

THE SOVIET UNION'S APPROACH TO ARBITRATION AND ITS ENDURING INFLUENCE UPON ARBITRATION IN THE FORMER SOVIET SPACE

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This article seeks to explain the enduring effect of the Soviet Union and its founding principles upon arbitration in the former Soviet space. It does so by reference to the Soviet Union's attitude towards – and contribution to – the development of arbitration, analysed in three stages: pre-1917, post-1917 and in the post-Soviet space. As part of that analysis the article considers what rights were being arbitrated in the absence of private rights that would otherwise be readily recognisable within an overtly capitalist jurisdiction. After analysing the Bolsheviks' attitude to arbitration, the article seeks to explain that a by-product of the distinctive goals of the USSR was a focus on arbitration as a mechanism for dispute resolution and to demonstrate how arbitration was a necessary component of the Soviet economy, developing as a tool through the arbitrazh tribunals and Moscow Convention 1972, both of which led to a two-track system which encouraged international arbitration but downplayed its significance at the domestic level. The article then seeks to explain the impact of the Soviet Union's approach to commercial arbitration upon modern arbitration in the post-Soviet space. A study of Russia, the CIS and the former Republics demonstrates the lasting impact of Soviet theory and practice on the post-Soviet arbitral environment.

Keywords: arbitration; Arbitrazh Courts; arbitrazh tribunals; commercial litigation dispute resolution; CIS; courts; international arbitration; litigation; Moscow Convention; New York Convention; Soviet Union; USSR.

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Introduction

When the Bolsheviks wrestled power from the hands of St Petersburg’s Provisional Government in October 1917, it might be argued that the resolution of disputes by way of arbitration was not at the forefront of their minds. Indeed, there may be some truth in the proposition that the Bolsheviks had not fully thought-through the implications of their revolution for dispute resolution.

Yet, commercial relations continued to exist in Russia and the Soviet Union after October 1917. Indeed, there were also ambitious economic objectives to achieve following the publication of the first five-year plan in 1928, which inevitably focussed attention upon the interface between and performance of state corporate entities. That required individual organisations within the Soviet architecture to recognise that there were rights and obligations between them that required determination by a body other than the court system, which the Soviets’ detested for its “legal fetishism.”

Marxism-Leninism provided an exceptional brand of jurisprudence that was prepared to accept the importance of resolving disputes between commercial (even if not private) actors within the command economy. As with all other facets of economic and social life in the USSR, the revolution had a lasting impact upon the resolution of disputes by way of commercial arbitration.

One might ask how this impact could have been particularly sophisticated given that Marxism-Leninism disputed the very essence of economic exclusivity within a market economy. In those circumstances, what could the former states of the USSR inherit from the Soviet approach to arbitration?

As this article demonstrates, not only does this opinion betray an ignorance of the practical reality of the Soviet economy, it fails to appreciate the legacy (for better or worse) of the legal framework of the USSR on modern day arbitration of commercial disputes within the Russian Federation and the other former fourteen Republics.

Whilst a Soviet jurisprudence hampered the development of domestic arbitration, it encouraged international arbitration between commercial (invariably state) parties that has had a lasting impact upon the culture of arbitration in the former republics of the USSR.

This article explores the development of arbitration in the USSR in the following stages:

(1) Prelude – Attitudes to Arbitration: What was the attitude of the Bolsheviks to determining their own internal disputes extra-judicially?

(2) Awakening – The Subject of Arbitration: What was there to arbitrate in a jurisdiction devoid of private rights?

(3) Coming of Age – Key Features: What were the key features of the USSR impacting upon the development of arbitration?

(4) Maturity – Present Influence: In what sense is the Soviet model for arbitration influencing the landscape of arbitration, both in Russia and the former Soviet space?

1. Prelude – Soviet Attitudes to Arbitration

Before engaging with the development of arbitration in the Soviet Union, it is worth turning the reader's mind to the attitudes that pre-existed the revolution among those who instigated it. From a cursory glance at these twilight years of Tsarist Russia, it becomes obvious that "the left" had a positive attitude towards the use of arbitration for the resolution of their internal disputes and much less predisposed to make use of the system of Tsarist courts.

1.1. Marxism-Leninism and the Otzovist Arbitration

Fundamentally, the leader of the Bolshevik faction of the Russian Social Democratic Labour Party (RSDLP) Vladimir Ulyanov "Lenin," was entirely cognisant of the need within his own party political disputes to seek resolution of disputes by independent arbiters. This much is proven by his interaction with the Menshevik and Otzovist¹ factions within the RSDLP.

This peculiar saga was set against a political dispute but was at its heart about the acquisition and dissemination of property.

¹ The Otzovist faction of the SDLP demanded complete withdrawal from the process of legal acquisition of political power in Russia. The name of the faction was derived from the infinitive verb of the Russian "to withdraw": "*otozvat*."

In January 1910, the Bolshevik wing of the RSDLP – which was later to form a break-away organisation modelled as the *Bolsheviki* – entered into an agreement with the remaining Caucasus within the RSDLP.

By way of a resolution of the Central Organ (i.e. the Central Committee of the RSDLP) an agreement was recorded for the dissolution of the Bolshevik wing of the RSDLP and the transfer of all of its property to the Central Committee. The dispossession of the Bolsheviks was a fundamental part of the agreement between the two wings and a key staging post in the anticipated formation of a central organ of the RSDLP for which Lenin himself had campaigned. There is a telling entry in the *Sotsial-Demokrat* published in December 1911, in which Lenin details his participation in an arbitration for the resolution of what was in essence a commercial dispute within the party arising from the abovementioned agreement.²

Lenin alleged that it was a condition precedent to the transfer of the Bolshevik's property that all other factions within the party structure reciprocated with respect to their own property. The contract appears to have been "endorsed" by the Central Committee of the RSDLP on the grounds that if the condition precedent was left unsatisfied the Bolshevik's assets were to be returned to their hands.

