowed a party to sell such goods to any purchaser independently of any planning agency. If the parties could not agree on the terms, the matter had to go *Arbitrazh* which, in effect, involved the intervention by a state agency (*i.e.*, *Arbitrazh*) though not the regular planning agency.¹⁸⁸ Under the 1969 Statutes a dispute between a prospective supplier and prospective purchaser over the terms of a contract for delivery of non-plan goods can be submitted to *Arbitrazh* for resolution only if the parties have agreed on the essential terms of the contract.¹⁸⁹

2. DEFECTIVE DELIVERIES AND FINES

No drastic changes have been introduced by the 1969 Statutes regarding the quality and completeness of goods delivered. Under the old regime the parties could stipulate a quality that was higher than that required by State Standards or Technical Conditions.¹⁹⁰ If the goods delivered did not meet the stipu-

184. 1969 SDP, *supra* note 42, § 22(4); 1969 SDG, *supra* note 42, § 18(1).

185. 1959 SDP, *supra* note 59, § 16(1); 1959 SDG, *supra* note 59, § 12(3).

186. 1969 SDP, *supra* note 42, § 6(1), 27(1), (2), (6), 29(1); 1969 SDG, *supra* note 42, §§ 6(2), 23(1)(2), 24(1), 26(1).

187. Speer, *supra* note 9, at 523.

188. *Id.* at 529-30.

189. 1969 SDP, *supra* note 42, § 23(2); 1969 SDG, *supra* note 42, § 19(2).

190. 1959 SDP, *supra* note 59, § 36(1); 1959 SDG, *supra* note 59, § 33(1); Speer, *supra* note 9, at 532.

lated higher standards, and met only the State Standard, the purchaser could either reject the goods or pay for them without the stipulated surcharge (*i.e.*, the charge in excess of that appearing in the price list).¹⁹¹ Under the new Statutes, if goods delivered meet only the State conditions and fail to meet the higher stipulated conditions, the purchaser has the same options previously available.¹⁹² The 1969 Statutes provide, however, that any fine imposed for defective delivery is to be stipulated by the parties themselves,¹⁹³ whereas the previous statutes made no provision whatsoever for the imposition of fines for defective delivery. This lacuna was, however, filled by the State *Arbitrazh*, which ruled that in such cases the fine would be the same as that specified for delivery of goods not conforming to State Standards if the parties had so specified.¹⁹⁴ The parties may now stipulate fines beyond those specified in the State Standards.¹⁹⁵ This reflects the growing official concern over the large number of contractual disputes involving defects in quality. Over twenty percent of *Arbitrazh* cases involve complaints over quality.¹⁹⁶ The increased freedom of parties to provide for higher fines is therefore an attempt to promote improvement in quality.

If the goods delivered do not conform to State Standards or Technical Conditions the purchaser, under both the previous as well as the new Statutes, has a duty to refuse to accept or pay for the goods and to bring suit to exact a fine from the supplier.¹⁹⁷ The prohibition against the granting of "amnesty"¹⁹⁸ still applies. In a 1962 ruling State *Arbitrazh* declared that an agreement between the supplier and purchaser under which the supplier was to replace defective goods at no extra charge and without the return to the supplier of the goods originally delivered, could not relieve

191. RSFSR CIVIL CODE of 1964, art. 160, para.4. For an English translation see W. GRAY & R. STULTS, CIVIL CODE OF THE RSFSR (1965). Under the 1959 Statutes the purchaser had the right to refuse goods as unordered. 1959 SDP, *supra* note 59, § 54(1)(a); 1959 SDG, *supra* note 59, § 52(1)(a).

192. 1959 SDP, *supra* note 59, § 63(1); 1959 SDG, *supra* note 59, § 64(1).

193. 1969 SDP, *supra* note 42, § 63(2); 1969 SDG, *supra* note 42, § 64(2).

194. Instructive Letter of July 31, 1963, No I-1-37, 25 Sbornik 42, 45 (1966) *cited by* Speer, *supra* note 9, at 533, n.121.

195. 1969 SDP, *supra* note 42, § 47(7); 1969 SDG, *supra* note 42, § 47(7).

196. *State Arbitrazh*, *supra* note 10, at 1299.

197. RSFSR CIVIL CODE of 1964, art. 261; *see also* Zile, *supra* note 6, at 239; and Liberman, *supra* note 31, at 48.

198. *See* text accompanying notes 93-97, *supra*,

the supplier of his liability to pay the stipulated fine for the delivery of defective goods.¹⁹⁹ This rule remains unchanged, and if an attempt is made by one party to protect the other from the imposition of a fine, *Arbitrazh* may, upon discovery, direct that the mandated fine be paid to the USSR. Treasury instead of to the party normally entitled to that fine.²⁰⁰ The prohibition placed upon the waived fines applies to *all* contracts and thus is not confined to those involving defective delivery. Thus, although enterprises have been given greater powers to stipulate higher fines for the nonfulfillment of contractual obligations, those enterprises have no corresponding freedom to waive fines.²⁰¹

One way in which a buyer can protect himself from the seller's charge that a delivery was in fulfillment of contractual obligations and that the buyer's refusal to accept the goods delivered was a unilateral breach is by promptly filing a Protocol of Disagreement. This issue has already been discussed in a previous section and will therefore not be discussed here.²⁰² Also discussed elsewhere is the question of nonconforming delivery (*i.e.*, delivery at variance with the contract) as a result of changes in plan.²⁰³ The 1969 legislation does not affect the principles discussed under those heads.

Another relevant issue is the compensatory nature of fines. Both the pre-1969 Statute and the 1969 Statutes stipulate that if a fine paid by one party for breach of a contractual obligation does not equal the other party's losses, then the party in breach must reimburse the other for the amount of loss not met by the fine.²⁰⁴ As pointed out above,²⁰⁵ however, Article 37 of the 1961 Principles specifies that the nonfulfillment of the contractual obligation must be due to the *actual fault* of the party in breach if liability is to be imposed. Thus, when the liability of a party is due to a statutory fine, fault is presumed. But if a party sues for a loss that is not

199. Instructive Letter of Mar. 29, 1962, No. I-1-9, 19-20 Sbornik 11, 14 (1962) *cited by* Speer, *supra* note 9, at 535, n.132.

200. Speer, *supra* note 9, at 535.

201. 1969 SDP, *supra* note 42, § 85(3), (4); 1969 SDG, *supra* note 42, § 87(2)-(7).

202. See text accompanying notes 104-107, *supra*; in particular see *Pavlodarsky Tractor Factory v. "Armmashsnabsbita,"* text accompanying notes 107-108, *supra*.

203. See Section C, 3, *supra*.

204. 1959 SDP, *supra* note 59, § 80(1); 1959 SDG, *supra* note 59, § 81(1); 1969 SDP, *supra* note 42, § 88(1); 1969 SDG, *supra* note 42, § 90(1).

