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Communist China's Foreign Trade Contracts and Means of Settling Disputes

Gene T. Hsiao*

I. INTRODUCTION

International trade involves a host of legal problems. Basic among these are the institution of contracts and the principles of settling disputes. Nations may enter into trade treaties and agreements to define and regulate their commercial relations, but actual transactions are always concluded on the basis of contracts. In the case of disputes arising from these contracts, the parties often resort to conciliatory or arbitrary means instead of court litigation.

Communist China has over the course of the past eighteen years established trade relations with more than 120 countries and regions. In so doing, the Peking regime has relied upon the institution of contracts to conclude its transactions and has employed various means to adjust disputes. The exact number of these contracts is not known; but in view of the regime's total volume of foreign trade,¹ it must be well into the thousands. Due to the political implications and economic interests involved in these contracts, hardly any of them have been made public.² One writer reportedly has had access to a

* Associate Specialist in the Center for Chinese Studies, University of California, Berkeley; concurrently a member of the University's Project on Comparative Study of Communist Societies. This is the third of a series of papers presented in the *Vanderbilt Law Review* on the legal aspects of Communist China's foreign trade. For the first article, entitled *Communist China's Foreign Trade Organizations*, see 20 *VAND. L. REV.* 303 (1967); for the second, entitled, *Communist China's Trade Treaties and Agreements (1949-1964)*, see 21 *VAND. L. REV.* 623 (1968). This topic was presented by the author for discussion at the luncheon-colloquium on February 8, 1969, sponsored by the American Society of International Law and the Graduate Faculty of Political and Social Science of the New School for Social Research in the City of New York. The author wishes to thank the Chancellor's Program Committee for International Studies, the Institute of International Studies, the Center for Chinese Studies, the Project on Comparative Study of Communist Societies, and the School of Law, University of Calif., Berkeley, for their support of his undertaking. He is also grateful to all those in Hong Kong and Japan who assisted him in this study.

1. Peking's total foreign trade rose from 1.2 billion dollars in 1950 to 3.7 billion dollars in 1965. See 2 *JOINT ECONOMIC COMM., 90TH CONG., 1ST SESS., AN ECONOMIC PROFILE OF MAINLAND CHINA* 584 (Comm. Print 1967). The figures for 1966 were estimated at 4.2 billion dollars and for 1967 at 4 billion dollars. *N.Y. Times*, Nov. 29, 1968, at 11.

2. D. JOHNSTON & H. CHIU, *AGREEMENTS OF THE PEOPLE'S REPUBLIC OF CHINA, 1949-1967: A CALENDAR* (1968). In this work, the authors include "some important contracts" between Communist China and its foreign partners, though the texts of these contracts are not available.

group of 42 contracts of different kinds concluded between Chinese and Italian corporations.³ However, he was not allowed to make reference to any specific contracts. As regards the question of adjusting disputes, an often quoted East German source reported that as of 1960, the Foreign Trade Arbitration Commission in Peking had been called upon "to hand down rulings in sixty-one cases" involving Chinese enterprises and their capitalist business partners from a number of foreign countries.⁴ However, none of these cases has been made public. Interviews with local arbitral officials of Peking's two largest trading partners, Hong Kong and Japan, also have not produced any written record of arbitration between Chinese corporations and their foreign counterparts. Thus, until more original source materials become available, any attempt to study Peking's foreign trade contracts and arbitration is preliminary in content and inevitably limited in scope.

The following discussion deals with two topics: (1) the basic types of contracts which the Chinese have used in their international transactions, and (2) the means they have used to settle disputes. The materials used for this discussion come primarily from three sources: original publications of the Peking regime available in American research libraries, the author's interviews with some ranking overseas trade representatives of the regime, and a number of books and a few authentic copies of contracts which the author was able to acquire in the Far East. Three of these contracts, concluded between Chinese and Japanese firms, are herein translated as appendices. The names of the parties and the statements concerning objects, specifications, prices, the loading port, and the port of destination involved in the contracts are all omitted.

II. CONTRACTS

In line with its foreign trade policy and practice, Peking's foreign trade contracts are divided into two major categories: those with socialist countries and those with non-socialist countries.