There are all sorts of interesting questions about the legal personality attributed to a faction within the RSDLP, but the crucial factor in this story of internal party struggle is that the Bolsheviks filed an application to the Central Committee in December 1910 on the grounds that the agreement was "null and void" and the assets should consequently be returned to the *Bolsheviki*.

The application was submitted to what Lenin refers to as the "trustees" of the Central Committee. It was referred to arbitration. The three arbitrators – Kautsky, Mehring and Zetkin – were appointed to provide resolution. Lenin's works do not indicate how these three individuals were chosen. However, the history of revolutionary Europe will inform the reader that these were respected trustees of the socialist movement.

Karl Kautsky was to become one of the most critical commentators on the October Revolution and its consequences. Franz Mehring and Clara Zetkin were senior political figures within the German SPD who had made their name in the radical politics of early 20th century Germany. Simply put, these three arbitrators were trusted for their expertise in the politics of the left and the internal mechanics of left wing political organisations in revolutionary Europe. As is evident from this information, the Bolsheviks favoured the use of expert arbiters, entrusted with the power to decide a property dispute (albeit with a political context).

Interestingly, Lenin records that the "court of arbitration" determined that "up to 1 November 1911" part of the assets were to be turned over for account to the

² Vladimir I. Lenin, *Collected Works*. Vol. 17 (Dora Cox (trans.), Moscow: Progress, 1977); extract from *Sotsial-Demokrat*, 8(21) December 1911, No. 25.

Technical Commission and the Organising Commission Abroad. Lenin's account of events is that in October 1910 Mehring and Kautsky resigned their posts as arbitrators (on what grounds we do not discover) and it was considered that Zetkin lacked authority to proceed with the arbitration.

Lenin determines that after 2 November 2011, the "Bolshevik faction" of the RSDLP was no longer bound by the agreement with the remaining wings of the Party. As a consequence, the Bolsheviks repossessed the printing plant and other property that was the subject of the dispute.

The dispute, however, provides an interesting window onto the compatibility of dispute resolution by way of the arbitral mechanism and the Soviet ideology. Some may retort that of course arbitration and mediation are an age-old mechanism of dispute resolution in any event. However, this is to misunderstand the point. The question at the heart of this paper is in what ways socialist revolution in Russia impacted upon dispute resolution by way of arbitration. The Otzovist Arbitration is an important insight into the Leninist view of the arbitrability of rights and obligations in respect of commercial assets.

The fact that the Bolsheviks partook in arbitration prior to the October Revolution should also be viewed within the context of their general aversion to a court system, which perpetuated the economic imbalance within the market economy by its obsession with legal formulae and rules – what was often termed "legal fetishism."

It is worth underlining that Lenin was not averse to making use of the Tsar's Courts in circumstances where he considered a civil injustice had been meted out upon the working man. These were not so much narrowed to labour disputes, but instead entailed the protection of commercial rights within a market economy:

Socialists are by no means against the Crown's court. We are for the use of legality. Marx and Bebel turned to the Crown's court even against their socialist opponents. It is necessary to know how to do this, and it is necessary to do it.³

According to Pashukanis Lenin used the Crown's court to intervene in a dispute between a profiteer and a humble boatmen.⁴ Lenin was, therefore, prepared to balance and prioritise his principles – use of an overtly capitalist judicial structure versus use of the courts to stamp out injustice.

In spite of this, it is undoubtedly clear that the general approach of the Soviets was to develop a scepticism towards the "legal fetishism" of formal judicial process. It

³ Evgeny Pashukanis, *Lenin and Problems of Law* in Evgeny Pashukanis, *Selected Writings on Marxism and Law* 132–164 (P. Beirne & R. Sharlet (eds.), New York: Academic Press, 1980) (Nov. 10, 2017), also available at <https://www.marxists.org/archive/pashukanis/1925/xx/lenin.htm>.

⁴ *Id.*

was, in their view, an obstacle to the achievement of socialist objectives within what should be a planned economy. This fact is important, as will be understood below, when it comes to an analysis of the historical role for the Arbitrazh⁵ tribunals in the Soviet legal structure and their future impact upon the development of domestic arbitration within the former republics of the USSR.

2. The Awakening – the Subject of Arbitration

A superficial investigation of socialism within the Soviet Union would lead the observer to conclude that rights and obligations were non-existent except those that were unidirectional (i.e. between the individual and the State). For reasons to be elaborated upon below, that was not always the case and is the key to determining why it is that in some respects arbitration increasingly flourished under successive Soviet administrations, encouraged by the need to resolve disputes between inter-state actors.

For many observers, the starting point for any analysis of the Soviet understanding of ownership is that the Soviet philosophy rejected the concept of property rights at all. That is entirely misleading. The foremost Soviet legal mind of the 1920's, Evgeny Pashukanis, described how Leninism did not take issue with the natural economy (which he described as the relationship "between a man and a thing") but with the "commodity-money economy" (the exchange of that thing). It is the question of appropriation, alienation and exchange among private individuals that so irked the Russian communist party (as the Bolsheviks became). Pashukanis sometimes referred to this as "enclosure."⁶ At the heart of the problem is not property or its ownership *per se* but the exchange thereof by private actors. As Lenin recalled:

Marx repeatedly points out, how at the foundation of civil equality, freedom of contract, and similar principles of the Rechtsstaat, there lie the relationships between commodity producers.⁷

Even so, in the light of the rejection of "exclusive material right," what place could the arbitration of disputes have within the Soviet context?

At the root of any commercial arbitration is the contractual bargain. Though it is commonly accepted that the arbitration agreement and the body of the contract that

⁵ It is essential not to confuse the word "Arbitrazh" with the "Arbitrazh Courts." As this article explains "arbitration" conducted by the "arbitrazh tribunals" of the USSR was not arbitration as it is commonly understood today. Furthermore, the Arbitrazh Courts are not to be confused with courts of arbitration as understood throughout this field of practice. They are Federal Courts engaged in the resolution of formal litigation of commercial disputes and (in addition, since 2002) the enforcement of arbitral awards in the jurisdiction of the Russian Federation.

