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American Trade With East Germany:
A Legal Frame of Reference*

CHARLES J. MCCLAIN, JR.**

I. INTRODUCTION

The German Democratic Republic, (GDR) until recently officially known in this country as the Soviet Zone of Germany, ranks thirty-first among the nations of the world in population but is among the top ten in industrial production. It is the second leading industrial power in Eastern Europe, and its citizens are widely believed to enjoy the highest standard of living in the Soviet bloc.1 As an advanced industrial state, the GDR does a large volume of trade with the other highly developed countries, communist and non-communist alike. In 1970, for example, it sold a little over $800,000,000 of its goods and services to the nations of Western Europe and Japan while it made slightly over $1,000,000,000 in purchases from these countries.2 Up to the present moment the American share in Western trade with East Germany has been miniscule. The volume of U.S.-East German trade in 1970 amounted to roughly $45,000,000 (as compared to the West German figure of approximately $1,100,000,000), decreased to $35,000,000 in 1971, and slid further to a paltry $25,000,000 in 1972.3 Recent events, however, suggest that the opportunity exists to reverse dramatically the downward trend of U.S.-East German trade statistics.

In late 1972 Dr. Gerhard Beil, State Secretary of the Foreign Trade Ministry, paid an unofficial visit to the United States. Dr. Beil, the highest-ranking

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East German to have visited the United States up to that time, was a guest of the American Management Association at a two-day seminar in New York on American-East German trade. He told the assembled businessmen that his government was keenly interested in expanding trade with the United States, and he estimated that trade could conceivably increase five-fold over its previous levels.\(^4\) While Dr. Beil had no official meetings with members of the American government, he did meet informally with several Congressmen and spent several weeks after the conclusion of the trade convention, visiting with prominent American entrepreneurs from New York to San Francisco.\(^5\) Following close upon Beil's return to East Germany, in April, 1973, a group of leading American corporations was invited by the East German government to send representatives to East Berlin for the purpose of continuing the trade talks begun by the State Secretary. Among the firms which responded to the invitation were such giants as Bank of America, Lockheed Aircraft Corporation, Union Oil Company of California and Bechtel Corporation. It is not known how many deals were struck by the Americans in East Berlin, but it is known that they were given the type of reception which is usually reserved only for the most important foreign dignitaries.\(^6\)

It seems incontrovertible, in sum, that there is major interest on the East German side in a quantum expansion of U.S.-East German trade. In American business circles as well there seems to be growing interest in East Germany as a trading partner. The purpose of this article is to explore the legal parameters within which any future expansion of American trade with East Germany must take place. The article will discuss American regulation of foreign trade with East Germany but will devote particular emphasis to East German trade legislation, a subject which, in this country at least, is largely terra incognita.

II. AMERICAN REGULATION OF TRADE WITH EASTERN EUROPE

A. Legislation Affecting Imports

Importers of goods from Eastern Europe must be concerned with the prohibitive duties imposed by the Smoot-Hawley Tariff of 1930.\(^7\) While imports from countries which have been accorded Most Favored Nation (MFN) status are exempted from this legislation, most of the nations of Eastern Europe do not fall into this category. Section 231 of the Trade Expansion Act of 1962 forbids granting MFN status to any state "dominated or controlled by communism". A 1963 Amendment to the act allowed the President to extend MFN treatment to Poland and Yugoslavia on the ground that this would

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6. See e.g. Christian Science Monitor, April 10, 1973, at 1, col. 3.
promote the independence of these states from communism, but the other states in Eastern Europe have remained under the ban of the act. Needless to say this seriously diminishes the marketability of goods of East European origin and is an irritant to communist trade officials.

B. Export Restrictions

Any discussion of restrictions on exports to Eastern Europe should include at least passing reference to those restrictions maintained by the Consultative Group Coordinating Committee (COCOM). COCOM is made up of the NATO countries, with the exception of Iceland and Japan, and maintains a list of strategic commodities whose shipment to the communist world is, in theory at least, embargoed. COCOM is a very loose, informal international body, and the commitment of its members to refrain from shipping listed goods is little more than a moral obligation since the Committee in practice lacks any enforcement mechanism. The COCOM schedule of controlled items is considerably smaller than that maintained by the American government and contains no entries which are not on the official American schedule; it is nonetheless worthy of mention as it is the only multilaterally-negotiated list of embargoed goods in force in the non-communist world.

As a practical matter the American exporter to East Germany need only be concerned with controls enforced under the Export Administration Act of 1969. This legislation replaced the Export Control Act of 1949, and part of the motivation for its enactment was Congress' intention to institute a more liberal trade policy toward the communist countries of Eastern Europe. The act begins with a Congressional finding that:

The unwarranted restriction of exports from the United States has a serious adverse effect on our balance of payments, particularly when export restrictions applied by the United States are more extensive than export restrictions imposed by countries with which the United States has defense treaty commitments.

Notwithstanding the liberal spirit of the 1969 Act, exports to Eastern Europe remain subject to a comprehensive and rather complex system of controls with which the American merchant must be familiar.

No special authorization is needed to engage in foreign trade, but all American exports, except those destined for Canada, must be made under cover of an officially issued license. The Department of Commerce's Office of Export Control, which has been delegated regulatory authority under the 1969 Act, issues the licenses for most classes of exports. (The Department

of State supervises the export of arms and technical data with military significance. The Atomic Energy Commission (AEC) licenses the export of nuclear materials.) The licenses are of two kinds, general licenses and validated licenses. A general license, only applied for once by the exporter, gives blanket authorization to export certain classes of goods in any quantity, at any time, without prior specific approval. There are several sub-classes of general licenses. A validated license, on the other hand, is a document authorizing a specific shipment of goods or technical data to a specific destination. It too, is issued upon application to the Office of Export Control.

To determine whether a given shipment requires a general or a validated license, one must consult the Office’s Commodity Control List, a complete schedule of commodities including technical data and know-how subject to the Department of Commerce’s licensing jurisdiction. To use the List, however, one must know how the country of destination is classified.

For export control purposes all countries of the world are divided into seven country-groups, each labeled with a letter of the alphabet. The nations of Eastern Europe, with the exception of Poland, Rumania and Yugoslavia, for example, belong to country-group Y. Having located one’s commodity on the Commodity Control List, one can see which country-groups require what type of license. It is a fact reflective of recently liberalized trade policies that most shipments to Eastern Europe, including East Germany, may now be made under a general license, type G-DEST. Some commodities and technical data, however, still require validated licensing.