A. Socialist Contracts

As a matter of practice, the form and content of Peking's individual contracts concluded between its foreign trade corporations

3. G. Reghizzi, *Legal Aspects of Trade with China: The Italian Experience*, 9 HARV. INT'L L. REV. 85, 99 (1968).

4. H. Fellhauer, *Foreign Trade Arbitral Jurisdiction in the People's Republic of China* (1960), United States Joint Publications Research Service, No. 8612, at 6 (English trans.).

and their socialist counterparts are governed by a general governmental contract, called "General Conditions of Delivery."⁵ Considered an exclusively socialist document, but potentially useful for the development of trade with non-socialist countries,⁶ the General Conditions of Delivery was designed to simplify procedures for the formation of individual contracts, to serve as a legal basis for the delivery of goods, and to supervise the execution of individual contracts. Unless circumstances call for the provision of specific terms in a given individual contract, it provides uniform principles and terms for the exchange of goods between socialist states. These principles and terms are legally binding upon the contracting parties, and violation is subject to penalties.⁷ Thus, both in theory and practice, the General Conditions of Delivery is a contract of primary importance in Peking's transactions with socialist countries.

A standard form of this document usually consists of twelve sections. Aside from the two sections dealing with the adjustment of disagreements and arbitration, which will be discussed later, the other sections may be summarized as follows:

1. *Formation of Contracts*.—This section stipulates that individual contracts for the exchange of goods, for making payments, and for fulfilling other obligations shall be made according to the General Conditions of Delivery. The authorized representatives of the foreign trade organizations (usually corporations) of the contracting parties shall sign the contract, which shall specify the denomination of the goods and the quantity, quality, specifications, price, total value, shipping marks, packing conditions, the date and place of delivery, and other special conditions not included in the General Conditions of Delivery. Amendments and/or supplements to the contract must be agreed upon in writing by both parties.

2. *Terms of Delivery*.—This section specifies the means of transportation (sea, land, air, or postal service) and the place where the transfer of ownership of the goods will take place. Responsibilities

5. For a discussion of the differences between this document and other forms of trade agreements, see Hsiao, *Communist China's Trade Treaties and Agreements (1949-1964)*, 21 VAND. L. REV. 623, 629 (1968).

6. Peking had two such agreements with one non-socialist country, Finland. See 2 MINISTRY OF FOREIGN AFFAIRS, CHUNG-HUA JEN-MIN KUNG-HO-KUO T'IAO-YUEH CHI (Collection of Treaties of the People's Republic of China) 372 (1952-1953) [hereinafter cited as TYC], 3 TYC 197 (1954).

7. WANG YAO-T'EN, KUO-CHI MAO-I T'IAO-YUEH HO HSIEH-TING (International Trade Treaties and Agreements) 127 (1958) [hereinafter cited as WANG YAO-T'EN].

for expenses and risks incidental to the goods are also determined on this basis. With the few exceptions where CIF and C & F terms are used, the price quotations are generally based on FOB terms.

3. *Date of Delivery.*—Unless otherwise specified in individual contracts, delivery shall be made within the period to which the General Conditions of Delivery applies.

4. *Notice of Delivery.*—This section requires the contracting parties to notify each other of the detailed procedures of delivery required in the execution of individual contracts. For example, if the delivery is made by sea transportation, the seller must issue a notice to the buyer 45 days before the goods arrive at the loading port. Within fifteen days after receiving the notice, the buyer must in turn notify the seller by telegram of the name of the vessel and the date of its arrival at the loading port.

5. *Late or Early Delivery and Penalties.*—Generally there is a grace period for late delivery—30 days for ordinary goods and 45 to 60 days for machinery and equipment. Further delay may be obtained after agreement by both parties. If the seller fails to make delivery after the grace period or the agreed period of delay, he is subject to a penalty of no more than eight per cent of the total value of the delayed goods. Early delivery (delivery ahead of the schedule) may be made after agreement by both parties.

