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SOVIET-AMERICAN TRADE: SOME PROBLEMS OF SOCIALIST LAW REQUIRING TREATY CLARIFICATION

William Henry Tuttle*

Increased trade between the United States and the Soviet Union has become a subject of primary concern to the present Administration in Washington;¹ and a concerted effort has been made by the Administration to interest legislators and businessmen in such trade expansion and to induce them into taking the prerequisite steps to that end.²

If American businessmen are to be encouraged to venture into the unfamiliar commercial world of state foreign trade monopoly and state planned economy, they must be protected in their private contracts from the juridical effects of certain unfamiliar rules of law derived from these monolithic socialist institutions.

Article 128 of The Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics states:

A foreign law shall not apply where its application contradicts the fundamental principles of the Soviet system.³

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However, the dominance of the "fundamental principles of the Soviet system" over foreign law may be overcome by treaty.

Article 129 of The Fundamentals of Civil Legislation states:

Where an international treaty or international agreement to which the USSR is party establishes rules other than those contained in Soviet civil legislation, the rules of the international treaty or international agreement shall apply.  

The purpose of this article is to investigate the effect on American legal doctrine of certain rules of law peculiar to the Soviet socialist system to which the above Article 128 would undoubtedly apply and, in regard to which, the Congress should provide American businessmen adequate and appropriate treaty protection, namely (1) the common law doctrine of apparent or ostensible authority vis-a-vis "special rules" of the Soviet foreign trade monopoly, (2) the doctrine of imposibility of performance vis-a-vis the "law of the plan," and (3) the right to sue on the contract vis-a-vis the sovereign immunity of Soviet Trade Delegations.

THE STATE MONOPOLY OF FOREIGN TRADE

The real "curtain" that surrounds the Soviet Union is the economic "curtain" created and maintained by the institution of state foreign trade monopoly. It is this "curtain" which insulates and protects the planned, socialist economy of the Soviet Union from the unplanned, market economy of the capitalist world.

Article 14 of the Constitution of the Union of Soviet Socialist Republics provides:

The jurisdiction of the Union of Soviet Socialist Republics, as represented by its higher organs of state power and organs of state administration, embraces:

(h) Foreign trade on the basis of state monopoly.

The policy of foreign trade monopoly as set forth in the 1936 Soviet Constitution is reflective of pre-existing Soviet law, since the business of engaging in international commerce was nationalized by the Decree of the Council of People's Commissars April 22, 1918.


5 Moore, Modern Constitutions 215 (1957).

6 1 Soviet Documents on Foreign Policy 71 (Degras ed. 1952).
The April 22 Decree was refined and rendered specific by a Decree of the All-Russian Central Executive Committee and the Council of People's Commissars, October 16, 1922, which states in part:

4. Liability in connexion with foreign transactions is borne by the State only when contracts are concluded and signed by the Commissariat for Foreign Trade, or by trade delegations of the RSFSR in particular countries, or by institutions and individuals specially authorized for each separate transaction by a decision of the All-Russian Central Executive Committee, the Council of People's Commissars, the Council of Labour and Defence, or the People's Commissariat for Foreign Trade.7

The principle of foreign trade monopoly is found in Section 17 of the Russian Civil Code:

All persons in the R.S.F.S.R., legal entities and human beings, shall participate in foreign trade only through the medium of the government as represented by the Ministry of Foreign Trade. Independent appearances in the foreign market shall not be permitted except under the control of the Ministry of Foreign Trade.8

The Soviet trade monopoly doctrine is enforced by maintaining strict control over the form of foreign trade transactions concluded by Soviet organizations, as is indicated by the "special rule" laid down by Article 125 of the Fundamentals of Civil Legislation:

The form of foreign trade transactions concluded by Soviet organisations, and the procedure governing their signature, regardless of the place where such transactions are concluded, shall be determined by the legislation of the U.S.S.R.9

The particular formalities demanded under Soviet law are not extensive, nor are they innovations in commercial law; however, the requirement that they be universally applied is most significant:

All such transactions must be made in writing. No oral expression of will relating to the foreign trade of the U.S.S.R. has any juridical force, even where such is recognized by the law of the place of making. The essential point in the signing of foreign trade transactions is that this is done by two [Soviet] persons. Lists of persons authorised to sign are published in the established manner, and, in addition, the government of the country of stay is notified of the names of persons authorised to sign transactions concluded by the trade mission of the U.S.S.R. or its branches. These rules determine the powers vested in trade delegates or representatives of Soviet foreign trade associations to perform certain acts giving rise to juridical consequences, and are

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7 Id. at 338-39.
8 2 Gsovski, SOVET CIVIL LAW 34 (1949). Although the text reads "all persons in the R.S.F.S.R.," it is understood that the monopoly refers to the entire Soviet Union (U.S.S.R.) which was officially formed after the promulgation of the Civil Code. Ibid.
9 SCL&P 113.
extraterritorial, i.e., are mandatory for foreign courts as well. (Emphasis added.)