If a validated license is necessary, the exporter must apply for one with the Office of Export Control. According to the Office’s regulations, each application is reviewed:

. . . in the light of prevailing policies with full consideration of all relevant aspects of the proposed transaction, including the kinds and quantities of commodities or technologies to be shipped, their military and civilian uses, the availability abroad of the same or comparable items, the country of destination, the ultimate end-user in the country of destination, and the intended end-use. Before passage of the Export Administration Act of 1969 the government’s handling of validated license applications for East European-bound goods was sluggish and its decisions often appeared to be arbitrary. Conditions now seem to be much improved. The Department of Commerce has officially declared it to be its policy to approve applications for export of commodities to Eastern Europe which are for a civilian use and which are not likely to contribute to the military potential of the country of destination in a way that

12. In connection with a large project abroad demanding the continuous export of goods requiring validated licenses, there is provision now for a “project license”, which authorizes exports for a period of up to two years. See Dept. of Commerce, Export Control Regulations, 15 C.F.R. § 373.2 (1974).
13. Id. § 385.2.
would be damaging to United States national security.\textsuperscript{14} From conversations with American businessmen who have had dealings with East Germany since the enactment of the 1969 legislation it is the impression of the writer that applications for permission to export to East Germany are, on the whole, handled expeditiously and fairly. The exporter whose request for a validated license is denied may appeal the decision to an Appeals Board within the Office of Export Control.\textsuperscript{15}

Penalties for violating export control regulations are severe. They include heavy fines and imprisonment. Even lesser sanctions have, in the past at least, been rather draconian. One American company, for example, for transmitting unauthorized know-how to Rumania (it was actually a highly technical violation of the law) was penalized by being denied the right to participate in any export dealings with communist countries for five years.\textsuperscript{16}

C. Restrictions on Extensions of Credit

The principal piece of American legislation affecting credit transactions with Eastern Europe is the Johnson Debt Default Act of 1934.\textsuperscript{17} It prohibits transactions in the securities of, or loans to, a foreign government or its instrumentalities while that government is in default of its payment obligations to the United States unless the government is a member of the International Monetary Fund and the World Bank. Since East Germany belongs to neither of these financial institutions and since it technically is still in default of its obligations to the United States by reason of American properties it expropriated after World War II, it comes under the terms of the Johnson Act—as in fact do all Soviet-bloc states except for Bulgaria and Albania.

If the language of the Johnson Act were taken literally, it would bar all extensions of credit to the affected communist countries. But official glosses on the Act have established that it will be invoked to bar only general purpose loans, the marketing of defaulting governments' securities to the U.S. public, or long-term financing of exports. The Johnson Act thus does not prohibit the normal financing of exports by U.S. firms. In the words of the Attorney General:

Financing arrangements lie beyond the scope of the Act if they are directly tied to specific export transactions, if their terms are based upon bona fide business considerations, and if the obligations to which they give rise move exclusively within the relatively restricted channels of banking and commercial credit.\textsuperscript{18}

Commercial credits of up to eighteen months in connection with the sale of certain commodities have been accepted as being within bounds.\textsuperscript{19} Longer

\textsuperscript{14} Id.
\textsuperscript{15} For the appeals procedure see id. §§ 389.1-389.3.
\textsuperscript{16} S. PISAR, COEXISTENCE AND COMMERCE 129 (1970).
\textsuperscript{18} 42 Op. Att'y Gen. 5 (1967).
\textsuperscript{19} See then Attorney General Robert F. Kennedy's justification for the agricultural
term financing, however, is probably still barred by the Act. It is worth noting finally that the Johnson Act does not apply to credit transactions by foreign subsidiaries of American corporations so long as they are consummated abroad.\textsuperscript{20}

In addition to restricting private extensions of credit to Eastern Europe the United States government places severe limitations on the use of its own credit insurance agency, the Export-Import Bank, in financing exports to Eastern Europe. The Export-Import Bank, by the terms of a 1968 statute, is virtually barred from participating in the financing of trade with Eastern Europe.\textsuperscript{21} This legislation was largely a reaction to the Russian invasion of Czechoslovakia, and the Congress in 1971 retreated somewhat from its militant stance by allowing the President to authorize the guarantee of credit extended to East European countries if he determined it was in the national interest.\textsuperscript{22} Presidents have in fact done this in the case of the USSR, Poland, and Rumania, but the other countries of the Soviet bloc, including East Germany, remain under the ban of the 1968 law.

A final piece of legislation governing credit transactions with Eastern Europe should be mentioned. Under the provisions of the Agricultural Trade Development and Assistance Act of 1954, sometimes referred to as Public Law 480, the sale of agricultural commodities on long-term credit to countries controlling world communist movements or to countries with which the United States does not maintain diplomatic relations is prohibited.\textsuperscript{23} However, short-term and medium-term financing of agricultural exports appears not to be forbidden.

### III. ORGANIZATION OF FOREIGN TRADE IN THE GDR

#### A. The State Monopoly of Foreign Trade

In East Germany, as in all other Soviet-bloc countries, the foreign trade function is the exclusive preserve of the state. The East German government's exclusive control over foreign trade is anchored in the organic law of state. Thus the Constitution of April 8, 1968 declares that "[T]he foreign economy, including foreign trade and foreign exchange control, is the monopoly of the state."\textsuperscript{24} Statutory authority for the government monopoly is contained in the Foreign Trade Act of January 9, 1958,\textsuperscript{25} which confirms

\begin{footnotesize}
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  \item S. Pisar, supra note 16, at 109.
  \item Id.
  \item Verfassung, art. IX, para. 5 (E. Ger., 1968). (Unless otherwise indicated all translations from the German are the author's.)
\end{enumerate}
\end{footnotesize}
the state monopoly and confers on the Foreign Trade Ministry the duty of supervising the conduct of foreign trade. For the foreigner intending to do business in East Germany, the consequences of this legal state monopoly are both far-reaching and obvious, the principal one being that only organs of the state may legally transact foreign trade business. Agreements with private individuals or with any of the few remaining private firms in the GDR are absolutely null and void.

B. The Foreign Trade Ministry

The Foreign Trade Ministry, to which authority over the conduct of foreign trade is assigned, is a juridical person, with its seat in East Berlin, and is subordinate and responsible to the Council of Ministers of the GDR, which is the supreme executive organ of the state. The Ministry is responsible for drafting a comprehensive annual foreign trade plan and for seeing to its execution.26 The responsibility for the actual carrying out of the plan is delegated by the Ministry to a group of legal entities under its control which bear various official designations but which may collectively be referred to as Foreign Trade Enterprises.

C. The Foreign Trade Enterprises

The Foreign Trade Enterprises (FTE's) of the GDR, which have their counterparts in all other East European states, are legally independent entities specially created by the Ministry for the purpose of negotiating export and import contracts with foreigners. The FTE's exist solely for this purpose. They neither produce nor use the goods and services in which they deal. They act rather as middlemen between the foreign trader and his East German purchaser or vendor. The FTE's are thus the instrumentalities with which the Westerner trading with the GDR will almost invariably deal. The FTE's exist at the pleasure of the Foreign Trade Ministry, which has the power to dissolve them at will, and the Ministry determines in which kinds of commodities or services each FTE is competent to transact business.27

(Staatsbank der deutschen demokratischen Republik) authority to fix foreign exchange rates. The bank most intimately involved in foreign trade operations is the German Foreign Trade Bank (Deutsche Aussenhandelsbank AG) which maintains branches wherever the East German export industry is concentrated, handles export documents, and settles international payments transactions. Its authority is set forth in the Directive on Payments Transactions With Other States of July 1, 1966, [1966] GBI. II 476.