205. See text accompanying note 148, *supra*.

covered by a fine, the other party may escape liability only by showing that the breach of the contract terms was not occasioned by his own fault. It has already been suggested above that this general rule admits exceptions in two cases. Firstly, when new planning acts have been issued and make performance impossible, that party whose superior agency issued the act will be held responsible for the loss regardless of fault.²⁰⁶ The second exception is the rule that defects in planning cannot be pleaded as a defense in a suit for nonperformance or defective delivery.²⁰⁷

Finally, it may be observed that an important element of contracts between Soviet business enterprises is the penalty clause. If the parties fail to insert such a clause it will be supplied by *Arbitrazh* when it is asked to decide a dispute arising from the contract.²⁰⁸ Thus, enforcement and penalties are to be worked out primarily through horizontal contractual relationships. If, however, the parties fail to provide for such enforcement and penalties, a vertical duty from a higher agency (*e.g.*, *Arbitrazh*) can always be imposed.²⁰⁹ This reflects the well-established principle that the enforcement of fines is not only the right of the injured party but also a duty of the State.²¹⁰

This vertical duty is operative even when a party against whom the fine is to be imposed can show that the other party has also violated the law. For example, a supplier who has made substandard delivery cannot escape liability even if he can prove that the purchaser failed to return the goods or has accepted a replacement of the goods. In such a situation the vertical duty operates against both parties; not only is the supplier fined but the fine may be made payable in whole or in part to the Union budget instead of to the purchaser. In this way both parties are punished.²¹¹ In some cases the acts of the purchaser may diminish or even extinguish the liability of the supplier. For example, the purchaser

206. See text accompanying notes 145-48, *supra*.

207. See text accompanying note 150, *supra*.

208. Instructive Letter of the State Arbitration Agency of the USSR Council of Ministers, Mar. 29, 1964, *cited in* Liberman, *supra* note 31, at 48. In *Orsk-Khabilovo Iron & Steel Combine v. Chirchik Electrical Machinery*, *id.* at 49, *State Arbitrazh* imposed a fine for incomplete delivery to the extent of 15 percent of the value of the incomplete set of deliveries.

209. *Chelyabinsk Office of "Rosbakalei" v. Uvorovsky Sugar Plant*, 18 Sov. IUST. 31, (1967), *cited in* *State Arbitrazh*, *supra* note 10, at 1299-1300.

210. See text accompanying note 98, *supra*.

211. Liberman, *supra* note 31, at 51; Fal'kovich & Barash, *supra* note 20, at 58.

may store perishable goods in such a way as to hasten their deterioration or he may do other acts that make it impossible to determine whether the supplier sent substandard goods. In all such cases the 1969 Statutes do not affect Article 37 of the Principles of Civil Legislation which allows arbitration agencies to reduce the liability of the supplier or to completely exonerate him. Also unaffected by the 1969 Statutes is *Arbitrazh* power to levy costs against the party bringing suit if the party bringing suit violated any law concerning the delivery and acceptance of products, the initiation of the suit, *etc.*²¹² Costs usually consist of a government fee payable for each suit and payment to experts, if any were called.²¹³

E. Conclusion

Contracts in the Soviet Union have a dual function. They serve as a mechanism for the centralized regulation of the economy as well as serving to provide some means through which individual economic enterprises may exercise initiative. It appears preferable to view the institution of contract as a plan-implementing mechanism rather than as a legal device through which enterprises can escape and exercise a function independently of the plan. Contracts implement the plan to the last detail by creating legal obligations between enterprises, and provide a mechanism for the imposition of fines for the nonperformance of plan tasks. As Loeber observes:

[C]ontracts—and only contracts—create those reciprocal and equivalent relations which characterize money-commodity exchanges between equal economic partners. This element of reciprocity so essential to any economic activity and initiative is missing the sphere of planning To inject spontaneity into the working of a planned economy . . . contracts . . . were introduced They are considered to be the optimum means for linking the principles of planning with the principles of economic rationality.²¹⁴

It is of course true that since the early 1950's the trend has been toward contractual independence, and the 1965 and 1969 reforms mark the culmination of this trend. Yet these reforms have been introduced to minimize or to reduce the rigid bureau-

212. Fal'kovich & Barash, *supra* note 20, at 62.

213. Points 42, 44 and 45 of the 1963 Rules, *supra* note 26.

214. Loeber, *supra* note 1, at 165.

cratization of economic control, and at the same time to facilitate plan implementation.

The institution of *Arbitrazh* is, in many ways, an ingenious device that serves as watchdog over the plan-implementing process. Having such powers as the power to go beyond the claims of the parties, to grant relief or levy fines that may not have been sought, to add or sever a party, to initiate suits, and to settle disputes as part of its public function of day-to-day economic administration gives the institution something more than a purely judicial role in the regulation of the socialist economy. The judicial aspect of its function has led to the establishment of a vast body of case law which has had the welcome effect of introducing stability and predictability after the havoc caused during the post-1917 years by attempts to regulate the economy without contracts. The devices of Instructive Letters and Informative letters may be regarded as judicially guided administrative instructions which serve the same end. In this way *Arbitrazh*-made law has made important contributions to such vital fields of contract law as improper performance, change of contract terms *vis-a-vis* changes in planning acts, dissolution of contracts, defective delivery, and the imposition of fines.

It is primarily the work of the institution of *Arbitrazh* that has molded for contracts the role of a plan-implementing mechanism. Its power to resolve what are known as "pre-contract" disputes embodies a doctrine that rights and duties can arise prior to the conclusion of contracts and can, for this reason, be the subject of pre-contract litigation. This theory leads to the conclusion that the ultimate source, or the "Grundnorm" to use Kelsenian terminology, of these rights and duties is the plan.

Furthermore, it appears that the fewer the number of plan indicators, the greater is the leeway for contractual negotiation and maneuvering between individual enterprises. Such leeway may, however, increase the number of pre-contract disputes because those items previously governed by plan indicators have to be resolved by the parties. It can be seen therefore that not only is the plan the source of pre-contract obligations, but the greater the scope for pre-contract negotiation the greater the degree of independence and initiative at the individual enterprise level. The conferring of juridical personality on the economic enterprise and the introduction of the principle of economic accountability as the

basis of its operations would seem to be a natural extension of the principle of operative independence. A future development, further strengthening this independence, may well be the creation of a right on the part of a subordinate enterprise to sue a superior agency for errors in planning, or to challenge the validity of particular planning acts. Alternatively, *Arbitrazh* power to join or sever a party may be extended so as to enable it to join a superior agency of one of the subordinate enterprises party to the case before it, and to render an award against the agency rather than its subordinate enterprise.

The foregoing presupposes the creation of procedural safeguards for the unfettered freedom of enterprises to initiate suits. As suggested above, procedural safeguards are weak even in those areas where statutory rights have been conferred on enterprises.

III. PART II: *FOREIGN TRADE AND THE PLANNED ECONOMY*

This part will examine the place of foreign trade within the planned economy. Specifically, it is intended to examine the legal and institutional framework for the conduct of foreign trade by the Soviet Union, the relationship between foreign trade and domestic industry, and the resolution of contractual disputes between Soviet foreign trade agencies and foreign businessmen. This part will finally examine the legal aspects of East-West joint ventures in the Soviet Union within the context of the plan.

A. The Legal and Institutional Framework—An Overview

External business relations for the Soviet Union are based on the fundamental principle of state monopoly of foreign trade, first proclaimed in 1918 by the Decree on the Nationalization of Foreign Trade.²¹⁵ Article 1 of the Decree provides, in part, that transactions for the purchase or sale of any product with foreign states or individual trading enterprises shall be carried out in the name of the Russian Republic by specially authorized agencies.