The Foreign Trade Arbitration Commission, a permanent arbitral institution attached to the All-Union Chamber of Commerce of the U.S.S.R. at Moscow, has consistently applied the "special rule" in cases involving Soviet foreign trade organizations. The requirement of a writing and rejection of any oral expression inconsistent with the written contract is strictly adhered to, as is the signatory

10 Commentary FCivL in SCL&P at 52-53. Article 14, FCivL in SCL&P at 63-64, defines "legal transactions" and further states "Failure to comply with the form prescribed by law shall entail invalidation of the legal transaction only if such consequence is expressly provided by law. Non-compliance with the form of foreign trade transactions and the procedure governing their signature (Article 125 of the present Fundamentals) shall entail invalidation of the transaction." SCL&P at 64. (Emphasis added.)


12 See generally, Ramzaitsev, Activity of the Foreign Trade Arbitration Commission in Moscow in 1957, 1958 SOVIET YEAR-BOOK 463; and also Ramzaitsev, supra note 11 at 128.

It is important to understand that Soviet foreign trade is carried on, in the main, by some twenty giant corporations (Combines), each of which is a specialist in and has jurisdiction over trading certain general lines of products or commodities. The corporate charters of the Combines, issued pursuant to a decree of the Ministry of Foreign Trade, embody the trade monopoly rules under discussion. For example, paragraph 11 of the Charter of the All-Union Export-Import Combine, "Sudoimport," states that all contracts of foreign trade concluded in Moscow or abroad must be signed by two persons who have received, under powers of attorney signed by the President of the Combine, the right of first and second signing. This requirement is then passed on, for instance, to the Russian-owned Amtorg Trading Corporation of New York under specific, written agency agreements between Amtorg and the various Combines whose interests it represents in the American market. See, for example, the Agreement between Amtorg and the Combine "Avtoexport" in TRADE RESEARCH 68-70.

13 For example, the defense of the Soviet Combine that a duly signed contract should be interpreted in the light of the oral negotiations which took place before the contract was signed, was rejected by the Commission in favor of a Dutch firm, and parol evidence offered by the Russian defendant was refused in the case Kattenburg v. Technoeeksport (1937), Ramzaitsve, Vneshnetorgovyi arbitrazh v. SSSR (Foreign Trade Arbitration in the U.S.S.R.) 33 (1952) [hereinafter cited as TRADE RESEARCH]. This requirement is then passed on, for instance, to the Russian-owned Amtorg Trading Corporation of New York under specific, written agency agreements between Amtorg and the various Combines whose interests it represents in the American market. See, for example, the Agreement between Amtorg and the Combine "Avtoexport" in TRADE RESEARCH 68-70.
requirement of "two authorized persons." And the Russian Commission has reiterated the universality doctrine that the trade monopoly rules "are subject to application even in those cases when corresponding foreign trade orders fall under action of the law of other countries," and "even had the litigation taken place in a foreign forum."

The Soviet rationale for its position on the universality of the "special rule" of the state foreign trade monopoly is based upon the international legal doctrine of state sovereignty:

Regardless of whether there is "recognition of the foreign trade monopoly on the part of a given state," certain inescapable "contract norms arise from the fact that foreign trade relations of the USSR are realized on the basis of its sovereign right . . . . Thus owing to the international-legal meaning of the state foreign trade monopoly on the part of the USSR, the norms of Soviet law which determine the form of foreign trade contracts to which Soviet organizations are parties are subject to application also to such contracts concluded outside the territory of the USSR . . . . In view of this, the application of Soviet law which determines the form of foreign trade contracts must take place also in those cases where disputes concerning such contracts are examined abroad."
The strict maintenance of the few formal requirements of Article 125 of the Fundamentals of Civil Legislation\textsuperscript{18} is of great importance to the Soviet Union; the rules are obviously regarded as basic to the socialist institution of foreign trade monopoly, and as such would enjoy the protection afforded by Article 128 of the Fundamentals of Civil Legislation.\textsuperscript{19} This conclusion must follow; otherwise Article 125 seriously conflicts with Article 126 of the Fundamentals of Civil Legislation, which purports to codify internationally accepted principles of conflict of laws:

The rights and duties of the parties to a foreign trade transaction shall be determined pursuant to the laws of the place where it is concluded, unless otherwise provided by agreement of the parties.\textsuperscript{20}

Soviet jurists and the Foreign Trade Arbitration Commission at Moscow have long recognized and applied the conflict of laws doctrines of \textit{party autonomy}\textsuperscript{21} and \textit{law of the place of contracting}.\textsuperscript{22} The comments of the Russian legal scholar, L. A. Lunz, bear this out:

Questions of the conflict of laws regarding international sale and purchase arise mainly in connection with contracts with capitalist firms . . . . .

