Arbitration with the Soviets: The Importance of Forum Selection in Dispute Resolution Clauses in Non-Maritime Joint Enterprise Agreements

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The reforms of Mikhail Gorbachev have caused dramatic changes in the Soviet Union. In an effort to strengthen the Soviet economy, Gorbachev has begun to remove many of the ideological and practical restrictions that have traditionally hindered American business involvement in the Soviet Union.

These trends increase the appeal of the Soviet Union as a target for new U.S. business ventures. Glasnost, with its emphasis on opening Soviet society, permits freer negotiations between potential Soviet and U.S. business partners. Perestroika has encouraged the implementation of free market measures, programs and policies in selected sectors of the economy.

In light of these changes, it is not surprising that U.S. businesses have shown increased interest in entering Soviet markets. However, because of the USSR's centrally-planned economy and government-imposed restrictions on commercial relations, a U.S. business may not simply lease land and set up shop on its own. Instead, it must enter into a joint enterprise with a Soviet partner.¹ In establishing and running these joint enterprises, the partners must act in accordance with a collection of complex laws and decrees. In an effort to encourage foreign investment, the Soviets have been changing the law with notable frequency. In addition,

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¹ This Comment will use the term “joint enterprise” (“JE”), rather than “joint venture,” which is more common to the West.

It should be noted that the Soviets are currently in the process of radically reforming their laws governing ownership and property. In March 1990, the central government published a new ownership law that increases the ability of foreigners to own land and other forms of tangible and intangible property. In addition, President Gorbachev has called for a public referendum concerning ownership. Depending on the result of this referendum, foreigners may benefit from further expanded ownership rights. Even under the March 1990 ownership law, however, foreigners still may only own property in conjunction with a joint enterprise. Razdel 5, statii 27-30, Zakona SSSR “O Jobstvennocti v SSSR,” Supreme Soviet of the USSR, Mar 1990.
they have been concluding private, unpublicized agreements with individual businesses—agreements that subsequently affect the regulation of JEs in general. As a result, U.S. businesses may find it difficult to determine what law will govern a JE agreement at the time of its creation. Even if it is possible to do so, it may still be difficult to ensure that the same law will be in force later when actual disputes arise.

Due to the general uncertainty of the law and the political situation in the USSR, inclusion of a well-considered dispute resolution provision could prove invaluable for the long-term success of a JE. In the Soviet system, matters involving foreign parties are arbitrated far more frequently than they are adjudicated, and parties have a great deal of autonomy to determine, by contractual provision, the forum and governing law for disputes arising under that agreement.

However, the process of negotiating a JE agreement in the USSR is difficult and time-consuming for U.S. businesses accustomed to contract negotiations in a free-market setting. As a result, parties may devote comparatively little time and effort to negotiating a dispute resolution clause. Rather than conducting lengthy negotiations, parties to U.S.-USSR JE agreements often use a boilerplate clause that calls for arbitration in Sweden using the rules of the United Nations Commission on International Trade Law ("UNCITRAL").

This Comment argues that while the Swedish forum may prove adequate for most disputes, considering the amount of time, effort and money involved, U.S. businesses would be well advised to consider the full range of dispute resolution forums available. In addition to the "Swedish option," these possibilities include Soviet courts and arbitral bodies, and dispute resolution before the International Chamber of Commerce ("ICC") in Paris. The procedural consequences of each forum are significant and should be considered when drafting dispute resolution clauses in joint enterprise agreements.

Part I of this Comment gives an overview of Soviet law affecting joint enterprises. Part II discusses dispute resolution mechanisms within the Soviet Union, including Soviet courts and arbitral bodies. Part III discusses dispute resolution in Sweden, and part IV considers the options provided by the ICC.

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2 The Commission drafted a set of arbitration rules that was subsequently adopted by the General Assembly on December 15, 1976. These rules are discussed in greater detail in part II.
I. THE LEGAL AND POLITICAL FRAMEWORK FOR JOINT ENTERPRISES IN THE SOVIET UNION

In order to craft a dispute resolution clause properly, a negotiator must first understand the nature and substance of the Soviet law governing the operation of joint enterprises in the Soviet Union. A brief overview will demonstrate the complexity of Soviet law and the ways it differs from U.S. law. These differences, though important, are not always apparent because translations of Soviet legal terms often use words familiar from U.S. law. Even the notion of what constitutes a law varies greatly between the two societies.

A. The 1987 Joint Enterprise Law

Joint enterprises in the Soviet Union are primarily governed by four enactments that comprise the 1987 Joint Enterprise Law. In the United States we tend to think of law as a statute—that is, a single enactment agreed upon by several government organs. That is not, however, an accurate description of Soviet law. The Joint Enterprise Law actually encompasses three documents created by three different government entities over the course of several months, and a substantial set of amendments passed little more than a year later. Each of these documents has a different focus. On January 13, 1987, the USSR Council of Ministers concluded the first of these promulgations, the Decree on the Establishment of Joint Enterprises (“January Decree”). The January

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9 Walter Sterling Surrey and Vladmir Lechtman, New Soviet Joint Venture Law: A Political Curiosity or a Real Investment Opportunity?, in Janice R. Moss, ed, Private Investors Abroad—Problems and Solutions in International Business 1988 § 6.01 at 6-2 (Matthew Bender, 1989). In addition, various ministries and other government organs have created at least nine sets of regulations implementing the basic law. As of 1988, the Soviets had not made these generally available. Id at § 6.01, 6-3 n 5. The point is two-fold: first, there are many “agencies” involved, and many of them are making regulations of which U.S. businesses may need to be aware; second, regulations are not automatically available for perusal as soon as they come into existence.

4 While reform may be imminent, at the present time “government” and “politics” are inseparable concepts in the Soviet Union. Therefore, the term “government” will here refer to the Communist Party of the Soviet Union (“CPSU”) as well as the government of the USSR.

Decree was accompanied by the Decree of the Presidium of the USSR Supreme Soviet On Questions Related to the Creation of Joint Enterprises,\(^6\) which focuses on taxation of JEs and dispute resolution in Soviet and international tribunals. Finally, on September 17, 1987, the Central Committee of the Communist Party of the Soviet Union ("CPSU") and the USSR Council of Ministers issued the Joint Resolution on Additional Measures to Improve the Management of Foreign Economic Relations,\(^7\) intended to increase the efficiency of the Soviet bureaucracy in international trade. Subsequently, the USSR Council of Ministers amended this initial collection of decrees, edicts and resolutions through their December 9, 1988, Resolution on Additional Development of Foreign Economic Activity ("December Resolution").\(^8\) The December Resolution accomplished several goals: it amended the January Decree through the removal of restrictions on foreign ownership and control, created additional tax incentives, granted the JEs flexibility in labor matters and announced the plan to make the ruble convertible.\(^9\)

Unfortunately, the Joint Enterprise Law does not address a number of issues, and its relative newness creates uncertainty as to how the law will be interpreted in practice. One commentator has called it "a moving target" for both the Soviet and U.S. partners in a JE.\(^10\) These uncertainties make a well-considered dispute resolution clause especially important.

B. Dispute Resolution under the Joint Enterprise Law

Dispute resolution under the Joint Enterprise Law is governed primarily by Article 20 of the January Decree. Article 20 addresses

\(^6\) Decree: On Questions Concerning the Establishment in the Territory of the USSR and Operation of Joint Ventures, International Amalgamations and Organizations with the Participation of Soviet and Foreign Organizations, Firms and Management Bodies, Presidium of the USSR Supreme Soviet (Jan 13, 1987), translated and reprinted as Appendix A in Osakwe, 22 Vand J Transnatl L at 109. The Russian text is published as Vedomosti Verkhovnova Sovieta SSSR, No 2, Item 35 (USSR 1987).

\(^7\) Joint Resolution on Additional Measures to Improve the Management of Foreign Economic Relations, Communist Party of the Soviet Union ("CPSU") Central Committee and the USSR Council of Ministers (Sept 13, 1987), 41 Economicheskaya Gazeta (Oct 1987), cited in Moss, Private Investors Abroad at § 6.01, 6-2 n 3 (cited in note 3).

\(^8\) Decree: On Further Development of Foreign Economic Activities of State, Cooperative, and Other Public Enterprises, Associations and Organizations, USSR Council of Ministers (Dec 2, 1988), translated and reprinted as Appendix C in Osakwe, 22 Vand J Transnatl L at 120 (cited in note 5). The Russian text is published in Izvestia 2 (Dec 10, 1988).

\(^9\) Osakwe, 22 Vand J Transnatl L at 122-25.

three types of disputes: (1) disputes between a JE and a Soviet state-owned operation, co-operative or "other public organization[s]"; (2) disputes between different JEs; and (3) disputes between partners in the same joint enterprise when the disputes concern "matters related to its activities."\(^1\) Disputes covered by Article 20 are to be governed by "legislation of the USSR."\(^2\) This provision suggests little flexibility for JE dispute resolution; in fact, however, the "legislation of the USSR" clause allows considerable latitude for parties to select the forum of their choice.\(^3\)

C. The Role of the Parties in Negotiating JE Agreements

Despite the variety of options apparently available to U.S.-USSR JEs, the Soviet system may impose significant restrictions on the practical ability of contracting parties to make use of these options. The structure of the Soviet political-economic system limits the ability of the Soviet contracting party to make contract decisions free from supervision by the ministries that control its existence. As of January 1987, 21 ministries and departments and 70 enterprises and amalgamations (that is, groups of enterprises) had direct access to foreign markets at the level of specific commercial operations.\(^4\)

The right of access to foreign markets does not automatically carry with it the right to act as the Soviet contracting party to a joint enterprise agreement. This theoretically confusing situation, however, has somewhat simplified itself in practice. Many of the existing JEs are between foreign entities and Soviet bodies known as Foreign Trade Organizations ("FTOs"). FTOs are based in Moscow and are part of the Chamber of Commerce and Industry ("CCI").\(^5\) Their central location and high profile in Soviet foreign economic relations should theoretically make it easier to resolve negotiation questions concerning who has the power to negotiate the contract for the Soviets and what provisions will be acceptable to the reviewing ministry.

