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# Legal Implications of the Dismantling of the Soviet Foreign Trade Monopoly

by  
John Quigley†

## INTRODUCTION

The *perestroika* policy in the Soviet Union has brought about wholesale changes to the Soviet Union's method of conducting foreign trade. By its decree issued in December 1988, the Council of Ministers of the USSR changed the valuation of the ruble, liberalized the Soviet rules for joint ventures, and reformed the Soviet foreign trade regime.<sup>1</sup> While all three of these changes are significant, the last is potentially the most far-reaching and will be the focus of this article. The first two are summarized below to provide helpful background information. In its 1988 decree, the Council of Ministers scheduled a fifty-percent devaluation of the ruble in relation to the dollar for the purposes of export and import trade to occur on January 1, 1990.<sup>2</sup> On January 1, 1991, a further devaluation, of an as yet unspecified amount, will be instituted.<sup>3</sup> By then, domestic prices are to be brought closer to world prices.<sup>4</sup> While convertibility of the ruble is not envisaged, its valuation will be brought closer to a global market rate.<sup>5</sup>

The Council also amended regulations promulgated in 1987 on joint ventures between Soviet and foreign companies in the Soviet Union to make joint

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† Professor of Law, Ohio State University, Columbus, Ohio; LL.B. Harvard University, 1966. The author is grateful to Thomas Hoya, U.S. Department of Commerce, and to Prof. John Hazard for encouragement to pursue this topic. He is indebted for information on current Soviet trade regulations to Sarah C. Carey, of Heron, Burchette, Ruckert & Rothwell in Washington, D.C., and to Randy Bregman, Director of Soviet and Eastern European Services of APCO Associates, Washington, D.C., a consulting firm of the Arnold & Porter law firm that advises on trade with the USSR.

1. Decree of the Council of Ministers of the USSR, O dal'neishem razvitií vnesheekonomicheskoi deiatel'nosti gosudarstvennykh, kooperativnykh i inykh obshchestvennykh predpriiatii, ob'edinenii i organizatsii (Further Development of Foreign Economic Activity of State, Cooperative and Other Social Enterprises, Combines and Organizations), Dec. 2, 1988 [hereinafter Further Development]; Sobranie postanovlenii pravitel'stva Soiuza sovetskikh sotsialisticheskikh respublik [SP SSSR] (Collection of Decrees of the Government of the Union of Soviet Socialist Republics) 1989, No. 2, item 7; Izvestiia, Dec. 10, 1988, at 2, col. 4.

2. Further Development, *supra* note 1, art. 13; Fuerbringer, *Plan to Devalue Ruble Is Given Qualified Praise*, N. Y. Times, Dec. 13, 1988, at D6, col. 3.

3. Further Development, *supra* note 1, art. 12.

4. A. AGANBEGYAN, THE ECONOMIC CHALLENGE OF PERESTROIKA 154-55 (1988).

5. Fedorov, *Vokrug valiuty* (About Currency), Izvestiia, Dec. 23, 1988, at 1, col. 1.

ventures more advantageous to foreign parties.<sup>6</sup> The Council eliminated<sup>7</sup> the previous rule that the Soviet partner must own at least a fifty-one percent share of the joint venture,<sup>8</sup> along with the requirement that both the chairperson of the board and the director must be Soviet citizens.<sup>9</sup> In addition, Soviet labor law which severely limits an employer's ability to fire a worker,<sup>10</sup> no longer regulates labor relations in a joint venture.<sup>11</sup> Under the new provisions, the joint venture itself determines questions of "hiring and firing" and of "the form and amount of wages."<sup>12</sup> The Council reduced the tax rate from the normal thirty-percent rate<sup>13</sup> to ten percent<sup>14</sup> for joint ventures operating in the Soviet Far East. Moreover, it extended the grace period during which new joint ventures in the Soviet Far East are not subject to tax from two<sup>15</sup> to three years.<sup>16</sup>

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6. O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovместnykh predpriatii s uchastiem sovetских organizatsii i firm kapitalisticheskikh i razvivaiushchikhsia stran (Procedure for the Creation on the Territory of the USSR and for the Activity of Joint Enterprises with the Participation of Soviet Organizations and Firms of the Capitalist or Developing Countries) [hereinafter Joint Venture Decree], SP SSSR 1987, No. 9, item 40. See also Richardson, *Glasnost: Joint Ventures Now Permitted in the Soviet Union*, 3 FLA. INT'L L.J. 125 (1987); Aronson, *The New Soviet Joint Venture Law: Analysis, Issues, and Approaches for the American Investor*, 19 LAW & POL'Y IN INT'L BUS. 851 (1987); Carpenter & Smith, *U.S.-Soviet Joint Ventures: A New Opening in the East*, 43 BUS. LAW. 79 (1987); Ross, *Foreign Investment: New Soviet Joint Venture Law*, 28 HARV. INT'L L.J. 473 (1987); A. Sherr, *Socialist-Capitalist Joint Ventures in the USSR: Law and Practice* (Briefing Paper #1, Project on Soviet Foreign Economic Policy and International Security, Center for Foreign Policy Development, Brown University, 1988); M. BOGUSLAVSKY & P. SMIRNOV, *THE REORGANIZATION OF SOVIET FOREIGN TRADE: LEGAL ASPECTS* 81-109 (1989); Viehe, *Joint-Ventures in the Soviet Union Under the New Regime—Boom or Bust*, 1 TRANSNAT'L LAW. 181 (1988); Osakwe, *The Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987*, 22 VAND. J. TRANSNAT'L L. 1 (1989). A separate decree regulates joint ventures with enterprises from Council of Mutual Economic Assistance countries, O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovместnykh predpriatii, mezhdunarodnykh ob'edinenii i organizatsii SSSR i drugikh stran-chlenov SEV (Procedure for the Creation on the Territory of the USSR and for the Activity of Joint Enterprises, International Combines, and Organizations of the USSR and of Other Countries that are Members of the C.M.E.A.), SP SSSR 1987, No. 8, item 38.

7. Further Development, *supra* note 1, art. 31. Nonetheless, that same paragraph preserves a role for the Soviet partner by stipulating that "important decisions" by the board must be made unanimously. "Important decisions," however, are not defined in the decree.

8. Joint Venture Decree, *supra* note 6, art. 5. See also M. Braginskii, *Sovместnye khoziaistvennye organizatsii* (Joint Ventures), SOTSIALISTICHESKAIA ZAKONNOST' (Socialist Justice), 1988, No. 7, at 18, 20; S. Zapol'skii, *Sovместnye predpriatii: pravovye problemy stanovleniia* (Joint Ventures: Legal Issues in Their Formation), SOTSIALISTICHESKAIA ZAKONNOST', 1988, No. 8, at 28, 29.

9. Further Development, *supra* note 1, art. 31. On the prior rule, see Joint Venture Decree, *supra* note 6, art. 21, and Braginskii, *supra* note 8, at 20.

10. Joint Venture Decree, *supra* note 6, art. 48.

11. W. BUTLER, SOVIET LAW 223-35 (1988).

12. Further Development, *supra* note 1, art. 31.

13. Joint Venture Decree, *supra* note 6, art. 36; Braginskii, *supra* note 8, at 20.

14. Further Development, *supra* note 1, art. 31.

15. Joint Venture Decree, *supra* note 6, art. 36; Braginskii, *supra* note 8, at 20.

16. Further Development, *supra* note 1, art. 31.

The last of the 1988 reforms made by the Council of Ministers is the opening of direct export and import between foreign firms and Soviet industry. This article analyzes the new Soviet approach to export and import, outlines certain Soviet laws applicable to export-import contracts, and discusses some implications of the reforms both for the Soviet Union and for Western companies trading there.

## I.

### THE MONOPOLY SYSTEM OF EXPORT-IMPORT

By its December 1988 decree, the Council of Ministers gave every Soviet privately-owned cooperative and state-owned enterprise the right to export and import directly.<sup>17</sup> This reform opens the Soviet economy to foreign traders. It represents a fundamental break with the centralized control of foreign trade that has prevailed in the Soviet Union since the 1930's.

The state monopoly of foreign trade was established in the Soviet Union in 1918.<sup>18</sup> A major aim was to protect Russia from capitalist traders. During the tsarist period, most of Russia's foreign trade was conducted by West European companies. The monopoly system enabled the Soviet government to exercise tight control over imports and was especially important during the rapid industrialization of the 1930's. It ensured that foreign exchange would be spent on machinery needed for industrialization, rather than on consumer goods.<sup>19</sup>

Under the monopoly system as it functioned since the early 1930's, trading was conducted only by export-import houses under the Ministry of Foreign Trade, each of which had the exclusive right to export or import a given category of products.<sup>20</sup> When exporting, these houses bought from Soviet producers and re-sold abroad; when importing, they purchased abroad and re-sold to Soviet users.