215. Decree of the Council of People's Commissars of April 22, 1918, "On the Nationalization of Foreign Trade." Reprinted in J. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY: INSTITUTIONS AND LAWS*, 202 App. B (1974). See generally, H. Berman & G. Bustin, *The Soviet System of Foreign Trade* in *BUSINESS TRANSACTIONS WITH THE U.S.S.R.* 25 (R. Starr ed. 1975).

The concept of monopoly was reiterated in 1922 by another decree²¹⁶ and then again in 1925 by a resolution²¹⁷ adopted by the Central Committee of the Communist Party of the Soviet Union. The resolution provided in part that the essence of the foreign trade monopoly:

[i]s that the State itself carries out management of foreign trade . . . establishes which organizations may carry out actual foreign trade operations in which branches and in what volume; determines working toward the goals of improving the economy . . . by means of an export-import plan, what and in what quantities may be exported from the country and what may be imported into it; and it directly regulates import and export and the operations of foreign trade organizations through a system of licenses and quotas.²¹⁸

The agency in which the monopoly is vested and which is responsible for the overall coordination of Soviet foreign trade is the Ministry of Foreign Trade. The Ministry was created solely for this purpose in 1953.²¹⁹

In the years immediately following its creation, the foreign trade monopoly of the Ministry of Foreign Trade was extensive. However, during the period of decentralization following the death of Stalin, and especially as the Soviet Union emerged as a major industrial power, the complexities of trade and foreign business relations could not be handled by a single Ministry alone. A number of functions and agencies have been transferred out of the Ministry of Foreign Trade to promote greater efficiency in the management of foreign trade. The most important of these is the Committee on Inventions and Discoveries formed in 1955 and given concurrent authority with the Ministry of Foreign Trade

216. Decree on Foreign Trade, Mar. 13, 1922, cited in Osakwe, *Legal and Institutional Barriers to United States-Soviet Trade: Soviet Perspective*, 8 VAND. J. TRANSNAT'L L. 83, 95 n.34 (1974) [hereinafter cited as Osakwe, *Barriers to United States-Soviet Trade*]

217. Resolution of the Plenum of the Central Committee of the Worker-Peasant Party (Bolsheviks) on Foreign Trade, Oct. 5, 1925, para. 2. Reprinted in J. QUIGLEY, *supra* note 215, at 206 App. C.

218. J. QUIGLEY, *supra* note 215, at 206. The monopoly concept has also been restated in art. 73(10) of the new Soviet Constitution of 1977. See CONSTITUTION (BASIC LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, adopted by the USSR Supreme Soviet, Law of Oct. 7, 1977, reproduced in W. BUTLER, *supra* note 7, at 3.

219. Decree of August 24, 1953, creating the Ministry of Foreign Trade, 1 Sbor. Zak S.S.S.R. 268 (1968).

over the patenting of Soviet inventions abroad.²²⁰ The Committee acquired the power in 1961 to sell licenses for Soviet products abroad and to recommend to the USSR Council of Ministers the purchase of licenses to foreign products.²²¹ The Committee also shares its functions with what is now the State Committee for Science and Technology, created in 1965 and reorganized in 1966.²²² Another important agency is the State Committee of the USSR Council of Ministers for Foreign Economic Relations, which was created in 1957.²²³ All the above agencies work in close collaboration with the Ministry of Foreign Trade.

Other important agencies involved in Soviet foreign trade are the State Planning Committee of the USSR Council of Ministers (*Gosplan*);²²⁴ the Ministry of Finance, which sets the limits to the amount of foreign currency that can be used by the Foreign Trade Ministry to purchase goods abroad; the state agency for foreign insurance, *Ingosstrakh*; the State Bank of the USSR; the USSR Ministry of Merchant Marine, which has responsibility over international maritime shipping; and the All-Union Chamber of Commerce, which, apart from arranging trade exhibits to promote sales abroad, also operates two arbitration tribunals. The arbitration tribunals are the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission.²²⁵

Although control of Soviet foreign trade is separated from the control of domestic trade, foreign trade is, like domestic trade,

220. Art. 3(a) of the Statute on the Committee on Inventions and Discoveries of the USSR Council of Ministers, confirmed by Decree of the USSR Council of Ministers, No. 274, Feb. 23, 1956, cited in J. QUIGLEY, *supra* note 215, 96 n.15.

221. Art. 6 of the Methodological Instructions on the Procedure for Preparing Materials on the Sale and Purchase of Licenses Abroad, promulgated by Decree of the Committee on Inventions and Discoveries of the USSR Council of Ministers, Dec. 19, 1961, cited in Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 98 n.49.

222. Statute on the State Committee of the USSR Council of Ministers for Science and Technology, confirmed by Decree of the USSR Council of Ministers, October 1, 1966. For English text, see W. BUTLER, *supra* note 7, at 129.

223. Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 98.

224. See Statute on the State Planning Committee of the USSR Council of Ministers (*Gosplan SSSR*), confirmed by Decree of the USSR Council of Ministers, Sept. 9, 1968, as amended Oct. 3, 1977. For English text, see W. BUTLER, *supra* note 7, at 123.

225. See J. QUIGLEY, *supra* note 215, at 76-79. For the resolution of foreign contractual disputes by way of the Foreign Trade Arbitration Commission see C. Norberg & D. Stein, *Arbitration of US-USSR Trade Disputes* in *BUSINESS TRANSACTIONS WITH THE USSR*, *supra* note 215, at 175. See also H. Berman & G. Bustin, *supra* note 215, at 49-53, and text accompanying notes 256-57, *infra*.

determined by the requirements of the national economic plan. The State Planning Committee (*Gosplan*) receives draft foreign trade plans from the Ministry of Foreign Trade, which in turn are determined by draft plans that the Ministry receives from the foreign trade agencies themselves. *Gosplan* then draws up final foreign trade plans as part of the overall national economic plan which is then approved by the USSR Council of Ministers and later confirmed by the Supreme Soviet. Under Article 3 of its Statute, *Gosplan* is required in its plans to provide for the "expansion of international economic cooperation and raising the efficiency of foreign trade."²²⁶

More specific definition of *Gosplan's* powers and responsibilities in foreign trade is given in Article 4 of the Statute:

4: There shall be entrusted to Gosplan SSR:

. . . .

(i) the preparation with the participation of USSR ministries and departments and union republic councils of ministers of proposals concerning the development of foreign economic ties of the USSR, the improvement of inter-state specialization and cooperation of production, the coordination of plans for the development of the USSR national economy with the national economic plans of other member countries of the Council of Mutual Economic Assistance;

(j) the working out with the participation of the Ministry of Foreign Trade, the State Committee of the USSR Council of Ministers for Foreign Economic Relations, USSR ministries and departments, and union republic councils of ministers on the basis of draft plans compiled by them, draft plans for the import and export of goods, as well as draft plans for the delivery of equipment and materials for objects being built abroad with the technical assistance of the Soviet Union;

(k) the drawing up jointly with the USSR Ministry of Finances on the basis of draft currency plans submitted by USSR ministries and departments and by union republic councils of ministers to draft composite annual currency plans (or payment balances), as well as reports concerning the fulfillment of such plans. . . .²²⁷

226. Article 3 of the Statute on The State Planning Committee of the USSR Council of Ministers (*Gosplan SSSR*), *supra* note 224.