⁶ Pashukanis 1980.

⁷ *Id.*

forms the subject of the dispute exist independently (the doctrine of separability), the contractual relationship between the parties inevitably dictates the remit of the arbitration and its substantive subject matter.

Given Lenin's negative mantra about freedom of contract and the perpetuation of the commodity-money economy, what role was there to be for the arbitration of rights as between actors within the USSR?

There was such a role for two reasons. The first is that the purist war communism was swiftly being brought to an end by the mid-1920s. The second is that even following the demise of market-based reforms by the end of the 1920s there was still a need to recognise and resolve disputes between state actors, each of which inevitably acted as commercial entities.

The first point to be made is that the Civil Code of the USSR developed in 1922 was famously formed against the backdrop of the end of "war communism" and the creation of the New Economic Policy (NEP). The NEP recognised in a limited way the necessity of market exchange and even the existence of private ownership, though this was "drastically curtailed" in later revisions as the years of the NEP waned and became a distant memory in the history of the USSR.⁸ For the last years of Lenin's life, the Soviet Union recognised the need to row-back on some of its purist Marxist theory for the sake of survival.

If the NEP was a recognition of the need for the market economy on a temporary basis, the existence of a commodity-money economy meant the need for the resolution of disputes between parties. However, the crucial role for the commercial bargain lay not in the private sphere but in the public. Scott Newton has beautifully articulated the great fallacy committed by many who, with a wave of the hand, dismiss a planned economy as one devoid of the need for a sophisticated civil law system:

Nationalisation does not do away with private forms, it simply fills them with public content... the Soviet state deprivatised the individual or "person" while retaining it in form.⁹

The answer is that the idealist Marxist-Leninist thought was, of course, quickly eroded within the 1920s by virtue of the fact that state enterprise was an essential feature of the Soviet economy. One of the fundamental features of the Soviet economy as it developed in its early years was the concept of *khozraschet* ("economic accountability").¹⁰ Tied-up within this concept was the notion that state enterprises, by virtue of their relationship with one another, with buyers and sellers within the

⁸ Scott Newton, *Law and the Making of the Soviet World: The Red Demiurge* 86–87 (Abingdon, Oxon; New York: Routledge, 2016).

⁹ *Id.* at 90, note 43.

¹⁰ *Id.* at 89–92.

new Soviet market place, would inevitably take upon themselves liabilities and assets. They would have their own balance sheets.

Pashukanis viewed this as a transient feature of the new Soviet economy and saw the ultimate aim as the extinguishment of the legal personality attributed to state enterprises.¹¹ This was, alas, simply a dream that was never realised. Though Pashukanis is widely considered today to have been the greater of the Soviet legal theorists in this respect, he committed a fundamental error when translating an ideological commitment into legal practice. Commercial “rights and obligations” in one shape or form survived the arrival of socialism and this, for the reasons noted above, was an inevitability.

By 1924 and the passing of Lenin, the Soviet Union had, therefore, conceded that – at least in the short term – it needed to recognise the existence of legal personality to which rights and liabilities attached. By and large these would morph into assets and liabilities held by state-owned entities. Nonetheless, where entities exist that can enter into contractual relationships with other parties, an environment for disputes (and the need for dispute resolution) inevitably emerges.

However, the consideration of paramount importance to Moscow’s legal theorists was to avoid the imposition of a regime of stringent legalistic rules that had in the past always propped-up the inequality of bargaining power that empire had nurtured and was viewed as one of the worst excesses of Tsarist capitalism.

Arbitration was in essence an attempt to escape from the institution of the state courts and the schema of rules that had been handed down within an inherently capitalist system. That scepticism of the state courts was, however, driven from above by the masters of the new era. In the modern age, there remains a degree of scepticism towards the state courts of the Russian Federation, which motivates litigants to seek redress by way of arbitral tribunals, but the process is driven from below by the participants rather than from some overarching political philosophy: it forced one individual to remark that

I do not think it is necessary to convince business people that international arbitration is better than the state courts when dealing with international commercial disputes.¹²

In conclusion:

(i) Even in the Soviet Union, there were rights and obligations that gave rise to disputes between commercial actors;

(ii) These disputes required resolution by way of proceedings that would be acceptable to the new Soviet ideology.

¹¹ Newton 2016, at 90.

¹² Sarah Dookhun, *Interview with Alexander Komarov*, 3 Global Arbitration Review 14 (2008).

As we will consider below, as the Soviet legal system came of age, it was the arbitral mechanism that was encouraged as the key tool for dispute resolution between commercial actors, though the nature of arbitration differed between inter and intra-state actors.

3. Coming of Age – Key Features

Having considered the subject matter that might form part of an arbitral dispute – namely that there were still rights and obligations between commercial entities that survived the implementation of the Soviet ideology – it is important to consider the key features within the USSR that would influence the continuing development of arbitration in the former Soviet space.

Whilst the ideological commitment to socialism has passed, there are two themes that run through the Russian approach to international commercial arbitration that serve as a legacy of Soviet nurture: Firstly, the development of a strong culture of international arbitration between commercial actors within the Russian Federation and beyond by virtue of the mechanisms for inter-state arbitration that were established by Moscow, particularly during the 1970s. In this respect there remains the fear of external influence by actors despite the abandonment of ideological differences by virtue of what I will call the “Moscow Convention paradigm” that was generated during the Brezhnev years. Secondly, the slower pace of development in domestic arbitration in the Russian Federation, which is in part due to the aims and purposes of the arbitrazh tribunals that were set up during the Soviet period. This was arguably driven by the Soviet state’s obsession with a less rules-driven approach to commercial dispute resolution between intra-state actors.