26. The powers and duties of the Foreign Trade Ministry are described in the Statue of August 9, 1973, [1973] GBI. 1 420. The Ministry has been called by various names in the past, including The Ministry of Inner- and Outer-German Trade, the Ministry of External Economic Relations, and the Ministry is that of “protecting the economy of the GDR against harmful influences of the imperialist economic and monetary system.” Statue of August 9, 1973 § 2. An Office of External Economic Relations was established by the GDR in 1970 to promote trade with capitalist, industrial countries, and to handle everyday administrative tasks, thus freeing the Ministry for more important matters.

27. Legal authority for the FTE's to conduct business is contained in the Regula-
The FTE’s are designated as either “foreign trade limited liability companies” (Gesellschaften mit beschränkter Haftung-GmbH), such as the firm *Unitechna*, which specializes in plant equipment and machinery for the textile industry, or as “people’s own foreign trade enterprises” (Volkseigene Ausenhandelsbetriebe), such as the firm *Chemie Export-Import*, which buys and sells chemicals. But whatever the official title, the FTE’s enjoy the same status in contemplation of East German law.

Within their respective spheres of competence and within the limits set by law the FTE’s have full capacity to enter into binding agreements with foreign partners and may sue or be sued for default on obligations. The statute or articles of association of each FTE stipulate which of its officers are authorized to represent it with legal effect (this will usually be the General Manager of the enterprise), but there is no East German parallel to the Soviet system of publishing periodic lists of individuals who alone are authorized to execute contracts in the name of their respective FTE’s.

Under the theory of the legal independence and separate personality of the FTE’s the state is not liable on the obligations they incur, nor are they responsible for actions taken by the state which interfere with the performance of their obligations. The likelihood of an FTE defaulting on its obligations because of bankruptcy, thus leaving its foreign partner without recourse, is very slim indeed. Nonetheless, the theory of legal distinctness can have interesting consequences in the real world, as was shown by the Soviet Arbitration Tribunal’s decision in the case of *Jordan Investments Co. v. Sojuzneftexport*. (All East European states consider their foreign trade organs to be legally independent entities, and thus the holding of this case would be equally applicable to all Soviet-bloc countries.) There an Israeli plaintiff, in the aftermath of the Suez crises of 1956, claimed damages for non-delivery of fuel oil promised it by the defendant Soviet foreign trade organization. The defendant pleaded *force majeure*, citing the refusal of its government to grant an export license as excuse for its failure to deliver the oil. The plaintiff countered that the foreign trade organization and the state were one and the same entity, but the Soviet tribunal held for the defendant, bottoming its decision on the distinct personality theory. Admittedly, such occurrences are extremely rare in East-West trade, but the *Jordan Investments* decision does point up the seriousness with which the distinct personality theory is taken. East Germany requires permits for the export of all commodities,\textsuperscript{30}

\textsuperscript{28} HANDBOOK, supra note 1, at 62.

\textsuperscript{29} An extended report of the litigation can be found in S. PISAR, supra note 16 at 274 et seq.

\textsuperscript{30} HANDBOOK, supra note 1, at 85.
but such permits are issued as a matter of course and no FTE would negotiate an export contract unless it were assured, at least at the time of execution, of state approval.

A few large manufacturing firms in East Germany, such as the world-renowned optical combine VEB Carl Zeiss, Jena, are permitted by law to deal directly with foreigners without the mediation of an FTE and to conclude export agreements. These agreements, however, must be ratified by the FTE responsible for the line of commerce in question in order to be legally effective. Additionally, the price is paid directly to the FTE by the foreign customer.

The GDR is chronically short of convertible foreign currencies and jealously guards its limited reserves. As a result, contracts for the import of goods and services from hard-currency countries are almost always negotiated by FTE's, only the smallest number of consumer firms having been delegated authority to conclude their own import agreements.

D. The Chamber of Foreign Trade

Another important instrumentality of foreign trade under the supervision of the Foreign Trade Ministry is the Chamber of Foreign Trade. It has been described by a leading East German jurist as a "nongovernmental, juridically autonomous, voluntary association of foreign trade enterprises, industrial enterprises concerned with export and import, and similar enterprises." The Chamber was established to promote trade with the non-communist world and before the recent rush to extend diplomatic recognition to East Germany had as one of its main tasks the establishment of trade relations with Western nations that refused to deal officially with the East German regime. The Chamber continues to devote much of its attention to promoting and improving trade relations with the capitalist world, but its chief significance now lies in the Arbitration Tribunal which it operates for the purpose of hearing controversies arising out of trade dealings between East Germany and foreign parties.

E. Marketing Operations in the GDR

Foreign trade in Eastern Europe is conducted within the framework of foreign trade policies, with the GDR giving a lopsided emphasis to exports as opposed to imports. Not only are import agreements surrounded with greater formal legal requirements and thus made more difficult to conclude, but also § 33 of the Regulation imposes on all government bodies engaged in foreign trade the express obligation to reduce the volume of imports and make maximum use of those commodities which have to be imported.

32. A careful reading of the Regulation of January 9, 1958 suffices to show what lopsided emphasis the GDR gives to exports as opposed to imports in its foreign trade policy. Not only are import agreements surrounded with greater formal legal requirements and thus made more difficult to conclude, but also § 33 of the Regulation imposes on all government bodies engaged in foreign trade the express obligation to reduce the volume of imports and make maximum use of those commodities which have to be imported.
33. Strobach, The Election of Arbitrators for Proceedings Before the Arbitration Court of the Chamber of Foreign Trade, LAW AND LEGISLATION IN THE GERMAN DEMOCRATIC REPUBLIC, No. 1 1969, at 40,
five-year export and import plans drawn by the foreign trade ministries of the respective states. These plans define in a rather general way the volume and composition of foreign trade and designate those countries which are to be traded with over the five-year period. They are publicly available but are so general as to be of only marginal utility to the foreigner contemplating doing business in Eastern Europe. The actual guidelines as to the specific types of commodities to be imported or exported are contained in the unpublished annual foreign trade plans, which are in the nature of directives to the state trading units. On the basis of these plans, which contain the all-important information on the availability of hard currency for making purchases abroad, these trading units decide what purchases they shall make. Since products which are not included in the purchasing plan of an East European state are difficult to market, regardless of price or quality, the marketing objective of foreign traders is to have their products included in the annual plans. To be sure, some flexibility is built into the plans, and a truly outstanding product may be purchased notwithstanding its non-inclusion in the plan, but the marketing operation is made much easier by having one's product included from the outset.

In East Germany there are several ways in which the Western vendor may seek to impress upon his potential East German purchasers the desirability of his product. In the first instance he may undertake occasional sales visits to the relevant FrE's; or he may decide that a more permanent presence is preferable, in which case he will be able to take advantage of a recent East German law which allows foreign firms to establish branch offices in the GDR. In order to receive permission to set up such an office the Western firm must make application to the Foreign Trade Ministry which meets periodically to review applications.

If the foreign company does not wish to establish its own office in East Germany, it may elect to be represented by one of the East German state sales agencies. These agencies do sales promotion work for their foreign clients, convey information of important developments in the area of foreign trade, and assist in the negotiation of contracts. The real usefulness of these agencies is a matter of some dispute, but they at least do provide the foreign firm, which could not otherwise afford it, a form of permanent representation.

