FINNISH CHOICE OF LAW PROBLEMS OF EAST-WEST TRADE

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1. In recent years it has been necessary to re-evaluate the rules and methods long applied in the settlement of legal disputes between parties to foreign trade. One of the principal reasons for this development has been the gradually increasing significance of state trading. When speaking of state trading, one usually thinks initially of the foreign trade plied by the Soviet Union and the other so-called socialist countries. One should not fail to remember, however, that in countries with a free-market economy—Finland among them—the state has continuously engaged in both direct and indirect foreign trade masked behind the façade of bodies set up formally as corporations.[1]

The problems of state trading have become crucial particularly in the trade relations between socialist countries and countries with a free-market economy or, as it is often called, in East-West trade. The solution of these problems has been helped by arrangements intended to serve international trade in general, for example recent developments in the field of arbitration rules,[2] and the drafting of the general conditions planned for special trade branches.[3] In addition, lawyers interested in the legal arrangement of international trade have discussed among themselves questions that are important with reference to the East-West trade. Thus, at the colloquium jointly arranged by UNESCO and by the International Association of Legal Science in Rome in 1958, the special legal questions regularly arising in trade between countries with dif-

[1] See generally Hazard, "State Trading in History and Theory", *Law and Contemporary Problems* 24 (1959), pp. 243 ff.; Ouin, "State Trading in Western Europe", *ibid.*, pp. 398 ff.

[2] For a general account see Bülow & Arnold, *Der internationale Rechtsverkehr in Zivil- und Handelssachen,* München & Berlin 1954, pp. 240.1 ff.; Benjamin, "The work of the Economic Commission for Europe in the field of international commercial arbitration", *International and Comparative Law Quarterly* 1958, pp. 22 ff.

[3] See Tunc, "L'élaboration de conditions générales de vente sous les auspices de la Commission économique pour l'Europe", *Revue internationale de droit comparé* 1960, pp. 108 ff.

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ferent economic systems were discussed.[4] Again, the agenda of the colloquium held in Helsinki in 1960 by the same organizations included some problems of non-performance and force majeure in international contracts of sale associated with the Model Contracts and General Conditions of Trade drafted by the United Nations Economic Commission for Europe (ECE).[5]

As far as Finland is concerned, East-West trade mainly takes the form of trade between Finland and the Soviet Union. The legal problems involved are naturally the same in many respects as those that have been discussed above, and the work devoted to clarification of matters on the international level therefore constitutes a valuable basis also for the study of Finnish law in its related parts.

2. The private law problems of Finland's East trade are largely connected with the public international law background of the trade between Finland and the Soviet Union. Trade between the two countries is based on the Treaty of Commerce[6] concluded on December 1, 1947, which has become part of the internal law of Finland by the Act of March 5, 1948 (No. 358/48 in the Finnish Official Series of Statutes) in so far as its provisions fall under Parliamentary Legislation, and by a Statute passed on May 8, 1948, (No. 359/48) with respect to other provisions. The treaty contains regulations concerning the general transaction of trade and a stipulation of the parties to the Treaty to the effect that "the Governments of the Contracting Parties shall from time to time enter into negotiations with a view to concluding agreements determining the volume and nature of mutual deliveries of goods". (Art. 1, para. 2.) Accordingly, the established practice is that the kinds and quantities of goods to be delivered in either direction are specified by five-year agreements between the countries. Thus an "Agreement between the Republic of Finland and the Union of

[4] For the valuable reports prepared for the Colloquium by Messrs. Berman, Domke, Goldstajn, Hazard, Ionasco, Kopelmanas, Metelius, Pisar, Schmitthoff, Trammer, Tunc, van Reepinghen and Vassilev, see *Aspects juridiques du commerce avec les pays d'économie planifiée,* Paris 1961 (in the following referred to as *Aspects*).

[5] Reports and proceedings of the Colloquium are published in: *Problèmes de l'inexécution et la force majeure dans les contrats de vente internationale —Some Problems of Non-performance and Force Majeure in International Contracts of Sale* (Studia iuridica Helsingiensia 2), Helsinki 1961.