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17. Further Development, *supra* note 1, art. 2.

18. See Dekret o natsionalizatsii vnesheinei trgovli (Decree on the Nationalization of Foreign Trade), Sobranie zakonov i rasporyazhenii raboche-krest'ianskogo pravitel'stva RSFSR (Collection of Enactments and Decrees of the Worker-Peasant Government of the R.S.F.S.R.) 1918, No. 33, item 432; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 7-8.

19. J. QUIGLEY, *THE SOVIET FOREIGN TRADE MONOPOLY: INSTITUTIONS AND LAWS* 173-74 (1974); V. Shemiatenkov, *Perestroika vnesheekonomicheskoi deiatel'nosti* (The Restructuring of Foreign Economic Activity), *EKONOMICHESKAIA GAZETA* (Economic News), 1986, No. 46 at 21; Simons, *Soviet Foreign Trade: Economic, Legal, and Political Aspects*, in *SOVIET LAW AND ECONOMY* 243, 244 (O.S. Ioffe & M. Janis eds. 1987).

20. M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 12; Laptev, *The Legal Status of Soviet Foreign Trade Organizations*, 5 *DEN. J. INT'L L. & POL'Y* 283 (1975); Statute on the All Union Economically Accountable Foreign Trade Organization within the System of the Ministry of Foreign Trade, SP SSSR 1978 No. 13, item 91, translated in W. BUTLER, *COLLECTED LEGISLATION OF THE USSR AND CONSTITUENT UNION REPUBLICS* (1980).

The monopoly system had the advantage of economies of scale.<sup>21</sup> A single import house could purchase the entire country's requirements of a product. The government was thus able to concentrate its foreign trade specialists in a manner which maximized their utility and efficiency. This was necessary because such expertise was at a premium, since historically foreigners had conducted Russia's trade. The monopoly principle for foreign trade was written into the Soviet Constitution.<sup>22</sup>

The monopoly system, however, also had significant disadvantages. First, it was highly bureaucratic. A vice-commissar of foreign trade complained in 1938 of a "terrible slowness" in export and import transactions.<sup>23</sup> The monopoly given to export-import houses cut Soviet industry off from the rest of the world<sup>24</sup> and separated the Soviet end-user from the foreign manufacturer.<sup>25</sup> Thus, Soviet industries, both as consumers and producers, could not benefit from the valuable information normally shared among trade partners.<sup>26</sup> Second, the monopoly system impeded the introduction of foreign technology into the Soviet economy.<sup>27</sup> Soviet enterprises that manufactured for export could not receive information directly from foreign consumers regarding their products.<sup>28</sup> Third, the export-import houses were not sufficiently aware of what was being produced by Soviet industry that might be marketed abroad,<sup>29</sup> and Soviet enterprises did not consider the world market when planning their production.<sup>30</sup> Fourth, the monopoly system led to inefficiency in importation. Some industries received too many imports, and some too few. Soviet enterprises had no incentive to minimize imports.<sup>31</sup> "Imports were made at the expense not of the enterprise but of state resources. The tendency was to live at somebody else's expense."<sup>32</sup> Many enterprises that needed imported items for their own production faced a time-consuming application process.<sup>33</sup> The Ministry did not import products that were already

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21. T. HOYA, *EAST-WEST TRADE: COMECON LAW: AMERICAN-SOVIET TRADE* 286 (1984).

22. KONSTITUTSIYA SSSR [KONST. SSSR] (Constitution of the USSR), art. 73, para. 10.

23. J. QUIGLEY, *supra* note 19, at 175.

24. *Sovershenstvovanie vneshneekonomicheskoi deiatel'nosti* (The Improvement of Foreign Economic Activity), *EKONOMICHESKAIA GAZETA*, 1987, No. 3, at 6 (interview with Vladimir Kamentsev, Chairperson, State Foreign Economic Commission of the Council of Ministers of the USSR) [hereinafter Improvement]; SHEMIATENKOV, *supra* note 19, at 21.

25. J. McIntyre, *Soviet Efforts to Revamp the Foreign Trade Sector*, in *Gorbachev's Economic Plans* (Study Papers Submitted to the Joint Economic Committee, Congress of the United States) 489, 490-92 (1987); Gardner, *Restructuring the Soviet Foreign Trade System*, *COLUM. J. WORLD BUS.*, Spring 1988, at 7, 8.

26. Maggs, *Direct Contacts by Soviet Organizations in International Economic Relations*, in *THE DISTINCTIVENESS OF SOVIET LAW* 183, 194 (F.J.M. Feldbrugge ed. 1987).

27. O.S. IOFFE & P. MAGGS, *THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS* 291 (1987).

28. J. QUIGLEY, *supra* note 19, at 179.

29. *Id.* at 179-80.

30. A. AGANBEGYAN, *supra* note 4, at 149; Boguslavsky, *supra* note 6, at 60.

31. Improvement, *supra* note 24, at 6.

32. A. AGANBEGYAN, *supra* note 4, at 150.

33. *Id.*

manufactured in the USSR, further depriving Soviet manufacturers of information about their foreign competition.<sup>34</sup>

For a Soviet enterprise producing for export, administrative controls were more severe than for comparable production aimed at the domestic market. The export-import house issued a production order (*zakaz-nariad*) to the enterprise that left the enterprise little room for maneuverability if it found the order unrealistic.<sup>35</sup> By contrast, in the case of domestic production, a supplier enterprise and a user enterprise entered into a contract directly and could negotiate precise terms.<sup>36</sup> In export production, on the other hand, administrative sanctions on a factory manager for improper delivery of goods were often harsher than similar remedies in domestic production.<sup>37</sup>

Under the monopoly system enterprises producing for export were subjected to more stringent quality controls than domestic producers<sup>38</sup> without realizing noticeable benefits. Meeting export specifications could disrupt production.<sup>39</sup> Furthermore, although higher quality was often demanded for export production,<sup>40</sup> the export price might be no higher than if the goods had been sold domestically.<sup>41</sup> Even when an enterprise did receive a higher price, this price typically was too low to cover the additional costs of the improved quality.<sup>42</sup> Bonuses were introduced for export production, but they did not compensate for the added burdens.<sup>43</sup>

In order to purchase materials and equipment abroad, export-producing enterprises were allowed to keep a small share of the foreign exchange they earned. This foreign exchange, however, was kept on account in the Foreign Trade Bank (re-named in 1988 the Foreign Economic Bank),<sup>44</sup> which doled out the foreign exchange to the enterprise on an annual basis rather than immediately and did not always let enterprises use the foreign exchange they had earned.<sup>45</sup> Because the Ministry of Foreign Trade imposed restrictions on

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34. Maggs, *supra* note 26, at 194.

35. J. QUIGLEY, *supra* note 19, at 129-35; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 62.

36. J. QUIGLEY, *supra* note 19, at 132; Gardner, *supra* note 25, at 8.

37. J. QUIGLEY, *supra* note 19, at 143-51; A. AGANBEGYAN, *supra* note 4, at 149.

38. J. QUIGLEY, *supra* note 19, at 141.

39. McIntyre, *supra* note 25, at 495.

40. Gardner, *supra* note 25, at 8.

41. A. AGANBEGYAN, *supra* note 4, at 149.

42. McIntyre, *supra* note 25, at 495.

43. J. QUIGLEY, *supra* note 19, at 152-53.

44. See Ob utverzhdennii Ustava Banka vneshneekonomicheskoi deiatel'nosti SSSR (Confirmation of the Charter of the Bank for Foreign Economic Activity of the USSR), SP SSSR 1988, No. 22, item 65. The decree refers to the Bank in abbreviated form as the Foreign Economic Bank of the USSR.

45. McIntyre, *supra* note 25, at 495; Braginskii, *Vneshneekonomicheskaiia deiatel'nost' predpriiatii* (The Foreign Economic Activity of Enterprises), KHOZIAISTVO I PRAVO (The Economy and Law) 1988, No. 2, at 9, 14.

the use of this foreign exchange, "producers were not really interested in receiving hard currency."<sup>46</sup> As a result, the export of manufactured goods was low,<sup>47</sup> and raw materials dominated Soviet exports.<sup>48</sup>

## II.

### THE 1986 REFORM: A RELAXATION OF CENTRAL CONTROL

After the USSR's period of rapid industrialization, the restriction on the importation of less-than-essential goods was not as critical.<sup>49</sup> Some of the East European socialist countries began to allow firms to export directly in the 1960's,<sup>50</sup> but the USSR kept its foreign trade monopoly intact.