6. *Quantity and Quality.*—Quantity and/or weight are generally accepted as set forth by the bill of lading. Quality must conform to the standard of the producing state or to the technical conditions specified in the individual contract and must be certified by the commodity inspection administration of the selling party's country.

7. *Packing and Marking.*—Unless otherwise specified in the individual contract, both packing and marking must conform to international standards.

8. *Guaranty.*—If necessary and if both parties agree, the seller must guarantee for a given period of time the quality of certain types of goods delivered. The length of the period is specified in the individual contracts.

9. *The Method of Making Payments.*—All payments are settled through the state banks of the contracting parties. Generally there are two ways of making payments: a payment may be settled through the clearing accounts of the state banks or the seller may get his payment directly from his country's state bank, which then debits it to the clearing accounts of the buyer's state bank. Either the seller's or the

buyer's state bank has the right to refuse payment if the papers (the bill of lading, etc.) submitted to the bank by the seller are not consistent with the terms specified in the individual contract.

10. *Force Majeure*.—This section describes the effect of various circumstances beyond the control of either party, such as fire, flood, draught, plague, earthquake, blockade and war. While there is some variation as to the precise meaning of this clause in individual agreements and contracts, none of them has included a provision utilized by the Soviet Union which includes "acts or demands of the [Soviet] government" as an element of *force majeure*.⁸

B. *Non-Socialist Contracts*

Outside the socialist camp, Peking has had governmental and non-governmental trade agreements with about 35 countries.⁹ While many of these trade agreements have served as the basis for the formation of individual contracts, they do not provide such uniform contractual rules as are embodied in the General Conditions of Delivery for use with socialist states. Consequently, in transactions with countries having trade agreements and those having no trade agreements with Peking, individual contracts have played a dominant role.

Generally, there are five types of contracts: straight sale, straight purchase, or the combined form, called "reciprocal trade," under which either party is both a seller and a buyer; barter; consignment;

8. For a discussion of the General Conditions of Delivery, see WANG YAO-T'EN 126-31. For reference to actual examples of this document, see Agreement with the Government of the Democratic Republic of Germany for the Exchange of Goods and Payments for the Year 1958, April 23, 1958, in 7 TYC 142 (1958); Protocol on the General Conditions of Delivery Between the Foreign Trade Organizations of the Ministry of Foreign Trade of the People's Republic of China and the Ministry of Foreign and East-West German Trade of the Democratic Republic of Germany for the Year 1958, May 22, 1958, in 7 TYC 144 (1958). The use of CIF and C & F price quotations appears in the Trade Agreement with the Government of the Republic of Finland, June 5, 1953, in 2 TYC 35 (1952-53); Trade Agreement with the Government of the Republic of Finland, June 21, 1954, 3 TYC 43 (1954); General Conditions of Delivery with Finland Concerning China's Exports, June 17, 1954, in 3 TYC 197 (1954).

The Soviet provision defining "acts or demands of the [Soviet] government" as an element of *force majeure* is in the contracts between certain Soviet and Israeli corporations. See Domke, *The Israeli-Soviet Oil Arbitration*, 53 AM. J. INT'L L. 787 (1959); also quoted in TRISKA & SLUSSER, *THE THEORY, LAW, AND POLICY OF SOVIET TREATIES* 506 (1962).

9. The figures change almost every year. For reference, see Hsiao, *supra* note 5, at 656-57; JOHNSTON & CHIU, note 2 *supra*.

“contracted sale” or *pao-hsiao*,¹⁰ and agency, sole or general.¹¹ Of these, the contracts of straight sale and purchase are most frequently used and therefore deserve further analysis.