34. Legal basis for the establishment of a branch office in the GDR is contained in the Decree of December 22, 1971, [1972] GBl. II 25, with the Implementing Regulations of June 8, 1972 [1972] GBl. II 463. Unlike some other East European states which permit the establishment of informational and technical but not commercial offices, East Germany imposes no such restrictions.


36. Much to the surprise and annoyance of one American firm known to the author, an East German agent was forced upon it in the course of its contract negotiations with an East German FrE. The agent was supposed to act as a mediator but in fact did little more than act as a chauffeur for the representative of the American firm, a
Advertising is another means of product promotion available to the foreign trader which does not require a firm's physical presence in the GDR. Foreign companies may not make direct contact with advertising media in East Germany but may arrange for advertising through the government firm Interwerbung. This agency is empowered by statute to enter into contracts with foreigners for advertising campaigns in the GDR.37

Finally, a word must be said about the two annual trade fairs held in the city of Leipzig, exhibitions which are among the largest in Eastern Europe and which thus offer the Western trader the opportunity to reach a wide audience of potential Eastern customers. The Leipzig Spring Fair is held in early March and focuses on capital rather than consumer goods. It attracts exhibitors from within and without the communist world, including a perennial small contingent from the United States. The Autumn Fair, held in early September, is a somewhat more modest event and focuses on consumer goods.

IV. SUBSTANTIVE EAST GERMAN LAW AFFECTING FOREIGN TRADE

A. The Law of Contract

As part of a comprehensive project of law reform, which is to include the drafting of a new Civil Code and Code of Civil Procedure, East German jurists have for some time been at work on the preparation of a Foreign Trade Contract Law (Aussenwirtschaftsvertragsgesetz) which will govern all trade agreements between the GDR and its foreign partners.38 The new law is inspired by and will evidently be patterned after the new Czech International Trade Code, a comprehensive body of law regulating "property relations arising in international commercial transactions where Czechoslovak law has been chosen by the contracting parties or is applicable on the basis of private international law."39 For the foreseeable future, however, whenever East German law is the applicable law, questions concerning contracts are governed by the general provisions of traditional German Civil Law, including the Civil Code of August 18, 1896 (Bürgerliches Gesetzbuch - BGB) and the Commercial Code of May 10, 1897 (Handelsgesetzbuch—HGB).40

A detailed discussion of East German Contract Law or the law of sales service for which he was quite handsomely compensated. The agent's commission was in effect a discount on the price.

40. Where they have not been modified by subsequent legislation the provisions of the Civil Code of 1896 (Bürgerliches Gesetzbuch—BGB) remain in force in East Germany, as do the provisions of the Commercial Code (Handelsgesetzbuch—HGB).
is beyond the purview of this paper (the basic law of sales is contained in the second book of the Civil Code, §§ 433-515; the law of contract is a complex weave of strands from many different parts of the Code, the principal elements being contained in the second book, §§ 241 et seq.), but the most salient and apposite features of this body of law may be sketched here by way of introduction.

It is not clear whether East German law requires international trade agreements to be in written form; nor is it clear whether oral agreements are considered enforceable. However, it is relevant to point out that under the General Conditions of Sale and Delivery, which govern trade between the countries of the East European economic community, trade agreements must be in writing. The same likewise holds true for contracts concluded within East Germany between the various East German firms and factories. Of course it is almost unthinkable that any East-West trade agreement would ever be concluded orally. In one recent transaction with which the author is familiar, for example, the East German representative insisted that detailed written protocols be kept of all negotiating sessions and that these protocols be incorporated into the final contract.

Under the German law of contracts the principal claim of the promissee is for performance, or what in Anglo-American jurisprudence would be called specific performance, of the agreement. Damages are a subsidiary claim. The essentials of the German doctrine are summed up admirably by Professor Rudolph Schlesinger, a leading scholar in the field of comparative law:

Unexcused failure to perform at the proper time (i.e. a breach in our sense of the word) ordinarily gives rise only to a claim for performance. An action for damages, rescission or restitution will lie only if the obligor is in “default”. In the absence of a contract term which makes time of the essence, “default” does not occur automatically as a result of the obligor’s failure to render due and timely performance, even though such failure is unexcused; it further requires a “putting in default”, i.e. a warning or admonition to perform, to be given by the obligor to the obligee, unless the obligor, by express refusal or prevention of performance, has made it clear that such putting in default would be a futile gesture.

Analogously in the law of sales it is a general rule that no claim for damages results from the delivery of defective goods. The aggrieved party may ask for a cancellation of the contract (Wandelung) or a reduction in price (Minderung), or he may request the delivery of similar goods


42. BGB § 241 (Staatsverlag der DDR 1967).

in perfect condition. If, however, there has been a malicious concealment of defects or there is the absence of qualities expressly warranted, then damages are an appropriate remedy.\textsuperscript{44}

If it is determined that a party may legally claim damages because of a failure of performance, then he may use a penalty clause in his contract as their measure. The civil law tradition does not share the common law's aversion for penalties or distrust for damage figures set in advance by the parties to an agreement. It can indeed even be said that damages as a penalty for nonperformance are positively encouraged in the continental systems. Thus the German Civil Code fully legitimates penalty clauses in contracts with the proviso that the court may reduce the figure if it is unreasonably high.\textsuperscript{45} However, section 348 of the Commercial Code qualifies the discretion of the court by stipulating that no reduction in liquidated damages be permitted in case of agreements between merchants—a fact worthy of remembrance since the East German FTE's are almost certain to be considered as merchants.

One provision of the Civil Code deserving special emphasis is section 275, which excuses the obligation to perform agreements in the case of objective impossibility of performance for which the obligee bears no responsibility. Under this section an East German FIE could colorably contend that its failure to obtain a government license or a change in the government's foreign trade plan created in it an objective impossibility of performance for which it could not be held liable.\textsuperscript{46} While such a turn of events is unlikely, the prudent trader will at least be aware of this potential loophole in the law.

Parties desiring to immunize their transactions against the provisions of German contract law may do so easily enough by drafting into their agreements their own terms and conditions of performance. The only prerequisite for the legal effectiveness of these terms, which, if legally effective, will prevail over the codes, is that they have the assent of all contracting parties.\textsuperscript{47} (Of course one party cannot impose terms on his opposite number by reason of superior bargaining; nor can agreements include terms which offend public policy or morality.\textsuperscript{48}) Thus a contract can contain a detailed statement of

\begin{thebibliography}{9}
\bibitem{44} BGB §§ 462-463 (Staatsverlag der DDR 1967).
\bibitem{45} Id. §§ 339, 343.
\bibitem{46} Some of the problems arising out of the concept of \textit{force majeure} and the state monopoly of foreign trade was broached in the discussion of the Soviet-Israeli oil dispute, text pp.12-13. It is well known that communist trading partners are loath to recognize \textit{force majeure} intervening from the Western side in the form of strikes, for example, or unforeseeable shortages of supplies. In this connection see S. Pisar, supra note 16, at 273-274.
\bibitem{48} BGB § 826 (Staatsverlag der DDR 1967) (frauds doctrine) and §§ 134, 138 (voiding agreements that offend against public policy).
\end{thebibliography}
what will constitute adequate performance and conversely what constitutes breach. It may also specify what remedies, including what damages, will be available to the aggrieved party upon breach. Agreements may incorporate as well a choice of law provision, designating the substantive law to be applied in construing the contract terms in the event of a dispute.40 Among those practiced in East-West trade, it is almost axiomatic that detailed, tightly-drafted contracts, providing for all contingencies, offer the best guarantee that business transactions will unfold smoothly.50

V. LAWS FOR THE PROTECTION OF INDUSTRIAL PROPERTY

Since East European demand for Western technology is expected to outstrip the demand for Western goods in the decade of the 1970's, legislation enacted in the East European states for the protection of rights in industrial property take on special importance for the Western trader. If there was a time when these states took a cavalier attitude toward patent and trademark privileges, it has passed. In the first place, it has become clear that the mere pirating of foreign inventions is not very productive. By the time the copying is complete, the inventions are outmoded. More important, these states now have a vested interest in seeing industrial property rights given international protection; for, as they have matured industrially, their desire to see the increasingly marketable products of their own scientific and technical laboratories sold and protected abroad has grown accordingly.