In the 1980's, the USSR's monopoly system came to be the target of economic reformers. Economist Abel Aganbegyan, a reform leader, complained that "producers of exports or consumers of imports . . . had no direct outlets into the international market. There was no effective economic mechanism to encourage external economic activity."<sup>51</sup>

In 1986, the Soviet government took control of twenty-one of approximately one hundred export-import houses from the Ministry of Foreign Trade and gave it to the domestic ministries concerned with the relevant products.<sup>52</sup> This gave the domestic ministries responsibility for about twenty percent of total Soviet trade and sixty percent of machinery exports.<sup>53</sup> The Ministry of Foreign Trade retained responsibility for the export and import of fuels, raw materials, and food,<sup>54</sup> items which figure prominently in Soviet foreign trade.<sup>55</sup> The Ministry has sold basic commodities more successfully than machinery.<sup>56</sup>

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46. A. AGANBEGYAN, *supra* note 4, at 149.

47. *Id.* at 142, 149.

48. In both export and import, there was no relation between the price paid externally and the price paid to or by the Soviet enterprise. This made it difficult to judge cost-effectiveness. See A. AGANBEGYAN, *supra* note 4, at 150.

49. J. QUIGLEY, *supra* note 19, at 188.

50. *Id.* at 185.

51. A. AGANBEGYAN, *supra* note 4, at 149.

52. E. HEWETT, REFORMING THE SOVIET ECONOMY: EQUALITY VERSUS EFFICIENCY 342 (1988); AGANBEGYAN, *supra* note 4, at 150.

53. Gardner, *supra* note 25, at 9.

54. E. HEWETT, *supra* note 52, at 342 n. 65.

55. See generally V. Shemiatenkov, *supra* note 19, at 21.

56. Maggs, *supra* note 26, at 193.

The Soviet government also authorized<sup>57</sup> about one hundred ministries and major enterprises to trade directly with foreign firms.<sup>58</sup> It gave all state enterprises the right to engage in direct trade with socialist countries<sup>59</sup> and established a procedure whereby the Foreign Trade Bank would make credit available to enterprises producing for export.<sup>60</sup> Furthermore, it permitted enterprises producing for export to keep higher proportions of the foreign exchange earned through their sales abroad and to use it with fewer restrictions.<sup>61</sup> To encourage exports, the government permitted enterprises in need of foreign machinery to buy it using only the proceeds of their own exports.<sup>62</sup> As an additional incentive to export, the government gave enterprises that earned foreign exchange through export the right to decide what imported machinery to buy.<sup>63</sup> The government directed the Foreign Trade Bank to make available credit in foreign exchange to enterprises for the purchase of imports.<sup>64</sup>

To promote the expansion of foreign trade, the Soviet government created a new super-agency—the State Foreign Economic Commission of the Council of Ministers of the USSR.<sup>65</sup> A deputy chairperson of the Council of Ministers chairs the Commission,<sup>66</sup> thus giving it a higher rank than the Ministry of Foreign Trade. The government subsequently reorganized the Ministry of Foreign Trade to become the Ministry of Foreign Economic

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57. Central Committee, Communist Party of the Soviet Union, and Council of Ministers of the USSR, O merakh po sovershenstvovaniiu upravleniia vneshneekonomicheskimi sviaziami (Measures to Improve the Administration of Foreign Economic Relations), SP SSSR 1986, No. 33, item 172, art. 8, summarized in Pravda, Sept. 24, 1986, at 1, col. 1, reprinted in EKONOMICHESKAIA GAZETA, 1987, No. 4, at 3-4 [hereinafter Measures to Improve]. It is generally referred to by Soviet authors as Decree No. 991 of Aug. 19, 1986.

58. *Id.* art. 8. A. AGANBEGYAN, *supra* note 4, at 151. List given in Butler, *The State Monopoly of Foreign Trade and the Family of Socialist Legal Systems*, 2 CONN. J. INT'L L. 215, 241 (1987).

59. A. AGANBEGYAN, *supra* note 4, at 151.

60. *Id.* On the renaming of the Bank, see *supra* note 44.

61. Measures to Improve, *supra* note 57, art. 21; A. AGANBEGYAN, *supra* note 4, at 151.

62. Measures to Improve, *supra* note 57, art. 22; Improvement, *supra* note 24, at 6.

63. Measures to Improve, *supra* note 57, art. 22.

64. *Id.* art. 23; Improvement, *supra* note 24, at 6. On the renaming of the bank, see *supra* note 44.

65. Measures to Improve, *supra* note 57, art. 1; W. BUTLER, *supra* note 11, at 379; A. AGANBEGYAN, *supra* note 4, at 150.

66. Measures to Improve, *supra* note 57, art. 7.

Relations.<sup>67</sup> The Commission directs the foreign trade activity of the Ministry, and of all other ministries and enterprises involved in foreign trade.<sup>68</sup>

In a final change, the Soviet government eliminated the use of production orders. It replaced them with a system of contracts executed between the export-import house and the enterprise producing for export.<sup>69</sup> While export through the export-import houses is still done on the basis of state plans,<sup>70</sup> the enterprise has the ability to negotiate with the export-import house over terms.<sup>71</sup> The intent is probably to make export through the Ministry less onerous—and hence more attractive—to Soviet producing enterprises.

### III.

#### THE 1988 REFORM: FURTHER RELAXATION OF CENTRAL CONTROL

The 1988 reform further relaxed central control by authorizing the production cooperatives<sup>72</sup> and all state enterprises<sup>73</sup> to trade directly with foreign partners as of April 1, 1989.<sup>74</sup> It also strengthened their right to use the foreign exchange they earned.<sup>75</sup> However, there are certain administrative

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67. In January 1988, the Ministry of Foreign Trade was merged with the State Committee on Foreign Economic Relations, which had responsibility for foreign aid and construction projects abroad, to form the Ministry of Foreign Economic Relations. Ob obrazovanii obshchegoiznogo Ministerstva vneshnikh ekonomicheskikh svyazei SSSR (Formation of an All-Union Ministry of Foreign Economic Relations of the USSR), Vedomosti verkhovnogo soveta SSSR [Ved. Verkh. Sov. SSSR] (Gazette of the Supreme Soviet of the USSR) 1988, No. 3, item 43; W. BUTLER, *supra* note 11, at 380. In 1989, the Council of Ministers of the USSR enacted a statute to govern the Ministry. Polozhenie o Ministerstve vneshnikh ekonomicheskikh svyazei SSSR (Statute on the Ministry of Foreign Economic Relations of the USSR), SP SSSR 1989, No. 14, item 45 [hereinafter Ministry of Foreign Economic Relations]. On the abolished State Committee on Foreign Economic Relations, see Simons, *supra* note 19, at 245; and Maggs, *supra* note 26, at 190-91.

68. Measures to Improve, *supra* note 57, arts. 2-4; W. BUTLER, *supra* note 11, at 379; Improvement, *supra* note 24, at 6; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 25-27.

69. Osnovnye usloviia regulirovaniia dogovornykh otnoshenii pri osushchestvlenii eksportno-importnykh operatsii (Basic Conditions for the Regulation of Contract Relations in Export and Import), SP SSSR 1988, No. 24-25, item 70, art. 2 [hereinafter Basic Conditions]; Measures to Improve, *supra* note 57, art. 19; Gardner, *supra* note 25, at 9; Kuvshinov, *Dogovornye otnosheniia pri eksportno-importnykh operatsiakh* (Contract Relations in Export and Import), KHOZIAISTVO I PRAVO, 1988, No. 10, at 30, 33-34; M. Braginskii, *supra* note 45.

70. Basic Conditions, *supra* note 69, art. 4.

71. S. Rosefelde, *The New Soviet Foreign Trade Mechanism: East-West Trade Expansion Possibilities under Perestroika*, paper delivered at conference, "Joint Ventures with the USSR and U.S. National Security Interests," Center for Foreign Policy Development, Brown University, Dec. 2, 1988; J. McIntyre, *supra* note 25, at 498; Gardner, *supra* note 25, at 8.