The main principle regarding conflict of laws applied to international sale contracts is that of \textit{lex voluntatis}. The essence of this is that the parties may choose the law to which they wish to make their reciprocal obligations subject. It is here a question solely of the actual intention of the parties voiced \textit{expressis verbis} or \textit{tacito consensu} . . . .

The work of the Foreign Trade Arbitration Commission gives no grounds for the assertion that under Soviet law regarding conflict of laws, the parties' choice of law is restricted.

\textsuperscript{18} SCL&P 113.
\textsuperscript{19} SCL&P 114.
\textsuperscript{20} SCL&P 113. It should also be noted that Article 15 of FCvL restates the fundamental rule of Agency: “A transaction performed by one party (the agent) in the name of another party (the principal) in virtue of powers based on a power-of-attorney, law, or administrative act, immediately establishes, modifies and terminates the civil rights and duties of the principal.” \textit{Id.} at 64.
\textsuperscript{21} \textit{V/O Soinzgleeksport v. (Egyptian firm) Yusef Ibrahim and Sadik Legeta} (1938), \textit{Hilton, supra} note 11, at 70, in which the Foreign Trade Arbitration Commission applied the contractually chosen Soviet law though the result was adverse to the Soviet party. See also, Ramzaitsev, \textit{supra} note 11, at 129; Ramzaitsev, \textit{supra} note 12, at 468.
\textsuperscript{22} In cases before the Foreign Trade Arbitration Commission, Belgian law applied as \textit{lex loci contractus} in \textit{Necton (Belgian firm) v. Prodintorg (All-Union Combine)} (1957), \textit{1958 SOVIET YEAR-BOOK}, at 469; English law applied in \textit{Holis Braziers v. Elksportles} (1957), \textit{ibid.}; and Danish law was applied in \textit{Danish Cornfeed Firm v. Eksportkbleb} (1957), \textit{ibid.} at 470. Furthermore, when the Commission has determined that a certain foreign law shall govern the contractual relations of the parties, “that law is applied by the FTAC in the same degree and in the same manner as it is in that foreign country.” \textit{Ibid.} See also, Ramzaitsev, \textit{supra} note 11, at 129.
This choice cannot be opposed by objections based on the fact that the legislation chosen has no connection with the actual transaction.

The establishment of the proper law of the contract based on the choice of the parties is fundamentally a matter of choosing a common legislation to the whole of the contract, not of making the settlement of some disputes subject to one law and the settlement of others to another. (Emphasis added.)

The parties' choice of a foreign law takes the relations between the parties out of the sphere not only of presumptive but also of imperative rules of lex fori. If a transaction is subject to foreign law, then it is subject to the foreign State's rules regarding the statute of limitations although Soviet law in this respect is imperative .... (Emphasis added.)

In cases where the intention of the parties regarding the proper law of the contract is not expressed, the proper law of the contract is the lex loci contractus.28

Dr. Lunz then goes on to state the exception to the rule, that the lex voluntatis and lex loci contractus are nonetheless subject to the omnipotent imperative rules of the foreign trade monopoly:

But a transaction may not be subjected to foreign law in violation of ... the rules governing the form and procedure for the signing of foreign trade contracts to which a Soviet organization is a party. These rules prevail over foreign law in the event of conflict and may in no case be violated.24

The inevitable problem may be posed. An American firm concludes a contract with representatives of the New York Amtorg Trading Corporation acting on behalf of a Soviet All-Union Export-Import Combine25 under factual circumstances that would give rise to a valid contract under the common law doctrine of apparent or ostensible authority; yet, the contract was signed by only one authorized person on Amtorg's part, thus rendering the contract invalid under Soviet "special" law.26 A dispute arises against Amtorg and the case comes before a New York court with American (New York) law chosen as the law of the contract. Amtorg raises the logical defense that the transaction was illegal under Soviet law and asserts that Soviet law on that issue must control. Does the court apply the law of the sovereign state of the U.S.S.R. over the chosen law of the sovereign state of New York? There is no ready answer to this question.27

24 Id. at 276.
25 See note 12, supra.
26 I.e., Article 125, FCrL, in SCL&P at 113.
27 Consider, however, Kulukundis Shipping Co. v. Amtorg Trading Corporation, discussed in note 14, supra.
It is possible the American court following established principles of contract and agency would find valid a contract not recognized under Soviet law; or it could find that Amtorg Corporation would be estopped from denying the validity of the contract where the American party had no notice of the formal requirements attached to Amtorg's express authority. If this result were to follow, and assuming enforcement of the judgment in Russia is necessary, the next important consideration would be whether the Russian courts would refuse to enforce the foreign judgment on the grounds that it contradicts Soviet public policy.\(^{28}\)