The reader will note below that the author does not provide a comprehensive chronology of events in the development of commercial arbitration in the USSR. Instead, the focus is upon those crucial turning points in the development of this tool of dispute resolution. That is not to say that the period 1924 (the death of Lenin) to 1972 (the ratification of the Moscow Convention) was devoid of meaningful development. It is simply to acknowledge that the foundations of socialism in the USSR and the burgeoning of arbitration from the 1970s onwards are the crucial periods for this analysis of both the Bolshevik approach and the Soviet contribution to the development of commercial arbitration in the USSR.

3.1. Intra-State Disputes: Domestic “Arbitration”

One of the peculiar features of the Soviet command economy was the fact that state enterprises nonetheless brought “suits” against one another. This was facilitated by the Soviet legal architecture in the form of quite a radical and unique system of tribunals.

From 1921 *Gosplan* (*Gosudarstvennyj planovyj komitet*) was established to facilitate the economic re-structuring of the Soviet economy. In 1928 the first Soviet five-year

plan was published, with ambitious objectives for the Soviet economy to achieve under the oversight of *Gosplan* and the Council of People's Commissars tasked with issuing the decrees that would form the rather abstract legal architecture that would achieve them.

Marxism-Leninism promoted a new model of dispute resolution by way of the arbitrazh tribunals; a regime that was concerned with throwing off the legal fetishism of the past and achieving the clear goals of the planned economy. Article 163 of the 1977 Brezhnev Constitution stated that

economic disputes between enterprises, institutions, and organisations are settled by state arbitration bodies within the limits of their jurisdiction.¹³

These tribunals could have been the successful precursor to a modern, flourishing scene of domestic arbitration. They were not, for a number of reasons:

(i) This tribunal system was not judicial in nature, even though it performed a legal function. Arbitrazh tribunals were the very embodiment of the Bolshevik frustration with legal fetishism and were unaccompanied by judicial instruments to facilitate effective arbitration;

(ii) Arbitrazh tribunals had a fixed purpose, namely to facilitate the Soviet five-year plans, and were not primarily concerned with determining rights and obligations between parties for the purpose of achieving civil justice.

As can be gleaned from the above analysis, the arbitrazh tribunals were the precursor to the Russian Federation's Courts of Arbitrazh, but only in name rather than form. The tribunals were never intended to engage in the application of strict legal rights and were never intended to perform the function of a court of law in that sense. If one observes the Brezhnev Constitution of 1977 it becomes clear that these arbitrazh tribunals were not designed to administer "justice." Only the courts were intended to achieve this. The flip-side of this was that the USSR courts did not have jurisdiction to make determinations in respect of economic disputes between public enterprises.¹⁴

They were primarily, however, concerned with commercial parties operating within what might be described as "the economic sphere."¹⁵ The arbitrazh tribunals were, therefore, bodies set up to resolve disputes between commercial parties that were not courts of law. The Soviet Union was from the outset placing non-

¹³ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, adopted at the Seventh (Special) Session of the Supreme Council of the USSR Ninth Convocation on 7 October 1977 (Nov. 10, 2017), available at <http://www.departments.bucknell.edu/russian/const/77cons07.html#chap20>.

¹⁴ *An Outline of Recent Changes in Soviet Domestic and International Arbitration*, 1(1) *American Review of International Arbitration* (1990).

¹⁵ Jane Henderson, *The Constitution of the Russian Federation: A Contextual Analysis* 7 (Oxford: Hart Publishing, 2011).

judicial bodies at the forefront of the resolution of commercial disputes as a direct consequence of its philosophy that even dispute resolution needed to be infused with the distinctive world view of Marxism-Leninism.

That is not to say, of course, that the arbitrazh tribunals were unconcerned with rights and obligations as it might be tempting to contend. It is simply that the decisions regarding rights and obligations to which parties were subject were driven by economic and state necessity rather than any sense of civil justice as we might know it today.

What was unique about *Gosarbitrazh* (state arbitration) was that its work was undertaken both post and pre-contract. Actions for “failure to deliver, breach of warranty, and similar questions” would be brought to “*Gosarbitrazh*.”¹⁶ Rather distinctive within the Soviet system was the idea that a tribunal could draft a contract on behalf of the parties.¹⁷ The arbitrazh tribunals would step in to forge the very bargain between two parties who were finding it difficult to reach a meeting of minds.

The arbitrazh tribunals were perhaps more akin to the process of adjudication in form. However, they entailed a three-member panel involving a lawyer, a worker and a neutral party. It was in that sense a process that very much mirrored the three-man arbitral process so common in modern international arbitration – one appointed by each party with a neutral arbiter to balance the scales.

The Arbitrazh Courts which now exist in the Russian Federation as commercial courts were developed out of the Soviet arbitrazh tribunals. They had very distinctive roles and operated in a very different manner, but the subject of their decisions – commercial parties – was the same, albeit that the mandate of the arbitrazh tribunals was to facilitate the Soviet plans.

Essentially, the Arbitrazh Courts were not equipped to make the sorts of decisions that parties would expect of arbitral tribunals. Their decisions were not guided by legal principles but by the overriding objective of achieving the Soviet five-year plans. Neither were they facilitated in any way by judicial instruments or the domestic courts.

For all of these reasons, it has been said of the Soviet experiment with arbitration that

while domestic private arbitration withered during the Soviet period, international arbitration flourished.¹⁸

¹⁶ Harold J. Berman, *The Comparison of Soviet and American Law*, 34(4) *Indiana Law Journal* 559, 568 (1959).

¹⁷ *Id.*

¹⁸ Glenn Hendrix & Ilya Nikiforov, *International Commercial Arbitration Practice in the Russian Federation in International Commercial Arbitration Practice: 21st Century Perspectives* (H. Grigera Naon & P.E. Mason (eds.), 2nd ed., New Providence, NJ: LexisNexis, 2012).

3.2. Inter-State Disputes: International Arbitration

Perhaps the most significant impact of the October Revolution in the field of arbitration was not witnessed until the 1970s, with the dawning of international arbitration between inter-state actors.

The Moscow Convention of 1972 (hereinafter Moscow Convention) was a seminal moment not simply for the USSR and the aligned movement but more widely for the development of international trade and arbitration.