72. See *infra* text accompanying notes 111-27.

73. See *infra* text accompanying notes 128-40.

74. Further Development, *supra* note 1, art. 2.

75. Foreign Economic Bank, *Valiutno-finansovoe regulirovanie vneshneekonomicheskikh svyazei: Poriadok perevoda sredstv v inostrannoi valiute na scheta predpriatii, ob'edinenii, proizvodstvennykh kooperativov i inykh organizatsii* (Foreign Exchange and Financial Regulation of Foreign Economic Relations: The Procedure for Transferring Funds in Foreign Currency to the Accounts of Enterprises, Combines, and Production Cooperatives and Other Organizations), EKONOMICHESKAIA GAZETA, 1989, No. 14, at 23.

checks. The Ministry of Foreign Economic Relations keeps a registry of Soviet cooperatives and state enterprises entitled to engage in export and import,<sup>76</sup> but this is more a formality than an authorization process.<sup>77</sup> The Ministry must register a cooperative or enterprise within thirty days after receiving its application.<sup>78</sup> It is also given the authority to verify the information supplied<sup>79</sup> and is apparently obliged to register the cooperative or enterprise if the information is correct. The Ministry is required to publish the registry list in an official publication.<sup>80</sup>

Cooperatives or state enterprises are not entirely free to export and import as they choose. They are empowered to export only their own products or services, and to import only for their own use. They may not purchase goods for export re-sale, or import for re-sale in the USSR.<sup>81</sup> In addition, the government reserves for itself, through a variety of devices, the power to control trade.<sup>82</sup> Whenever any of these devices is used, the Ministry of Foreign Economic Relations and the Chamber of Commerce are required to make the information available to Soviet and foreign parties whose operations might be affected.<sup>83</sup>

#### A. *Items Banned from Export and Import*

The Council of Ministers keeps a list of items forbidden for export, and another list of items forbidden for import.<sup>84</sup> The two lists include approximately the same range of items: weaponry, explosives, nuclear technology, precious metals and items produced from them, poisons, narcotic and psychotropic substances, and devices for smoking opium or hashish.<sup>85</sup> The list of items prohibited for export also includes artwork and items of historical value.<sup>86</sup> Each list includes a catch-all category of items that cannot be exported or imported, though the decree does not indicate which agency makes that designation.<sup>87</sup> Problems will presumably arise in defining which items fall into the categories indicated in the list, as the categories are quite general.

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76. Further Development, *supra* note 1, art. 2; Statute on the Ministry of Foreign Economic Relations of the USSR, *supra* note 67, art. 7.

77. Decree of the Council of Ministers of the USSR, O merakh gosudarstvennogo regulirovaniia vneshneekonomicheskoi deiatel'nosti (State Regulation of Foreign Economic Activity), SP SSSR 1989, No. 16, item 50, arts. 2-3 (Decree No. 203, Mar. 7, 1989), *also in* EKONOMICHESKAIA GAZETA, 1989, No. 13 at 21 [hereinafter State Regulation].

78. *Id.* art. 2.

79. *Id.* art. 3.

80. *Id.* art. 2.

81. State Regulation, *supra* note 77, art. 8.

82. Further Development, *supra* note 1, art. 5.

83. State Regulation, *supra* note 77, art. 11.

84. Further Development, *supra* note 1, art. 4.

85. State Regulation, *supra* note 77. The lists of items prohibited for export and import appear in a note in the Decree.

86. *Id.*

87. *Id.*

B. *Licensing of the Export-Import of Certain Items*

Another control device available to the government is the requirement that cooperatives and state enterprises receive a license to export or import items deemed to be of "state importance."<sup>88</sup> The Council of Ministers compiled a list of such items, effective for 1989 and 1990 only.<sup>89</sup> A cooperative or state enterprise that wishes to trade in a listed item must apply for a license to the responsible government agency as specified in the list.

The Ministry of Foreign Economic Relations is the agency responsible for issuing licenses for the export of oil, minerals, cotton, and grain. Other ministries are similarly designated for products that fall within their respective jurisdictions.<sup>90</sup> This licensing procedure also applies to imported commodities, although for a smaller number of items.<sup>91</sup> The only import item licensed by the Ministry of Foreign Economic Relations is construction in the USSR by foreign firms financed by the central government.<sup>92</sup>

Trade offices maintained by the USSR abroad are also empowered to issue export and import licenses.<sup>93</sup> For goods considered to be important ("goods of all-state designation"), these offices issue licenses only for a defined quantity or value of goods. For state monopoly organizations, these licenses can be "general," meaning that they are valid for a defined time period, but for cooperatives or state enterprises, they are issued for one shipment only. The Council of Ministers of the USSR decides which goods are of "all-state

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88. *Id.* art. 7.

89. *Id.* app.: List of Products (and Services) Whose Export in 1989 and 1990 Is Done by Enterprises, Combines, Production Cooperatives and Other Soviet Organizations on the Basis of Licenses Issued by the Appropriate Ministries or Departments of the USSR or the Councils of Ministers of the Union Republics; List of Products (and Services) Whose Import in 1989 and 1990 Is Done by Enterprises, Combines, Production Cooperatives, and Other Soviet Organizations on the Basis of Licenses Issued by the Appropriate Ministries or Departments of the USSR or the Councils of Ministers of the Union Republics.

90. *Id.* apps. For example, the Ministry of Fertilizers issues licenses to export fertilizers, the Ministry of the Forestry Industry issues licenses to export timber, the Ministry of Building Materials issues licenses to export cement, the Ministry of the Fishing Industry issues licenses to export ocean-caught fish and fish products, the State Agricultural Industry Office issues licenses to export liquor, the Ministry of Health issues licenses to export medical equipment, the State Committee for Science and Technology issues licenses to export inventions, the Ministry of Culture issues licenses to export theatrical performances. Certain items, presumably of somewhat lesser significance, are licensed not by a central ministry or committee, but by the council of ministers of the appropriate union republic. These items are fish caught in internal waters, wine, wild fowl, wild plants (medicinal applications), and herbal medicines.

91. *Id.* app. (Import List). The Ministry of Health licenses import of medicines, the Ministry of Fertilizers licenses import of fertilizers, the State Committee on Publications licenses import of printed matter, the State Committee on Labor licenses import of foreign workers, and the Ministry of Culture licenses import of theatrical performances. Import of films and videotapes is licensed by the State Film Office, the State Television and Radio Office, the State Committee on Publications, the Ministry of Culture, or the council of ministers of a union republic, depending on the item in question.

92. *Id.*

93. Polozhenie o torgovykh predstavitel'stvakh SSSR za granitsei (Statute on Trade Offices of the USSR Abroad), Ved. Verkh. Sov. SSSR 1989, No. 14, item 95, art. 4.

designation" and must publish lists of them in government newspapers.<sup>94</sup> Once a cooperative or a state enterprise has negotiated a contract on the basis of a license received, it must so inform the agency that issued the license.<sup>95</sup>

In both export and import, the Foreign Economic Bank issues licenses for credits, loans or deposits in foreign currency.<sup>96</sup> The licensing requirement applies not only to goods that are bought from or sold to a foreign firm located abroad but also to the sale to or purchase from a foreign firm operating in the USSR.<sup>97</sup> The State Foreign Economic Commission is empowered to amend the lists of items that require a license for export or import.<sup>98</sup>

### C. *Temporary Limitations on Export-Import*

The State Foreign Economic Commission is authorized to prohibit or restrict trade in certain products, or with certain countries, if necessary to: (1) regulate supply and demand on the Soviet market; (2) fulfill treaty obligations of the USSR; (3) fulfill obligations undertaken by the USSR in international trade negotiations; (4) respond to discriminatory trade measures taken against the USSR by other countries; or (5) limit trade for balance of payments reasons.<sup>99</sup> These limitations are to be imposed only for a defined period of time.

The Commission may set quotas for the export or import of certain items, and to or from certain countries. In these cases, exports or imports must be licensed.<sup>100</sup> When a quota is imposed, licenses are issued by the Ministry of Foreign Economic Relations.<sup>101</sup> These limitations are not to be imposed on export or import by joint ventures.<sup>102</sup>

### D. *Suspension of Trading by a Cooperative or State Enterprise*

Finally, the State Foreign Economic Commission is given the power to stop or limit trade by a certain cooperative or state enterprise should it engage in "unconscionable competition" in foreign trade or in conduct harmful to "state interests."<sup>103</sup>

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94. State Foreign Economic Commission of the Council of Ministers of the USSR, *Polozhenie o poriadke litsenzirovaniia operatsii vo vneshneekonomicheskikh svyaziakh SSSR* (Statute on the Procedure for the Licensing of Operations in the Foreign Economic Relations of the USSR, arts. 5, 7, Mar. 20, 1989), *EKONOMICHESKAIA GAZETA*, 1989, No. 13, at 23 [hereinafter *Procedure for Licensing*].

95. *Id.* art. 8.

96. State Regulation, *supra* note 77, app.

97. *Id.* art. 7.

98. *Id.*

99. *Id.* art. 9.

100. *Id.*

101. Procedure for Licensing, *supra* note 94, art. 6.

102. State Regulation, *supra* note 77, art. 9.

103. Further Development, *supra* note 1, art. 2. The Ministry of Foreign Economic Relations is to report to the Commission the names of cooperatives or enterprises whose trading it thinks should be curtailed. Ministry of Foreign Economic Relations, *supra* note 67, art. 7.