\(^{11}\) Decree on the Establishment of Joint Enterprises, art 20, in Osakwe, 22 Vand J Transnatl L at 109, 114.
\(^{12}\) Id.
\(^{13}\) See discussion in part I.D. regarding deference to contractual terms defined by the parties.
Nevertheless, FTOs may have to submit proposed contracts to their supervising ministry. Even if the FTO negotiating the contract were willing to submit all disputes to an alternative arbitral forum, such as the ICC, it is possible that the ministry controlling that FTO would be able to pressure it into rejecting such a “lesser known” (from the Soviet perspective) form of dispute resolution, effectively limiting the parties’ choices to either the Swedish Option or the Soviet Arbitration Court. Recent reforms have increased the number of Soviet entities that have the authority to conclude JE agreements. However, since the number of organizations with this authority is still somewhat limited, U.S. businesses should be certain at the outset of JE negotiations that they know exactly how much authority their Soviet counterparts possess.

D. The Importance of Soviet Contract Law Doctrine

Dispute resolution clauses will probably prove most useful to joint enterprises in contract disputes (as opposed to tort or criminal actions). These contractual disputes are the easiest form of conflict to anticipate. Moreover, other disputes, such as labor disputes, are potentially subject to government intervention. It is important then, to keep in mind certain basic features of Soviet contract doctrine.

The Soviet Union has a rather well-developed body of contract law, with many superficial similarities to its U.S. counterpart. Soviet law, however, must be analyzed in light of the environment in which it functions. The similarities to U.S. contract law should not automatically lead to the conclusion that each country’s laws are invoked for the same reasons. In particular, common terminology may not have the same meaning in both systems. Additionally, it may be harder to disprove fault in a breach of contract action when the party attempting to do so is part of a planned economy where “provision is made for materials to move along a chain enforced at every stage.” In such a system, only an entirely unforeseeable event would provide an excuse for non-performance.

Furthermore, contract negotiations with the Soviets often involve hard bargaining. As a result, the Soviets assume that the parties intend to have their contract govern their relationship to the fullest reasonable extent. If it is possible to resolve a conflict using

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17 Id at 98.
contractual provisions, the Soviets will use the contract as the governing law. The Soviets often refer to this as the “autonomous law of the parties.” This autonomous law, consisting of the terms of the parties’ written agreement, will govern the parties’ relationship and dispute settlement so long as it is not in contravention of Soviet treaty obligations or legislation.

II. DISPUTE RESOLUTION MECHANISMS WITHIN THE SOVIET UNION

Unlike the norm in the United States, arbitration, rather than formal court proceedings, is the standard way of resolving commercial disputes in the Soviet Union, particularly when foreign parties are involved. Therefore, if a JE dispute is resolved within the Soviet Union, it will probably be handled by arbitration, although there are situations in which the Soviet courts have mandatory jurisdiction.

Although most JE-related disputes will not involve questions raising mandatory jurisdiction (since they will involve disputes between the parties and will be governed by the terms of the contract), familiarity with Soviet courts is important for JE negotiators. The role of Soviet judges and arbitrators is similar, and procedural similarities between Soviet courts and arbitral bodies also exist. In contrast to the U.S. system, in which arbitration is theoretically less formal than adjudication, arbitration in the USSR involves a large component of formality. As a result, Soviet arbitrators act as non-partisan moderators or judges rather than amicable go-betweens for the disputants; the more flexible atmosphere of American arbitration may be absent in the Soviet system.

A. Dispute Resolution in Soviet Courts

In certain circumstances, mandatory jurisdiction may force the U.S. investor into the Soviet courts. In brief, there are two major categories of possible mandatory jurisdiction. First, if parties do not contract for any particular method of dispute resolution, the Soviet courts have jurisdiction over the dispute by default. Second, Soviet law may restrict the use of alternative methods of dispute resolution in disputes involving “private” Soviet citizens, such as

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18 See part II.A.
19 Here in quotation marks because a distinction between public and private citizens is antithetical to the socialist ideal.
labor disputes, or certain torts, such as products liability. While litigation in the Soviet courts is not altogether to be avoided, it is rather different from the U.S. litigation system. Therefore, U.S. businesses will probably wish to avoid this unfamiliar system whenever possible.

1. The Structure of the Soviet Legal System.

The Soviet court system has four levels. First, at the neighborhood/factory level, Comrade’s Courts afford local individuals an “unofficial forum” for resolving their conflicts. Second, the People’s Courts are the equivalent of American trial courts. Two levels of appeal are also available—first in the District Courts and then in the Supreme Court of the Soviet Union.

The Soviet system differs from its U.S. counterpart in several fundamental ways, although there have been signs that the Soviets are interested in reforming their legal system so as to reduce those differences. First, there are no juries in the Soviet system, even in criminal trials. Second, Soviet judges take a more active role in determining the course of litigation. Third, Soviet courts have no appellate jurisdiction over the awards made by arbitral bodies.

On the other hand, Soviet civil trials are similar to those in the U.S. (and different from Soviet arbitral proceedings) in that they are normally conducted in public. Third parties may request to be joined in civil proceedings when the eventual decision might be prejudicial to their interests. There is, however, no mandatory joinder. In notable contrast to the U.S. system, Soviet procurators (government lawyers) have the right to initiate civil proceedings on behalf of the interests of others, and have the right to intervene at any stage in the proceedings. Therefore, U.S.

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20 Osakwe, 22 Vand J Transnatl L at 64, 65 (cited in note 5).
21 Gary Feinberg, Restructuring Justice in the Shadow of the Kremlin: A Journey from Rhetoric to Reason, 72 Judicature 348, 356 (Apr-May 1989). These forums are unofficial in that they are run by co-workers or neighbors rather than by judges and advocates. Nevertheless, these courts may impose sanctions such as fines and warnings.
22 Id at 355.
23 Id.
25 Feinberg, 72 Judicature at 355.
27 RSFSR CCP, art 38, cited in Kiralfy at 93 n 20.
28 RSFSR CCP, art 62, cited in Kiralfy at 98 n 76.
29 RSFSR CCP, art 41, cited in Kiralfy at 100 n 102.
businesses faced with liabilities in the Soviet Union must remember that the possibility always exists that the Soviet government will bring an action.

2. Procedural Aspects of the Soviet Court System.

The Soviet system is based on the civil law tradition of Western Europe. However, it also has a "federalist" influence that should be familiar to U.S. businesses. Much like the U.S. system of state law, each republic has its own set of civil procedure codes, although the independence of the republics is more limited than that of U.S. states. Although each code may contain unique provisions, the codes of the republics are based on their counterparts from the Russian Soviet Federalist Socialist Republic ("RSFSR"), and on the whole, the similarities between the various codes are much greater than the differences. Moreover, all Foreign Trade Organizations ("FTOs") are based in Moscow and therefore are governed by the RSFSR legal codes. As a result, most JE disputes handled by a Soviet court are likely to be governed by the RSFSR Code of Civil Procedure ("RSFSR CCD").

The Soviet procedural structure affects the resolution of JE disputes in Soviet courts in several important ways. First and foremost, the RSFSR CCD requires that most contracts (including JE agreements) be in writing. U.S. businesses should not assume that oral agreements or modifications of agreements will be enforced. Second, as mentioned above, there are no juries in the Soviet system.

Third, the judge plays an active role in creating the record upon which the decision will be based. If a party fails to submit a piece of available evidence that would support its case, the court may either direct the party to provide more evidence or collect the additional evidence on its own. In addition, the process of determining the probative value of the evidence has few guidelines, and those provided are general rather than specific. The judge must determine the weight to be accorded to each piece of evidence based on his "internal conviction" and his "socialist conscience."

This expansive view of the role of the bench extends beyond the area of evidence. Courts can exceed the limits of the case as

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30 RSFSR CCP, art 54, cited in Kiralfy at 98 n 80.
31 Feinberg, 72 Judicature at 355 (cited in note 21).
32 RSFSR CCP, art 50(2), cited in Kiralfy at 99 n 87.
33 RSFSR CCP, art 56, cited in Kiralfy at 98 n 87.
delineated by the claims presented by the parties. A court can also seize a defendant's property and money for the duration of the proceedings so that the defendant cannot render the assets unavailable should the final award be in favor of the plaintiff. In addition, courts are not required to terminate a case in the event that the disputants agree on a settlement or the plaintiff abandons his case. Even after the case has been decided, the court may on its own initiative reopen and retry a case if "fresh" evidence that was not originally available is discovered.

Finally, legal representation may present U.S. investors with some undesirable choices. Non-Soviet lawyers cannot present a case in a Soviet court unless they are members of the Soviet bar, or are accompanied by a Soviet advocat. In either case, the proceedings will probably be conducted in Russian, thus increasing the inconvenience for participants who do not speak Russian.