The Moscow Convention was the product of the trade relations between members of the Council for Mutual Economic Assistance (COMECON). Established in 1949, it was a recognition of the strong trading relationship between the Soviet Union and its Eastern bloc. The political *raison d'être* for COMECON is often over-exaggerated¹⁹ at the expense of an important feature of the global context in which it was created: the Eastern bloc countries would inevitably come to develop strong economic ties with their sponsor, the Soviet Union. In those circumstances a body designed to manage and control that trading relationship was an important part of the future economic infrastructure for the nations that formed COMECON. Disputes between trading entities in any of the member states had to be referred to arbitration in the country of the respondent's domicile. Alternatively it was open to the parties to choose a third country in which to have the dispute arbitrated providing that this country was also a signatory to the Moscow Convention.²⁰

The impact of this organisation (and the Moscow Convention to which it gave birth) upon international arbitration has often been overlooked. The framework for the practice of arbitration for the pursuit of trade goals that was generated by the inter-relationship between the nation states within COMECON was significant for a number of reasons.

Firstly it generated a network of arbitration centres throughout the signatory countries. Each member state of COMECON had its own domestic arbitration centre. The most influential of them all was the Foreign Trade Arbitration Commission (FTAC) based in Moscow. It was established in 1932 as a court of the USSR Chamber of Commerce and Industry and has outlived the Soviet Union even if in another guise, the International Commercial Arbitration Court, which is an arm of the Chamber of Commerce and Industry of the Russian Federation. In 1975, the *Verkhovnyi Sovet* afforded the FTAC independence from government, with its own procedural rules and competences.²¹

¹⁹ It is often considered that COMECON was a direct response to the Marshall Plan of 1948, which was designed to engender stronger pangs of sympathy for a generous U.S. nation willing to dispense with its cash in Eastern Europe.

²⁰ Zsolt Okanyi & Peter Bibok, *Arbitration in Hungary* in *CMS Guide to Arbitration*. Vol. 1 393 (Nov. 10, 2017), available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_HUNGARY.pdf.

²¹ Valdimir S. Pozdnjakov, *Commercial Arbitration in CMEA Member Countries*, 4(2) *International Tax & Business Lawyer* 272, 273 (1986), reference to Decree of the Presidium of the USSR *Verkhovnyi Sovet*, 16 April 1975.

The second significant effect of COMECON on international arbitration was the aforementioned Moscow Convention, which applied a mandatory international arbitration regime to all those state enterprises of the Member States of COMECON (with some limited exceptions where exclusive jurisdiction was reserved to the domestic courts or governmental organs of the member states). It was designed to regulate the arbitration of disputes that arose from economic, scientific and technical cooperation between the signatory states. Though often overlooked, it was a landmark in the history of international arbitration that was rooted in the Soviet planned economy, rather than the more conventional commercial exchange between private enterprises. Signed on 26 May 1972 it is still technically in force between the surviving states that have not withdrawn – Bulgaria, Cuba, Mongolia, Romania and Russia.

Thirdly, COMECON foresaw that an increasingly globalised world would require greater harmonisation of the rules upon which international arbitration was conducted. The Moscow Convention was followed in 1974 by the adoption of Uniform Rules of Procedure for the arbitration courts within the COMECON countries' chambers of commerce. A decade prior to UNCITRAL producing its first Model Law on International Arbitration, the USSR was driving COMECON towards greater harmonisation of the rules designed to enhance commercial dispute resolution.²²

What the historical fact of the Moscow Convention demonstrates is that between those international actors with mutual aims and objectives, Moscow was actively encouraging a philosophy of international arbitration of the kind that UNCINTRAL has increasingly attempted to promote in the 21st century.

Awards in any given dispute would be rendered "final and binding" by virtue of Art. IV(1) of the Moscow Convention. Though they were to be "voluntarily" enforced by the parties, in the event that this did not take place they could be enforced as any other judgment would be in the courts of a signatory state by virtue of Art. IV(2). This is a sophisticated regime for the recognition and enforcement of awards. Though, of course, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 had long pre-existed the Moscow Convention (and Moscow was a signatory), the USSR was engaged in the active promotion of principles of enforcement within its sphere of influence.

The Moscow Convention explicitly recognised that

the courts of arbitration in [member state] countries have proved in practice to be effective instruments for the solving of disputes connected with foreign trade transactions.

It is certainly true to say that the COMECON model for the arbitration of disputes was not always seen as being in keeping with foreign aims, objectives or

²² Pozdnjakov 1986, at 272.

understanding of commercial dispute resolution. This led some commentators to emphasise that Soviet monopolies needed to be “liberal in making concessions” if they were to develop a “healthy commercial exchange” with Western private actors.²³ This ignores the fact, however, that the FTAC itself – by far the most significant of the arbitral centres and one which has a lasting impact upon the arbitration of international disputes on Russian soil today – built-up a strong body of support among Western legal thought, especially due to its robust inclination to avoid what might be considered to be disputes with a particularly political hue.²⁴

Perhaps the greatest draw-back to the FTAC was that at this stage of its evolution, the landscape of dispute resolution between domestic and foreign actors was limited to those within the Soviet sphere of influence. For example, it is noticeable that Yugoslavia was not a signatory state to the Moscow Convention presumably as a consequence of its non-aligned status. It might be submitted that this is one of the lasting features of the Soviet approach to the enforcement of awards in the Russian Federation. There is a continuing scepticism towards foreign arbitral awards that are out with that pre-existing sphere of influence. There was no wholesale adoption of what might be referred to as a “Westphalianist theory” of international arbitration within the Soviet legal architecture.²⁵ It was only prepared to accept the sovereignty of other jurisdictions over its own state actors insofar as those jurisdictions met with its own unique legal and ideological world view. Prior to the liberalising reforms of the 1980s, Moscow would probably not have desired the participation of non-aligned movement countries in the Moscow Convention paradigm. This has obvious repercussions for the modern Russian approach to international commercial arbitration, which I discuss below.