These broad categories are refined to let the Commission issue a suspension order against a cooperative or state enterprise that: (1) violates trade legislation or violates foreign law in a way which causes economic or political harm to the USSR; (2) trades in products or services in which it is not entitled to trade; (3) repeatedly fails to deliver items ordered for export by the central government if it exports such items on its own; (4) exports at an unjustifiably low price or imports at an unjustifiably high price; (5) repeatedly exports or imports poor-quality items; (6) knowingly makes false statements in advertisements, customs declarations, foreign currency declarations, or in documents submitted in connection with its registration as an entity carrying out export or import; or (7) violates Soviet legislation in any other fashion.<sup>104</sup>

The Commission may prohibit a specific transaction or may forbid all operations in which the violation occurred for a period of up to one year. Alternatively, the Commission may issue a warning to the cooperative or state enterprise or may license its export or import operations for a period of up to six months. The Commission must lift restrictions if an offending cooperative or state enterprise ceases the violation.<sup>105</sup> As a precautionary measure, licenses for any type of goods are issued by the Ministry of Foreign Economic Relations for one transaction only rather than for a period of time.<sup>106</sup>

#### *E. Procedure for Applying for a License*

When a license is required, the cooperative or state enterprise must apply for it using a form published by the State Foreign Economic Commission.<sup>107</sup> The fact that the applicant may already have concluded a contract for the transaction for which the license is sought does not guarantee its issuance. The issuing agency may request additional information from the applicant, who is required to pay a fifty ruble application fee.<sup>108</sup> The issuing agency must then decide on the application within thirty days, and if it denies the application it must give the applicant its reasons in writing.<sup>109</sup>

### IV.

#### THE NEW SOVIET TRADERS

For foreign firms, the 1988 reform opens up the entire Soviet market to export and import. The reform fundamentally changes the context in which foreign firms operate in the Soviet Union. Because there are more potential contracting partners, both foreigners and Soviets are setting up consulting

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104. State Regulation, *supra* note 77, art. 10.

105. *Id.*

106. Procedure for Licensing, *supra* note 94, art. 7.

107. Published as an annex to Statute on the Procedure for the Licensing of Operations in the Foreign Economic Relations of the USSR, *supra* note 94, art. 9.

108. *Id.* art. 9.

109. *Id.* art. 10.

agencies to advise potential Soviet and foreign exporters and importers.<sup>110</sup> Therefore, contracting with Soviet cooperatives and state enterprises will require familiarity with their legal status.

#### A. Cooperatives

Under the December 1988 decree, any "production cooperative" is entitled to export and import.<sup>111</sup> The Law on Cooperatives defines "production cooperative" to include both a cooperative producing goods and one providing services.<sup>112</sup> As a result of recent liberalizations, the Soviet cooperatives engaged in services and production of goods number in the tens of thousands.<sup>113</sup> They may employ non-members on employment contracts,<sup>114</sup> and they currently employ about 800,000 persons.<sup>115</sup> In addition, collective farms—the basic unit of Soviet agriculture—are cooperatives.<sup>116</sup>

A cooperative is owned collectively by its membership.<sup>117</sup> Each cooperative has a charter, which is registered with the local government (i.e., the soviet of the working people's deputies).<sup>118</sup> A cooperative is a legal person,<sup>119</sup> responsible for its own obligations.<sup>120</sup> However, since the members of a cooperative are not individually liable for its debts,<sup>121</sup> a cooperative enjoys limited liability. Still, a cooperative may provide in its charter for the individual liability of its members for its obligations.<sup>122</sup>

Since cooperatives are not state-owned, the state is not responsible for their obligations.<sup>123</sup> Thus, a creditor may not look to the state to satisfy the

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110. APCO Associates, the consulting affiliate of the Arnold and Porter law firm in Washington, D.C., has established with INFEEKS, a recently established Soviet consulting cooperative, a joint venture to advise Western companies on Soviet trade. *Arnold & Porter Announces U.S.-Soviet Joint Venture*, PR Newswire, Dec. 13, 1988.

111. Further Development, *supra* note 1, art. 2.

112. *Zakon o kooperatsii v SSSR* (Law on Cooperatives in the USSR), Ved. Verkh. Sov. SSSR 1988, No. 22, item 355, art. 3(2) [hereinafter Law on Cooperatives]. Cooperatives are forbidden to produce certain types of goods and to provide certain types of services; for certain other goods and services they are permitted to operate only by agreement with a state enterprise that produces the relevant goods or provides the relevant services. O regulirovanii otdel'nykh vidov deiatel'nosti kooperativov v sootvetstvi s Zakonom o kooperatsii v SSSR (The Regulation of Certain Types of Activity of Cooperatives under the Law on Cooperatives in the USSR), SP SSSR 1989, No. 4, item 12.

113. Galuszka, *And You Think Western Capitalist Have Problems*, BUSINESS WEEK, Jan. 30, 1989, at 50 (60,000 cooperatives); *Norris Institute Establishes a Joint Venture in the USSR*, PR Newswire, Jan. 17, 1989 (32,000 cooperatives). The State Committee on Statistics reported as of Jan. 1, 1989, a total of 77,548 cooperatives, of which 16,152 were in the production category. EKONOMICHESKAI GAZETA, 1989, No. 13, at 14.

114. Law on Cooperatives, *supra* note 112, art. 7(2).

115. Kirkland, *Why Russia Is Still in the Red*, FORTUNE, Jan. 30, 1989, at 176.

116. Law on Cooperatives, *supra* note 112, arts. 3(1), 33.

117. *Id.* arts. 6-7.

118. *Id.* art. 11(4).

119. *Id.* art. 5(3).

120. *Id.* art. 8(4).

121. *Id.*

122. *Id.* art. 43.

123. *Id.* art. 8(4).

debts of a cooperative. However, all of a cooperative's property is available to satisfy its obligations.<sup>124</sup> This rule differs from the rule applicable to state enterprises, making certain assets immune from execution.<sup>125</sup> The assets of a cooperative consist of the production of its members and their contributions, proceeds from the limited sale of shares, and bank credits.<sup>126</sup>

A cooperative may join with other cooperatives to form a union of cooperatives. If this is done, a charter is drawn up for the union, which becomes a legal person.<sup>127</sup>

### B. State Enterprises

The state enterprise is the basic unit of Soviet industry.<sup>128</sup> It is a legal person,<sup>129</sup> and the state does not claim sovereign immunity for it. It operates with capital allocated by the state but, for financial purposes, is separate from the state.<sup>130</sup> The state is not responsible for its financial obligations<sup>131</sup>—a postulate reiterated in the December 1988 decree.<sup>132</sup> An enterprise is not responsible for the obligations of the state or of other enterprises.<sup>133</sup> Thus, a foreign firm contracting with a state enterprise may look only to that enterprise for satisfaction of obligations.

Some Soviet state enterprises are in unions with other state enterprises that collectively constitute a new economic unit called a production combine.<sup>134</sup> A combine is a legal person. It is not responsible for the obligations of its constituent enterprises, and the constituent enterprises are not responsible for the obligations of the combine.<sup>135</sup> Thus, in a contract between a foreign firm and a combine, the foreign firm may look only to the combine for the satisfaction of its contractual obligations.

Soviet legal persons are permitted to act only within the range of their legal competence.<sup>136</sup> If they act *ultra vires*, the act is invalid.<sup>137</sup> This is a potential concern in the case of foreign goods imported by a Soviet state enterprise, because an enterprise may typically import only for its own use. For

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124. *Id.*

125. *See infra* text accompanying note 140.

126. Law on Cooperatives, *supra* note 112, art. 7(2).

127. *Id.* art. 16(3).

128. *Zakon o gosudarstvennom predpriatii (ob'edinenii)* (Law on the State Enterprise (or Combine)), *Ved. Verkh. Sov. SSSR* 1987, No. 26, item 385 art. 1(1).

129. *Id.* art. 1(2).

130. *Id.* arts. 1(2), 3.

131. *Id.* art. 2(6).

132. Further Development, *supra* note 1, art. 2.

133. Law on the State Enterprise (or Combine), *supra* note 128, art. 2(6).

134. *Polozhenie o Gosudarstvennom proizvodstvennom ob'edinenii* (Statute on the State Production Combine), *SP SSSR* 1987, No. 47, item 156 art. 1.

135. *Id.* art. 5.

136. *Grazhdanskii Kodeks RSFSR [GK RSFSR]* (Civil Code of the RSFSR), art. 50. All references to Civil Code will be to the Civil Code of the Russian Soviet Federated Socialist Republic, the largest of the fifteen constituent republics of the USSR.

137. *Id.* arts. 49-50; T. HOYA, *supra* note 21, at 287-88.

example, if a Soviet enterprise producing trucks were to buy chewing gum for the purpose of selling it in the Soviet Union, that contract would be *ultra vires*.