The judicial and arbitral systems in the Soviet Union are totally independent from each other. With the exception of the right of the Supreme Court of the Soviet Union to vacate Maritime Arbitration Committee awards, arbitral awards are final and need no judicial supervision to be enforceable. Once a dispute is before the Arbitration Court ("AC"), Soviet courts have no role to play in the resolution process. AC awards are final and cannot be set aside or modified by a court.

Even within Soviet court proceedings, there remains a strong preference for resolving disputes through arbitration rather than traditional trials. A judge must refuse any application for court proceedings if the parties have agreed to arbitration. Even if a judge accepts a case, he must explain to the parties and their representatives their procedural rights and duties, including the op-

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34 RSFSR CCP, art 195, cited in Kiralfy at 96 n 54. In other words, the court is not limited to the issues as they are defined by the parties.
35 RSFSR CCP, art 133-34, cited in Kiralfy at 96 n 49.
36 RSFSR CCP, art 219(4)(5), cited in Kiralfy at 96 n 55.
37 RSFSR CCP, art 333, cited in Kiralfy at 103 n 124.
38 Osakwe, 22 Vand J Transnatl L at 66 n 247 (cited in note 5).
39 Maritime Arbitration Committee Statute § 13 ("MAC Statute"), 2A WAR at 2638 (cited in note 26).
40 For a more detailed discussion of the arbitration court, see part II.B.1.
41 2A WAR at 2637-38.
42 RSFSR CCP, art 129(6), 2A WAR at 2629; Fundamental Principles of Civil Procedure of the USSR and Union Republics (1977), art 31, cited in 2A WAR at 2628 ("Fundamental Principles").
tions of arbitration and the Comrade's courts, and the conse-
quences of exercising either of those options. In a similar vein,
judges may transfer cases for settlement to arbitral tribunals so
long as the parties have agreed to the transfer. Agreement for
this purpose entails approval by the parties themselves as well as
their representatives. Finally, if the parties reach an independent
agreement to transfer the case to an arbitral tribunal, the court
must honor that agreement.

B. Soviet Arbitration

The various components of the Joint Enterprise Law require
the use of arbitration to resolve some disputes arising from JE ac-
tivities. While disputes may usually be brought before either the
Soviet courts or an arbitral tribunal if the parties have agreed to
do so, Soviet law stipulates that, in some cases, disputes must be
submitted to state arbitration tribunals.

Arbitration in the Soviet Union is divided into two entirely
separate systems—one for domestic conflicts and the other for
conflicts involving foreign entities. The latter system contains two
major forums: the Maritime Arbitration Committee ("MAC") and
the Arbitration Court of the Chamber of Commerce and In-
dustry ("AC"). Although ad hoc arbitration is permitted, in prac-

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43 RSFSR CCP, art 155, cited in 2A WAR at 2629.
44 RSFSR CCP, art 27, cited in 2A WAR at 2629.
45 RSFSR CCP, art 46, cited in 2A WAR at 2629.
46 RSFSR CCP, art 219, cited in 2A WAR at 2629; Fundamental Principles, art 41,
cited in 2A WAR at 2628.
47 Decree on the Establishment of Joint Ventures, art 5, in Osakwe, 22 Vand J Trans-
natl L at 109 (cited in note 5).
48 While domestic and foreign arbitration are handled by two entirely independent ar-
britration systems, they are part of the same jurisprudential system. Therefore, the domestic
system may provide some useful insights into the perspective of the Soviet negotiators and
their perceptions of arbitration.

The domestic arbitration system has remained basically the same since 1931. It uses the
same rigorous evidentiary rules used by the Soviet courts. These evidentiary rules create a
sense of continuity with the court system. They also provide predictability as to how arbi-
tration will be conducted from a procedural standpoint. Contracts tend to be strictly
enforced.

On a practical level, U.S. negotiators should always be certain that negotiations are
being conducted using the framework, principles and procedures of the foreign system
rather than the domestic one.

For a fuller discussion of the Soviet domestic judicial and arbitral system, see the Intro-
and Maritime Arbitration (Oceana, 1988) ("ICA Sov Arb Binder"); Introduction to 2A
WAR at 2625-27; and Kiralfy (cited in note 16).

49 The MAC exclusively handles maritime disputes.
tice almost all international commercial disputes settled within the USSR are decided by the MAC or the AC, with jurisdiction based on international treaties. These treaties have divided disputes involving parties from member nations of the Committee for Mutual Economic Assistance ("CMEA") from those involving parties from the developing or non-Eastern Bloc industrialized nations. To the investor from a non-CMEA nation, this means that reviewing the resolution of disputes involving JE partners from CMEA nations may not provide an entirely reliable picture of how he or she would have fared in the same situation.

The Arbitration Court ("AC") is a standing arbitration body located in Moscow. No arbitral institutions in the other union republics handle international commercial matters. Therefore, U.S. businesses can be fairly certain that any arbitration in which they are involved will take place in the AC. Known until recently as the Foreign Trade Arbitration Commission ("FTAC"), the AC consists of a central committee that creates ad hoc tribunal panels to handle disputes as they arise. The AC resolves conflicts between Soviet entities and investors from CMEA member nations, as well as conflicts between Soviets and business partners from developing countries and non-socialist industrialized countries.

Established in 1932, the AC is controlled by the All-Union Chamber of Commerce and Industry ("CCI"). The CCI is not part of the state apparatus; however, it is still subject to "general supervision by a state agency," namely, the USSR Ministry of Foreign Economic Relations. Traditionally, Westerners have held strong reservations about the possible hidden ties between the AC and the various groups that oversee it, and also about the "alternative occupations of the Soviet arbitrators." However, despite these concerns, the AC has achieved an excellent reputation for

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50 2A WAR at 2625-27.
51 The Committee for Mutual Economic Assistance is the Eastern Bloc equivalent of the European Economic Community.
52 2A WAR at 2626.
54 2A WAR at 2627.
55 The AC is attached to the Committee of Commerce and Industry. Since the AC serves the same function as its predecessor, the FTAC, and use of the two acronyms might be confusing, AC will here refer to both the AC and FTAC.
56 ICA Sov Arb Binder, bklt 2 at 18.
57 Id.
58 Id at 19.
independence and impartiality and has gained increasing recognition and acceptance in the international community.  

1. The History of Arbitration Court Decisions Involving American Parties.

The favorable reputation of the AC seems to be based largely on the decisions it has rendered over the years, although the value of relying on those awards as indicia of a favorable atmosphere for resolution of disputes involving U.S. JE partners may be somewhat questionable. The AC issued over three thousand awards between 1934 and 1987, 511 of which are readily available in English. However, only about one hundred of the translated cases involved non-CMEA parties between 1978 and 1981, and of those, many involved developing countries.

In light of U.S.-USSR relations since World War II, it is not particularly surprising that the number of reported awards involving U.S. corporations was particularly small. Of the three U.S.-USSR awards readily available in English for the period between 1934 and 1981, only one involved a truly American corporation, a fur purchaser in New York. The other two involved Amtorg, the Soviet trading organization incorporated in the United States. Therefore, little evidence is available to refute concerns some individuals may have that a Soviet dispute-resolution body is likely to discriminate against U.S. businesses. However, the wealth of existing cases involving various Western European entities could be reviewed for signs of anti-capitalist bias.

The three awards involving U.S. entities addressed export/import trade disputes rather than joint economic projects within the Soviet Union. Despite the varying natures of the trade relationships, the awards indicate the existence of procedures that may be beneficial to U.S. JE partners entering into arbitration before the AC. Decisions tend to be made quickly. In the three translated cases involving U.S. parties, the longest time span from the initial

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80 Id.
81 ICA Sov Arb Binder, bklt 2 at 17. Note that not all decisions are published.
82 Gu, 46 U Toronto Fac L Rev at 117 (cited in note 15).
85 For an extensive collection of AC awards translated into English, see ICA Sov Arb Binder.
filing of the claim to the final award was just over three months.65 The types of relief sought and granted were familiar from U.S. contract cases, as was much of the terminology and reasoning. In reaching its decisions, the AC considered issues such as statutes of limitation, contract modifications and imperfect delivery.

Perhaps the most notable trend in the awards and their accompanying explanations was the AC's focus on the terms of the contract. Consistent with the commitment to the "autonomous law of the parties,"66 whenever possible, the AC referred to the terms of the contract and used them to resolve the dispute.67 Since JE agreements must be reviewed by the ministry in charge of overseeing the Soviet partner to the agreement before they are signed, it seems likely that most of the potential conflicts with Soviet law will have been weeded out before the agreement enters into force. If that is indeed the case, the parties can be relatively certain that the structure and rules that they have created will be used to settle any future disputes brought before the AC.