227. *Id.* art. 4(i)(j)(k).

B. Some Important Principles of Soviet Import-Export Law

1. OPERATIONAL PRINCIPLES OF FOREIGN TRADE

Today there are approximately sixty-nine Soviet import-export agencies or combines carrying out the bulk of Soviet foreign trade.²²⁸ For export purposes, each combine purchases goods from domestic economic enterprises and sells the goods abroad in accordance with the export and import plan which has previously been drawn up as described above by the superior state agencies, the Foreign Trade Ministry, *Gosplan*, the USSR Council of Ministers and the Supreme Soviet.

Each combine and production enterprise receives an export plan from the appropriate ministry. The plan creates an administrative obligation owed by each combine to the Ministry of Foreign Trade, and is fulfilled by the issuing of "order-requisitions" (*zakazymariady*) by each combine to the production enterprise[s] named in the plan. For the production enterprises, the order requisition creates an administrative obligation to its ministry to comply with the combine's order.²²⁹

Under the Condition of Delivery of Goods for Export issued by the Ministry of Foreign Trade, of January 26, 1960, the combine's order must indicate the plan under which the order has been issued as well as the name of the goods required, their basic technical data, quality, quantity, packaging, and shipment dates.²³⁰

If any of these conditions becomes disputed after the order has been made, there is no arbitral remedy available as in the case of domestic contract disputes. Indeed, the transaction between combine and enterprise is not a contract, but the order of the combine is binding on the enterprise. This binding effect puts the enterprise at a considerable disadvantage, which is further compounded by the power of a combine to unilaterally modify an order which has already been issued if such modification "is required by

228. For a list of the combines (with names and description of goods dealt in) see Loeber, *Capital Investment in Soviet Enterprises? Possibilities and Limits of East-West Trade*, 6 ADEL. L. REV. 338, 356 (1977-78 hereinafter cited as *Capital Investment*); Osakwe, *Legal Aspects of Soviet-American Trade: Problems and Prospects*, 48 TUL. L. REV. 536, 554-59 (1974).

229. J. QUIGLEY, *supra* note 215, at 129; H. Berman & G. Bustin, *supra* note 215, at 62.

230. Article 12 of the Conditions of Delivery of Goods for Export, Order of the Minister of Foreign Trade, Jan. 26, 1960, No. 25, excerpt reprinted in J. QUIGLEY, *supra* note 215, at 219 App. G.

conditions of sale of the goods to foreign purchasers."²³¹ An order may also be modified or cancelled if there is a ministerial prohibition of trade relations with the country in question, or if there is a change of plan by a superior agency (e.g., the Council of Ministers or the Ministry of Foreign Trade). This situation is not different from the automatic effect of changes in plan on domestic contracts.²³²

Article 28 of the 1960 Conditions of Delivery of Goods for Export establishes guarantee periods that bind the supplier-enterprise.²³³ If a longer period of guarantee is required by a foreign purchaser, such a period can be negotiated between the combine and the supplier-enterprise.²³⁴ Similarly, the foreign purchaser is not bound to accept the standards of quality and packaging specified in the 1960 Conditions, and may stipulate higher standards. The combine may then stipulate the higher standards in its order to the supplier-enterprise and compensate the supplier-enterprise for the extra expense.²³⁵

As with the export of goods, there is a plan for the import of goods and for their distribution inside the Soviet Union. The plan specifies what goods are to be imported by the various combines, in what quantities, from which countries, and how they are to be paid for.²³⁶ Here the individual enterprises have a greater say. As the end users of the imported goods, the individual enterprises are allowed to apply to their ministry for import goods as an early stage. The Ministry takes these applications into account before submitting its own overall import application to *Gosplan*.²³⁷ Once the plan has been confirmed, the USSR Council of Ministers issues import permits to various supply-and-sales agencies which, in turn, deliver to the appropriate combine "import-commissions" requesting the combine to contract with a foreign supplier for the goods in question.²³⁸ The combine may contract with any foreign supplier as long as the foreign supplier is located within the country specified in the import plan. The prudent foreign supplier

231. *Id.* art. 19.

232. See text accompanying note 129, *supra*.

233. Article 28 of the "Conditions of Delivery of Goods for Export," note 230, *supra*.

234. *Id.*

235. *Id.* art. 35.

236. J. QUIGLEY, *supra* note 215, at 163.

237. *Id.* at 164.

238. *Id.* at 165.

would therefore wish to ensure not only that the particular goods have been authorized for import into the USSR, but also that the goods in question can be imported into the USSR *from his country*. This may not necessarily be problematic for the foreign supplier since in addition to the import permit already issued by the Council of Ministers to the supply-and-sales agency, the combine itself has to obtain an import license from the Ministry of Foreign Trade before it can contract with a foreign supplier. Before issuing the license to the combine the Ministry will carefully check the combine's proposed foreign supplier, the foreign supplier's country, and the proposed terms of the transaction.²³⁹

In the event of any dispute over the imported goods it is the combine's duty to use or settle with its foreign business partner and pass on to the supply-and-sales agency, or the end user of the imported goods, whatever it is able to obtain from the suit or settlement.²⁴⁰

Most of Soviet foreign trade is carried out by a number of export-import agencies or combines. Each combine is a juridical person under Soviet law and specializes in a group of commodities drawn up by the Minister of Foreign Trade in the form of a list which is generally included in the combine's constituent instrument.²⁴¹ A combine specializing in one group of commodities may not deal in any other unauthorized commodity, otherwise the deal may be *ultra vires* and therefore unenforceable.²⁴² The foreign businessman should therefore ensure that the transaction in question is authorized by his Soviet partner's commodities list.²⁴³ Other commodities can be added to a combine's list by means of *ad hoc* authorization from the Foreign Trade Ministry.²⁴⁴ In the event of

239. H. Berman & G. Bustin, *supra* note 215, at 63; J. QUIGLEY, *supra* note 215, at 167.

240. In 1960, in a case concerning the Minsk Raw Materials Center and the combine *Raznoexport*, the combine was compelled by order of State *Arbitrazh* of the USSR Council of Ministers to settle a dispute as to the quality of goods it had imported from a foreign supplier, *cited in* J. QUIGLEY, *supra* note 215, at 170.

241. Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 104. *See also* H. Berman & G. Bustin, *supra* note 215, at 46.

242. H. Berman & G. Bustin, *supra* note 215, at 46; J. QUIGLEY, *supra* note 215, at 116.

243. Article 50 of the RSFSR Civil Code, *reprinted in* W. GRAY & R. STULTZ, *supra* note 191. Under Article 49 of the RSFSR Civil Code, a contract contrary to the interests of the state or against public policy is void *ab initio*. The foreign businessman should therefore be aware that other Soviet statutes in addition to the combine's charter may govern the transaction in question.

244. Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 105.

any doubt as to a particular combine's authority, the combine's foreign business partner could always insist that the combine seek clarification, approval or further authorization, as the case may be, from the Ministry of Foreign Trade.