The FTAC jurisprudence was also not entirely in keeping with the substance of European and Transatlantic thought on the mechanics of international arbitration. The doctrine of separability has in recent years been seen as a key feature of international arbitration, preserving as it does the evidence of consent to arbitrate a dispute, even though the substantive allegation that forms the dispute includes the nullity of the underlying contract between the parties, of which the arbitration agreement at least on its face forms part. However, it is this author’s submission that these differences can often be exaggerated. For example, Sir Alistair Blair-Kerr commented in 1989 that though in the rules of “the FTAC there are no direct references to the fact that an arbitration agreement (arbitration clause) is autonomous in relation to the contract” the conclusion could still be drawn that “the independence of an arbitration clause is not subject to doubt.”²⁶

²³ Eugene J. Leff, *The Foreign Trade Arbitration Commission of the USSR and the West*, 24(1) *Arbitration Journal* 1 (1970).

²⁴ Hendrix & Nikiforov 2012.

²⁵ Emmanuel Gaillard, *Legal Theory of International Arbitration* 26–31 (Leiden; Boston: Martinus Nijhoff, 2010).

²⁶ Ayten Mustafayeva, *Doctrine of Separability in International Commercial Arbitration*, 1 *Baku State University Law Review* 93 (2015), reference to *Sojuznefteexport v. Joc Oil Limited* (Award in case no. 109/1980 of 9 July 1984).

In spite of all of the above, there can be no doubt that the FTAC and the Moscow Convention paradigm enhanced in a significant way the arbitration landscape within not simply the republics of the former Soviet Union but also their aligned partners in COMECON.

The 1980s was the decade that created the perfect storm. Following Gorbachev's speech to the 27th Party Congress in 1985, political and trade liberalisation was the theme of the hour. That would lead to new opportunities for the arbitration of disputes between entities that were permitted the formal civil rights and obligations founded upon the conventional (and private rather than public) contractual relationship that had been denied them for the previous 70 years.

The Soviet infrastructure was still geared towards facilitating the objectives of the planned economy. In the evolutionary process that the legal system went through over the remaining 6 years of Soviet government, synergies and incompatibilities would arise that would generate what I have already referred to as a burgeoning international arbitration scene in Moscow and dwindling opportunities to encourage domestic arbitration.

It is necessary to qualify the contention that the promise for domestic arbitration was less than for international arbitration. Due to the historical nature of the arbitrazh tribunals within the USSR, when the liberalisation of trade came in the 1980s the ordinary courts of the USSR did not possess the authority to rule upon commercial disputes – especially where a public entity was one of the parties. As a consequence the natural substitute was arbitration.²⁷ As time passed, however, this body of commercial expertise was indeed built-up by the Courts of Arbitrazh.

At the international level, however, the USSR was readying itself for trade with the West and the disputes that would emerge between them. It resorted to a model that had been widely tested in the past and was respected by jurists: the FTAC.

In 1987, the Presidium of the USSR *Verkhovnyi Sovet* renamed the FTAC the "Court of Arbitration" within the USSR Chamber of Commerce and Industry. The edict expanded the remit of the new Court to relations between enterprises that were Western, Soviet or otherwise. The FTAC also adopted the increasingly common norms in international arbitration. Rule changes in 1988 meant that the arbitration clause within an agreement was to have legal validity that was separate from the underlying Agreement of which it formed part (developing the now accepted jurisprudence in international Arbitration at the Soviet level).

At the point of its dissolution in December 1991, the Soviet Union had actively promoted international arbitration and contributed to the canon of international law devoted to regulating the arbitral environment.

²⁷ *An Outline of Recent Changes in Soviet Domestic and International Arbitration*, *supra* note 14.

4. Maturity – Present Influence

Having addressed the Soviet attitude towards and contribution to arbitration, the final question that this article poses is: What is its legacy for international arbitration in the post-Soviet space? This question is addressed by using the Russian Federation and the CIS as case studies.

4.1. Russia

There are a number of respects in which Russia in the 21st century is an embodiment of the Soviet legacy as far as its approach to international commercial arbitration is concerned. Firstly, arbitration is seen as something other than the achievement of civil justice. Secondly, Russia retains a scepticisms towards the enforcement of particular foreign arbitral awards. Each of these points are addressed in turn below.

4.1.1. Arbitration is Not Civil Justice

On 1 September 2016, Federal law No. 382-FZ dated 29 December 2015 entered into force. Entitled “On Arbitration (Arbitration Proceedings) in the Russian Federation” it replaced the pre-existing regime under the law of 2002.

The new law regulates both international and domestic arbitration. Under the old law there were two regimes for the purpose of arbitrating disputes in the Russian Federation. The first regime regulated domestic arbitration between domestic Russian parties (Federal law of 24 July 2002 No. 102-FZ “On Arbitral Tribunals in the Russian Federation”). The second regulated what is often referred to globally as “international arbitration” (i.e. where there is some foreign entity involved in the dispute or where foreign laws are to be applied to the dispute) (Federal law of 7 July 1993 No. 5338-I “On International Commercial Arbitration”).²⁸

As with the Soviet Union, the Russian state remains unsure as to the purpose and role of arbitration in the resolution of commercial disputes and achieving civil justice as between two domestic parties. There is an ongoing perception that the primary purpose of the court system in Russia is very different from the purpose and objectives of commercial arbitration. Article 118(1) of the Constitution of 1993 makes it clear that “justice in the Russian Federation shall be effected only by a court.” This, of course, leaves room for the perception that domestic arbitrations are in essence not performing “civil justice” *per se* and have a very different function to a court of law. This, the author submits, is a consequence of the delicate relationship between the old arbitrazh tribunals and the more overtly legal judicial system, neither of which had any real relationship with one another and both of which pursued very different

²⁸ Mikhail Samoylov, *The Competence of Arbitral Tribunals under the Moscow Convention on Protection of the Rights of the Investor*, Lexis®PSL Arbitration (Nov. 10, 2017), available at <http://www.msamoylov.ru/the-competence-of-arbitral-tribunals-under-the-moscow-convention-on-protection-of-the-rights-of-the-investor/>.

objectives. As a consequence, it can perhaps be asserted that the domestic arbitral scene in Russia has not developed with the same purpose and speed as the field of international commercial arbitration and BIT arbitration.