[6] UNTS 217, pp. 3 ff. (official texts in Russian and Finnish, translations into English and French).

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Soviet Socialist Republics concerning Deliveries of Goods in the Years 1961–1965" was concluded on October 22, 1959.

But even such an agreement concerning the exchange of goods, concluded between the countries on the basis of the Treaty of Commerce, is merely a framework, as it presumes the negotiation of individual contracts concerning specified items of merchandise. Such contracts have to be agreed upon individually in each case between the parties engaged in foreign trade. It is on this particular point that one encounters those legal problems which occur typically in the trade between countries with a free-market economy and socialist countries. Since in the latter foreign trade is a state monopoly, on their side natural persons cannot act as sellers or buyers; instead, these functions are exercised by special juridical persons. On the side of the countries with a free-market economy, on the other hand, both natural and juridical persons appear as contracting parties. In the Treaty of Commerce between Finland and the Soviet Union, Finnish natural persons and juridical persons constituted in accordance with Finnish law are granted the most-favoured-nation treatment in the exercise of economic activities in Soviet territory (Art. 10), and they are assumed to be able to act as contracting parties also in the territory of the Soviet Union.

3. Among the organs of Soviet foreign trade, the Soviet *Trade Delegation* in Finland has been provided with comparatively detailed regulations. Art. 11 of the Treaty of Commerce states on this subject: "In view of the fact that, under the laws of the Union of Soviet Socialist Republics, foreign trade is a State monopoly, which constitutes one of the essential bases of the Socialist structure secured by the Constitution of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics shall maintain in Finland a Trade Delegation, the legal status of which shall be governed by the provisions of the annex to this treaty which shall constitute an integral part thereof." In the Annex to the Treaty of Commerce,[7] again the observation is made that the Trade Delegation shall form an integral part of the Legation of the Union of Soviet Socialist Republics in Finland (Art. 2) and that it shall act on behalf of the Government of the Union of Soviet Socialist Republics (Art. 3, para. 1). The said government shall be responsible only for commercial contracts concluded or guaranteed in the

[7] "The Legal Status of the Trade Delegation of the Union of Soviet Socialist Republics in the Republic of Finland", in the following referred to as "the Annex".

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territory of Finland by the Trade Delegation and signed by authorized persons (Art. 3, para. 1).[7a] The status of the Trade Delegation in Finland prescribed by these provisions is the same as that of the Trade Delegations of the Soviet Union in general. It is, namely, that the Soviet trade delegations in other countries attend to the commercial interests of the USSR in the countries where they have been posted, acting as authorities subordinated to the Ministry of Foreign Trade of the Soviet Union. Their duties are twofold for they not only perform customary consular functions on the one hand, but also engage in transactions belonging to the realm of private law according to the Western concept.[8]

From the fact that the Trade Delegation enters into legal transactions in the country where it is posted, on behalf of a foreign country as an integral part of its diplomatic representation, the question arises how to settle legal disputes which may arise from these transactions, where there is no agreement on the matter. Of course, there is always the possibility of negotiations through diplomatic channels and of the use of other ordinary means of peaceful settlement of international disputes. However, these expedients, which belong to the area of public international law, are not appropriate to the sphere of normal trade,[9] and can therefore be disregarded here. Thus, there remain only the usual paths available to private businessmen, namely, legal proceedings in a court or in an arbitral tribunal.

The key questions here are the extent to which the Trade Delegation is liable to submit to the jurisdiction of the court or of the arbitral tribunal and what law is to be applied in settling the legal dispute. The question of the immunity of organs of a foreign state, which as a general problem in itself is rather multi-faceted,[1] has

[7a] Art. 3, para. 2 of the Annex: "The Trade Delegation shall publish in the Government publication of Finland the names of the persons authorized to take legal action on its behalf and information concerning the extent to which each such person is empowered to sign commercial contracts on its behalf."