Like its domestic commerce and its trade with socialist countries, Peking’s trade with non-socialist nations is also governed by a set of export and import plans.¹² The export plan consists of a group of subordinate plans for the purchase of export commodities from domestic producers, for the coordination of activities with other state export corporations, and for the processing of certain types of goods.¹³ Since the purpose of exporting is often to assure the successful importing of products needed for the expansion of production and industrialization,¹⁴ the export plan is considered the key to the successful implementation of the entire foreign trade plan. The import plan involves the classification of products needed by various domestic consumers, the clarification of commodity specifications in order to meet international standards, the search for substitutes on the domestic market in order to save foreign exchange, the coordination of planning processes with domestic consumers, and the building and operation of a system of files concerning importing activities.¹⁵

Planning is facilitated by and coordinated with a process of market investigation, calculation of costs and prices, and selection of suitable foreign buyers and sellers. When all this is done, the negotiation of transactions begins. Negotiations are generally conducted by correspondence and/or face-to-face bargaining. In the former case, the contract is concluded in one of the following ways. (1) In accordance with the terms agreed upon by both parties, the seller makes out a contract in two copies, one for himself and the

10. Under this type of contract, the buyer in a given location is responsible for a specified period of time for the profits and losses arising from the resale of the goods which he has purchased. At the same time, the seller is obligated not to sell the same types of goods to other buyers or consumers in the same location within the same period.

11. DEPARTMENT OF FOREIGN LANGUAGES FOR FOREIGN TRADE, SHANGHAI FOREIGN LANGUAGES INSTITUTE, TUI-WAI MAO-I SHIH-WU (*The Practice of Foreign Trade*) 164-66 (1958) [hereinafter cited as *THE PRACTICE OF FOREIGN TRADE*]. This is a textbook of the institute.

12. Hsiao, *The Role of Economic Contracts in Communist China*, 53 CALIF. L. REV. 1029 (1965); Chao Chi-ch’ang, *Overall Planning of Foreign Trade and Conclusion of Long-Term Trade Agreements*, in 2 MINISTRY OF FOREIGN TRADE, TUI-WAI MAO-I LUN-WEN HSUAN (*Selection of Essays on Foreign Trade*) 151 (1956) [hereinafter cited as *ESSAYS*].

13. *THE PRACTICE OF FOREIGN TRADE* 45-47.

14. Yeh Chi-Chuang, *Address to the Eighth National Congress of the Chinese Communist Party* (1956), in 3 *ESSAYS* 5 (1957).

15. *THE PRACTICE OF FOREIGN TRADE* 84-86.

other for the buyer. The contract takes effect when both parties have signed it. (2) When the buyer has accepted the seller's offer and the seller has confirmed the acceptance by telegram, the contract is deemed concluded. The correspondence between the parties and the seller's final confirmation of the buyer's acceptance serve as the legal basis of the contract. (3) When the seller has accepted the buyer's order and conditions by mail or telegram and has sent back to the buyer a confirmation of the order, the contract is also considered concluded. (4) When an agreement has been reached through correspondence containing both parties' signatures, the agreement is considered to be a contract.¹⁶

The face-to-face bargaining usually takes place at periodical trade fairs, held either in the buyer's or the seller's country, or on the occasion of a visit by a special trade delegation.¹⁷ The international business community will not know of the private negotiations by visiting trade delegations. On the other hand, transactions at periodical fairs are more open and, therefore, are sometimes reported by observers. As outlined by one reporter, in general the proceedings in these transactions are as follows:

Since all Chinese purchasing is done through the various State Trading Corporations, selling to individual concerns is of course impossible. From this it follows that the normal Western methods of sales promotion . . . [are] either completely inappropriate in China or [have] to be drastically modified. Since China buys in a collective manner, the best way to promote sales is to adopt the same policy. Exporting nations have found that a comprehensive exhibition of their products mounted in a major Chinese city, sponsored by a central authority with individual firms taking part, is the best way to achieve maximum results in the shortest time . . . Just how does one set about putting on an exhibition in China? On the side of the exhibitors, there are various bodies, official and otherwise, whose job is to promote exports. Organizations such as the Sino-British Trade Council, the UK Scientific Manufacturers' Association, the Association Belgique Chine, the Comite Permanent des Foires et Manifestation a l'Exterieur, have all organized exhibitions in China. A secretariat is formed, and the general lines of the operation are laid down. Negotiations then begin with the China Council for the Promotion of International Trade. This body handles, as

16. THE PRACTICE OF FOREIGN TRADE 69. For reference to actual examples of correspondence for the conclusion of transactions and contracts, see TING HSIU-SHAN & YOSHITARO SIBAGAKI, ZUJIN RI-ZHONG MAOYI TONGXINWEN (The Latest Correspondence in Japanese-Chinese Trade) (1957); TERUO-SUMIDA, CHUGOKU GENDAI SHOGYO TSUSINBUN (The Contemporary Commercial Correspondence of China) (1964).