2. FORMAL REQUIREMENTS FOR THE CONCLUSION OF FOREIGN TRADE CONTRACTS

Soviet law establishes certain formalities for the creation of valid foreign business contractual relations. The most important requirement is that all contracts must be in writing and signed by two persons on the Soviet side, the chairman of the combine (or his deputy) and a person authorized to sign foreign trade transactions. Monetary obligations, such as bills of exchange, need the signatures of the combine's chairman (or his deputy) and its chief accountant.²⁴⁵ If the transaction is concluded outside Moscow or abroad, it needs the signatures of two persons holding a power of attorney from the combine's chairman.²⁴⁶

Just as all oral contracts have to be reduced to writing, so must all subsequent amendments or variations to the contract. The signature requirements relating to new contracts apply to amendments as well.²⁴⁷

Observance of the above formalities is especially important in the event of a dispute. Thus, an unrecorded oral agreement between a Soviet combine and a foreign corporation to resolve all disputes by arbitration would be invalid inside the Soviet Union.²⁴⁸ Likewise an arbitral award made abroad under an unrecorded agreement would be unenforceable in the Soviet Union, regardless of where the contract was concluded.²⁴⁹ As Osakwe has observed, "[t]his is a strict departure from the universally recognized princi-

245. *Id.* at 107.

246. Law No. 1 of Dec. 26, 1935, Procedure for Signing Foreign Trade Transactions [1936], cited in Osakwe, Barriers to United States-Soviet Trade, *supra* note 216, at 107, n.81.

247. Osakwe, Barriers to United States-Soviet Trade, *supra* note 216, at 107.

248. Article 45 of the Civil Code of the RSFSR provides that "[n]on-observance of the form of legal acts in foreign trade or of the procedure for signing them (Article 565) results in the invalidity of such acts." Article 565 of the RSFSR Civil Code provides in part that "[t]he form of legal acts concluded by Soviet organizations in connection with foreign trade and the procedure for signing such acts are governed by legislation of the USSR, regardless of the place in which they are concluded." For an English translation of the Civil Code of the RSFSR see W. GRAY & R. STULTS, *supra* note 191.

249. S. PISAR, COEXISTENCE AND COMMERCE: GUIDELINES FOR TRANSACTIONS BETWEEN EAST AND WEST 306 (1970). See also H. Berman & G. Bustin, *supra* note 215, at 45.

ple of *lex loci contracti* and is a perilous trap into which an unwary foreign businessman may fall."²⁵⁰

In the interest of speedy dispute settlement not only should the contract be in writing, but provision must also be made regarding the forum in which controversies should be litigated and the system of law under which they will be resolved. The trend seems to be toward arbitration being fixed in Western Europe, with Stockholm being a favored site.²⁵¹ The foreign businessman should, however, be aware that the Soviet combine, while it does have wide discretion in negotiating the terms of a contract, may not always be able to accept the forum and law preferred by him. As Pisar has observed:

The unitary nature of the commercial structure affords the Ministry of Foreign Trade ample opportunity to require its licensed trading instrumentalities to forego submissions to alien forums, alien laws and other "unapproved" clauses. The party's formal autonomy to express contractual intentions is thus largely negated by the lack of a will independent of the state's.²⁵²

3. IMPORTANT PROCEDURAL AND SUBSTANTIVE RULES OF SOVIET FOREIGN CONTRACT LAW

Soviet enterprises themselves are never parties to foreign trade contracts. The contract is between a foreign party and the appropriate combine. In the event of breach of contract by either party, it is either the combine that sues the foreign partner or the foreign partner who sues the combine alone, even if in the latter case the breach was due to the fault of the supplier/producer enterprise. The combine may then sue the enterprise before State *Arbitrazh* in a separate action.²⁵³ Thus, for example, if under a typical export contract the combine has to pay damages to its foreign partner for defective goods, the 1960 Conditions of Delivery of Goods for Export allows the combine to recover the dam-

250. Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 108.

251. Fitzpatrick, *Soviet-American Trade: 1972-74: A Summary*, 15 VA. J. INT'L L. 39, 63 (1974). See also C. Norberg & D. Stein, *supra* note 225, at 179.

252. S. PISAR, *supra* note 249, at 299. Arbitration could of course be arranged before the Foreign Trade Arbitration Commission in Moscow or the Maritime Arbitration Commission, either which would probably be preferred by the Soviets to almost any other venue. See H. Berman & G. Bustin, *supra* note 215, at 49.

253. J. QUIGLEY, *supra* note 215, at 144.

ages from the enterprise.²⁵⁴ If the foreign trade contract provides for arbitration by the All-Union Chamber of Commerce's Foreign Trade Arbitration Commission, and if the foreign partner seeks arbitration in that forum, the combine being "sued" may bring the enterprise into the suit as co-defendant, if the enterprise and the foreign plaintiff both consent. This procedure is not specifically provided for by legislation but it has been developed by the Commission itself.²⁵⁵ Ordinarily, the Commission handles only "disputes arising from foreign trade transactions, in particular disputes between foreign firms and Soviet economic organizations."²⁵⁶ Furthermore, any agreement by a Soviet combine to arbitrate before the Foreign Trade Arbitration Commission has the force of law in the Soviet Union and an award of the Commission itself is binding.²⁵⁷

Finally, the principle of liability based on fault, discussed in relation to domestic contracts,²⁵⁸ also applies to foreign trade with some modifications. If, for example, a combine knowingly exports defective goods, it cannot recover from the supplier-enterprise the damages that the combine might have to pay the foreign purchaser.²⁵⁹ However, the combine can, in such a situation, always sue the supplier-enterprise for statutory penalties under the Conditions of Delivery of Goods for Export, since statutory penalties can be collected without proof of damage.²⁶⁰ Furthermore, penalties continue to accumulate against the enterprise until there is actual performance. This can be changed only if the enterprise's ministry intervenes and negotiates a change with the combine.²⁶¹

In the event of a change of plan ordered by a superior agency,

254. Article 80 of the "Conditions of Delivery of Goods for Export", *supra* note 230, provides:

Financial disputes connected with delivery of goods for export, in which one of the parties is a foreign trade organization, shall be resolved in Moscow in the procedure specified in the Statute of State *Arbitrazh*.

Other disputes connected with delivery of goods for export shall be resolved by the appropriate *arbitrazh* under established jurisdictional rules.

255. J. QUIGLEY, *supra* note 215, at 144 n.124.

256. Article 1 of the Decree of the Central Executive Committee and Council of People's Commissars, "On the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce," June 17, 1932, *cited in* J. QUIGLEY, *supra* note 215, at 159 n.123.

257. Osakwe, *Barriers to United States-Soviet Trade*, *supra* note 216, at 99 n.53.

258. See text accompanying notes 99 and 148-49, *supra*.

259. J. QUIGLEY, *supra* note 215, at 146.

260. *Id.* at 145-46.