Some businesses may be concerned that the fate of a JE in the Soviet Union is tied more to the general economic and political situation in the USSR than to rules and regulations or contract terms. While this may be true of efforts to establish new JEs, barring a second October Revolution (complete with the nationalization of all property), the dispute resolution system seems to be independent enough to maintain its ability to make impartial decisions, even in the face of adverse political conditions. For example, the ability of the AC to hand down a decision partially in favor of a U.S. party in 1949, seems indicative of independence from the political powers of the country.68


The Chamber of Commerce and Industry recently implemented new legislation concerning the operation of the AC. A series of measures completed in late 1987 and early 1988 have replaced the body of law that had governed the Foreign Trade Arbitration Commission since 1975. The Reglament of March 1988 ("Reglament") now contains the great majority of the current reg-

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65 Kestenbaum Bros (cited in note 62).
66 See part I.D.
67 See, for example, Kestenbaum Bros.
68 Since the Kestenbaum decision is over forty years old, U.S. businesses would be well advised to review more recent cases involving Western European entities with similar commercial characteristics and investment strategies.
ulations. Other than changing the name of the arbitral board to the Arbitration Court, most of the governing regulations remain unchanged from the earlier law. The changes that have been made seem to reflect a desire to increase the predictability of arbitration before the AC.

One new provision spells out more clearly the guidelines for determining what law will be applied. Procedurally, AC arbitration is governed by Soviet legislation—most notably by the terms of the Reglament, but also by "legislative provisions of Soviet law appertaining to international commercial arbitration." The arbitrators are given broad discretion to decide all other procedural manners as they see fit and in accordance with equitable treatment of the parties.

The Reglament limits AC jurisdiction to contract disputes and other civil law disputes concerning foreign trade, technology transfers and other related disputes.

Procedures for filing and responding to claims before the AC are similar to the procedures for complaint and response used in U.S. courts. Both sides may present written evidence and use expert witnesses to support their arguments. During the hearing itself, both parties may present their case using any authorized representative they appoint.

Although parties may be represented by foreign counsel, proceedings are primarily conducted in Russian. If a party wishes to have a translation of any evidence, filed papers, or part of the proceedings, the translation will be done at the expense of the party.

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68 The Reglament is law just as the 1987 Joint Venture Law is law. However, the provisions of the Reglament are all contained in one document with appendices. These are: (1) Statute on the Arbitration Court Attached to the USSR Chamber of Commerce and Industry (confirmed Dec 14, 1987), reprinted in ICA Sov Arb Binder, bklt 2 at 37 (cited in note 48); (2) Reglament of the Arbitration Court Attached to the USSR Chamber of Commerce and Industry (confirmed Mar 11, 1988), reprinted in id at 39 ("Reglament"); and (3) Annex to the Reglament of the Arbitration Court Attached to the USSR Chamber of Commerce and Industry: Statute on Arbitration Fees and Expenses and on the Costs of Parties, translated and reprinted in id at 57 ("Annex to the Reglament").

70 Reglament § 13.
71 Id at § 13(2).
72 Id.
73 Reglament § 1(1).
74 See, for example, Reglament §§ 14-18, 29.
75 Id at §§ 28, 30.
making the request.\textsuperscript{77} The existing provisions suggest that if a party chooses to use a representative who does not speak Russian well, a translator will be required for the proceedings.\textsuperscript{78}

The Reglament has also changed several procedural aspects of arbitration before the AC. First, in the area of evidence, the new legislation gives arbitrators greater discretion. On a general level, arbitrators are charged with evaluating the evidence “according to their internal conviction.”\textsuperscript{79} More concretely, the Reglament contains a new provision giving arbitrators the right to summon and hear witnesses.\textsuperscript{80}

Second, the Reglament encourages speedy resolution of disputes. Previously, parties in all cases had two months to eliminate defects in the Statement of Claim.\textsuperscript{81} Now, however, two months is the upper limit, and it appears that in some cases the parties may have less time to amend their errors.\textsuperscript{82} In addition, the parties themselves may reduce the amount of time between notification and the arbitration hearing to fewer than 30 days.\textsuperscript{83}

The most significant changes from the prior law were made to improve the confidential nature of AC proceedings. Closed-session proceedings have become the rule rather than the exception under the Reglament. In the past, proceedings were open, unless one of the parties or the arbitrator requested that the session be closed.\textsuperscript{84} The Reglament, however, provides only for closed sessions, although non-participants may attend with the permission of the parties.\textsuperscript{85} Finally, publication of AC awards is now possible only with the approval of the Chairman of the AC, and even then is subject to fairly rigorous restrictions. In publishing an award, “the interests of the parties shall be taken into account, and, in particular, information containing the surnames of the persons, the names of the enterprises, goods and prices are not to be published. The

\textsuperscript{77} Annex to the Reglament § 6(1) (cited in note 69).

\textsuperscript{78} Reglament § 9.

\textsuperscript{79} Reglament § 30(4).

\textsuperscript{80} Reglament § 30(1).

\textsuperscript{81} Rules of Procedure for Cases in the Foreign Arbitration Commission Attached to the USSR Chamber of Commerce and Industry § 16(1) (repealed), translation reprinted in ICA \textit{Sov Arb Binder}, bklt 2 at 15. The Statement of Claim is similar to a plaintiff’s complaint in the U.S. system. The Rules were repealed in conjunction with the enactment of the new legislation that included the Reglament.

\textsuperscript{82} Reglament §§ 17(1), 17(2).

\textsuperscript{83} Reglament § 22.


\textsuperscript{85} Reglament § 25.
chairman . . . also may not permit the publication of other data whose disclosure he considers to be inappropriate." On the one hand, these provisions may be an improvement since they offer parties more privacy. However, the new restrictions may make it more difficult to monitor the performance of the AC and to use existing awards to predict the outcome of future disputes.

The new legislation did not affect the procedures for setting fees or enforcing awards. Fees are set using schedules in the Annex to the Reglament.\(^8\) The rates were raised most recently in March of 1988.\(^8\)

Enforcement of AC awards rests on a two-tier system. Voluntary adherence is preferred, but if parties fail to execute the award within the designated time (or a reasonable time if no time has been designated), recourse may be had to the courts to ensure enforcement. In addition, support is provided by the New York Convention on the Enforcement of Arbitral Awards,\(^8\) to which both the USSR and the U.S. are signatories.


Under the Reglament, disputes brought before the AC are decided by a sole arbitrator or a panel of three arbitrators, depending on the wishes of the parties.\(^9\) Regardless of the number of arbitrators to be used, the basic qualifications are the same. Arbitrators are expected to be impartial and independent.\(^9\) They must be selected from a list of individuals who have been pre-selected by the Presidium of the CCI.\(^9\) Theoretically, the list could contain non-Soviets. In practice, however, it does not.\(^9\)

\(^{**}\) Reglament § 42.

\(^{8}\) Annex to the Reglament §§ 2(3), 2(4) (cited in note 69).

\(^{88}\) Id. The fees were raised as follows:

<table>
<thead>
<tr>
<th>Amount in Controversy</th>
<th>Old Cost</th>
<th>1989 Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,000R</td>
<td>150R</td>
<td>150R</td>
</tr>
<tr>
<td>10,000R</td>
<td>300R</td>
<td>400R</td>
</tr>
<tr>
<td>100,000R</td>
<td>2,100R</td>
<td>2,650R</td>
</tr>
<tr>
<td>200,000R</td>
<td>3,100R</td>
<td>4,150R</td>
</tr>
</tbody>
</table>


\(^{90}\) Reglament § 5(3).

\(^{91}\) Reglament § 4(2).

\(^{92}\) Reglament § 4(1).

\(^{2A}\) WAR at 2634 (cited in note 26).
Recently, there has been some discussion of changing the system so as to allow foreign arbitrators to sit on AC panels. Although no changes have actually been made, two approaches have been suggested: (1) adding foreigners to the AC lists, or (2) combining the lists of the AC and other foreign national institutions. Under the current system, the Presidium selects arbitrators for four-year terms. Arbitrators must have "the special knowledge" necessary to resolve the types of disputes that may be brought before the AC.

If the dispute is to be heard by a single arbitrator, the parties have thirty days to select a mutually agreeable arbitrator. In the event that the parties fail to do so, the president of the AC makes the selection. If the case is to be heard by a three-person panel, the claimant must select one arbitrator in the claim, or request that the AC make an appointment on his behalf. The respondent then has 30 days from receipt of the Statement of Claim to select a second arbitrator (or request that the AC make a selection). The two arbitrators then select the presiding arbitrator. If the two arbitrators fail to make a selection within fourteen days, the AC will appoint the presiding arbitrator. In certain cases, parties may appoint reserve arbitrators at the same time. Parties may challenge the impartiality of any of the arbitrators prior to the commencement of the proceedings. However, once the proceedings have begun, challenges will be permitted only at the discretion of the unchallenged member(s) of the panel, or of the AC, when necessary. Arbitrators have the authority to decide questions of jurisdiction, challenges to themselves, experts and translators, and procedural issues. They may also make awards or terminate the proceedings. However, the AC retains the power to deter-

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84 RSFSR CCP, art 155, cited in 2A WAR at 2629, 2634.
85 Reglament § 4(1).
86 Id.
87 Reglament § 20.
88 Id.
89 Reglament § 15(2)(e).
90 Reglament § 18(3).
91 Reglament § 19(2).
92 Reglament § 19(3).
93 Reglament § 23.
94 Reglament § 1(4).
95 Reglament § 23(1), (3).
96 Reglament §§ 21-31.
97 Reglament §§ 34-35.
mine the law to be applied.\textsuperscript{108} Until a panel is formed, all procedural matters are handled by the AC.\textsuperscript{109}

C. Assessment of Arbitration Mechanisms Within the Soviet Union

Some commentators suggest that U.S. business partners will find Soviet arbitration procedures more familiar than Soviet court proceedings.\textsuperscript{110} It is certainly true that the arbitration procedures of the AC have been specifically designed to address disputes with foreign trading partners. On the other hand, these procedures may provide illusory benefits. In Soviet arbitration, as well as court proceedings, contracts tend to be strictly enforced. Therefore, even though the Soviets may institute a number of procedural changes for arbitration involving foreigners—changes that may make it appear that the Soviets are willing to accommodate the special needs of foreign investors—it seems unlikely that the Soviets will ever be very flexible. Given the Soviet emphasis on the parties' contract, there is little room for arbitrators to act less as a judge and more as a moderator.