4.1.2. Enforcement and the Arbitrazh Courts

There is, then, a distinction to be made between the two-track system of development emerging in Russia, which is a direct consequence of the Soviet system of commercial dispute resolution.

However, the second obvious impact of the Soviet approach to dispute resolution has fed-through into the manner in which Russia complies with its obligations under international law to promote the enforcement and recognition of foreign arbitral awards.

The Russian Federation has been a signatory to the New York Convention since 1960. When the Soviet Union was dissolved in December 1991, Russia became the successor state for the purpose of existing treaties with international organisations. However, there were no foreign awards enforced within the “Russian” jurisdiction prior to 1992.

In spite of the fact that awards have been enforced successfully within the Russian jurisdiction since that date, it has been contended that Russian approaches to the enforcement of foreign awards is still particularly revealing. Since 2002 responsibility for enforcing foreign arbitral awards has fallen to the Arbitrazh Courts.

Concerns about the extent to which the Arbitrazh Courts are an obstacle to the otherwise appealing arbitral resolution of disputes where enforcement will be necessary in the Russian jurisdiction, remain at the forefront of many minds.

Articles 35 and 36 of the International Arbitration Law sets out the basis upon which enforcement of a foreign arbitral award might be refused. For the purpose of the Arbitrazh Courts these principles are set out in Art. 244(1) of the Arbitrazh Procedure Code and include the rather infamous provision preventing enforcement on the grounds that it would be contrary to public policy.

Public policy concerns have often been cited as reasons for not enforcing a given award, including on the grounds that the relevant award is “punitive” or “disproportionate to the breach.”²⁹

²⁹ Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (6th ed., Oxford; New York: Oxford University Press, 2015), para. 11.118; Информационное письмо Президиума Высшего Арбитражного Суда Российской Федерации от 22 декабря 2005 г. № 96, Вестник Высшего Арбитражного Суда Российской Федерации, 2006, № 3 [Information Letter of the Presidium of the Supreme Commercial (Arbitrazh) Court of the Russian Federation of 22 December 2005 No. 96, Bulletin of the Presidium of the Supreme Commercial (Arbitrazh) Court of the Russian Federation, 2006, No. 3], s. 29; Информационное письмо Президиума Высшего Арбитражного Суда РФ от 26 февраля 2013 г. № 156, Вестник Высшего Арбитражного Суда Российской Федерации, 2013, № 5 [Information Letter of the Presidium of the Supreme Commercial (Arbitrazh) Court of the Russian Federation of 26 February 2013 No. 156, Bulletin of the Presidium of the Supreme Commercial (Arbitrazh) Court of the Russian Federation, 2013, No. 5], s. 6.

Questions about the jurisdiction of the domestic Arbitrazh Courts and their role in the review of the decisions of arbitral tribunals remain. What is particularly interesting is that in 2011 the Supreme Arbitrazh Court determined that it was within the jurisdiction of the state courts to review a decision of an arbitral tribunal on the question of choice of law.³⁰ That stands in contravention of the generally accepted principle that the decision of the arbitral tribunal on choice of law sits well within the tribunal's field of competence and should not be subject to challenge within the domestic courts.

In fact, the Supreme Arbitrazh Court issued limiting and clarifying guidance in respect of the circumstances in which the public policy exception should apply in April 2013. Arbitrazh Courts in Russia were provided guidance that these were exceptional circumstances and should be applied sparingly.

Whilst one should avoid the temptation to reduce the technical decisions of Arbitrazh Courts to overarching political themes, it is clear that until 2013 there was a great deal of discomfort among commercial parties and investors regarding the enforcement decisions of Russia's enforcement courts. That aversion to the judgment of tribunals seated in foreign jurisdictions is perhaps one of the primary legacies of the Moscow regime for the resolution of disputes between inter-state actors. Whilst the FTAC's contribution to the field of international arbitration is not to be underestimated, it was until 1987 confined to the regulation of legal relationships between entities within the Soviet sphere of influence (if not within the formal jurisdictional boundaries of the USSR).

The consequence is a temptation in the literature for legal commentators to give prominence to the role of foreign arbitral institutions in disputes with a Russian element. The London Court of International Arbitration (LCIA) and the SCC in Sweden are often championed as strong alternatives to the Russian equivalent to the MKAS. In fact by 2008, MKAS continued to be the "leading international commercial arbitration body for Russia-related disputes."³¹

This gives hope to those who consider (rightly, in my opinion) that the adoption of the Russian Arbitration Act was just a further illustration of "a long tradition in Russia" of the appetite for resolution of commercial disputes by way of the arbitral mechanism.³²

³⁰ Sergey Yuryev & Konstantin Kantyrev, *Arbitration in Russia* in *CMS Guide to Arbitration*. Vol. 1 672 (Nov. 10, 2017), available at https://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_RUSSIA.pdf, reference to *OJSC Efirnoe v. LLC Delta Villmar CIS*, Case No. VAS-11861/10, Supreme Arbitrazh Court, 13 January 2011.

³¹ Hendrix & Nikiforov 2012.

³² Yuryev & Kantyrev, *supra* note 30, at 683.