261. *Id.* at 148.

the principle of liability based on fault is modified in foreign trade contracts in the same way that it is modified for domestic contracts.²⁶² Thus, if a change of plan requires the combine to cancel an export order already placed with a supplier-enterprise, the supplier-enterprise has no remedy against the combine even if the goods have been prepared and shipped. Similarly, the combine is not liable if cancellation was due to a revocation of an export license or a prohibition of trade relations against the country in question issued by the appropriate authority.²⁶³ As was already noted,²⁶⁴ a combine can also unilaterally modify a prior order if this is "required by the conditions of sale of the goods to foreign purchasers."²⁶⁵

These modifications to the rule in favor of the combines reflect the privileged position which the export combines continue to enjoy internally under the Soviet law of foreign trade.

C. *Some Pertinent Contractual Problems of East-West Joint Ventures within the Planned Economy*

1. INTRODUCTION

The rapid rise in East-West trade since the late 1960's has been characterized by the development of new forms of business relationships between Eastern and Western enterprises. As far as the Soviet economy is concerned, its planned nature and the monopoly of the State in foreign trade have kept it relatively insulated from foreign business participation inside the Soviet Union. Foreign participation has been limited to economic cooperation agreements involving sales of equipment, licenses, entire production units together with technical assistance to set them in operation, subcontracting of components, collaboration in research and development, and co-production.²⁶⁶ However, all of these types of agreements associate the parties in a contractual relationship in which they clearly maintain their separate identities and exchange goods and services on the fixed-payment basis. The rela-

262. See text accompanying notes 145-49, *supra*.

263. Article 41 of the "Conditions of Delivery of Goods for Export," *supra* note 230.

264. See text accompanying note 231, *supra*.

265. Article 19, of the "Conditions of Delivery of Goods for Export," *supra* note 230.

266. C. McMILLAN & D. ST. CHARLES, JOINT VENTURES IN EASTERN EUROPE: A THREE COUNTRY COMPARISON 10 (1974). This work was published under the auspices of the C.D. Howe Research Institute and the Canadian Economic Policy Committee.

tionship is terminated upon the completion of the transaction. There are, consequently, no economic arrangements at present in the Soviet Union between foreign business firms and Soviet economic agencies involving joint management and the sharing of profits or losses.²⁶⁷ Examples of such associations, often called joint ventures, do however exist in a number of eastern European countries such as Hungary, Yugoslavia, and Romania.²⁶⁸

East-West joint ventures established in the three socialist countries mentioned above are distinguishable by the mechanism that each country has adopted to regulate currency and accounting problems. All Romanian joint venture operations are in foreign currency and the joint venture is said to create an exclusive foreign currency "enclave" within the local monetary system.²⁶⁹ In Hungary, joint venture accounting is done under the "calculation system" whereby transactions are undertaken in both hard foreign currency and local currency depending on whether the transaction in question is a local one or an external one.²⁷⁰ In Yugoslavia the "integration system" is used whereby the joint venture is fully incorporated into the national economic order. All accounting is done in local currency.²⁷¹

A joint venture is likely to be a much more complex undertaking than any of the more common forms of industrial cooperation presently existing between East and West. As such, the joint venture contract would need to make detailed provisions for property

267. Berman, *Joint Ventures Between United States Firms and Soviet Economic Organizations*, 1 INT'L TRADE L.J. 139, 144 (1975-76) (hereinafter cited as *Joint Ventures*).

A joint venture is essentially a contractual arrangement between Eastern and Western enterprises under which an identifiable entity is created to undertake joint-production marketing and other activities. The parties establishing the entity contract to pool their productive resources, and undertake to manage its operation jointly and to share all of the risks associated with the venture.

268. C. McMILLAN & D. ST. CHARLES, *supra* note 266, at 27, 45, 61. See generally Scriven, *Joint Venture Legislation in Eastern Europe: A Practical Guide*, 21 HARV. INT'L L.J. 633 (1980); Note, *The Legal Framework for American Direct Investment in Eastern Europe: Romania, Hungary and Yugoslavia*, 7 CORNELL INT'L L.J. 187 (1974); Dagon, *Cooperation Agreements and Joint Ventures with Socialist Business Associations: The Hungarian System*, 21 AM. J. COMP. L. 752 (1973); Morse & Goekjian, *Joint Investment Opportunities with the Socialist Republic of Romania*, 29 BUS. LAW. 133 (1973); Sukijasovic, *Legal Aspects of Foreign Investment in Yugoslavia*, 37 LAW & CONTEMP. PROBS. 474 (1972).

269. *Capital Investment*, *supra* note 228, at 347.

270. Pedersen *Joint Ventures in the Soviet Union: A Legal and Economic Perspective*, 16 HARV. INT'L L.J. 390, 400 (1975).

271. *Capital Investment*, *supra* note 228, at 347-48. See generally Friedman, *The Contractual Joint Venture*, 10 COL. J. WORLD BUS. 57 (1972).

rights, management, risk-sharing, prices, profits, currency and accounting mechanisms, enterprise operation, dispute settlement, securing regular supplies of needed materials from domestic supply sources, and integrating these needs into the national plan.²⁷² It would be beyond the scope of this study to discuss all the legal and economic ramifications of joint ventures in the USSR. The present section will therefore, in accordance with the general aim of the study, be limited to an examination of the relationship between plan and contract (*i.e.*, the joint venture contract) and the possible methods of dispute settlement.

2. THE JOINT VENTURE CONTRACT AND THE NATIONAL PLAN

As one of the essential characteristics of a joint venture is shared management of the enterprise, a major question which arises is whether such management is possible in a centrally planned economy. Under the Soviet Constitution the State has an absolute monopoly over foreign trade, while internally the economy is planned and administered under a hierarchical system of administrative authorities.

For a foreign firm to enter into a joint venture contract inside the Soviet Union, the foreign firm would need direct access to its Soviet partner and the ability to exercise a minimum of operational influence on it. It would also clearly be in the interest of the foreign firm to ensure that its Soviet counterpart is acting *intra vires* and that the contract itself conforms to all the formal requirements of Soviet law, especially that it be in writing.

None of these requirements pose insurmountable barriers to the creation of joint ventures in the Soviet Union. The present capacities and powers of Soviet foreign trade combines make them suitable partners for joint venture agreements. There is an almost total separation of foreign transactions from domestic trade. The foreign trade combine is given considerable latitude in negotiating the terms of foreign contracts and enjoys certain privileges not available to the domestic enterprise.²⁷³ It has been said that Soviet foreign trade combines, as juridical persons and as the sole representatives of the state in matters of foreign trade, can incur any kind of contractual obligation they desire, even if it is in contradic-

272. See Scriven, *supra* note 268, at 642-56.

273. See text accompanying notes 231 and 263-65, *supra*. See also S. PISAR, *supra* note 249, at 298.

tion to domestic law, as long as the contract does not exceed the authority granted in the charter.²⁷⁴ The charters of the combines are themselves usually couched in very broad terms. A typical example is the Charter of the combine *Stankoimport*, which provides that in order to carry out its functions the combine shall have the right to:

(a) conclude contracts both in the USSR and abroad, conclude all kinds of transactions and other legal undertakings . . . sue and be sued in courts and arbitral tribunals;

(b) construct, acquire, alienate, take or let on lease, both in the USSR and abroad, enterprises pertinent to its activity;

(c) acquire, alienate, take or let on lease all kinds of movable or immovable property, both in the USSR and abroad;