[8] For the status of the USSR Trade Delegations see Awjerino, "Das Recht der Aussenhandelsgeschäfte der Sowjetunion", *Recht der internationalen Wirtschaft* 1954–55, p. 181; Sucharitkul, *State Immunities and Trading Activities in International Law*, London 1959, pp. 152 ff.

[9] See Lunts, "Einige Fragen des Internationalen Privatrechts", *Fragen des Internationalen Privatrechts*, Berlin 1958, p. 13; Kopelmanas, "The Settlement of Disputes in International Trade", *Columbia Law Review* 61 (1961), p. 385.

[1] The opinions in the Western world as to the immunities of States in regard to trading activities have been divergent. See Gihl, "Staters immunitet vid främmande domstolar", *Sv.J.T.* 1944, pp. 193 ff.; Setser, "The immunities of the State and Government Economic Activities", *Law and Contemporary Problems* 24 (1959), pp. 301 ff.; Sucharitkul, *op. cit.*, pp. 285 ff.; Schmitthoff, "L'immunité de juridiction des Etats souverains et le commerce international",

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been solved in Finland, as concerns the Trade Delegation of the Soviet Union, in Art. 4 of the said Annex (1947) as follows:

> The Trade Delegation shall enjoy all the immunities to which the Union of Soviet Socialist Republics is entitled and which relate also to foreign trade, with the following exceptions only, to which the Union of Soviet Socialist Republics agrees:
>
> (a) Disputes regarding commercial contracts concluded or guaranteed in the territory of Finland by the Trade Delegation under Article 3 of this annex shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the Finnish courts. No interim orders may, however, be made against the Trade Delegation;
>
> (b) Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may only be levied on the goods and claims outstanding to the credit of the Trade Delegation.

In the cited passage of the Annex, the Soviet Union agrees to waive its immunity in certain specified cases. First of all, the waiver of immunity applies only to contracts entered into in Finland in accordance with Art. 3 of the Annex. Art. 3 provides that the contract must have been made in writing within the scope of an appropriately announced authorization. The provision is consistent with the regulation in the Soviet law that foreign trade transactions must be in writing and that oral agreements and orally agreed amendments of written documents are invalid. Some advocates assert that, on the strength of the principle of peaceful coexistence, these formal requirements should be recognized in other countries dealing with the USSR.[2]

The reference to "arbitration or other jurisdiction" indicates that in these matters it is possible to agree upon arbitration as well as on jurisdiction of a court outside Finland. From this section one may conclude that, in the absence of any special agreement, neither party can take the dispute for judicial settlement to any other tribunal than a Finnish court of law.

Aspects (note 4, *supra*), pp. 183 ff.—The Soviet writers adhere to the theory of absolute immunity, see Lunts, *Mezhdunarodnoe chastnoe pravo, obshchaia chast,* Moscow 1959, pp. 187 f. Cf. Zourek, "Some comments on the difficulties encountered in the judicial settlement of disputes arising from trade between countries with different economic and social structures", *Journal du droit international* 1959, pp. 641 ff.

[2] See Ramzaitsev, "La jurisprudence en matière de droit international privé de la Commission arbitrale soviétique pour le commerce extérieur", *Revue critique de droit international privé* 1958, pp. 465 ff.; Wiemann, "Das Obligationsstatut im sowjetischen Aussenhandelsvertragsrecht", *Jahrbuch für internationales Recht* 8 (1959), pp. 292 f.; Lunts, *op. cit.*, pp. 170 ff.

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The Annex leaves open what law should apply to the case.[3] Accordingly, this preliminary question has to be solved by means of the rules for the choice of law.[4] If the parties stipulate what law shall govern their contract, as a rule no difficulties will arise since, in the sale of goods as well as in the law of contractual obligations generally, the parties have the power to decide this matter. This is true with respect to Finnish[5] as well as to Soviet[6] law.