There are corresponding advantages to Soviet arbitration that may make up for the disadvantage of having a less conciliatory arbitrator. Arbitration before the AC provides a solid set of procedural guidelines and safeguards that may be preferable to those provided by a non-Soviet forum, depending on where enforcement will be necessary and the nature of the JE. These procedural rules are relatively predictable and may be determined by reference to only a few bodies of law. The parallels between Soviet court and arbitral proceedings provide an important method for predicting how these rules will be applied.

Use of the AC eliminates one of the major uncertainties associated with any form of international arbitration. Normally, the sovereignty of the host state for the arbitration may impose unexpected limitations on the ability of parties to determine the procedural laws that will govern their subsequent disputes. Simply put, the host state may bar the use of any procedure it considers antithetical to the nation's public policies, sovereignty or judicial theory. Arbitration before the AC eliminates that potential problem. Since the AC is officially part of the Soviet apparatus, and its gov-

\textsuperscript{108} Reglament § 13.
\textsuperscript{109} Reglament §§ 1-20.
\textsuperscript{110} Osakwe, 22 Vand J Transnatl L at 66 n 246 (cited in note 5).
erning laws were created and passed by the Soviet government, it should be less likely that the Soviet government will strike down the use of one of the AC procedures on the grounds that the procedure violates Soviet public policy or sovereignty.

Moreover, using the AC may offer greater predictability concerning choice of law. In international arbitration, simply determining which procedural laws may apply and how they will interact is often difficult and time-consuming. If there is little in the way of "case law" to use as guidance, the task of reviewing all the potentially applicable procedural codes may be overwhelming. But unlike other arbitral bodies, the AC has developed a body of accessible "case law" that potential parties may use to discern how the AC might handle their disputes.\textsuperscript{111}

At the same time, the AC's history of more than fifty years of independent and apolitical decisionmaking indicates a system that, despite its link to the government and political apparatus, can provide impartial decisionmaking. Therefore, in constructing forum selection provisions of JE agreements, U.S. businesses should give the Soviet arbitration system serious consideration.

II. Arbitration before the Stockholm Chamber of Commerce

In addition to the dispute resolution mechanisms provided by the Soviet government, U.S. business partners in joint enterprises may, by contract, provide for dispute resolution in a third country. Since the early 1970s, the governments of the U.S. and the USSR have expressed a commitment to this kind of dispute resolution, culminating in the 1977 agreement between the USSR All-Union Chamber of Commerce and Industry ("CCI") and the American Arbitration Association ("AAA").\textsuperscript{112}

Under the provisions of the 1977 Arbitration Agreement, U.S.-Soviet JEs may refer all their disputes to arbitration by the Stockholm Chamber of Commerce or any other arbitral body upon which the parties agree.\textsuperscript{113} The 1977 Arbitration Agreement contains a suggested "Optional Clause" that, when included in a con-

\textsuperscript{111} Admittedly, the case law may be of limited value as a tool for making predictions. See part I.B.1. However, parties may take some comfort in the existence of an alternative method of assessing the forum's behavior.

\textsuperscript{112} The agreement took the form of exchanged letters dated December 29, 1976. The full set of these letters is reprinted as Appendix 5 in English in Arbitration in Sweden (1984) 203 (Stockholm Chamber of Commerce, 2d ed 1984).

\textsuperscript{113} Id at 204-05.
tract, binds parties to arbitration of disputes by the Stockholm Chamber of Commerce using UNCITRAL rules.\textsuperscript{114}

Provisions calling for arbitration of disputes in Sweden using Swedish substantive law have become increasingly common in JE agreements between U.S. and Soviet partners.\textsuperscript{116} Some scholars have dismissed this option as doing little for the U.S. investor beyond affording a modicum of "psychological comfort" through the knowledge that any arbitration will be conducted using the law of a neutral third country.\textsuperscript{116} However, despite these criticisms, Swedish arbitration remains a popular option.\textsuperscript{117}

A. Obligations under the 1977 Arbitration Agreement

The 1977 Arbitration Agreement actually consists of letters exchanged among the CCI, the AAA, and the Stockholm Chamber of Commerce ("SCC"). In these letters, the organizations agreed to encourage the use of Swedish arbitration, and particularly the inclusion of the Optional Clause.\textsuperscript{118} The Stockholm Chamber of Commerce agreed to act as the host organization, as well as the authority responsible for overseeing the appointment of the arbitrators, providing facilities and support services on request.\textsuperscript{119}

Under the Optional Clause, contracting parties agree to submit "[a]ny dispute, controversy or claim out of or relating to this contract" to the Stockholm Chamber of Commerce for final, binding arbitration, to be conducted using the UNCITRAL Arbitration Rules.\textsuperscript{120} Although the reason for this choice of procedural law has never been spelled out, perhaps it may be explained by the fact that the Soviets were involved in drawing up the UNCITRAL

\textsuperscript{114} Optional Arbitration Clause for Use in Contracts in USA-USSR Trade 1977, ¶ 1-2 ("Optional Clause"), Enclosure 1 to AAA Letter to the USSR CCI (Dec 29, 1976), reprinted in \textit{Arbitration in Sweden} at 205.

\textsuperscript{116} Gu, 46 U Toronto Fac L Rev at 115 (cited in note 15).

\textsuperscript{118} Id at 119. Gu argues that the only reason the Soviets are willing to submit to a Swedish choice of law provision is because the Soviets believe that Swedish substantive law is not substantially different from their law. Gu implies that arbitration in Sweden is substantially the same as arbitration in the USSR.

\textsuperscript{117} Note that the option is only available to U.S. businesses (as opposed to other non-Soviet investors). One scholar has suggested that this limitation may violate the Soviet Constitution. Osakwe, 22 Vand J Transnatl L at 92-96 (cited in note 5). However, as Professor Osakwe admits, it seems rather unlikely that any of the Soviet partners involved will force adjudication of the issue. Id at 96.

\textsuperscript{119} Optional Clause.

\textsuperscript{120} Stockholm Chamber of Commerce, letter to the AAA (Dec 29, 1976), reprinted in Appendix 5 to \textit{Arbitration in Sweden} at 209-10 (cited in note 112). An identical letter was also sent to the USSR CCI.

\textsuperscript{120} Optional Clause, ¶ 1.
Rules. Therefore, it is possible that the Soviets feel more comfortable with UNCITRAL than with other sets of arbitral rules.

The CCI and AAA agreed that the Optional Clause may be used in contracts between “legal or natural persons of the U.S.A” and Soviet FTOs.2 However, the Optional Clause is not the only option under the 1977 Agreement. Parties are free to make use of “the [Optional] Clause or other such form of arbitration clause which they may mutually prefer and agree best suits their particular needs.”122 In practice, parties have tended to use the Optional Clause and the 1977 Arbitration Agreement in general as the basis for dispute resolution clauses calling for arbitration in Sweden.123

Parties can only use the “Swedish Option” for matters that Swedish law permits the SCC to arbitrate. The controlling provision for the Stockholm Chamber of Commerce states, “[a]ny question in the nature of a civil matter which may be comprised by agreement . . . may, when a dispute has arisen, with regard thereto, be referred by agreement between the parties to the decision of one or more arbitrators.”124 In other words, the organization can handle civil matters with some exceptions and some extensions.

Including the Optional Clause in a contract has a number of effects. First, it makes the arbitration binding and final. Second, it designates the Stockholm Chamber of Commerce as the appointing authority. Third, it requires that disputes be resolved by a three-member panel and sets out the procedures for selecting the arbitrators. Fourth, it designates Stockholm as the venue for the proceedings. Fifth, it requires that parties make their best efforts to choose a language in which to conduct the proceedings.125 If the parties fail to agree on a language, the arbitrator will make the decision.126 In this situation, the statements of claim and defense must be written in English and Russian, and all oral hearings will be interpreted into English and Russian.127 However, all other documents will be translated only at the arbitrators’ discretion.128

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121 Letter of the AAA to the USSR CCI (cited in note 114).
122 Id at 203-04.
123 Gu, 46 U Toronto Fac L Rev at 115 (cited in note 15).
125 Optional Clause (cited in note 114).
126 Optional Clause ¶ 8.
127 Optional Clause ¶¶ 8.1, 8.3.
128 Optional Clause ¶ 8.2.
B. Choice of Procedural Law under the Optional Clause

The Optional Clause makes arbitration subject to the UNCTRAL Arbitration Rules unless an UNCTRAL provision conflicts with a provision of the clause. In the event of a conflict, the clause provision governs. However, parties should not assume that UNCTRAL will be the only procedural law that will apply. The procedural law governing U.S.-USSR JE disputes in Swedish arbitration will be a patchwork of provisions drawn from the Swedish laws, UNCTRAL rules and the terms of the contract itself. On the one hand, the arbitrators will apply the laws in a hierarchical manner. If there is a conflict between an UNCTRAL rule and a contract term, the contract term will govern. If a conflict arises between a mandatory Swedish law provision and an UNCTRAL rule or a contract provision, the Swedish law will govern. On the other hand, these three bodies of law will supplement each other, filling in gaps left by one another. The relationship is complex and may vary rather significantly from one dispute to the next.