(d) establish both in the USSR and abroad . . . branches, offices, representatives, and agencies, and participate in any type of combine, society, association, or organization whose activity corresponds to the tasks of the combine.²⁷⁵

There seems, therefore, to be no legal restriction either in the Constitution or in practice that would prevent a combine from contracting a joint venture with a foreign firm. The joint venture could then itself enjoy the same status as a combine, the contract being the charter. Likewise, there is no restriction that would prevent exemption of the joint venture from bureaucratic control from the central administration or from the requirements of the national economic plan itself.²⁷⁶

It would be in the interest of both parties to ensure that the contract is as detailed as possible. From the Soviet point of view the more detailed the contract the more predictable it becomes; the greater the predictability under the contract, the greater will be the ability of the parties to define and control their activity in advance. This in turn would allay any fears that the central plan-

274. Pedersen, *supra* note 270, at 410.

275. Article 6 of the Charter of the All-Union Export-Import Combine "*Stankoimport*," reprinted in J. QUIGLEY, *supra* note 215, at 216 App. F., *Stankoimport* specializes in exports and imports of machine tools, forging and pressing equipment, roll turning lathes, foundry equipment, measuring machines and tools, instruments, hard alloy products, abrasive products and bearings; art. 5 of the Charter. The above quoted formulations from Article 6 of the Charter of *Stankoimport* appear in the charters of nearly all combines and have been restated in Article 10 of the Statute of the All-Union Economically Accountable Foreign Trade Combine approved by the Council of Ministers of the USSR, May 31, 1978, cited in *Capital Investment*, *supra* note 228, at 354.

276. Pedersen, *supra* note 270, at 407.

ning agencies might have of *laissez-faire* economics creeping into the socialist economy. From the viewpoint of a foreign partner, the more detailed the contract, the greater will be the protection given to the foreign partner's investment, and the more satisfied it will be that the appropriate Soviet agencies and combines will behave in accordance with the best interest of the venture.

The contract should specify how the joint venture should be freed from the restrictions of the planned economy. Some of the most important restrictions which could be avoided include "directive planning, unlimited inspections, freedom from changes in plans or orders without prior consultation, absolute dependence on Soviet sources of supply, turnover taxes, and success indicators other than profits."²⁷⁷ Thus, for example, the joint venture contract should be specifically insulated from Article 234 of the Civil Code of the RSFSR which provides that changes in the national plan may cancel contracts; nor should such changes be allowed to interrupt or in any way jeopardize the joint venture's sources of supply within or outside the Soviet Union.²⁷⁸

It is with regard to securing the joint venture's supplies within the Soviet Union that the joint venture's needs would require some integration into the national plan. Also to be intergrated would be the sales of the finished product by the joint venture to Soviet enterprises. Such sales could be regarded as foreign transactions (*i.e.*, between an appropriate foreign trade combine on the one hand and the joint venture on the other). These sales would be treated as conventional import contracts, regulated by the general import-export law and requiring incorporation into the foriegn trade plan.²⁷⁹

While the sales of finished products to Soviet enterprises would need some integration, securing the joint venture's supplies from Soviet sources would need more detailed planning and incorporation into the system of material-technical supply, and, therefore, the plan. Such incorporation would, however, be in the interests of the joint venture since once the plan is ratified by the Supreme Soviet, it becomes binding on all the lower enterprises, including those acting as supply sources to the joint venture.²⁸⁰

277. Berman, *Joint Ventures*, *supra* note 267, at 150.

278. Pedersen, *supra* note 270, at 418.

279. See generally text accompanying notes 236-40, *supra*.

280. Pedersen, *supra* note 270, at 418-19; J. QUIGLEY, *supra* note 215, at 79.

The needs of the joint venture would, however, be something which the joint venture would decide for itself and transmit, through an appropriate agency or combine, to the central authorities for incorporation into the national plan. Upon incorporation, the joint venture would become bound to accept the supplies (subject to appropriate safeguards in the contract as to quality, production deadlines, and penalties) with the knowledge that *its* stipulated domestic supplies are *guaranteed*. The actual procedure would take much the same form as that of a conventional export contract: the appropriate combine would issue an "order-requisition" (*zakaznariad*) to the domestic enterprise through the Ministry.²⁸¹ The enterprise would be bound to produce and deliver the materials or goods in question, which the combine would then sell to the joint venture.

One authority is of the belief that because of the joint venture's inevitable reliance on the involvement in the network of material-technical supply, "the entire operation of the joint venture, down to the last details, should, if it is to succeed, be cleared in advance with at least a dozen different Soviet bureaucracies, starting with *Gosplan* and ending with the local soviet."²⁸²

The joint venture legislation of Romania, which is seen by many to be an attractive model for the Soviet Union,²⁸³ provides an elaborate procedure for the formation of joint ventures in Romania. It requires the drawing up of a feasibility study, a memorandum of association, a contract of association, and appropriate statutes, all of which are reviewed at different stages by various state agencies including the State Planning Committee, the Ministry of Labor, the Bank of Foreign Trade, the Ministry of Foreign Trade, and the Council of Ministers.²⁸⁴ If the Soviets follow the Romanian model, elaborate prior screening procedures may be necessary for the formation of joint ventures in the Soviet Union.

As for sales by joint ventures in the Soviet Union to non-

281. See text accompanying notes 229-235, *supra*. See also H. Berman & G. Bustin, *supra* note 215, at 61.

282. Berman, *Joint Ventures*, *supra* note 267, at 150.

283. C. McMILLAN & D. ST. CHARLES, *supra* note 266, at 3; Pedersen, *supra* note 270, at 401, 406-07.

284. Article 16 of the Joint Companies Decree, Decree 424 of 2 Nov. 1972, Concerning Constitution, Organization and Operation of Joint Companies in the Socialist Republic of Romania, cited in Burgess, *Direct Foreign Investment in Eastern Europe: Problems and Prospects of Romania's Joint Venture Legislation*, 6 LAW & POL. INT'L BUS. 1059, 1079-83.

Soviet buyers, there should be no reason why this could not be done directly by the joint venture itself, especially if, as suggested above,²⁸⁵ the joint venture has been granted the status of a foreign trade combine. Such sales would be "foreign transactions" from the Soviet viewpoint, and since all foreign trade is treated differently from domestic transactions, such sales would have little impact on the domestic plan.²⁸⁶ A power to buy and sell abroad directly by the joint venture could always be stipulated in its original contract or charter. If this is found to be impossible, the contract could provide for the joint venture's foreign purchases and sales *through* designated foreign trade combines.²⁸⁷

Whatever the procedure adopted, it has been recommended that all, or at least most, of the joint venture's transactions should be carried out in hard currency since prices and profits are centrally established in the Soviet economic system.²⁸⁸

In conclusion, it would seem that as far as the national economic plan is concerned, complete exclusion of the joint venture therefrom would be neither possible nor desirable. The joint venture contract, however, in making detailed provisions governing the activity of the venture, should spell out in what ways the joint venture is to be freed from the restrictions of the plan.