When the contract is silent concerning the applicable law, the situation becomes complicated. From the Soviet standpoint the fact that one contracting party is a government organ of the Soviet Union, viz. the Trade Delegation, is considered a relevant factor, and on this basis application of Soviet law is held to be the sole possibility.[7] No doubt this solution would occur if a dispute on a contract concluded by the Trade Delegation in Finland were referred to a Soviet court of law or arbitral tribunal.

However, if the case is tried in Finland, the question of the applicable law has to be decided according to Finnish rules for the choice of law. Regarding sales of goods in Finland, the seller's law is considered the starting point in principle, unless otherwise provided.[8]

For illustration, imagine a transaction in which a Finnish seller delivers goods to the Soviet buyer at the Finnish frontier station and there have been no contacts with Soviet law except that the buyer was the Trade Delegation. In this case there might be reason for a Finnish court not to abandon the general presumption favouring the seller's law, which would imply settlement of the dispute

[3] In some of the Soviet treaties there is a provision to the effect that the competence of a foreign court includes also power to apply *lex fori*. See the Treaty of Commerce and Navigation between the Soviet Union and Italy of 11 Dec. 1948 (*UNTS* 217, pp. 181 ff.), Art. 4 of the Annex; Agreement between the Soviet Union and France concerning reciprocal trade relations and the status of the USSR Trade Delegation in France, of 3 Sept. 1951 (UNTS 221, pp. 79 ff.), Art. 10, para. 2.

[4] Cf. Lunts, *op. cit.* (note 9, *supra*), pp. 11 ff.

[5] See Jokela, *Irtaimen kaupasta kansainvälisen yksityisoikeuden kannalta*, Helsinki 1960, pp. 242 f. As to the Scandinavian law in general see Lando, "Scandinavian Conflict of Law Rules Respecting Contracts", *American Journal of Comparative Law* 1957, pp. 3 f.: "The freedom of the parties to choose the law which shall apply to a contract is recommended so unanimously by Scandinavian doctrine and presupposed, if not recognized, in so many dicta of the courts that it must be said to be law."

[6] See Ramzaitsev, *op. cit.*, pp. 467 ff.; Wiemann, *op. cit.*, pp. 290 f.; Lunts, *op. cit.* (note 1, *supra*), pp. 178 ff.

[7] See Wiemann, *op. cit.*, pp. 293 f. (with ref. to Soviet writers).

[8] See Jokela, *op. cit.*, p. 264.

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according to Finnish law. Against this must be weighed the fact that, where there is no express choice of the proper law and the method of the presumed intention or some other similar method is applied, one may also start from the assumption that the State as a contracting party does not willingly submit to application of foreign law and that therefore the law of the sovereign State should be applied to its contractual obligations.[9] On the other hand, it should be taken into account that, when the question arose in Finland as to what law should govern gold value clauses attached to bonds issued abroad by the Finnish Government, the fact that the Finnish State was the debtor was not considered decisive and the law of a foreign country was held to apply to the legal relationship.[1]

The problem is further complicated if we imagine a possible business transaction in which the Finnish Government, for example, a Ministry, as is possible in exceptional cases, or the Forest Administration Board, a quasi-governmental agency, was the seller and the Trade Delegation of the Soviet Union the buyer. Now both parties may assert the presumption that the State did not intend to submit to being judged according to a foreign law. If no other additional factor in favour of the buyer's law could be found, it would seem that the balance comes down on the side of the seller's law, according to the Finnish point of view.

A further theory must be investigated. In treaties of commerce similar to the Treaty of Commerce between Finland and the

[9] See Awjerino, *op. cit.*, p. 181; Kegel, *Internationales Privatrecht,* München & Berlin 1960, pp. 210 f.—For the English views see Cheshire, *Private International Law,* 6th ed. Oxford 1961, pp. 262 f. discussing *Rex* v. *International Trustee,* [1937] A. C. 500, where the House of Lords held that the sovereign nature of the borrower, though a factor of great weight, does not conclusively determine the governing law.—On the other hand, there is in this particular case a presumption in favour of the *lex fori*: Lando, *op. cit.*, p. 10 indicates, when dealing with Scandinavian law, that "it has also been stated that a clause by which the parties have agreed that a court shall have exclusive jurisdiction over disputes, indicates that they intend the law of the forum to apply".