On the other hand, the court might find some guidance in the case of *Camden Fibre Mills Inc. v. Amtorg Trading Corp.*\(^{29}\) There, Camden, an American firm, had agreed to arbitrate any disputes arising from its contract with Amtorg before the Foreign Trade Arbitration Commission at Moscow. When a dispute arose, Camden refused to so arbitrate on the grounds it would not get a fair hearing by the state-dominated Commission. The court ruled against Camden as follows:

> In this instance, although respondent may not have known in detail how the U.S.S.R. Chamber of Commerce Foreign Trade Arbitration Commission was constituted, it is chargeable with notice as recently as 1947 that such an organization could not function in the U.S.S.R. unless it were subject to over-all control by the Soviet Government. Having entered into such an arbitration agreement, it does not lie in respondent's mouth at this point to declare that it was ignorant of this matter of common knowledge. (Emphasis added.)\(^{30}\)

If an American firm is to be charged with notice of the political structure of Soviet socialist institutional organization, it could also be argued that it be charged with notice of the legal structure of the fundamental socialist institution of foreign trade monopoly, including the formal restrictions it imposes on foreign trade transactions. That is to say, under the above rule of the *Camden Fibre Mills* case, the American firm, in the problem posed, could be charged with notice of the nature and extent of the express authority vested in Amtorg Trading Corporation, and its contract would stand invalid.

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\(^{28}\) See Article 128 of the FCvL cited in the text at note 3, *supra.*

\(^{29}\) 277 App. Div. 531, 100 N.Y.S.2d 147 (1950).

\(^{30}\) *Id.* at 53, 100 N.Y.S.2d at 748. Interestingly, the Russian Chamber of Commerce and the attached Arbitration Commission are "social" or "public" organizations and as such are distinguished from "state" organizations under Soviet law by the fact that membership in them is voluntary and their members participate in the administration of their affairs. Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482, 493 (1959). There is no valid basis for the assertion that the Soviet state controls decisions of the Foreign Trade Arbitration Commission. For a detailed study of this point, see Tuttle, *supra* note 11, at 52-66.
for want of proper formality. This would seem a harsh and inequitable result.

The extraterritorial effect of Article 125 of the Fundamentals of Civil Legislation of the U.S.S.R. should be considered in connection with any negotiations for a treaty of trade between the United States and the Soviet Union. It may be suggested that a simple treaty solution to the hypothetical problem posed would be to impose a duty on the Soviet trade representative to give written notice of the formal requirements of Soviet law to the American firm with which it is doing business, and upon breach of this duty, the Soviet party would be presumed at fault if the contract thereafter failed for want of the formality required by Soviet law.

THE STATE PLANNED ECONOMY AND THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE

Article 4 of the Constitution of the U.S.S.R. provides that the economic life of the Soviet Union shall be determined and directed by the state economic plan.

It is difficult to imagine a more complicated system of economy than that introduced in Russia in 1928 under the First Five-Year Plan. A glance at the myriad bureaucratic details which compose this vast and total plan of economic life is useful and probably necessary to an understanding of the problem to be discussed below.

The National Economic Plan is the central coordinating mechanism of the Soviet economy. It outlines the goals to be accomplished during a given period and directs the allocation of all resources toward the fulfillment of stated goals. The Plan prescribes the national income objectives, the physical volume of production for all major commodities, and divides the national income between investment and consumption. The volume and composition of both domestic and foreign trade as well as the pricing of commodities are traditionally governed by the Plan. The circulation of all money is considered in estimating the distribution of popular income among purchasers of consumer goods, bank savings, government bonds and

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31 The "special" rule governing formality of Soviet foreign trade transactions. See text at notes 9 and 10, supra.
32 Moore, Modern Constitutions 212 (1957).
33 See generally, Campbell, Soviet Economic Power, 12-21 (1960); Dobb, Soviet Economic Development Since 1917, 230-60 (1948); Schuman, Russia Since 1917, 143-56 (1957); Schwartz, Russia's Soviet Economy, 117 (2d ed. 1954).
34 No attempt will be made here to discuss the apparent introduction of the "free market" concept of "supply and demand" into the operation of certain Russian industries. Russian authorities have stated such innovations are not to be interpreted as a departure from the basic concept of planned economy.
direct taxes. Further, the annual government budget is integrated with the overall plan of the economy. In short, the Soviet economic plan "is a gigantic, comprehensive blueprint that attempts to govern economic activities and interrelations of all persons and institutions in the U.S.S.R., as well as the economic relations of the U.S.S.R. with other countries... from the central headquarters in Moscow."  