3. SETTLEMENT OF DISPUTES ARISING FROM THE JOINT VENTURE

Disputes between economic enterprises operating domestically in the Soviet Union are settled by the special system of economic courts known as the State *Arbitrazh*.²⁸⁹ This institution

285. See text accompanying note 276, *supra*.

286. Pedersen, *supra* note 270, at 423.

287. The idea is partly borrowed from Pedersen who suggests that the joint venture contract could:

[P]rovide for acquisition of many of its supplies from abroad by including . . . a provision that it is "expected" that certain supplies will be purchased abroad by designed FTO's [Foreign Trade Organizations] under long-term contracts and according to the specifications desired by the joint venture. This procedure would avoid joint venture participation in the foreign trade monopoly [on the assumption that the joint venture is *not* granted FTO status] while simultaneously giving the joint venture authority to place supply orders through FTO's directly without going through the appropriate ministry.

Id. at 423-24.

288. *Id.* at 424-30. This would be following the Romanian example. Article 22 of the Romanian Joint Companies Decree, *cited in* Burgess, *supra* note 284, at 1083.

289. See Part I, Sections A and E of this study, *supra*.

serves as a watchdog over the plan-implementation process as a whole. It is because of the clear orientation of the institution toward state interests, and its commitment to the primacy of the plan, that *Arbitrazh* would not prove acceptable to the foreign investor as a forum for resolving joint venture contractual disputes. On the other hand, if the joint venture is insulated from the undesirable restrictions of the plan to the satisfaction of the foreign partner, it is not inconceivable for the foreign partner to agree to submit to *Arbitrazh* those disputes in which the national plan is not relevant.

Perhaps a more attractive alternative to the foreign investor would be the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce.²⁹⁰ The Commission's jurisdiction can be said to extend to joint venture disputes since it is empowered, in part, to handle "disputes between foreign firms and Soviet economic organizations."²⁹¹

Third-country arbitration would be another possibility. The joint venture legislation of Romania provides for the settlement of disputes either in the local law courts or by arbitration.²⁹² In the case of arbitration, the parties may use the Foreign Trade Arbitration Commission of the Romanian Chamber of Commerce or an international tribunal.²⁹³ Thus in one Romanian joint venture, the parties chose arbitration under the procedures of the International Chamber of Commerce in Switzerland,²⁹⁴ while in another, arbitration was stipulated under the procedures of the International Chamber of Commerce in Paris.²⁹⁵

As seen with regard to conventional Soviet import-export contracts²⁹⁶ the Soviets have shown a willingness to accept arbitra-

290. Decree of the Central Executive Committee and Council of Peoples Commissars on the Foreign Trade Arbitration Commission of the All Union Chamber of Commerce, June 17, 1932, SZ SSSR (1932) No. 48, item 281.

291. *Id.*, art. 1. See also C. Norberg & D. Stein, *supra* note 225 at 177, and text accompanying note 257, *supra*.

292. Article 38 of the Romanian Joint Companies Decree, *cited in* Burgess, *supra* note 284, at 1099.

293. Burgess, *supra* note 284, at 1099.

294. Joint venture between *Zahnradfabrik Renk AG* of the Federal Republic of Germany and the Romanian Industrial Central for Machine Construction at Resita, Oct. 6, 1973, *cited in* Burgess, *supra* note 284, at 1061.

295. Joint Venture between Control Data Corp. of the U.S. with the Romanian Industrial Central for Electronics and Vacuum Technology, Apr. 4, 1973, *cited in* Burgess, *supra* note 284, at 1061.

296. See text accompanying note 251, *supra*; C. Norberg & D. Stein, *supra* note 225, at 180-84.

tion in neutral third countries, with Stockholm being a popular site. If the parties choose such arbitration to settle joint venture disputes, they would nevertheless have to stipulate the arbitration procedures to be followed.

It has also been suggested that since some joint venture disputes could involve complex technical matters, there may be an agreed procedure of "on-site arbitration" by technical experts rather than trained arbitrators.²⁹⁷ It is, however, possible that both parties may prefer limiting the role of technical experts to a purely advisory level to promote an amicable settlement, while providing for formal arbitration as a last resort. The chosen arbitral tribunal could always be empowered, or even obliged, to take into account expert testimony and advice before rendering a decision.

D. Conclusion

In the regulation of the domestic industry in the Soviet Union, contracts are seen to have a dual role as a mechanism for the central control of the economy and, within certain limits, as a means of exercising enterprise initiative. It is also evident that the legal institution of contract and the quasi-judicial/administrative institution of *Arbitrazh* both operate on the fundamental principle of the supremacy of the plan.²⁹⁸

This basic principle remains inviolable in the sphere of foreign trade as well. In the foreign trade sphere, the fundamental principle of state monopoly over foreign trade serves to buttress the primacy of the plan. Plan changes made by the agencies entrusted with the foreign trade monopoly can nullify agreements between foreign trade combines and domestic enterprises without the domestic enterprises having any remedy. The effect of a change of plan on domestic contracts is, of course, identical.

Yet, because of the inherent nature of foreign trade, there is not, and cannot be, a Soviet judicial or administrative agency parallel to *Arbitrazh* having compulsory jurisdiction over all foreign trade disputes. Dispute settlement, the choice of law, and the forum of settlement are left to the agreement of the combine, with appropriate checks from above, and the foreign party. The function of *Arbitrazh* in domestic trade as watchdog over the plan-

297. Pedersen, *supra* note 270, at 436.

298. See Part I, *supra*.

implementing process is, in the sphere of foreign trade, exercised by the Ministry of Foreign Trade. Each combine, once it receives its export plan, owes an administrative obligation to the Foreign Trade Ministry to fulfill its export orders. Imports, too, are strictly overseen by the Ministry. Even after import permits have been issued by the Council of Ministers, the import combine, before contracting abroad, must obtain another import license from the Ministry.

It is perhaps due to the absence of an *Arbitrazh*-type agency overseeing foreign trade, and bringing to heel erring enterprises, that Soviet foreign contracts are so painstakingly scrutinized by superior agencies, and why Soviet law prescribes strict procedural formalities for the conclusion of foreign trade contracts. It would also be due to this reasoning that the Soviets prefer to eliminate as much uncertainty as possible by insisting on detailed provisions in the contract.

While the institution of contract *vis-a-vis* the plan is clearly in a subordinate position for domestic as well as foreign trade, there is one possible area of foreign trade where there could be tension between plan and contract. This is the field of joint ventures. It is a tension, however, which can be resolved, given some flexibility and a desire to compromise on the part of both parties.

There would seem to be strong motivation on both sides for the formation of joint ventures.²⁹⁹ For the West, the chief attractions would be wider markets, cheaper and stable labor costs, and the opportunity, not available under other forms of industrial cooperation, to share in the management and control of an enterprise to which it contributes capital and technology, in return for a share in the profits.³⁰⁰ For the Soviet Union, there would be the possibility of access to Western markets, obtaining much needed up-to-date foreign technology, capital, and new managerial skills and techniques.³⁰¹ Such benefits have already persuaded some socialist countries to push aside ideological considerations and favor joint ventures. It is conceivable that the same could happen in the Soviet Union in the near future.

299. See Scriven, *supra* note 268, at 634, 662.

300. *Capital Investment*, *supra* note 228, at 338-39.

301. *Id.* See also Pedersen, *supra* note 270, at 394-97.