[1] *Y. Baffrey-Hennebique* v. *the Finnish Government,* The Finnish Supreme Court Reports 1938, pp. 26 ff. The point at issue was much the same as that of the English case referred to in the footnote 9 *supra.* For the decisions to the same effect in the Scandinavian countries see Hjerner, *Främmande valutalag och internationell privaträtt,* Uppsala 1956, pp. 167 ff., 400. On this basis it was not difficult for Finland to sign the Hague Convention on the law applicable to international sales of goods (1951). This Convention, which has not yet entered into effect, does not pay any attention to the sovereign nature of the parties to a contract. See Julliot de la Morandière, "Rapport", *Conférence de la Haye de droit international privé, Documents relatifs à la septième session tenue du 9 au 31 octobre 1951,* The Hague 1952, p. 10.

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Soviet Union of 1947, the immunity of the Soviet Union has been recognized in regard to the actions of the Trade Delegation. Some publicists assert that the USSR's own internal law is implied in this recognition, considering, *inter alia,* that the Soviet Union has given its consent only to those exceptions from the immunity which are specifically enumerated and defined in the treaty, and the agreed exceptions do not cover application of the Soviet law.[2]

The advocates of this doctrine have probably not tested their theory on cases in which the Finnish, or any other non-socialist, state is party to a particular business transaction with the Soviet Trade Delegation. In that situation, one would have to hold for the sake of consistency that, since in the Treaty of Commerce between Finland and the Soviet Union of 1947 the Finnish state has not waived its immuniy in any respect, it has retained the right to insist on application of its own law to transactions negotiated by the State. The application of the respective national laws to the particular transaction might therefore be asserted with equally good reasons by each party.

In my opinion this logical implication proves the fallacy of the idea that from the Treaty of Commerce between Finland and the Soviet Union a rule for the choice of law, applicable to all transactions concluded by the Trade Delegation, could be derived which would invariably refer to Soviet law. Be that as it may, it seems natural to assume that if the High Contracting Parties to the Treaty of Commerce of 1947 had intended Soviet law to apply to all transactions of the Trade Delegation, this would have been expressly specified in the Annex. On the basis of the present text it is therefore hardly possible to arrive at any conclusion other than that the Treaty of Commerce has left open the question of the applicable law and that consequently the decision in each case will rest on the choice-of-law rules of *lex fori.* In this manner one would arrive at the conclusion that in the individual case the choice of law will not depend upon whether the contracting party is a representative of the State, a private person, or a corporation.

Although the question of the applicable law has to be decided in each case in accordance with Finnish choice-of-law rules, this does not imply that preference will be given to Finnish law. It cannot be taken for granted that Finnish law will apply even to all those instances in which the seller has his habitual residence in Finland. This is so because in Finland regard is paid to the

[2] See Lunts, *Mezhdunarodnoe chastnoe pravo,* Moscow 1949, pp. 226 f.; Wiemann, *op. cit.,* pp. 293 f.

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dominating connecting factors.[3] Thus the presumption pointing to the seller's law can be set aside when there are in the actual case material factors pointing to Soviet law besides the fact that the buyer was the Trade Delegation acting on behalf of the Government of the Soviet Union.

Thus, the application of Soviet law would seem proper in litigation before a Finnish court concerning the obligation of a Finnish seller to deliver and install in operational condition in the Soviet Union a piece of industrial equipment involving considerable work. The nature of the buyer, the Trade Delegation as a government organ, *and* the place of performance of part of the seller's obligation in Soviet Union territory, are elements of such significance that the scales are weighed down in favour of the application of Soviet law. It is possible that, in a given case, even an additional element of lesser weight would suffice to break the principal presumption under Finnish law that the seller's law should apply.

It is in the spirit of the same rule, which demands the application of Finnish law when a Finnish subject is the seller, that the Soviet law will apply when the Trade Delegation has been the selling party. Similarly, *mutatis mutandis,* in this situation, too, the presumption in favour of the seller's law might be set aside in the particular case on the basis of the method of weighing the actual connecting factors.