Both the UNCTRAL Rules and the Swedish Foreign Arbitration Act limit the extent to which UNCTRAL procedural law can determine the course of proceedings in Swedish arbitral forums. Under UNCTRAL arbitration rules, if there is a conflict between an UNCTRAL rule and a provision of the law applicable to a given arbitral forum from which the parties cannot derogate, the latter provision prevails. If the arbitration is conducted in

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129 Optional Clause ¶ 1.
131 UNCTRAL Arbitration Rules, art 1.1, reprinted as Appendix 7 in Arbitration in Sweden at 217.
132 Arbitration in Sweden at 53.
133 Foreign Arbitration Act.
134 It may prove difficult to predict from which laws governing the arbitration the parties will be able to deviate. Article 1.2 of the UNCTRAL Arbitration Rules is intended to act as a safeguard against infringement on the sovereignty and legal integrity of the contract and the nation in which the arbitration proceedings are held. Accordingly, if an UNCTRAL provision conflicts with a mandatory provision of the law applicable to the arbitration, the arbitral body will disregard the UNCTRAL provision.
Sweden, the provisions of the Swedish arbitration acts govern; parties generally cannot provide for arbitration in Sweden under foreign procedural rules that conflict with the mandatory provisions of the Arbitration Act. The relevant commentary by the Stockholm Chamber of Commerce has both extended and limited the scope of this restriction. On the one hand, the SCC commentary on the provision asserts that the Arbitration Act leaves “ample room” for the use of foreign procedural rules. On the other hand, the SCC also notes that it is often difficult to classify individual Swedish statutory provisions as mandatory or voluntary.

Arbitrators in Sweden must adhere to the Arbitration Act as well as to procedural regulations specified by the parties. While the Arbitration Act contains only a few rules of procedure, the fundamental concepts behind the Swedish arbitration system should be kept in mind, since arbitrators may not contravene Swedish public policy. Arbitrators may also use the Swedish system to resolve conflicts that arise concerning what procedural provision should be applied in a given situation.

The Swedish procedural code builds on three basic principles. First, all material considered in reaching a judgment must be presented orally. Second, the oral presentation must be made directly to the court. Third, the main hearing should be conducted without interruptions, in one session if possible, and if there is too much material for one day, the hearing should be conducted on consecutive days. This last provision in particular should be carefully noted by U.S. participants who may be more accustomed to the often protracted process of litigation in U.S. courts.

The primary procedural rules, of course, are those in the Arbitration Act. The procedural regulations of the Arbitration Act are contained in sections 12 through 15 and section 19. Subject to limitations found elsewhere in the Act, arbitrators must follow the wishes of the parties. In so doing, Sweden emphasizes the use of arbitration as a private dispute resolution mechanism, requiring the arbitral tribunal to act in accordance with any agreement reached by the parties, whether the agreement was reached before

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137 Arbitration in Sweden at 7.
138 Id at 6 n 3.
139 Id at 52. Note, however, that even the Stockholm Chamber of Commerce is not entirely sure what constitutes “public policy” for these purposes. Id at 52-53.
140 Id at 121.
141 Arbitration Act § 13, in Arbitration in Sweden at 175.
or during the proceedings. In Swedish domestic arbitration this entails the enforcement of a fairly stringent restraint on the amount of time that an arbitrator has to make an award. While no equivalent time limitation exists for international arbitration conducted in Sweden and the Optional Clause and UNCITRAL Rules are silent on the matter, the general principle of speediness may help ensure that the dispute is handled in a timely manner. In furtherance of this goal, Swedish arbitral tribunals will decide a dispute even if one party refuses to cooperate with the proceedings. Beyond these requirements, parties are theoretically free to choose what procedural law will govern. "So long as the procedures selected do not violate sections 13 and 14 of the Arbitration Act, they will with few exceptions be permissible." It is rather difficult, then, given the interaction of Swedish procedural law, the law of the contract, and UNCITRAL rules, to state in the abstract exactly what it means for a U.S.-Soviet JE to use the Optional Clause as its dispute resolution provision. Two specific problems illustrate the complexities the Optional Clause may present in practice.

1. Service of Process under the Optional Clause.

Parties must begin arbitration proceedings by filing a request for arbitration directed to the other party in the dispute. Determining what constitutes permissible service and actual notice is very complex. UNCITRAL Article 2(1) allows service by leaving the document(s) at the party's habitual place of residence. This rule may conflict with a mandatory provision of Swedish law, depending on which Swedish law applies to service in arbitration proceedings, a point that is not entirely settled. More specifically, the Swedish Documents Act may or may not apply. If it does apply, a party in a civil action may not make effective service on an individual by leaving the documents with an agent, family member or

142 Arbitration in Sweden at 95.
143 Arbitration Act § 13.
144 Arbitration Act § 18.
145 Arbitration in Sweden at 121.
146 Arbitration Act § 14.
147 Arbitration in Sweden at 95-96.
149 UNCITRAL Arbitration Rules, art 2(1).
150 Arbitration in Sweden at 63. The Service of Documents Act of 1970 is discussed in id at 59-66.
landlord unless there is reason to believe that the party is hiding to avoid being served.151 Also, in the Swedish system, the court itself, rather than the parties, normally takes responsibility for effecting service.152

2. Interim Security Measures.

The ability of arbitrators to impose “interim security measures”—that is, attachments and injunctions—may also create conflicts between Swedish and UNCITRAL provisions. Article 26 of the UNCITRAL Rules gives arbitrators the authority to take interim security measures.153 However, this authority may have only limited effectiveness for two reasons. First, under Swedish law arbitrators are not empowered to enforce such interim security measures with threats of sanctions.154 Second, a Swedish arbitrator might refuse to issue such an interim security order on the grounds that to do so would violate the other party’s right to have “sufficient opportunity to present his case,” as provided for by section 14 of the Arbitration Act.155 Interaction of the various procedural codes creates significant uncertainty, which may be particularly troublesome to a business concerned about potentially serious injunctions during the course of dispute resolution.

C. Selection of Arbitrators

As mentioned above, the controlling provision for the Stockholm Chamber of Commerce allows parties to submit any civil dispute to one or more arbitrators for resolution.156 Within this framework, the Swedish rules have a good deal of flexibility concerning the selection and structure of arbitral tribunals, thereby allowing parties to create a tribunal responsive to their particular needs.157

The arbitration panel is created through a process similar to the one used by the Soviet AC, the key difference being that the panel can include arbitrators of any nationality. The Optional Clause requires a three-member arbitration panel, with each member selected from a pre-existing list created by the AAA and the

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151 The Book of Civil Procedure (rättengnsgsbalken) 33:6(2) ("RB"), Arbitration in Sweden at 2-3; 63-64.
152 RB § 33:4; Documents Act § 2, cited in Arbitration in Sweden at 65.
153 UNCITRAL Arbitration Rules, art 26 (cited in note 131).
155 Arbitration in Sweden at 100.
156 Arbitration Act § 1.
157 Arbitration in Sweden at 71.
USSR CCI. In other words, arbitration before the ICC allows for the use of arbitrators who are not Soviet citizens. Therefore, a U.S. investor concerned about the possibility of Soviet arbitrators being biased may find the Swedish Option preferable to arbitration before the AC in the Soviet Union. The list of possible arbitrators for SCC proceedings contains approximately eighteen notable practitioners and scholars, approximately two-thirds from Western Europe, and the rest from Central Europe. Each party may select one arbitrator. The two arbitrators thus chosen then have thirty days to select the third member, who will serve as the chairman of the panel. Failure by any of those involved to make their selections in a timely manner will result in a default of the privilege and the SCC will make the selection in their stead.

D. Enforcement of Arbitration Agreements and Awards

Regardless of the parties' intentions, an arbitration agreement will not be enforced in Sweden unless it meets the following four requirements: (1) the parties must have the necessary legal authority to conclude the agreement; (2) the contract must not be tainted by any matter that would render it void under private law, such as fraud or duress, and enforcement must not be unreasonable in the given circumstances; (3) the agreement must identify the matters to be handled by arbitration; and (4) in accordance with the New York Convention, the matter must be "capable of settlement by arbitration" under Swedish law. If a contract does not meet these requirements, a Swedish arbitration panel will not enforce it.

The enforceability of Swedish awards abroad depends entirely on the cooperation of the country in which the award must be enforced. However, several safeguards may facilitate enforcement. First, since the awards are rendered in Sweden, most nations will treat them as Swedish awards to be tested on the basis of Swedish law. Second, as long as it has jurisdiction, a Swedish court may, on request, issue a declaratory judgment confirming the validity of the

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Enclosure 2 of the December 12, 1976 letter from the AAA to the USSR CCI, part of the 1977 Arbitration Agreement, Arbitration in Sweden at 207. The Enclosure is a comprehensive list of the individuals who may serve as presiding arbitrators for disputes to be resolved under the Optional Clause.

Optional Clause ¶ 6 (cited in note 114).

Optional Clause ¶¶ 5-6.

Arbitration in Sweden at 29-30.