4.2. Beyond the Federation

When the Soviet Union was dissolved formally in December 1991 its legal demise had been prefaced by what Mikhail Gorbachev regarded as an illegal act – namely the purported dissolution of the USSR by three entities acting in consort: the Ukrainian, Belorussian and Russian Soviet Socialist Republics. It has always seemed bizarre that the Soviet Union – associated so closely with the Kremlin for years – was in fact brought down by three soon-to-be independent countries, the largest of which also laid claim to the same Capital as the institution it sought to deconstruct. Nonetheless, on 8 December 1991, these three entities signed the Belazheva Accords that gave birth to the Commonwealth of Independent States (CIS).³³

The label “CIS” would from this point on be attributed to many of the former republics of the USSR and would spawn its own rather niche approach to the practice of arbitration law. But the creation of this new creature of international law could not undermine the legacy of the Soviet years for the purpose of dispute resolution and international arbitration. This is most obvious upon a review of the two areas of greatest debate among participants in CIS-related arbitration: the culture of enforcement in the CIS countries and the growth of investor-state arbitrations.

4.2.1. Enforcement

The point made above regarding the extent and scope of the Moscow Convention is directly relevant to the enforcement of arbitral awards in the former Soviet space, except that on this occasion the principle of enforcement as between COMECON signatory states has been internalised within the former membership of the USSR.

In the late 1990s the member states of the CIS entered into the Agreement on Procedure for Mutual Execution of Decisions of Arbitration, economical Courts in the territories of the CIS. Arbitral awards made in any of the countries that are signatory states to this convention will be enforced in another member state on the basis of reciprocity. In these circumstances should the aim be to enforce an arbitral decision in a CIS member state it is safer for the venue and seat of the arbitration to be in a CIS jurisdiction.

4.2.2. Investor State Arbitration

One of the key consequences of the FTAC-inspired journey that the post-Soviet world has gone through is the growth of investor-state arbitration throughout the former republics of the USSR. This is arguably a product of many years of experience (indeed encouragement) of inter-state arbitration now applied to foreign business acting in the former USSR and the CIS countries.

A prime example of this is Kazakhstan. Kazakhstan is a signatory to the CIS Enforcement Agreement, the New York Convention (since 1995), the European

³³ It is commonly forgotten that though Leonid Kravchuk signed the Treaty, it was never ratified by the Verkhovna Rada and so Ukraine never in fact acceded to the CIS.

Convention on International Commercial Arbitration 1961 and, crucially, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965. Within a few years of its independence, Kazakhstan was keen to emphasise the link between attracting further economic investment and creating a stable environment for dispute resolution.

More recently it has actively encouraged the development of a healthy environment for the resolution of investor-state dispute resolution. Pursuant to Art. 4 of the Law of the Republic of Kazakhstan of 8 January 2003 No. 373-II "On Investments," an investor in Kazakhstan obtains a degree of the legal protection for their investments and Kazakhstan is a party to at least 39 state-investor conventions. Furthermore, the country is readying itself for what it hopes is a bright future for the new Astana International Financial Centre Court and International Arbitration Centre.

As always the question is not so much the legal architecture to facilitate arbitration vis-à-vis the state of Kazakhstan but the enforcement of an arbitral award rendered pursuant to the investment laws.

Whilst Kazakhstan has not had need to resort to the "public policy" grounds as a basis to refuse to enforce an award rendered in a foreign jurisdiction, however Kazakhstan's national law takes priority above and beyond the conventions of international law to which it is a signatory. It has been emphasised that Kazakhstan will only enforce those arbitral awards that have been rendered in the jurisdiction of a country that engages in the reciprocal enforcement of awards rendered by arbitral institutions in Kazakhstan.³⁴

Kazakhstan has perhaps bucked the trend among the former USSR member states in that the Code of Civil Procedure even permits parties the right to have their property disputes before the court of arbitration. Domestic arbitration is encouraged in Kazakhstan with a vigour less evident, for example, in the Russian Federation.³⁵

Conclusion

What lessons do we draw from the above analysis?

Firstly, the Soviet attitude to arbitration as a mechanism for dispute resolution was positive from the outset.

Secondly, the nature of rights and obligations within the commercial sphere of Soviet relations lent themselves to resolution by way of arbitration.

³⁴ Salima A. Sarina et al., *Confession and Carrying Into Execution of Foreign Arbitration Courts' Decisions: Reciprocity and Public Policy*, 11(11) International Journal of Environmental and Science Education 4760 (2016).

³⁵ Muhammadali Makhmudov, *Issues Regarding the Enforcing of Foreign Arbitral Awards in the Republic of Kazakhstan*, Global Arbitration Review, 25 October 2013 (Nov. 10, 2017), available at <http://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2014/1036812/kazakhstan>.

Thirdly, its contribution to the development of arbitration within and outside the USSR is not to be understated. Furthermore, the Soviet legacy for arbitration in the former Soviet space is self-evident.

In the ebb and flow of change at the political level, there emanated from Moscow a consistently distinctive approach to arbitration.

These developments, which in the case of Moscow's contribution to arbitral disputes at the international level grew apace in the 1970s, encouraged – throughout the Soviet Union and beyond to its sphere of influence in the former republics – an inclination towards the resolution of commercial disputes by way of arbitration. That this same approach was not, in the Russian Federation at least, perhaps fostered at the domestic level is most likely a consequence of the particular role performed by the arbitrazh tribunals within the USSR prior to its dissolution in 1991.

There are some features of the post-1991 regime for the enforcement of arbitral awards rendered by tribunals seated in foreign jurisdictions that may discourage long and hard-fought battles in the Russian Arbitrazh Courts. This appears also to have been a priority for many parties when considering the ease with which arbitral awards may be enforced in the former states of the CIS. However, in the Russian Federation at least, the Supreme Arbitrazh Court in its extra-judicial statements and publications, has gone some way to encouraging the seeds that were sown in the Soviet era so as to ensure that the Russian Federation can remain at the forefront of development in this important field of commercial dispute resolution.

In addition there are strong signs that the growth of investor-state arbitrations in the former Soviet republics is but another example of the way in which the Moscow Convention paradigm has given rise to positive conditions for the development of arbitration in the former USSR.

As this article demonstrates, a century after the October Revolution and almost 26 years after the dissolution of the USSR, the lasting impact of Soviet theory and practice on the post-Soviet arbitral environment is unquestionable.

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