4. The Trade Delegation of the Soviet Union is by no means the sole organ appearing in foreign trade in the interests of that country. On the contrary, it seems that the Trade Delegations have largely ceased to conclude transactions themselves and that this task has been assigned to the different Foreign Trade Corporations which have been established in the Soviet Union.[4] This practice is also reflected in Art. 6 of the agreement between Finland and the Soviet Union concerning deliveries of goods in the

[3] It should be kept in mind, however, that the Hague Convention on the law applicable to international sales of goods (1951) contains the following general provision (Art. 3, para. 1): "In default of the law declared applicable by the parties, under the conditions contemplated in the preceding article, a sale is governed by the internal law of the country where the vendor has his habitual residence at the time when he receives the order."—There is no provision in the Convention for the method of reference to the law of the place of the dominating factors.

[4] Regarding the status of the Foreign Trade Corporations see Genkin, "Pravoe polozhenie sovetskih eksportnyh i importnyh ob'edinenii za granitsei", *Problemy mezhdunarodnovo chastnovo prava,* Moscow 1960, pp. 3 ff.; Berman, "Le cadre juridique des relations commerciales entre pays d'économie planifiée et pays d'économie libre: l'example américano-soviétique", *Aspects,* pp. 19 ff.

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years 1961–65, in which, on the side of the Soviet Union, only the foreign trade corporations are mentioned as parties to the individual contracts concluded on the basis of the agreement. It is thus presumed that these corporations will be the regular parties to the individual contracts. However, since the provisions on the matter in the Treaty of Commerce of 1947 have not been repealed, it seems likely that the Trade Delegation still has the authority to enter into contractual engagements where this is deemed suitable.

Since in other socialist countries besides the Soviet Union foreign trade is in the hands of special foreign trade corporations, the questions discussed here carry significance in respect to Finland's relations with all such countries.[5]

In regard to the nature of the foreign trade corporations it should be noted that they have been established as legal entities apart from the State. A foreign trade corporation has the status of a juridical person according to private law[6] with specific authority to enter into foreign trade transactions within the range defined in its charter. Transgression of the limits of this authority renders a transaction invalid, a consequence detrimental to the other party to the contract.[7]

The fact that the State is not considered judicially bound by the transactions of the foreign trade corporations[8] may perhaps seem a violation of the rights of the foreign contracting parties at first glance, but this is probably not so. The separate status of the corporation means that it cannot rely upon sovereignty and claim immunity as may the Trade Delegations of the Soviet Union. Therefore it is possible to treat the foreign trade corporations which have their own assets in their own country as well as elsewhere as contracting parties operating in the field of private law, who can sue and be sued both in their own country and abroad in courts as well as in specially stipulated arbitral tribunals.[9]

The foreign trade corporations of the USSR favour a policy of

[5] See Spulber, "The Soviet-bloc foreign trade system", *Law and Contemporary Problems* 24 (1959), pp. 420 ff.; Trammer, "L'organisation juridique du commerce extérieur polonais en général, et l'organisation de ses institutions exécutives en particulier", *Aspects,* pp. 197 ff.

[6] See Ramzaitsev, *op. cit.,* pp. 462 f.

[7] See Genkin & Bratus & Lunz & Nowizki, *Sowjetisches Zivilrecht,* Vol. 1, Berlin 1953, pp. 184 f.; Trammer, *op. cit.,* p. 204.

[8] See Ramzaitsev, *loc. cit.;* Zourek, *op. cit.,* p. 665.

[9] Lunts, "Einige Fragen des Internationalen Privatrechts", *Fragen des Internationalen Privatrechts,* Berlin 1958, p. 12; Berman, *op. cit.,* p. 22.—Cf. Art. 10, para. 3, and Art. 13 of the Treaty of Commerce between Finland and the Soviet Union.