Id at 158.
award, thus facilitating efforts to prove to the enforcing nation that the award is valid. Third, Sweden is a party to the New York Convention. Therefore, neither the U.S. nor the USSR, both of which are also signatories to the Convention, can block enforcement.

Arbitration fees and expenses are set according to a schedule provided by the Stockholm Chamber of Commerce.

E. Assessment of the Swedish Arbitration Option

In short, businesses using the Optional Clause cannot assume that UNCITRAL rules will be the only body of law governing the procedural aspects of arbitration under the Optional Clause. A business considering using the Optional Clause would be well-advised to compare the UNCITRAL and Swedish codes to ensure that there are no potential conflicts that would result in the application of undesirable Swedish procedural rules. Even this precaution, however, may be inadequate; given the difficulty the Swedish legal community has in determining which provisions of Swedish law are mandatory and which can be waived, it is possible that an arbitration panel would reach conclusions differing from those of a pre-contract investigation by the parties.

Using the Optional Clause may be much more complex than it appears on the surface; therefore, other options should be considered as well. Although it may be easy and convenient for parties to include the Optional Clause in their J/E agreements, using the clause to govern actual disputes may prove rather difficult. The involvement of many legal codes may add substantially to the uncertainty of the proceedings and the time it takes to conduct them. If time and expense are major concerns for the U.S. investor, this problem may detract considerably from the appeal of arbitration before the SCC as contemplated by the Optional Clause.

III. THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce ("ICC") in Paris has settled international commercial disputes since 1923. In addition to the Court of Arbitration, which provides traditional arbitration

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163 Id at 159.
164 New York Convention (cited in note 89).
165 Arbitration in Sweden at 158.
services, the ICC offers several less formal services that attempt to prevent disputes or resolve them before they require formal arbitration.

A. Dispute Prevention Services

The ICC offers two “dispute prevention” services: expertise proceedings and contract adaptation. Although the expertise and contract adaptation processes cannot replace arbitration entirely, parties to a JE agreement may wish to supplement dispute resolution with one of these services. An agreement to use one or both of these services could provide a flexible complement to Soviet-style arbitration, which is formal and tends to enforce contract provisions strictly. Since the contract itself assumes great importance during arbitration, these services might be useful to ensure that the contract reflects to the greatest extent possible the actual intentions of the parties.

1. Expertise Proceedings.

In expertise proceedings, parties bring their problem to the Secretariat of the International Centre for Technical Expertise and request assistance in solving it. Commonly, these proceedings are sought before the problem has crippled the working relationship between the parties. Such a problem may arise from an ambiguity, a gap in the contract, or a change in circumstances.

Expertise proceedings are governed by the International Center for Technical Expertise. The procedure is available whenever the parties agree to submit to it. Regardless of the method of agreement, parties must initiate each request with an application that sets out the details of the problem and the expertise necessary for its resolution.

An expert in the field is selected either by agreement of the parties or, failing that, by the ICC. Parties may ask the Center to make use of its “worldwide business and technical connections” in obtaining an expert. The expert evaluates the situation for the purpose of identifying the problem and collecting the necessary

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168 Id at 18. The ICC prefers that parties express that agreement in a provision in their contract.
169 Id.
171 Guide to Arbitration at 18.
evidence. In addition, if the parties expressly consent, the expert may make recommendations for changes and supervise the carrying out of contractual obligations.172 Parties may agree in advance to bind themselves to the recommendations made by the expert.173

The ICC Secretariat determines costs, including an administrative fee and deposit, which the party requesting the expertise must pay in advance.174

Expertise may prevent small problems from developing into full scale disputes. In addition, its informality may foster creative and prompt resolution. On the other hand, this informality, and most notably the experts' lack of power to modify the terms of the governing contract directly, may detract from the usefulness of expertise proceedings should a future problem arise on the same issue.

2. Adaptation of Contracts.

Parties may also take advantage of the ICC service for the adaptation of contracts. This service allows parties to turn, upon agreement, to an independent third person whose purpose is to adapt their original contract or to fill in gaps in its provisions so that the contract responds to the current needs of the parties.175 The system was specifically created to facilitate the maintenance of complex, ongoing contractual relationships such as joint ventures.176

To use the service, the parties must first provide the ICC Standing Committee for the Regulation of Contractual Relations with evidence of their mutual agreement to the process. This may be accomplished by a provision in their contract that sets out under what circumstances they will have recourse to contract adaptation.177

Once parties have made an adequate request to the Secretariat of the Standing Committee, the Standing Committee appoints a one- or three-person panel, depending on the preference of the parties.178 The investigating panel reviews the situation presented and, in accordance with the expressed desires of the parties, either

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172 Rules for Expertise, art 6(1).
173 Rules for Expertise, art 6(3).
174 Rules for Expertise, art 7.
175 Guide to Arbitration at 20.
176 Id.
177 Id.
makes recommendations or takes a decision. If the panel makes a recommendation, the parties must consider it in good faith. However, if the panel takes a decision, the parties are bound to the same extent that they are bound by the contract into which the panel's decision is to be incorporated.

The Standing Committee determines costs for the service and limits them to the panel's fees and the administrative costs generated by the actual services rendered. The requesting party pays an advance at the outset to cover the fees and expenses of the panel, plus an administrative charge of US$300. At the end of the proceedings, when the final costs have been calculated, the parties split the costs evenly, unless the panel has found that the conditions necessary for its involvement in the contract adaptation process were not met, in which case the requesting party bears the full costs.

The contract adaptation process allows parties to resolve difficulties without disrupting their contractual relationship to the extent often caused by more formal dispute resolution mechanisms. Contract adaptation is often faster and less expensive than full arbitration. In general, the panel must make a recommendation or take a decision within ninety days of receiving the file on the matter. However, the Standing Committee reserves the right to extend or reduce the period as it deems necessary.

B. Dispute Resolution Services

If a dispute progresses beyond the stage at which it can be averted by one of the dispute prevention options, the parties may make use of one or both of the ICC's dispute resolution mechanisms: conciliation and formal arbitration. Conciliation provides an informal alternative to arbitration and therefore may be desirable for business partners who wish to maintain an amicable relationship in the future. Formal arbitration before the ICC Court of Arbitration may serve as either an alternative or a follow-up to conciliation proceedings.
1. Conciliation.

Conciliation is perhaps best described as an amicable alternative to formal arbitration. Even if the parties have included a conciliation provision in their original agreement, the Administrative Commission for Conciliation will not accept the case unless the parties specifically reassert their desire to use conciliation for that dispute.\textsuperscript{186}

The ICC Administrative Commission for Conciliation has the responsibility for overseeing the process—including receiving requests for conciliation and selecting a three-person committee of “leading members of the business world” for each dispute.\textsuperscript{187} Once selected, the committee takes primary responsibility for the remainder of the conciliation process; thus, the parties present their arguments and supporting documentation directly to the conciliation committee appointed for its dispute.\textsuperscript{188}

To the extent possible, the members of each committee reflect the nationalities involved—one member from each of the countries of the two parties and one from a third country who serves as the chairman.\textsuperscript{189} Unlike the AC or the Swedish Option, the ICC leaves open the possibility of including a U.S. citizen on the arbitration panel.

The proceedings involve written and oral review. The panel first reviews the written cases provided by the parties. It then conducts an oral hearing at which the parties may attend either in person or through any accredited agent or representative.\textsuperscript{190} In addition to using the information given to it by the parties, the conciliation committee may also solicit any additional information it needs from the parties or their National Committees.\textsuperscript{191}

The process may resolve the dispute or it may serve as a prelude to formal arbitration, usually before the ICC. The committee may conclude a formal settlement, signed by the parties.\textsuperscript{192} Alternatively, the panel may make recommendations that the parties

\textsuperscript{186} \textit{Guide to Arbitration} at 24.
\textsuperscript{187} Id.
\textsuperscript{188} ICC Rules for Conciliation, art 2, reprinted in \textit{Guide to Arbitration} at 67 (“Rules for Conciliation”).
\textsuperscript{189} Rules for Conciliation, art 1.
\textsuperscript{190} Rules for Conciliation, art 3(3). The ICC imposes no restrictions on who the parties use as their representatives and advisors for oral hearings. \textit{Guide to Arbitration} at 25.
\textsuperscript{191} Rules for Conciliation, art 3. At least 58 countries currently maintain National Committees that act as liaisons to the ICC. As of 1983, the U.S. had a National Committee, but the Soviet Union did not. For a more detailed explanation and a list of National Committees, see \textit{Guide to Arbitration} at 125-33.
\textsuperscript{192} Rules for Conciliation, art 4.
are "invited" to use as the basis for resolving their dispute within a given period. If the conciliation process fails to produce a settlement, the parties are free to pursue formal arbitration or bring an action at law.

In the event that further action is pursued, several measures protect the rights of the parties. Nothing that "arose in connection with the conciliation" proceedings may affect either party's legal rights. In addition, the individuals who sat on the conciliation committee may not serve as arbitrators for the same dispute.

Costs for the conciliation service include an advance payment of US$500 for administrative expenses and a final charge calculated on the basis of the amount in dispute. Each party pays half of the costs. It should be noted that the costs of conciliation are apparently much lower than the costs of arbitration. For example, conciliators, unlike arbitrators, do not receive any remuneration for their work. In addition, conciliation may be faster because it is not subject to the procedural rules that govern ICC Arbitration Court proceedings.