Now there exists in Soviet society an equilibrium between Plan and Law. "Soviet economists and jurists speak of the interdependence of Plan and Law. Planning is the integrating, social, dynamic element; legality is the decentralizing, personal, stabilizing element... Plan is that aspect of the social process which is concerned with the rational use of institutions and resources from the point of view of economic development; law is that aspect of the social process which is concerned with the formalizing and enforcement of social policy (plan) in terms of the personal and property rights and duties arising therefrom."  

Although the Plan when adopted is not the Law, the Law nevertheless imposes a positive duty on individuals and institutions to carry out the Plan according to its specifications. It is the directives issued from the higher authority relative to Plan fulfillment which become in part the positive Law of the land. Article 4 of the Fundamentals of Civil Legislation entitled, "Grounds from which Civil Rights and Duties Arise," reads in part:

\[
\ldots, \text{ civil rights and duties arise:}
\]

\[
\ldots \text{ from administrative acts, including—for state, co-operative, and mass organizations—planning acts; \ldots} \quad \text{(Emphasis added.)}^{37}
\]

\[\]

35 From Schwartz, supra note 33, at 146. The Constitution of the U.S.S.R. further provides that at the head of the national economy, responsible both for making and for executing the plan, shall be the All-Union Council of Ministers (Article 68); and that this body in which the leading planning, industrial, agricultural, commercial and financial organizations are represented (Article 70), shall also be the highest executive and administrative organ of the state (Article 64) whose decisions and orders shall be binding throughout the territory of the U.S.S.R. (Articles 66, 67). Moore, Modern Constitutions, 225-26 (1957). The State Planning Commission, Gosplan, which draws up the perspective (five or seven year plan), annual and quarterly (working) plans for the Soviet Union, is an administrative body serving the Council of Ministers. Berman, Justice in Russia, 55 (1950).

36 Berman, supra note 35, at 54.

37 SCL&P 59. Sanctions may be imposed for failure to perform "planning acts." E.g., Granick, The Red Executive, 133-34 (1961); Schwartz, supra note 33, at 191-94. "Administrative acts, including planning acts for state, co-operative and mass organizations, may, in cases established by law, immediately produce civil legal obligations. Thus, an approved goods haulage plan gives rise to an obligation for the carrier to make available means of conveyance and an obligation for the consignor to make due use of them (for example, to load cars, sea going river vessels, etc., without delay). Most frequently, however, an administrative act does not directly produce a civil legal obligation, but an obligation to enter into a contract in accordance with the instructions of the administrative (as a rule, planning) act, which are elaborated in the
Certain procedures and criteria, economic and legal, must necessarily be followed under this process. "These procedures and criteria constitute what might be called the law of the plan, a field nonexistent in our society.""88

To conclude this brief and insufficient glance at Soviet planning, it must be noted that, as is the case with all Soviet commercial activities, the import and export procedures of the giant trade Combines are integrally related to the overall Plan of national economy.40

Now it would seem obvious that the "law of the plan" could not be imposed as such on foreign merchants. However, the Awards rendered in two domestic arbitrations in the Soviet Union would seem to indicate that foreign merchants could be subjected to the "law of the plan" by virtue of its positive effect on the traditional doctrine of impossibility of performance:

The Mogilev enterprise "Ob' edineniye" was respondent in a number of suits brought against it in the Mogilev oblast state arbitration tribunal for breaches of contract to supply shawls made out of a special fabric. The respondent showed that when the contracts were concluded at the end of 1957 the fabric in question was not subject to planning control, but early in 1958 it was brought under planning control by the Government of the Belorussian SSR and no allocations of it were made to "'Ob' edineniye." It was therefore factually impossible for it to make and supply these shawls, and the actions for breach of contract were dismissed. (Emphasis added.)42

... if an automobile plant has contracted to manufacture a dozen lorries for a customer, and it is then directed by a planning authority to switch its production entirely to passenger vehicles, it would actually be in breach of its planning obligations to continue to manufacture the lorries, and it has a defence to an action brought by the customer. (Emphasis added.)48

The above arbitral decisions must be evaluated in the light of traditional Soviet jurisprudence, which recognizes three basic conditions that may give rise to a valid defense under the doctrine of contract made by the parties in accordance with the planning act." Commentary FCnL, in SCL&P at 24.

88 BERMAN, supra note 35, at 95. "The Plan, in Stalin's words, is not merely a program but it is rather a 'creative process,' embracing all aspects of production and distribution; it is 'a living reality.' Planning is not finished until the plans are executed...." Id. at 57.

89 See note 12, supra.

40 TRADE RESEARCH 64-66. The import and export procedures of Soviet Combines are discussed in detail in 10 SOVIET STUDIES 397-98 (1959).