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inserting arbitration clauses in contracts made by them with foreign parties. According to the standard clause, disputes arising from the contract are submitted to the Foreign Trade Arbitration Commission of the All-Union Chamber of Commerce in Moscow.[1] Generally such an arbitration clause is also made part of the contracts with Finnish businessmen. I have not tried to find out whether Finnish businessmen have made any serious attempts in their bargaining over business transactions to achieve provisions for arbitration in Finland or in a third country.

When a foreign trade corporation appears as a party in a legal dispute, the question of the proper law to be applied arises when not expressly settled in the contract. In disputes before Finnish courts or arbitral tribunals, mainly the same points have to be considered as previously were considered with respect to transactions entered into with a Trade Delegation.

However, there is one essential difference. Where contracts of foreign trade corporations are concerned, there is no counterpart to the formal requirements which are laid down in the Annex to the Treaty of Commerce with respect to transactions of the Trade Delegation of the Soviet Union. In principle, there are in Finland no form requirements with respect to ordinary commercial transactions, and the Finnish law of conflicts relies upon the rule of *locus regit actum*. Therefore the question may be posed whether in Finnish courts and arbitral tribunals the written form required of foreign trade contracts by Soviet law has to be taken into account when the contract was made in Finland.

In regard to this question it has to be noted that the Treaty of Commerce between Finland and the Soviet Union seems to imply form requirements of the contract. Thus, for instance, para. 1 of Art. 13 prescribes that "provision for settlement of the dispute ... was made in the contract or in a separate agreement drawn up in the form required for the contract itself". This clause can hardly be construed as anything but a reference to the form provisions in Soviet law. On the other hand, regard to the formal requirements

[1] For information concerning the Soviet practice see Ramzaitsev, *op. cit., passim*. As to commercial arbitration in socialist countries in general see Benjamin, "Aperçu des institutions arbitrales de l'Europe de l'Est qui exercent une activité dans le domaine de l'arbitrage commercial international", *Revue de l'Arbitrage* 1957, pp. 114 ff., and *ibid.* 1958, pp. 2 ff.; Domke, "Arbitration of State-Trading Relations", *Law and Contemporary Problems* 24 (1959), pp. 317 ff.; van Reepinghen, "L'arbitrage dans les différends commerciaux entre organisations de pays à économie planifiée et contractants de pays à économie libre", *Aspects*, pp. 215 ff.

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can also be justified on the ground that they concern the legal capacity of the foreign trade corporation of a socialist state and are therefore governed by the law of the country in which the legal entity in question was incorporated.[2]

Accordingly it is sensible from the standpoint of Finnish law to treat contracts entered into with a foreign trade corporation of a socialist state, where the formal requirements are concerned, on the basis of the law of the country of incorporation. The same is true with respect to the capacity of such corporations to enter into foreign trade transactions, on which question the law of the place of incorporation is conclusive.[3]

It can thus be stated that, whether tried in Finland or in some socialist state, probably no major controversial decisions are to be expected in questions concerning the form of foreign trade contracts.

On the other hand, the possibility of contradictory decisions exists where there is a question as to the substance of the obligation. If there is an express choice of law clause in the contract, the practice admittedly is probably the same in socialist countries as it is in Finland,[4] but in the absence of such a clause, when the proper law has to be determined objectively on the basis of other criteria, the difference becomes evident.

As has been shown, in the case of sales of goods the Finnish courts incline towards taking the law of the seller as their starting point which, however, may be given up when the transaction has a closer connection with the law of another country, generally that of the buyer. On the other hand, the settled practice of the USSR Foreign Trade Arbitration Commission is to apply the law of the country in which the contract was made.[5] Hence, the Foreign

[2] Cf. Ramzaitsev, *op. cit.*, pp. 465 ff.; Lunts, *Mezhdunarodnoe chastnoe pravo, obshchaia chast'*, Moscow 1959, pp. 170 f. See also Lando, "Udenrigshandelens kontrakter og sovjetrussisk ret", *Juristen* 1959, p. 251.