A. Patent Law of the GDR

East Germany, like all other East European countries, has a two-tier system of patents. It differentiates between "economic patents" (Wirtschaftspatente) and "exclusive patents" (Ausschliessungspatente). Economic patents, modeled after the "certificates of authorship" pioneered by the Soviet Union, are designed for citizens of the GDR. They are issued to the inventor in his personal capacity and create in him a legal right to compensation to the extent his invention is used. Proprietary rights in the invention vest in the state. Foreigners are technically eligible for economic patents, but since there is no reason why the foreign inventor or patentee should be satisfied with this lesser form of patent protection when the complete panoply of rights conferred by exclusive patents is fully available, economic patents are given no further consideration in this paper.

Exclusive patents (hereafter referred to simply as "patents") are for foreign consumption. They create in the patentee the exclusive right to make,
sell or use the invention. The privileges they confer are tantamount to the monopoly of ownership and control over inventions, including the right to restrain use by third parties and to license the invention to the highest bidder, which is conferred by a standard patent in the West.\footnote{51}

Foreigners, including Americans\footnote{52}, may make application for patent registration with the Patent Office (Amt für Erfindungs und Patentwesen) in East Berlin; however, they must be represented by local counsel.\footnote{53} The applications must be in the German language and must be accompanied by, \textit{inter alia}, an exact description of the invention, a report on publications on the state of the art, a power of attorney for local patent counsel, drawings needed to understand the invention, and priority documents if applicable.\footnote{54} The transferee of a patent must include with his application a declaration of how he acquired the patent rights.\footnote{55}

Those inventions and technical processes are eligible for patents which show the requisite degree of newness and distinctness. An invention is considered to be new if, at the time of filing of the registration application, it has not been described in an East German or foreign publication nor publicly used in the GDR, except that a description of the invention by an applicant within six months prior to the application does not prejudice the application.\footnote{56}

Lack of novelty will not prevent patenting if an applicant can establish a prior claim to the invention. The basis for a priority claim may be either prior filing of an application with the Patent Office or prior filing according to the terms of the Union Convention of Paris for the Protection of Industrial Property of 1883, the principal international agreement on patents and patent

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\footnote{51}{The basic East German statute on patents is the Patent Law of September 6, 1950, [1950] GBI. 989, as modified by the Amendment of July 31, 1963, [1963] GBI. I 21. Technically, East German citizens may hold exclusive patents, but few do. If the patents are marketable for convertible foreign currency, they are quickly nationalized by the state after payment of compensation; and even if the inventor is allowed to keep his patent, it is in effect nationalized since there is only one customer with whom to deal, namely the government.}

\footnote{52}{Even though the United States does not recognize the GDR, U.S. nationals may register their patents in East Germany. U.S. firms made 197 applications for patent registration in 1970, 160 of which were successful. \textit{See} \textit{Doing Business With Eastern Europe}, \textit{supra} note 2, at 215.}

\footnote{53}{Law of September 6, 1950, [1950] GBI. 989, as modified by the Amendment of July 31, 1963, [1963] GBI. I 121 § 43. The International Patent Bureau Berlin, not to be confused with the Patent Office, provides legal counsel in all patent and trademark matters as does the Office of Patent Agents, Berlin.}


\footnote{55}{\textit{Id.} § 6.}
The Convention provides that patent application in one signatory state puts all other members of the Convention on notice that similar application may be filed there within one year and for the duration of that period deprives of legal effect any action by a competitor prejudicing the first applicant's rights. The GDR has declared its adherence to the Paris Convention of 1883, in the Stockholm version of July 14, 1967, and thus recognizes Union priority rights. Where priority under the Paris Convention is asserted, a German translation of the original application must be submitted to the East German Patent Office.

A 1955 East German law gives priority rights to inventions which have been displayed at certain international exhibitions designated by the Foreign Trade Ministry. Under this legislation an invention has priority status for six months following the date of the exhibit no matter when in this period the application is filed. However, since the rights of foreigners to the protection of this law are contingent on reciprocal treatment of GDR nationals by the foreigner's state of origin, it is not clear whether the statute is available to Americans.

The GDR follows a two-step procedure in examining patent applications once filed. The Patent Office first checks the application for compliance with the formal requirements. A so-called "provisional patent" is then issued. This document is of very limited legal effect, however. The provisional patentee, for example, cannot sue for infringement of a provisional patent. Upon issuance of the provisional patent, interested third parties may raise objections to the patentability of the invention which are then noticed but not acted upon by the Patent Office. If the provisional patentee wishes to have the full protection of the law, he must then file a petition for a "supplementary examination". At this time the Office conducts an in-depth investigation into the invention's patentability, considering also any objections which have been filed. If all is in order, a final patent is then issued. It is effective from the date of issuance of the provisional patent, has a duration of eighteen years and is non-renewable. Decisions rejecting patent applica-


58. HANDBOOK, supra note 1, at 91. Prof. Henri Rollin of the Free University of Brussels and Prof. Alois Troller of Fribourg University were requested by the government of the GDR to give their opinions on whether the GDR was entitled to consider itself a party to the Paris Convention of 1883 by reason of its declared adherence to the agreement. The two scholars answered in the affirmative despite the fact that at the time their opinions were solicited the GDR was not recognized by most of the other signatory powers. Rolin and Troller, Response to Questions Posed by the East German Government, Law and Legislation in the German Democratic Republic, No. 1, 1968, at 47.