41 Disputes between domestic socialist (state-owned) commercial enterprises must be settled by Gosarbitrazh, the State Arbitration Commission. See generally, Collard, State Arbitration in the U.S.S.R., 18 MODERN LAW REV. 474 (1955).

42 Johnson, Planning and Contract Law, 12 SOVIET STUDIES 263, 266 (1961).

48 Ibid.
impossibility of performance, namely, where (1) performance has become impossible in fact, (2) performance has become impossible at law, and (3) performance has become morally impossible.\textsuperscript{44}

Performance of a contract is \textit{impossible in fact} whenever a situation has arisen which makes it actually or objectively impossible to fulfill the obligations of the contract.\textsuperscript{45} The position of the Foreign Trade Arbitration Commission at Moscow is stated as follows:

In cases where the party responsible for fulfilling the obligation (debtor) claims the impossibility of carrying out the contract, the Commission holds that in order to exculpate himself the debtor must not only produce evidence of the circumstances which made fulfillment of his liabilities impossible, but also prove the impossibility of preventing those circumstances.\textsuperscript{46}

A valid defense of factual impossibility (to deliver promised shipments of ore) was recognized by the Commission in the case \textit{Czechoslovak Ceramics v. Exportal} (1957),\textsuperscript{47} where its finding of fact showed:

\ldots that an insurmountable force in the form of unusually heavy (1954-1955) snow drifts brought about a termination of auto transport within the area of the country where the ore subject to delivery was mined. Communications in that part of the country could be carried out only by air.\textsuperscript{48}

The performance of a contract is \textit{impossible at law} "whenever the subject matter of the contract becomes unlawful."\textsuperscript{49} "Such is the case whenever the performance of an act contemplated by the contract is afterwards forbidden by law or by an order of some duly authorized body."\textsuperscript{50}

\textsuperscript{44} Agarkov, \textit{The Debtor's Discharge from Liability When Performance is Impossible (under the Soviet Law)}, 29 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 9 (1947). See also Sections 118, 119, 129 R.S.F.S.R. CIVIL CODE (U.S.S.R.); 2 Gsovski, \textit{supra} note 8, at 107-08, 110.

\textsuperscript{45} And only where there is objective or actual impossibility "is there impossibility of performance in the proper sense of the word." Agarkov, \textit{supra} note 44, at 10.

\textsuperscript{46} Ramzaitsev, \textit{supra} note 11, at 132.

\textsuperscript{47} Ramzaitsev, \textit{supra} note 12, at 466, 467, 473.

\textsuperscript{48} \textit{Id.} at 473.

\textsuperscript{49} Agarkov, \textit{supra} note 44, at 10.

\textsuperscript{50} \textit{Ibid.} Soviet law attaches no importance to the difference which exists between "so-called initial impossibility, \textit{i.e.,} one existing at the time the contract was made and supervening impossibility." For example: A contract may be annulled on the ground of initial impossibility; for instance a contract induced by misrepresentation or fraud as to the possibility of performance may be held voidable. (S. 32 of the Civil Code.) If both the parties were aware of the impossibility the contract may be held invalid as fictitious, \textit{i.e.,} one not intended to be of any legal consequence. (S. 34 of the Civil Code.) Finally, if the impossibility consists of legal impossibility the courts will hold the contract void by reason of its subject-matter being unlawful. But when the contract is not held invalid on the grounds of initial impossibility, the precise moment at which the impossibility arises is of no importance, and it is only impossibility existing at the
The performance of a contract is *morally impossible* under Soviet law when it would be "contrary to morality, in the particular circumstances of the case, to insist upon the contract being completely performed." According to Professor Agarkov, the rule is derived from Article 130 of the Constitution of the U.S.S.R.:

It is the duty of every citizen of the U.S.S.R. . . . , to respect the rules of socialist intercourse.52

An example given is when the obligor, "being personally bound to perform some act under contract, is overtaken by some illness rendering the performance exceedingly painful though not physically impossible."53 And, to enforce performance in such a case "would be contrary to the rules of socialist human intercourse. . . ."54

**Economic conditions** which prevent performance of the contract are not acceptable as a valid defense. For example, changes in market conditions do not constitute a valid excuse for non-performance of the contract.

In this type of case the Commission requires the strict performance of contractual obligations by both parties, irrespective of economic changes which [occurred] in the meanwhile.55

The Commission in deciding cases of this type demands proof that the fulfillment of the contract is impossible and that failure to fulfill the terms of a contract is not simply a result of the lack of profits.56

The Commission followed this practice in deciding the case of V/O Eksportles against the Belgian firm *Ansien Etablissement Lui de Naier*.57 The suit arose when the Belgian firm refused to accept its purchase of lumber products from Eksportles because of worsened market conditions. The Commission held:

time when the performance becomes due that matters. Agarkov, *supra* note 44, at 10. See also Gsovski, *supra* note 8, at 57.