[3] According to Finnish legal writing the place of registration of the company is decisive in international relations. See Alanen, *Yleinen oikeustiede*, Helsinki 1948, p. 227; Suontausta, "Oikeushenkilön kansalaisuudesta", *Juhlajulkaisu Toivo Mikael Kivimäki*, Helsinki 1956, p. 360; Saario, "Yhtiöiden henkilöstatuutista", *Lakimies* 1962, pp. 32 f. The same opinion prevails also in the other Scandinavian countries; see Philip, *Studier i den internationale selskabsrets teori*, Copenhagen 1961, pp. 115 ff. who points out that there is a difference between the Anglo-Saxon incorporation theory and the Scandinavian registration theory.

[4] See Ramzaitsev, *op. cit.*, pp. 467 pp.; Lunts, *op. cit.*, pp. 178 pp.; Jokela, *op. cit.*, p. 243.

[5] See Ramzaitsev, *op. cit.*, pp. 469 ff.; Lunts, *op. cit.*, pp.170 ff.—The question of the determination of the place of contracting is beyond the scope of this article.

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Trade Arbitration Commission may apply to a contract the law of another country than a Finnish court or arbitral tribunal would have chosen in a similar case. This might occur when the dispute concerns a contract which the seller has entered into in the buyer's country.

The rules for the choice of law of the socialist countries are not, however, identical on this particular point. In Poland[6] and in Hungary[7] the *lex loci contractus* cannot claim the same authority as in the Soviet Union, while on the other hand the seller's law has considerably strong support.[8] The seller's law is held conclusive to a certain extent when foreign trade corporations of two socialist countries deal with one another.[9]

5. The choice of law problems considered above show that there are certain divergencies in their solution depending on whether the starting point is the Finnish law or the law of a socialist country. Those differences are not, however, as far-reaching as they might seem to be initially.

First, it may be noted that the question of State immunity is involved solely with regard to contracts entered into by the Soviet Trade Delegation on one side and by a Finnish party on the other. As to the formal validity of those contracts there are no difficulties since the problem is solved by the provisions of the Treaty of Commerce. Even the law governing the substance of obligations created by the Soviet Trade Delegation does not offer any major problems because the actual solutions of the choice of law questions in the vast majority of cases are likely to be identical, though on partly different grounds, both in Finland and the USSR.

Secondly, as far as the contracts between Finnish merchants and

[6] The existing doctrine of *lex loci contractus* is rejected in the 1961 Draft of the Polish Code of Private International Law. For information regarding the translation of the Draft into French, see *Revue critique de droit international privé* 1962, pp. 189 ff.

[7] See Réczel, *Internationales Privatrecht*, Budapest 1960, pp. 270 f.

[8] See Korkisch, "Das neue internationale Privatrecht der Tschechoslovakei", *Zeitschrift für ausländisches und internationales Privatrecht* 1952, p. 442; Réczel, *op. cit.*, p. 286; Art. 15 the Draft of the Polish Code (note 6, *supra*).

[9] Art. 74 of the General Conditions of Delivery of Goods between Foreign-Trade Organisations of Member-Countries of the Council for Mutual Economic Aid (1958) provides as follows: "Relations of parties to the delivery of goods, in so far as they are not regulated or not fully regulated by contracts or by the present General Conditions, shall be governed by the substantive law of the seller's country." The English translation of the General Conditions by Prof. Harold J. Berman is published in the *International and Comparative Law Quarterly* 1958, pp. 659 ff.

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the Foreign Trade Corporations of the socialist countries are concerned the questions of the formal validity seem to be settled in these cases also. On the other hand, the law governing the substance of the obligation may vary to a certain extent according to the *lex fori*. This is particularly true in view of relations between Finland and the USSR or other countries adhering to the *lex loci contractus* doctrine, when the seller, in the absence of a choice of law clause, has entered into a contract in the buyer's country.

Considering the fact that the differences relating to the choice of law appear only within a limited area they are not likely to cause serious troubles in trade relations between countries. They constitute, however, obstacles to trade the removal of which by means of international cooperation is to be recommended.

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