60. Law of September 26, 1955, [1955] GBl I 656. The law applies to trademark registration as well.
tions are appealable within two months following their rendition.\(^6\)

Objections to a final patent are made by filing suit for invalidation with the Patent Court in Leipzig, which has jurisdiction over all disputes involving patents.\(^6\) A patentee can avoid an invalidation suit by filing an application for a "revision" with the Patent Office which satisfies the objecting party. Such revision may take the form of a rewriting of the patent claims or a modification of the specifications of the invention. If suit cannot be avoided in this way, then the patentee will have to defend the legitimacy of his claims before the Patent Court. Anyone making illegal use of a patent may be sued by the patentee. The common remedy is injunction, but deliberate or grossly negligent use entitles the patentee to damages. The Leipzig Patent Court would again have jurisdiction over such litigation, with an appeal lying to the Supreme Court of the GDR.\(^6\)

The GDR may order that a patent be commercially exploited within its borders or compel the licensing of the invention for just compensation or may even invalidate the patent partially or completely for failure to work it.\(^6\)

Patents confer valuable legal rights on the patent holder. In addition, they are of immense practical value to the Westerner seeking to market his technology profitably in Eastern Europe. As is pointed out by Samuel Pisar in his work on East-West trade:

> The mere circulation of a locally established patent gives useful exposure to the holder's know-how and products and therefore serves as an advertising device aimed at industrial managers. In addition, registration constitutes clear legal recognition, fully operative within the particular communist country, that the beneficiary is the proprietor of the rights and that he derives his title from local legislation, not merely from unverified recitals contained in his contract.\(^6\)

### B. Trademark Law

If there are marketing advantages which accrue to the patent holder, the same can be said for the merchant who registers his trademark in East Germany. The registered trademark, besides providing legal protection to the registrant, offers a focal point for product promotion. Trademark protection is secured by registration of the mark in the Official Register of Trademarks, a public document maintained by the Patent Office. Legal basis for registra-

\(^6\) The procedure is set out in the Law of September 6, 1950, [1950] GBI. 989, as modified by the Amendment of July 31, 1963, [1963] GBI. I 121 \(\S\S\) 23 & ff.


\(^6\) Pisar, *supra* note 16, at 334,
tion is the Trademark Act of February 17, 1954,66 as modified by the Amendment of November 15, 1968.67

Applications for registration must be in German and must be filed with the Patent Office. They must include a pictorial representation of the mark as well as a verbal description. They must contain besides a description of the line of commerce in which the mark is to be used and a catalogue of the type of items to which the mark is to be affixed. Certain kinds of marks are ineligible for registration, to wit: (1) those which are not distinctive or which contain only numbers or letters or statements of place, time of manufacture or similar generic information (an exception is made, however, for the marks of this type which have obtained wide popularity or acceptance); (2) free marks, that is those which have lost their distinctiveness by reason of continued exploitation by several companies; (3) deceptive and fraudulent marks; (4) marks which offend public policy or morality; and finally (5) marks which are already in use in the GDR for the same or similar products absent the assent of the other user to its registration by the applicant. If there are several applicants with the same mark, priority not unexpectedly goes to the one making application first. There being no legal bar to registration, the mark is inscribed in the public register and its owner receives a certificate.68

Registration of most marks is virtually automatic. Though distinctiveness is one of the stated criteria of eligibility, the examiners only consider the possibility that a mark sought to be registered will be confused with an existing mark when the existing mark is one broadly known in the GDR.69 Otherwise competing mark owners are left to pursue their own remedies at law after registration is complete. (Third parties may not file objections to registration while an application is pending.) The Patent Office, however, does reserve the right to cancel a registered mark unilaterally upon discovery of adequate cause.70

Once registration is complete, third parties alleging conflicting rights may petition the Patent Office to have the trademark cancelled—but only if they have previously called upon the alleged owner to cancel voluntarily and he has refused. If the objections are found to be valid, the mark is cancelled. Disputes are decided after a hearing before the Patent Office involving both parties.71

Trademark rights last for ten years and are renewable. They are alienable, but the transfer of rights, to be legally effective, must be recorded in the central register. The rightful holder of a registered trademark has the

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68. Id. §§ 4-9.
71. Id. § 15.
exclusive right to use it in all phases of commerce. He may sue to have the illegal use of his mark enjoined and in certain instances may even collect damages from the infringer. Upon successful outcome of his suit he is entitled to make a public announcement of his vindication at the infringer’s expense. The owner of a registered mark may also bar the import of illegally marked goods into East Germany.\textsuperscript{72}

Foreigners may seek the protection of East German trademark legislation so long as they are domiciled in states which do not discriminate against East German trademarks.\textsuperscript{73} As in patent matters, however, they must be represented by East German counsel, and they must give assurance that they do in fact hold trademark rights in their states of residence.\textsuperscript{74}

East Germany has signified its adherence to the Madrid Agreement on the International Registration of Manufacturers’ Marks or Trademarks of April 14, 1891, in the Nizza version of June 15, 1957, under which a trademark registered in a member state is deemed to be registered in all other member states for a span of twenty years. Since the United States is not a party to this convention, its citizens may not avail themselves of its terms.\textsuperscript{75}

C. Licensing Regulation

Considering the enormous interest in the countries of Eastern Europe in advanced Western, particularly American, technology, licensing agreements will doubtless continue to constitute a substantial part of East-West trade for the foreseeable future. These agreements encompass not only patent and trademark licenses but also licenses for the use of “know-how”, “know-how” being here defined as specialized technical information which is not patentable but which is the exclusive property of its possessor and is marketable. Of late there have been rumblings of discontent in East Germany over the outflow of precious hard currency necessary to purchase foreign licenses.\textsuperscript{76} Nonetheless, it can be safely said that the American firm with highly advanced technology to market should find no dearth of interest on the East German side. Conversely, it can also be said that American firms on the lookout for new scientific and technical processes should not be surprised to find attractive packages for sale in the GDR.

Licensing is the only area of East German foreign trade in which the individual firms and factories are allowed to play a direct role. Under the law the individual firms (VEB’s or the equivalent) are given authority to negotiate and conclude licensing agreements with foreigners.\textsuperscript{77} However, this

\textsuperscript{72} Id. §§ 11, 12, 20, 29, 33, 34. Trademark infringement actions are prosecuted in the Leipzig District Court, not to be confused with the Leipzig Patent Court.

\textsuperscript{73} Holders of American trademarks may have them registered in the GDR.


\textsuperscript{75} HANDBOOK, supra note 1, at 95.

\textsuperscript{76} See Business International, 1 E. EUR. REP. 154-55 (1972).

\textsuperscript{77} Regulation of December 11, 1968, [1969] GBI. II 125, § 5.
authority is somewhat circumscribed in that the same legislation imposes on the invididual firm the obligation to consult closely with its competent foreign trade enterprise and with the Central Office for International Licensing (Zentrales Büro für Internationalen Lizenzhandel der DDR) in negotiating the agreement.\textsuperscript{78} This latter body, which despite its title is not a central clearing house for licensing transactions, consults with and advises the individual firms or factories on the purchase and sale of licenses and exercises a supervisory role in the conduct of negotiations.\textsuperscript{79}

Licensing contracts require the explicit approval of the Foreign Trade Ministry to become legally binding. Additionally, they must be registered and deposited with the Ministry.\textsuperscript{80} (This requirement applies to all licensing agreements, it must be noted, even those incidental to larger foreign trade transactions such as the purchase or sale of a complete industrial plant.)

Contracts licensing technology to East German customers must be drafted with special care. They should be comprehensive in scope and should contain specific provisions on the licensee's sublicensing rights, the obligations of the licensee to keep his licensor informed of improvements made in the licensed product, and the territorial restrictions to which the licensee is subject. Finally payment terms ought to be provided for, in which connection it should be said that fees paid to foreign licensors are taxable in East Germany at a rate of 25\%.\textsuperscript{81}

VI. Dispute Settlement in the East German Foreign Trade Regime

Normally the domestic courts of the GDR do not adjudicate controversies arising out of foreign trade transactions.\textsuperscript{82} These disputes are resolved rather through arbitration, which as one authority has pointed out, because of its relatively speedy, simple and informal procedures, is ideally suited to the settlement of complex international trade problems.\textsuperscript{83}

Arbitration clauses are included in virtually all foreign trade contracts (if

\textsuperscript{78}. Id.