2. Formal Arbitration.

The ICC Court of Arbitration (the "Court") has a well-established reputation for competent arbitration of international commercial disputes in a wide range of areas. As of 1983, the Court was receiving approximately 250 requests for arbitration per year. These disputes covered a variety of issues from industrial

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196 Rules for Conciliation, art 5(2).
197 Id.
198 Guide to Arbitration at 26. The schedule for calculating expenses is the same as the administrative expenses schedule for ICC arbitration proceedings:

<table>
<thead>
<tr>
<th>Sum in dispute (in $US)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 50,000</td>
<td>4.00% (min $1,000)</td>
</tr>
<tr>
<td>From 50,001 to 100,000</td>
<td>3.00%</td>
</tr>
<tr>
<td>From 100,000 to 500,000</td>
<td>1.50%</td>
</tr>
<tr>
<td>From 500,001 to 1,000,000</td>
<td>1.00%</td>
</tr>
<tr>
<td>From 1,000,000 to 2,000,000</td>
<td>0.50%</td>
</tr>
<tr>
<td>From 2,000,001 to 5,000,000</td>
<td>0.20%</td>
</tr>
<tr>
<td>From 5,000,001 to 10,000,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>From 10,000,001 to 50,000,000</td>
<td>0.05%</td>
</tr>
<tr>
<td>From 50,000,001 to 100,000,000</td>
<td>0.02%</td>
</tr>
<tr>
<td>Over 100,000,001</td>
<td>0.01%</td>
</tr>
</tbody>
</table>

Id at 91. One half of any charges paid in conjunction with unsuccessful conciliation may be deducted from the costs of subsequent ICC arbitration. Id at 26.
199 Id at 26.
200 Id at 26, 45.
201 Id at 49.
cooperation to public works. Foreign trade disputes accounted for 37 percent of all the disputes. The Court works with parties from diverse geographical backgrounds, with Eastern Europeans accounting for ten percent of the parties.

The Court limits itself to business disputes submitted to the ICC on the basis of mutual agreement by the parties. The Court may accept jurisdiction over international business disputes and, if there is an arbitration agreement, it may also accept jurisdiction over disputes that are not of an “international business nature.” As a result, there should be no immediately obvious jurisdictional problem with submitting a contract dispute between U.S. and Soviet partners to the Court, so long as the partners have included an arbitration clause to that effect in their original agreement.

The work of the Court is confidential and all participants are expected to respect this condition. On the other hand, the system claims to be open in that it allows for interaction between the Court, the arbitrators and the parties. This is notably different from other arbitral systems that do not allow informal contact between the parties and the arbitrators.

The Court itself does not decide any of the disputes submitted to it. Instead, it selects an ad hoc panel of one or three arbitrators who review the case and make an award. Once the proceedings have begun, the Court’s only role is to review the panel’s award before it is issued to the parties.

In submitting to ICC arbitration, parties are deemed to have agreed to abide by the Court’s rules. The proceedings need not take place in Paris; however, they must respect the sovereignty of the host nation. Therefore, while parties are free to select the body of procedural law to be applied, they must observe the mandatory rules of law concerning international arbitration of the nation in

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200 Guide to Arbitration at 49.
201 Id.
202 Internal Rules for the Court of Arbitration, Appendix II to the Rules of the ICC Court of Arbitration, art 1, reprinted in Guide to Arbitration at 83.
203 Internal Rules for the Court of Arbitration, art 2.
204 Guide to Arbitration at 27.
205 Rules for the ICC Court of Arbitration, art 2(1), reprinted in Guide to Arbitration at 71 (“Rules for the Court”).
206 Rules for the Court, art 21.
207 Rules for the Court, art 8(1).
which the arbitration is conducted.\textsuperscript{208} In addition, any rules selected by the parties must be compatible with the ICC Rules.\textsuperscript{209} Rules designated by the parties or the arbitrator may be used to fill in gaps left by the ICC Rules.\textsuperscript{210} Finally, the parties may choose the substantive law to be applied,\textsuperscript{211} but in all cases the arbitrator must take into account the terms of the contract and relevant trade practices.\textsuperscript{212}

As in conciliation, the ICC arbitration procedure involves a review of the written record by the panel followed by an optional hearing at which the parties may present their cases.\textsuperscript{213} If the parties so agree in advance, the arbitrator may assume the more informal role of an \textit{amiable compositeur},\textsuperscript{214} thus decreasing the rigidity of the proceedings and making them more similar to a negotiation session than to a formal judicial proceeding.\textsuperscript{215}

On the technical side, the arbitrator determines the language (or languages) of the arbitration. This determination must be made in light of all relevant circumstances, most notably the language of the contract in question.\textsuperscript{216} Since most U.S.-USSR JE agreements are concluded in English and Russian, it seems likely that a U.S. partner may assume English would be one, if not the only, language of the arbitration proceedings.\textsuperscript{217}

As mentioned earlier, the arbitrator must submit the award to the Court for review. The Court may "lay down modifications as to the form of the award, and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance."\textsuperscript{218} However, once made, the award is final.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{208} \textit{Guide to Arbitration} at 39. Note the similarity to UNCITRAL Arbitration Rules, art 1(2) (cited in note 131), that binds parties to the mandatory provisions of law governing the arbitration.
\item \textsuperscript{209} Rules for the Court, art 11.
\item \textsuperscript{210} Rules for the Court, art 11.
\item \textsuperscript{211} Rules for the Court, art 13(3).
\item \textsuperscript{212} Rules for the Court, art 13(5).
\item \textsuperscript{213} Rules for the Court, art 14(1).
\item \textsuperscript{214} An arbitrator acting as an \textit{amiable compositeur} operates more as a liaison or negotiator than as an impartial decision maker.
\item \textsuperscript{215} Rules for the Court, art 13(4).
\item \textsuperscript{216} Rules for the Court, art 15(3).
\item \textsuperscript{217} It is less likely that Russian would be used. The ICC prefers to conduct its proceedings in a single language.
\item \textsuperscript{218} Rules for the Court, art 21.
\item \textsuperscript{219} Rules for the Court, art 24(1).
\end{itemize}
While the Court may grant extensions in "exceptional circumstances," the arbitrator generally has six months from the day on which the Terms of Reference are signed to make his award.220

Under the ICC Rules, the parties, by submitting to ICC arbitration, are deemed to have agreed to execute the award made without delay and without attempts to appeal.221 While this is the only enforcement mechanism provided by the ICC rules, U.S. and Soviet parties can also rely on the New York Convention as grounds for demanding enforcement.222

Parties to ICC arbitration must cover both advance payment charges and the final costs as assessed by the Court after the award has been made. The minimum down-payment of US$500 per party to cover anticipated administrative expenses must be included with the initial application to the ICC. The amount paid will then be deducted from the total amount charged at the end of the proceedings.223 The Court may also assess separate deposits for any counterclaims that are submitted apart from the principal claim.224 Depending on the amount assessed for each claim, this provision may cause parties to limit the number and complexity of the claims they bring before the Court. The final award must set the final costs and decide in what proportions the parties will bear those costs.225 The fee schedules for administrative expenses and arbitrators set out the rates to be charged as a percentage of the amount in dispute.226 Unlike the conciliation process, the parties to an arbitration must pay the individuals who review their dispute, which significantly increases the cost of the process.

E. Assessment of the ICC Dispute Resolution Option

Although the expertise and contract adaptation processes of the ICC cannot replace arbitration, parties to a JE agreement may wish to consider adding as a supplement to their dispute resolution clause a provision in which they agree to submit to one or both of

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220 Rules for the Court, art 18(1-2). The "Terms of Reference" is a document drawn by the arbitrator that lays out the claims and counterclaims of the parties and defines the general parameters of the subsequent arbitration. Its form and content are governed by Article 13 of the Rules of the Court.
221 Rules for the Court, art 24(2).
222 New York Convention (cited in note 89).
224 Rules for the Court, art 9(1).
225 Rules for the Court, art 29(1).
226 Schedule of Conciliation and Arbitration Costs, § 5(a).
these options in specified situations. Such a provision may strengthen the good faith commitment of the parties to the non-adversarial settlement of disputes, and it might prove invaluable in resolving disputes before they become grave enough to undermine the JE agreement.

Even if attempts at conciliation fail in a given case, the exercise of having gone through the process may be useful. It may help parties identify their true points of contention, thus simplifying proceedings before the ICC Court. In turn, simplified arbitration proceedings may save the parties time and money.

CONCLUSION

U.S. businesses negotiating JE agreements with Soviet partners would be well-advised to give serious consideration to the full range of dispute resolution options available before choosing a particular dispute resolution mechanism. While the Optional Clause drafted by the AAA and the USSR CCI in 1977 has been popular and provides a ready-made provision that has the backing of the Soviet authorities, it is far from clear whether the provision will be as easy to use as it is to install in the contract. The uncertainty created by the need to coordinate Swedish law, UNCITRAL rules and the law created by the terms of the contract itself may outweigh the ease it creates in the negotiation process. If U.S. investors are adamant about not submitting to dispute resolution before the AC, they should consider neutral location alternatives, such as the ICC in Paris or the Swedish Option, although the latter may not always meet the needs of a particular JE relationship. Whatever dispute resolution mechanism is finally included in the contract, the U.S. and Soviet partners should be certain that they feel relatively comfortable with it, since it could become the key for overcoming difficulties throughout the life of the partnership.