A state enterprise has "rights of possession, use, and control" of its "property."<sup>138</sup> These are equivalent to ownership rights, as defined in Soviet law,<sup>139</sup> and other legal systems. Nonetheless, not all assets of a state enterprise are available to creditors. Buildings and equipment, which are considered the "basic assets" of an enterprise, are exempt from execution.<sup>140</sup>

## V.

### THE LAW APPLICABLE TO AN EXPORT-IMPORT CONTRACT

The Soviet law regulating export-import transactions between Soviet entities and foreign entities is found in Soviet civil legislation within a system of civil codes modeled after France's Napoleonic code.

#### A. *Laws of the Soviet Republics*

The Soviet Union is organized as a federation of fifteen constituent republics.<sup>141</sup> The federation establishes basic concepts in each field of law by enacting a statute called "fundamental principles" in that field.<sup>142</sup> The federation's Fundamental Principles of Civil Legislation establishes the Soviet Union's basic civil law concepts. Each of the fifteen republics has a civil code which incorporates these basic concepts *verbatim* and provides more detailed rules.

Until the 1988 reform, virtually all export-import transactions concluded in the Soviet Union were concluded in Moscow, which meant that, to the extent that Soviet law might apply, the applicable law would be the civil code of the Russian Republic. Now, foreign parties may contract with enterprises or cooperatives headquartered in any part of the Soviet Union. As Soviet law follows *lex loci contractus*,<sup>143</sup> a contract concluded between a foreign firm and a Soviet cooperative or state enterprise in, for example, the Kazakhstan republic, would be governed by the civil code of the Kazakhstan republic.

The applicability of the codes of the different republics is not a major complication. The Fundamental Principles of Civil Legislation establishes the most important propositions of law. Even on matters not covered by the Fundamental Principles, the codes do not differ significantly.

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138. Law on the State Enterprise (or Combine), *supra* note 128, art. 4(1).

139. Ob utverzhdenii osnov grazhdanskogo zakonodatel'stva soiuza SSSR i soiuznykh respublik (Fundamentals of Civil Legislation of the USSR and Union Republics), Ved. Verkh. Sov. SSSR 1961, item 50, art. 19 [hereinafter Fundamentals].

140. *Id.* art. 22.

141. KONST. SSSR, arts. 70-71.

142. *Id.* art. 73(4).

143. See *infra* text accompanying note 145.

The task of construing the civil codes is simplified by the fact that Soviet law does not follow the notion of *stare decisis*. While some appellate court decisions are published and are generally available, they are not deemed to be binding in future cases. Thus, lawyers do little case law research. As in other continental European countries, lawyers rely primarily on the text of the code provisions. But since these provisions are often quite general, lawyers also use books of code commentaries, treatises, and law review articles written by legal scholars.<sup>144</sup>

### B. *Lex Loci Contractus*

Soviet law recognizes a choice of law by the parties. "Norms of the general civil legislation are applicable to relations in foreign trade if a commercial transaction is concluded in the USSR and if the parties do not provide by agreement for the application of foreign legislation to the relations resulting from the transaction."<sup>145</sup> Thus, in an export-import contract, the parties are free to select the applicable law.

If the parties do not select the law applicable to an export-import contract, the Fundamental Principles of Civil Legislation stipulates that the laws of the place where contract was concluded shall apply.<sup>146</sup> A Soviet tribunal would determine the place of contracting by applying Soviet law.<sup>147</sup> When a contract is concluded between absent parties, Soviet law deems the place of contracting to be the place where the offeror received the offeree's acceptance.<sup>148</sup>

## VI.

### LEGAL AUTHORITY TO BIND THE SOVIET CONTRACTING PARTNER

The Statute on the State Enterprise provides that an enterprise "shall collaborate with foreign partners on the basis of economic contracts."<sup>149</sup> The Law on Cooperatives also contemplates direct contracts with foreign partners.<sup>150</sup> Legislation on the status and internal organization of cooperatives

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144. See, e.g., KOMMENTARIJ K GK RSFSR (Commentary to the Civil Code of the R.S.F.S.R.) 20 (E.A. Fleishits & O.S. Ioffe eds. 1970) [hereinafter Fleishits & Ioffe].

145. Fleishits & Ioffe, *supra* note 144, at 20.

146. Fundamentals, *supra* note 139, art. 126; GK RSFSR, art. 566; Rosenberg, *Conclusion of Contract*, in *USSR Contract Law* 33, 36-37 (V.S. Pozdnyakov ed. 1982).

147. Quigley, *Soviet Conflicts Rules: Merchant Shipping Code of 1968*, 63 AM. J. INT'L L. 529, 532 (1969).

148. GK RSFSR, arts. 162-163; Rosenberg, *supra* note 146, at 36-37. This rule was applied in the case *Prodintorg v. Teax, Vneshnetorgovaia arbitrazhnaia komissii* (Foreign Trade Arbitration Commission) Moscow, Jan. 20, 1970, discussed in *Sektsiia prava Torgovo-Promyshlennoi Palaty SSSR* (Section of Law of the Chamber of Commerce of the USSR), SBORNIK INFORMATSIONNYKH MATERIALOV (Collection of Informational Materials), 1973, No. 26, at 9, 14-15, translated in 2 EAST-WEST TRADE: A SOURCEBOOK ON THE INTERNATIONAL ECONOMIC RELATIONS OF SOCIALIST COUNTRIES AND THEIR LEGAL ASPECTS 424 (D.A. Loeber ed. 1976).

149. Law on the State Enterprise (or Combine), *supra* note 128, art. 19(5).

150. Law on Cooperatives, *supra* note 112, art. 28(2).

and state enterprises indicates which persons have the authority to bind them to a contractual obligation.

*A. Authority to Bind Cooperatives and State Enterprises*

A state enterprise operates on the basis of "single-person management" (*edinonachalie*), exercised by its director.<sup>151</sup> For relations outside the enterprise, this means that the enterprise is represented by its director. A director is elected at a meeting of the enterprise's workers.<sup>152</sup> The director "without power of attorney shall act in the name of the enterprise," and shall "represent" the enterprise, "conclude contracts," and "issue powers of attorney."<sup>153</sup> Thus, the director is empowered to contract in the name of the enterprise or to authorize others to do so.

In a Soviet cooperative, the general meeting is the highest decision-making body. It selects its own chairperson who, according to the Law on Cooperatives, "shall represent the cooperative in relations with state agencies, enterprises, organizations, institutions, and other cooperatives," and "shall conclude contracts."<sup>154</sup>

According to the December 1988 decree, a cooperative or state enterprise may "carry out export-import operations directly—creating for this purpose, where necessary, economically accountable foreign trade firms—on a contractual basis through other foreign trade organizations."<sup>155</sup> Thus, a cooperative or state enterprise may utilize the services of some other Soviet organization that conducts foreign trade. That other organization would negotiate with the foreign partner, but the cooperative or state enterprise would be the contracting partner.<sup>156</sup>

If a cooperative or state enterprise trades directly, it may (but does not have to) establish for that purpose a subsidiary entity called a foreign trade firm. Such a firm does not normally possess legal personality separate from

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151. Law on the State Enterprise (or Combine), *supra* note 128, art. 6(4).

152. *Id.* art. 6(3).

153. *Id.* art. 6(4).

154. Law on Cooperatives, *supra* note 112, art. 14(4).

155. Further Development, *supra* note 1, art. 2.

156. Basic Conditions, *supra* note 69, art. 3; Kuvshinov, *supra* note 69, at 32. It is also possible that the export-import house would conclude in its name the export-import contract, though on behalf of the Soviet enterprise. Kuvshinov, *supra* note 69, at 31-32; Braginskii, *supra* note 45, at 9.

that of the cooperative or state enterprise.<sup>157</sup> Thus, the firm of a state enterprise would contract in the name of the enterprise,<sup>158</sup> and the enterprise's assets would stand behind the obligation.<sup>159</sup> If litigation were necessary, the firm would appear as a party, but in the name of the enterprise.<sup>160</sup>

Nevertheless, the law contains a provision for an enterprise's ministry to decide to make an enterprise's foreign trade firm a legal person.<sup>161</sup> In this case, the firm's property would be separated from that of the enterprise. The foreign trade firm would contract in its own name, and it alone would be responsible for its obligations.<sup>162</sup> The enterprise would be responsible only if it separately agreed with the foreign partner to guarantee the obligation of the firm.<sup>163</sup>

### *B. Two-Signature Rule on Export-Import Contracts*

Soviet law requires that an export or import contract be signed by two persons specifically authorized to sign export or import contracts for the given organization.<sup>164</sup> A cooperative or state enterprise is bound by this two-signature rule.<sup>165</sup> Unless a contract is signed by two properly authorized persons, it is invalid under Soviet law.<sup>166</sup>

The applicable statute, enacted in 1978, specifies the following persons as authorized to sign a contract: the director of an organization; deputy directors; heads of subsidiary firms that are not legal persons; and persons given a

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157. Tipovoe polozhenie o khozraschetnoi vneshnetorgovoi firme nauchno-proizvodstvennogo, proizvodstvennogo ob'edineniia, predpriiatiia, organizatsii (Model Statute for an Economically Accountable Foreign Trade Firm of a Scientific-Production or Production Combine or of an Enterprise or Organization), SP SSSR 1987, No. 6, item 24, art. 1 [hereinafter Model Statute]; Braginskii, *Vneshneekonomicheskaiia deiatel'nost' predpriiatiia* (The Foreign Economic Activity of Enterprises), KHOZIAISTVO I PRAVO, 1988, No. 1, at 11, 12; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 50; Riabikov, *Vneshneekonomicheskaiia deiatel'nost' kooperativov* (The Foreign Economic Activity of Cooperatives), KHOZIAISTVO I PRAVO, 1989, No. 5, at 35, 37.