The defense of *legal* impossibility of performance, as such, is apparently not common to actions brought before the Foreign Trade Arbitration Commission. Cases wherein the facts would support this defense have been decided with reference to the presence or absence of *objective* impossibility arising under the terms of a *force majeure* clause. See e.g., the Soviet-Israeli Oil Arbitration, Jordan Investments Ltd. v. Soiuznefteksport (1958), where an impossibility to perform arose when the Soviet government refused to issue an export license to its Combine and prohibited it from delivering oil under contract to Israel during the Egyptian crisis. Domke, *The Israeli-Soviet Oil Arbitration*, 53 Am. J. INT'L L. 787 (1959). See also, *Eksportles v. Piltenburg* (1938), noted in Berman, *Force Majeure and the Denial of an Export License under Soviet Law: A Comment on Jordan Investments Ltd v. Soiuznefteksport*, 73 HARV. L. REV. 1128, 1144 n.34 (1960).

52 *Moore, Modern Constitutions* 237 (1957).
56 Hilton, *supra* note 11, at 98.
57 *Id.* at 98-9.
... that the claimant had the indisputable right to demand fulfillment of the contract by the defendant because neither in conformity with the terms of the contract nor on the basis of the principles of internationally accepted commercial practices did the defendant have the right to refuse to carry out the terms of the contract because of a change in market conditions.\(^5\)

The decisions of the State Arbitration Commission in the “shawls” and “lorries” cases mentioned above\(^6\) can now be evaluated in the light of the applicable Soviet law. It is readily apparent that those decisions will not stand the light of ordinary Soviet law. There is no indication in either case that actual, legal (in the usual sense) or moral impossibility to perform existed. In both cases, the obligor’s inability to perform was due to a change in Soviet state planning. Regardless of the use of the phrase “factually impossible” by the arbitrator, clearly these are cases of economic impossibility.

When the central planning authority\(^6\) issues a directive or “planning act,”\(^7\) it is done solely to implement the National Economic Plan; the action is necessarily economically motivated. It must also follow that a change in planning—say, the rescission or alteration of an existing “planning act” by a superseding directive of the planning authority—is similarly economically motivated. Although the directive may have the force and effect of law under the “law of the plan” concept,\(^8\) it is nonetheless the result of an economic rather than juridical decision on the part of the state authorities. The question then to be asked is, will this doctrine of socialist economic impossibility of performance be imposed on foreign merchants?\(^9\) For example, suppose the customer for the “shawls” or “lorries” had been a private American firm dealing under contract with the Amtorg Trading Corporation at New York, and Amtorg was prevented from delivering the goods by the change in planning. Could Amtorg rely on this defense? As in the case of the trade mon-

\(^{68}\) *Id.* at 99. Conditions of war giving rise to economic hardship or changed circumstances “can operate to discharge a contractor from performance only when performance is absolutely impossible . . . .” Agarkov, *supra* note 44, at 13.

\(^{69}\) Notes 42 and 43, *supra*.

\(^{70}\) See note 35, *supra*.

\(^{71}\) See note 37, *supra*.

\(^{72}\) See note 37, *supra*.

\(^{73}\) There is some indication that the rule would be limited to transactions between “socialist” enterprises. “The debtor may be absolved from specific performance if the planned assignment on which the obligation is based *(this refers to relations between socialist organisations)* expires.” (Emphasis added.) *Commentary FCvL*, SCL&P 26. Article 36 of FCvL, in SCL&P at 74–75 deals with liability for breach of obligations between “socialist organisations” and although it covers the situation where a “planned assignment . . . has become inoperative” prior to performance of the contract, it does not speak of changes or cancellations of planned assignments. No case was found in which the Foreign Trade Arbitration Commission dealt with this issue.
opoly “special rule,” would the Soviets seek extraterritorial recognition of this defense of economic impossibility which is *fundamental* to their socialist system under the “law of the plan?” If the situation were reversed and an American private corporate subdivision had failed to perform due to a change in planning of its Board of Directors, neither an American nor a Russian court would excuse it from liability on that account.

Where there are commercial dealings between a private (capitalist) firm and a government acting in a proprietary capacity through a state-owned (socialist) firm, it would be patently unfair to deny the defense of impossibility of performance to the one party whose non-performance was due to a *private* economic decision, and at the same time grant the defense to the other party whose non-performance was due to a *public* economic decision.

It is suggested that a simple treaty solution to this potential problem would be to declare expressly that when changes in Soviet economic planning result in the non-performance of a contract made by a Soviet organization with an American firm, the Soviet socialist organization shall be deemed to be at fault.