\textsuperscript{79}. The Central Office was established by the Statute of February 25, 1968, [1968] GB1. II 132. In addition to the advisory role it plays in normal licensing transactions, it has the exclusive authority to conclude licensing agreements on behalf of private citizens, private firms and mixed companies. Regulation of December 11, 1968, [1969] GB1. II 125, § 7.

\textsuperscript{80}. Regulation of December 11, 1968, [1969] GB1. II 125, § 8. According to Pisar, supra note 16, at 345, German licensing contracts contain this standard stipulation: "It is necessary that the contract—signed by the parties—be approved by the competent authorities of the contracting parties. It comes into force at the date of the last given approval. The parties bind themselves to apply for this approval immediately."


\textsuperscript{82}. But note that in the case of patent and trademark disputes this is not true. See text, pp. 17, 19 and fn. 72.

\textsuperscript{83}. Strohbach, Commercial Arbitrage in the GDR, Law and Legislation in the German Democratic Republic, No. 3, (1966), at 57.
they are not, the parties may agree to submit their differences to arbitration after they have arisen) and provide either for arbitration before an established arbitral tribunal, according to its rules, or for some variety of ad hoc arbitration.

A. Ad Hoc Arbitration

Ad hoc arbitration is any arbitration which does not take place before an established arbitration court according to that body’s rules of procedure. It may take place before an established court, but according to rules of procedure chosen by the parties, or it may take place before a tribunal specially constituted by the parties to hear their controversy. Ad hoc international trade arbitration is apparently quite common in East Germany though it is impossible to say how common since no records of any kind are kept of these proceedings.  

Ad hoc arbitration is governed by the Code of Civil Procedure of 1879, still valid law in East Germany. By its provisions an agreement to arbitrate between traders or enterprises with full power to contract (Vollkaufmänner) may take any form. The parties to the arbitration are free to select their own rules of procedure. If the agreement contains no rules of procedure, it is up to the arbitrators to formulate them within the limits set forth in the Code. It is worth noting that the GDR places no bar in the way of foreigners sitting on the tribunal in an ad hoc arbitration.

B. The Court of Arbitration Attached to the Chamber of Foreign Trade

While arbitration ad hoc may occur with some frequency in East Germany, it is not nearly as common an event as is arbitration before the Court of Arbitration attached to the Chamber of Foreign Trade in East Berlin, the most important arbitral tribunal in the GDR. This Court was established by the Chamber of Foreign Trade in 1954 and continues to receive its funding from the Chamber though it is formally an independent entity. The Court maintains a panel of arbitrators consisting in the main of lawyers though it includes a sprinkling of economists and representatives of other professions. The panelists are volunteers and are selected on the basis of knowledge, experience and reputation for objectivity. In the words of the Court’s former Secretary, “The institutional SG (Schiedsgericht) has a reputation which it wished to

84. Strohbach, Election of Arbitrators, supra note 33, at 41.
85. Zivilprozessordnung (ZPO) §§ 1025-1040 (Staatsverlag der DDR 1967).
86. ZPO §§ 1026-1027 (Staatsverlag der DDR 1967). The draft of the new East German ZPO purportedly contains a completely altered section on arbitral procedures which reflect recent trends in the field. See Strohbach, Election of Arbitrators, supra note 33, at 44.
87. ZPO § 1034 (Staatsverlag der DDR 1967).
According to rules promulgated in 1957 the Arbitration Court has jurisdiction over all disputes which arise out of business transactions if its competence has been agreed upon by the parties concerned and if at least one of the parties is domiciled outside the GDR. By agreeing to submit the controversy to arbitration, the parties impliedly accept the Court's rules of procedure.

Arbitration is formally begun by submission of a detailed statement of claims to the Secretary of the Court, who then serves this statement on the defendant and calls for an answer. When an answer is returned, the issue is joined and the case is ready to be heard. However, before a hearing can begin it is mandatory that there be a conciliation session with the Secretary, at which time the possibility of an amicable compromise is discussed. If no compromise can be reached and if the party plaintiff formally petitions that the proceedings go forward, then adjudication of the dispute begins.

An Arbitration Board of three members selected from the panel actually hears the dispute. Each party to the arbitration chooses one member, and these two in turn choose a third. Either party may object to an arbitrator selected by his opposite number; and if it can be shown that an arbitrator is biased, he may be disqualified.

The Board conducts its proceedings in German and provides interpreters upon request. A party is permitted to be represented by legal counsel though this is not mandatory. The parties may seek to present all available evidence in support of their claims, but the Board is not bound to accept their proposals nor is it restricted to hearing the evidence offered by the parties alone. Rather it has a roving commission to search for and adduce whatever evidence it deems relevant. A thorough understanding of the issues involved

89. Strohbach, Election of Arbitrators, supra note 33, at 43.
90. Rules of the Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic § 1. They appear in English translation in Kos-Rabcewicz-Subkowski, supra note 41, at 147 & ff. The following is given as a model arbitration clause in Strohbach, Commercial Arbitrage in the GDR, supra note 83, at 62-63: "All disputes that might arise out of or in connection with this contract including all disputes relating to the validity of the contract, shall be finally settled by the Court of Arbitration attached to the Chamber of Foreign Trade of the GDR in Berlin under its Rules. Both parties undertake to abide by the award rendered without delay."
91. Strohbach, Election of Arbitrators, supra note 33, at 42.
92. Rules, supra note 90, §§ 11, 12, 14. Between 200 and 250 applications are filed with the Court each year, 80% by foreign plaintiffs. Strohbach, Election of Arbitrators, supra note 33, at 41. It should be noted that the Court handles commercial litigation involving other socialist states as well as controversies with the capitalist world.
93. If the defendant fails to answer and the court after careful consideration determines that the arbitration clause in the contract is valid in all particulars, then the Arbitration Board may proceed to hear the case and render a decision in his absence. Strohbach, Commercial Arbitrage, supra note 83, at 62.
94. Rules, supra note 90, § 16. It is estimated that 50% of all claims are settled through such informal conciliation. Strohbach, supra note 83, at 61-62.
95. Rules, supra note 90, §§ 6, 7, 8, 19.
96. Id. §§ 9, 10, 25.
is the end sought, and in complex commercial litigation it is not uncommon for the proceedings to stretch over several months. When the Board is satisfied that it has heard sufficient evidence, it renders a decision including an award of relief to the victorious party. This decision is final, no appeal lying against it.\textsuperscript{97}

Most arbitration clauses stipulate which substantive law is to govern disputes arising out of the transaction, and normally the parties' choice will be honored by the Court. If, however, there is no choice of law stipulation, the Court must decide which is the applicable law.\textsuperscript{98} At one time the East German Court held that submission to its jurisdiction meant submission to the substantive law of the GDR, but heavy criticism, including a fair amount from sister socialist states, has forced the Court to adopt a more flexible view. Absent a choice by the parties, the Court apparently now favors the law of the seller as the governing law.\textsuperscript{99} Interestingly, in judging the controversy the Court is required to take into consideration trade customs "in particular as far as the recognition of these customs has been agreed upon by the parties."\textsuperscript{100}