158. Model Statute, *supra* note 157, art. 14; Braginskii, *supra* note 157, at 12; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 50.

159. Model Statute, *supra* note 157, art. 15; Braginskii, *supra* note 157, at 12; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 53.

160. Model Statute, *supra* note 157, art. 14; Braginskii, *supra* note 157, at 12.

161. Model Statute, *supra* note 157, art. 21; M. BOGUSLAVSKY & P. SMIRNOV, *supra* note 6, at 50.

162. Braginskii, *supra* note 157, at 13.

163. *Id.*

164. O poriadke podpisaniia vneshnetorgovykh sdelok (The Procedure for Signing Foreign Trade Transactions), SP SSSR 1970, No. 6, item 35, art. 1 [hereinafter Procedure for Signing]. See also Rabinovich, *The Procedure for Signing Transactions with Soviet Foreign Trade Organizations*, 22 INT'L LAW. 143 (1988); Riabikov, *Novoe sovetskoe zakonodatel'stvo o poriadke podpisaniia vneshnetorgovykh sdelok* (New Soviet Legislation on the Procedure for Signing Foreign Trade Transactions), VNESHNIAIA TORGOVLIA (Foreign Trade), 1978, No. 6, at 48.

165. See Model Statute, *supra* note 157, art. 6; Rabinovich, *supra* note 164, at 149; Braginskii, *supra* note 157, at 13; Riabikov, *supra* note 157, at 38.

166. See Fundamentals, *supra* note 139, arts. 14, 125; Braginskii, *supra* note 157, at 13.

power of attorney for that purpose by the director.<sup>167</sup> The charter of an organization may alter these rules, however, giving others the right to sign contracts.<sup>168</sup>

Since the 1978 statute was promulgated before the liberalization of cooperatives in 1988, the statute contains no rules specifically applicable to cooperatives. A cooperative is headed by a "chairperson" rather than a "director." By analogy to the director of a state enterprise, the chairperson of a cooperative presumably has a right to sign export and import contracts.

There is no statutory requirement that the names of persons authorized to contract for a cooperative or state enterprise be maintained in the public registry in which cooperatives and state enterprises carrying out export and import are enrolled.<sup>169</sup> A list is maintained by the superior agency responsible for a given organization of those individuals authorized to enter contracts on the organization's behalf.<sup>170</sup> For a state enterprise, this is the enterprise's ministry.<sup>171</sup> Since a cooperative lacks a superior agency, it is unclear whether any agency other than the cooperative itself need maintain the names of persons authorized to contract on its behalf.

### C. Powers of Attorney

The Soviet civil codes provide for conclusion of contracts through a power of attorney.<sup>172</sup> If the person concluding the contract is not properly authorized or exceeds the authority granted, then the contract is not binding for the entity on whose behalf the person purported to contract, unless that entity subsequently approves the contract.<sup>173</sup>

A Soviet cooperative or state enterprise must issue in writing a power of attorney to a person authorized to contract on its behalf.<sup>174</sup> The Civil Code does not indicate that a power of attorney must be notarized;<sup>175</sup> however, it must indicate the date on which it was executed.<sup>176</sup> The power of attorney for a state enterprise must be issued by the director over the seal of the enterprise.<sup>177</sup> The power of attorney for a cooperative may be issued by any person designated in the cooperative's charter as entitled to do so.<sup>178</sup> Presumably, the chairperson has authority to do so.<sup>179</sup>

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167. Procedure for Signing, *supra* note 164, art. 1; Braginskii, *supra* note 157, at 13.

168. Procedure for Signing, *supra* note 164, art. 1.

169. Further Development, *supra* note 1, art. 2.

170. Procedure for Signing, *supra* note 164, art. 1.

171. Braginskii, *supra* note 157, at 13.

172. Fundamentals, *supra* note 139, art. 15; GK RSFSR, art. 62.

173. GK RSFSR, art. 63; SOVIET CIVIL LAW 96 (O.N. Sadikov ed. 1988).

174. GK RSFSR, art. 64.

175. *See id.* art. 66.

176. *Id.* art. 67.

177. *Id.* art. 66; O.N. Sadikov, *supra* note 173, at 98. A state enterprise has a seal. Law on the State Enterprise (or Combine), *supra* note 128, art. 23(3).

178. GK RSFSR, art. 66.

179. *See* Law on Cooperatives, *supra* note 112, art. 14(4).

Under the Soviet civil codes, there may be a time limit on a power of attorney. If no expiration date is indicated, the power of attorney expires one year from the date of execution.<sup>180</sup> A power of attorney may not be issued for a period exceeding three years.<sup>181</sup> Nevertheless, powers of attorney for foreign trade transactions are valid until revoked, if they are notarized.<sup>182</sup>

The form and validity of a power of attorney are deemed, by Soviet conflict of law rules, to be governed by the law of the country where the power of attorney is issued.<sup>183</sup> But a power of attorney issued by a Soviet entity is not deemed invalid for failure to observe the form required by local law, if it meets the formal requirements of Soviet law.<sup>184</sup>

#### D. Contracts in Written Form

Any contract with a Soviet cooperative or state enterprise must be in writing. Soviet civil legislation requires that transactions between state, cooperative, or social organizations and individuals or other organizations be in writing.<sup>185</sup> The only exception to this requirement is for nonexecutory contracts.<sup>186</sup> A written contract is also required for export-import contracts pursuant to the 1978 legislation on the signing of export-import contracts.<sup>187</sup> While Soviet law requires that certain written contracts be notarized, that requirement does not apply to commercial contracts, whether domestic or international.<sup>188</sup> However, the parties may have a contract notarized if they so desire.<sup>189</sup>

If an export or import contract is concluded in a form other than in writing, it is invalid.<sup>190</sup> Furthermore, the Foreign Trade Arbitration Tribunal of the Soviet All-Union Chamber of Commerce has declined to recognize the validity of oral modifications to the contracts of the monopoly export-import houses.<sup>191</sup>

### VII.

#### PROBLEMS OF SUIT IN CASE OF CONTRACT BREACH

Two issues arise in the event of breach of an export-import contract with a Soviet cooperative or state enterprise: the entity's continuing solvency and the forum in which a dispute may be resolved.

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180. GK RSFSR, art. 67.

181. *Id.*; O.N. Sadikov, *supra* note 173, at 99.

182. Rabinovich, *supra* note 164, at 151; O.N. Sadikov, *supra* note 173, at 99.

183. Fundamentals, *supra* note 139, art. 126-1.

184. *Id.*

185. GK RSFSR, art. 44; Braginskii, *supra* note 157, at 13.

186. GK RSFSR, art. 43.

187. *See* Procedure for Signing, *supra* note 164, art. 1.

188. *Id.*, art. 42. Notarization is required for sale of a dwelling, *id.* art. 239, or for a will, *id.* art. 540. Braginskii, *supra* note 157, at 13.

189. *See* GK RSFSR, art. 161.

190. *See* Fundamentals, *supra* note 139, arts. 14, 125; Braginskii, *supra* note 157, at 13.

191. T. HOYA, *supra* note 21, at 291.

A. *Insolvency and Bankruptcy*

There is no bankruptcy code in the USSR. One commentary to the Russian Republic Civil Code states that "the civil code does not regulate the procedure for termination of the existence of state organizations by liquidation. In the civil code there are no rules, even by reference; in particular, the property-legal consequences of liquidation are not addressed."<sup>192</sup> To the extent that the rights of foreign trading partners may be affected by the liquidation of a Soviet state enterprise or cooperative, foreign traders should become familiar with the Soviet rules and procedures for liquidations.