**STATE TRADING AND THE DOCTRINE OF SOVEREIGN IMMUNITY**

The All-Union Ministry of Foreign Trade of the U.S.S.R. has absolute control and management of Soviet foreign trade. The Ministry is composed of many departments and sub-departments which carry on the actual work required to realize the export-import plans of the government. There are twenty-one major departments directly under the Ministry plus the Scientific Research Institute of Marketing Analysis and two institutions of higher learning: The Academy of Foreign Trade and The Institute of Foreign Trade.

The actual commercial contacts between the Ministry of Foreign Trade and foreign nations, private firms and individuals are carried on through the several agencies under the Ministry’s direct control and supervision. The most important of these agencies are the Soviet Trade Delegations, the Import-Export Combines and in the case of the United States, the Amtorg Trading Corporation of New York.
The Trade Delegation (Torgpredstvo) represents the Soviet Union in countries with which the Soviets have established trade agreements and is a component of the Soviet diplomatic corps abroad. Each delegation has virtually unrestricted power to negotiate trade contracts with foreign firms in the name of any Soviet Combine. The head of the Delegation is usually an official of the Ministry of Foreign Trade and the other members are often officials of various Combines or other Soviet industrial organizations. The Trade Delegation, unlike the Trade Combine discussed below, is not a legal entity under Soviet Law; it is not, in absence of treaty provision to the contrary, responsible for its contracts or debts; it cannot sue; and it may claim the defense of sovereign immunity if sued, unless such immunity has been waived by treaty provision. Because of the sovereign immunity problem, the United States Government has consistently refused Russian offers to send a Trade Delegation to Washington and, to date, the United States Government has not sought to enter into a treaty which could eliminate the problem.

Concluding a Soviet-American trade agreement and installing a Soviet Trade Delegation in the United States are diplomatic steps

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69 Apparently the Soviet Union has always been willing to negotiate treaty provisions which render the Trade Delegations legally responsible for contracts and other juridical acts done in the foreign country and also waive the right of the Government to claim the defense of sovereign immunity in suits involving the Delegations. See, e.g., Treaty of Commerce and Navigation with Turkey, March 16, 1931, art. 12, in 2 SOVIET DOCUMENTS 479, 483; Treaty of Commerce between Japan and the Union of Soviet Socialist Republics, December 6, 1957, Annex, arts. 1-5, in 2 JAPANESE ANNUAL INT'L L. 173, 177-9 (1958).


71 The implication to be drawn from the American stand in this matter is that were the United States to agree to the Russian offer to send an official Trade Delegation to this country to negotiate and contract directly with American businessmen, a commercial-legal relationship partial to the Russians would result. The Soviets do not subscribe to the international-legal concept of "limited" or "relative" sovereign immunity. For a discussion of this concept, see Fensterwald, supra note 70 at 453-55; and Zourek, supra note 70 at 647-665. Most American lawyers are familiar with this concept, that a sovereign may be immune from suit when it acts in a governmental capacity but is not immune when it acts in a proprietary or business capacity. See also, Pisar, World Trade and the Soviet Bloc, Seminar Conducted by the Russian Research Institute at Harvard University, December 16, 1960, at 10. See generally, Seidl-Hohenveldern, Commercial Arbitration and State Immunity, INTERNATIONAL TRADE ARBITRATION 87-92.
which should logically and eventually follow the adoption of the Soviet-American Consular Treaty.\textsuperscript{72}

An essential part of any treaty that results from taking these steps should be a clause protecting American businessmen from the defense of sovereign immunity in suits involving Soviet Trade Delegations.

**CONCLUSION**

American capitalists will surely approach with suspicion, and should approach with caution, the unfamiliar juridical consequences of Soviet socialist economic policy which has evolved from the Soviets' dedicated pursuit of Lenin's belief that eventually society would become "one office and one factory."\textsuperscript{77} However, such concerns should not discourage American businessmen from the careful pursuit of Soviet trade, for as Maxim Litvinov suggested in 1933, Soviet trade may have its advantages:

Our foreign trade policy is based on firm foundations which have not been altered since the beginning of our foreign trade and which we have no intention of changing. . . . This system has from our point of view entirely justified itself . . . . This system should be recognized . . . as being of advantage also for the persons with whom we deal; . . . When trade is distributed among many customers there is always a certain percentage of loss from bankruptcies and in years of crisis this percentage is particularly high. But this risk is non-existent when there is trade with a single customer represented by such a powerful state as the Soviet Union.\textsuperscript{74}

\textsuperscript{72} Note 2, *supra*.
\textsuperscript{73} SCHWARTZ, *RUSSIA'S SOVIET ECONOMY* 117 (2d ed. 1954).
\textsuperscript{74} 3 *SOVIET DOCUMENTS* 14-15 (Degras, ed. 1952).