The Rules of the Court of Arbitration are not so rigid as to preclude some modification by the litigants; and although it is the stated policy of the tribunal not to countenance major alterations in the rules, there is precedent to suggest that even major changes will be tolerated by the Court if the cause is one the tribunal genuinely wishes to hear. The former Secretary of the Court, for example, records the case of a Dutch firm which sued an East German foreign trade enterprise, nominating a Moscow law professor as its arbitrator. The Dutch firm insisted on this man despite provision in the rules that only those listed in the panel of arbitrators, \textit{i.e.} East Germans, were eligible for selection. Unable to escape from this impasse in any other way, the Secretary, in an admirable display of judicial imagination, persuaded the parties to modify their agreement to provide for \textit{ad hoc} arbitration, whereupon the Arbitration Court sat as an \textit{ad hoc} body. The Secretary comments, "In this manner appearances were saved in every direction and no additional complications were added to the considerable intricacies of the case."\textsuperscript{101}

Western firms have traditionally been reluctant to arbitrate before the foreign trade tribunals of Eastern Europe.\textsuperscript{102} Skeptical of the objectivity of

\begin{itemize}
\item \textsuperscript{97} Id. §§ 30, 31, 34.
\item \textsuperscript{98} Id. § 27, which reads, in relevant part, "Unless the private international law of the German Democratic Republic stipulates otherwise, the Court of Arbitration shall judge according to the legal provisions decided upon by the parties. Where an agreement on the legal provisions to be applied has not been made, the Court of Arbitration shall decide thereupon."
\item \textsuperscript{99} PISAR, supra note 16, at 448.
\item \textsuperscript{100} Rules, supra note 90, § 27.
\item \textsuperscript{101} Strohbach, supra note 33, at 44.
\item \textsuperscript{102} Western suspicion of East European arbitral tribunals is reciprocated on the other side. Consider for instance this statement by a former Secretary of the Court of Arbitration: "The class bias of the arbitration institutions within the capitalist economic
these bodies, they have, as a rule, preferred to refer their disputes to neutral third countries and have agreed to arbitration in Eastern Europe only when forced to because of the superior bargaining position of their communist partners. But if the experience of one American company before the East German arbitral tribunal is at all typical, then this court's claim to fairness and objectivity, at least, is not without foundation in fact.

IMI Warp Knits, Inc., a New York importer of textile machinery, was the first American firm to arbitrate a dispute before the East German Court. In 1971 the firm purchased a large number of automatic knitting machines from East Germany via the FTE Unitechna. When the machines arrived in the United States, they did not perform as promised; and after efforts by East German technicians to repair the defects proved unavailing, IMI notified the East German firm that it was cancelling the contract and demanded $2,500,000 damages. Unitechna promptly counterclaimed for $1,900,000 for disruption in its production schedule occasioned by IMI's cancellation.

Because of the seller's bargaining position at the time the contract was concluded, the contract provided for arbitration before the tribunal in East Berlin under East German law. IMI approached this litigation with some uneasiness not only because of the unfamiliarity of the setting, but also because of its relatively unfavorable legal position (no minimum standards of performance had been written into the sales contract). Nonetheless, according to the American firm, the Court of Arbitration handled the case with exemplary fairness, deciding after a full airing of the controversy to deny fully the claim of the East German FTE and to award $500,000 to IMI.  

The East Germans have agreed and will agree to arbitrate disputes before the established tribunals of the non-communist world (though for special reasons they refuse to arbitrate before the International Chamber of Commerce in Paris); but, by drafting their own rules of procedure, they will often succeed in turning the arbitration into an ad hoc proceeding. The enforcement of foreign arbitral awards in East Germany is governed by several multilateral conventions to which the GDR has declared its adherence or, ab-

system, their lack of knowledge about the principles and mechanisms of socialist economy, the frequent lack of consideration of the legal basis of nationally-owned socialist export enterprises . . . have, in many cases, led to decisions which violate the rights of socialist litigants.” Strohbach, Commercial Arbitrage in the GDR, supra note 83, at 58.


104. A recent contract between an American and an East German firm provided for arbitration in Stockholm according to the rules of the United Nations Economic Commission for Europe, with Austrian law stipulated as the substantive law. The East Germans apparently choose Austrian law with some frequency. See Herzfeld, Negotiating East-West Deals: Case Studies for Lawyers, in AMERICAN BAR ASSOCIATION, CURRENT LEGAL ASPECTS OF DOING BUSINESS WITH THE SINO-SOVIET NATIONS 13 (Height ed. 1973).

105. The GDR has declared its adherence to the Geneva Protocol on Arbitration Clauses of September 24, 1923, the Geneva Convention on the Enforcement of Foreign Arbitral Awards of September 26, 1927, and the New York Convention on the Recogni-
sent such a treaty, by the provisions of its own law, which provide basically for enforcement of foreign awards unless the arbitration has been unfair or the award contravenes the public policy of the state.\textsuperscript{106}

VII. Conclusion

East Germany, after the Soviet Union, may well be the most logical trading partner of the United States among the countries of Eastern Europe. It possesses a keen appetite for the advanced technical know-how and goods of the West. Additionally, with its highly built-up industry and comparatively sophisticated technology, it, more than most of its sister socialist states, is capable of marketing its own products abroad and thereby earning the foreign exchange which is the great lubricant of East-West trade. If the volume of trade to date has been small, the explanation is probably more political than economic.

East Germany, like the other states of its region, bristles under those U.S. trade policies, such as high tariffs on its goods, which it considers both discriminatory and unjustified. State Secretary Beil made specific reference to these practices as obstacles in the way of trade expansion during his New York visit.\textsuperscript{107} A much greater obstacle, it can be said with certainty, is the lack of any form of diplomatic relations between the United States and the GDR. The United States remains in the steadily shrinking minority of states that extend no form of official recognition to the GDR,\textsuperscript{108} but the East Germans have made it clear that in arranging their economic relations with the various countries of the capitalist world they set great store by the presence or absence of diplomatic relations with these states.\textsuperscript{109} It seems therefore that the potential for large-scale East German-American trade, whose existence cannot be denied, may remain largely unrealized until the U.S. extends some form of recognition to the regime in East Berlin.

\textsuperscript{106} The provisions of East German domestic law governing the enforcement of foreign awards are discussed in Kos-Rabczewicz-Zubkowski, \textit{supra} note 41, at 86 and Lemke, \textit{supra} note 88, at 167.

\textsuperscript{107} N.Y. Times, Dec. 1, 1972, at 55, col. 2 and at 61, col. 6.

\textsuperscript{108} As of the opening of the 28th session of the U.N. General Assembly, Sept. 18, 1973, some 95 states had extended diplomatic recognition of some kind to the GDR, up from a mere 30 in 1969. The total doubtless exceeds one hundred by now. N.Y. Times, Sept. 21, 1973, at 5, col. 1.

\textsuperscript{109} \textit{See Handbook, supra} note 1, at 42.