The Soviet civil codes state that a state enterprise is liquidated by decision of its superior agency,<sup>193</sup> i.e., the enterprise's ministry. According to the Statute on the State Enterprise, if no successor acquired the liquidated enterprise's assets, then the ministry would receive claims by creditors.<sup>194</sup> The ministry would then establish a liquidation commission to take over the enterprise's assets. The commission would establish a deadline for the filing of claims by creditors.<sup>195</sup>

However, there is a long-established practice that when a state enterprise is liquidated, either a new one is formed to replace it or its assets are given to an existing enterprise.<sup>196</sup> While the matter appears not to be regulated by statute, the successor enterprise assumes the obligations of the enterprise that was liquidated.<sup>197</sup>

A cooperative may be liquidated either by its membership<sup>198</sup> or, in case of financial difficulty or violations by it of the law, by the executive committee of the local soviet.<sup>199</sup> Upon liquidation, a liquidation commission preserves the assets and satisfies claims of creditors.<sup>200</sup>

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192. Fleishits & Ioffe, *supra* note 144, at 63.

193. GK RSFSR, art. 38.

194. Law on the State Enterprise (or Combine), *supra* note 128, art. 23(2).

195. While the details are left vague by statute, one commentator has stated that until new law on the matter is written, the 1965 Statute on the Socialist State Production Enterprise, Article 109, should apply. This statute does not permit the time for creditors to file claims to be set at less than thirty days. V. Rakhmilovich, *Sozdanie i prekrashchenie deiatel'nosti predpriiatiia* (The Formation and the Termination of Activity of an Enterprise), KHOZIAISTVO I PRAVO, 1989, No. 2, at 3, 9.

196. Fleishits & Ioffe, *supra* note 144, at 63.

197. O.N. Sadikov, *supra* note 173, at 63-64.

198. Law on Cooperatives, *supra* note 112, art. 15(1).

199. *Id.* art. 15(2). The vagueness of the Law governing which violations warrant liquidation is noted by A. Panin, Chairperson of the Commission on Cooperatives and Individual Labor Activity of the Executive Committee of the Moscow City Soviet, interviewed in *Kooperatsiia na polose pravovykh prepiatstviu* (Legal Hurdles Faced by Cooperatives), SOVETSKAIA IUSTITSIIA, 1988, No. 24, at 11.

200. GK RSFSR, art. 40. Legal provisions are vague on the procedure for claims by creditors. Panin, *supra* note 199, at 11.

*B. Soviet Courts*

Western firms and Soviet monopoly export-import houses typically specify in their agreements that disputes will be resolved through arbitration in an arbitral tribunal located in a third country.<sup>201</sup> Since Soviet cooperatives and state enterprises are only now being given the right to export and import directly, arbitration procedures will be unfamiliar to them. Presumably, however, they too will consent to third-country arbitration.

The Soviet Union has an arbitral tribunal in which Western firms sometimes agree to arbitrate, the Arbitration Court of the Chamber of Commerce and Industry of the USSR.<sup>202</sup> The Court hears commercial disputes either when expressly chosen by the parties to a contract as the venue for arbitration, or when the plaintiff brings an action and the defendant submits to the Court's jurisdiction.<sup>203</sup> Arbitral awards are not appealable<sup>204</sup> and are enforced by the Soviet courts.<sup>205</sup> The Arbitration Court has functioned since 1932 and has well qualified Soviet specialists in international trade law as arbiters. The Court has frequently found in favor of Western firms against Soviet parties and enjoys a reputation for impartiality.<sup>206</sup>

In the absence of a venue chosen by the parties, a regular Soviet court might have jurisdiction over an export-import contract dispute. These courts do not have significant experience in commercial matters, since disputes between Soviet state enterprises (including joint ventures with foreign parties) are handled by a separate dispute-resolution system, called state arbitration. State arbitration courts do not have jurisdiction over disputes in which one party is a foreign firm.<sup>207</sup>

A foreign exporter or importer would have standing to sue in a Soviet court. The Fundamental Principles of Civil Procedure of the USSR and Union Republics provides that: "[f]oreign enterprises and organizations shall have the right to sue in the courts of the USSR and shall enjoy civil-procedure rights to defend their interests."<sup>208</sup> A legal suit would be filed in the people's court for the judicial district in which the Soviet cooperative or state enterprise has its headquarters or where it has property.<sup>209</sup> A foreign firm is

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201. T. HOVA, *supra* note 21, at 324-25.

202. Polozhenie ob Arbitrazhnom sude pri Torgovo-promyshlennoi palate SSSR (Statute on the Arbitration Court of the Chamber of Commerce and Industry of the USSR), Ved. Verkh. Sov. SSSR 1987, No. 50, item 806.

203. *Id.* art. 2.

204. *Id.* art. 9.

205. Fundamentals of Civil Procedure of the USSR and Union Republics, art. 58.

206. W. BUTLER, *supra* note 11, at 393.

207. See Zakon o Gosudarstvennom arbitrazhe v SSSR (Law on State Arbitration in the USSR), Ved. Verkh. Sov. SSSR 1979, No. 49, item 844, art. 9, *amended by* O vnesenii izmenenii i dopolnenii v Zakon SSSR "O gosudarstvennom arbitrazhe v SSSR" (Introduction of Changes and Additions into the Law of the USSR "State Arbitration in the USSR"), Ved. Verkh. Sov. SSSR 1988, No. 1, item 3.

208. Fundamentals of Civil Procedure of the USSR and Union Republics, art. 59.

209. GRAZHDANSKO-PROTSESSUAL'NYI KODEKS RSFSR [GPK RSFSR], art. 117.

within the personal jurisdiction of a Soviet court only if the firm has property or a permanent office in the USSR.

### VIII.

#### THE PROBABLE IMPACT OF DIRECT SOVIET TRADING

The implementation of the contemplated reforms faces a number of obstacles. One problem is finding personnel competent to manage export and import operations at the production, enterprise and ministry levels.<sup>210</sup> Personnel from the centralized offices in Moscow are being transferred to localities in order to assist,<sup>211</sup> and instructional articles are being written to describe techniques of international trade.<sup>212</sup> But when the seventy enterprises were given the right to trade directly in 1987, few immediately took advantage of the opportunity.<sup>213</sup> At least in the short term, Soviet economic managers were unsure as to what the new legislation authorized them to do.<sup>214</sup>

Production ministries may try to restrict enterprise autonomy in export-import activities. Recent legislation asks ministries to respect the autonomy that the law affords enterprises.<sup>215</sup> As regards the foreign trade activity of an enterprise, the ministry is to limit itself to general promotion of trade.<sup>216</sup> Nevertheless, Soviet ministries have a history of protecting their prerogatives against attempts at decentralization.

The export-import houses of the Ministry of Foreign Economic Relations are likely to retain a significant role in the purchase and sale of items in quantity, since an economy of scale is of particular advantage. With the exception of cooperatives, the traders are state-owned companies which the central government can influence in a variety of ways. The extent to which individual enterprises and cooperatives will take over export and import remains to be seen, as does the amount of export and import done by the export-import houses.

The opening of export and import to Soviet cooperatives and state enterprises puts Soviet industry and commerce into direct contact with the world economy for the first time. The consequences are likely to be substantial, not only for trade but also for political relations. Direct export and import will bring a wide range of Soviets and foreigners into direct contact. Foreign

210. E. HEWETT, *supra* note 52, at 343; Gardner, *supra* note 25, at 9.

211. Measures to Improve, *supra* note 57, art. 11; V. SHEMIATENKOV, *supra* note 19, at 21.

212. A. Engibarov, *Organizatsiia sbyta na vneshnikh rynkakh* (Organizing Sales in Foreign Markets), *KHOZIAISTVO I PRAVO*, 1988, No. 12, at 41.

213. Gardner, *supra* note 25, at 9.

214. Rosenberg, *Caution: The Bear's No Teddy Bear*, *AMERICAN BANKER*, Mar. 6, 1989, at 20.

215. O perestroike deiatel'nosti ministerstv i vedomstv sfery material'nogo proizvodstva v novykh usloviakh khoziaistvovaniia (Restructuring of the Activity of Ministries and Departments Involved in Goods Production under the New Conditions of Economic Activity), *SP SSSR* 1987, No. 38, item 122.

216. *Id.* art. 4.

firms will no longer be limited to Moscow but will work all over the Soviet Union. Lawyers representing foreign firms will require greater knowledge of Soviet law. Soviet factories will send their people abroad to explore trade possibilities. Soviets and foreigners will gain greater knowledge of each other and of their countries.<sup>217</sup> As with other aspects of *perestroika*, the secondary consequences may in the long term be more significant than the immediate ones.

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217. For a discussion of the rules restricting contact for trade and other purposes between Soviet citizens and foreigners, see Maggs, *supra* note 26, at 187-88.