17. In many of Peking's foreign trade agreements with other countries, there is a provision for the holding of periodical trade fairs. For example, see Trade Agreement with the Government of the Republic of Iraq, May 25, 1960, art. 5, in 10 TYC 266, 267 (1961). For reference to visiting trade delegations, see FAR EASTERN ECONOMIC REVIEW (Hong Kong), May 19, 1968, at 450 [hereinafter cited as FEER].

its name implies, all aspects of foreign trade promotion. It has a Fairs and Exhibitions Department which deals with all arrangements for an exhibition . . . except the actual business. When all arrangements have been made and exhibition is open, thousands of Chinese technicians and end-users attend. They do not come to buy, they come to look. Through their own channels, suggestions are then passed upwards and so to the corporations, the actual buyers. The corporations call for the exhibitors, and negotiations begin. Initially, these are usually for the sale of the actual exhibits, and tension tends to mount as sales managers try to sell equipment before they are due to go home. With the exception of a British exhibition last autumn [1966], exhibits are usually mostly sold and do not have to be shipped back again. Further business is also discussed, though there is often little time; and that is why those who are prepared to stay [longer] do better. But if the Western businessman leaves without having sold a thing he need not necessarily feel all is lost; contracts can come through as long as a year later. In fact, it has now come to be accepted that no exhibition should be judged until at least three months after it is over.¹⁸

In economic terms, the importance of the periodical fairs is also illustrated by a report that in the spring of 1968 about 970 Japanese traders representing 285 companies were expected to attend a fair in Canton in anticipation of doing at least 140 million dollars worth of business, their total for the previous year's sales to Peking and slightly over 25 per cent of Japan's total volume of trade with Peking in 1967.¹⁹

The form and content of the contracts concluded at the fairs are, of course, not all the same. As indicated by Peking's terminology of price quotations, the terms of these contracts range from FOB, CIF, C & F, CIF & C to Ex Quay, Ex Bond, Spot, Ex Warehouse, Ex Factory, and Ex Buyer's Godown.²⁰ In practice, the present author was told that FOB and, to a lesser extent, CIF terms are most frequently used. Under the FOB contract, the seller's obligation is to deliver the goods on board a vessel and to assume all risks until that delivery has been made. He also pays all export duties and is responsible for the export license and other related expenses. The loading port and the date of delivery are specified in the contract. As to the clean bill of lading, generally the seller is obligated to obtain it for the buyer only when he has agreed to charter a vessel or freight space in the vessel for the buyer. On the other hand, the buyer's obligation is primarily to charter a vessel or freight space in the vessel, to buy insurance for the goods, to notify the seller of the name of the vessel, to pay all expenses incidental to the goods, and to bear

18. Ian Rae, *China Trade: Patterns for Profit*, in FEER, March 2, 1967, at 414-15.

19. FEER, April 21, 1968, at 229. The total volume of Japan's two-way trade with Peking in 1967 was estimated at \$557 million. See FEER, July 14, 1968, at 156, 157.

20. THE PRACTICE OF FOREIGN TRADE 13-15.

all risks from the moment the goods have actually been loaded on board the vessel in the port agreed upon by the parties.

Under the terms of a CIF contract, the seller is responsible for the chartering of a vessel or freight space in the vessel and bears all risks until after the goods have been actually loaded on board the vessel within the date or period stipulated in the contract. He is also obligated to pay the freight fare to the port of destination, to buy adequate insurance to cover the sum specified in the contract, to obtain the export license, to assist the buyer in obtaining other necessary papers issued by the exporting country, and to provide the buyer with the clean bill of lading, insurance policies, invoices, and other documents specified in the contract. The buyer's obligation is to accept the documents presented by the seller, to pay expenses provided for in the contract, to handle all procedures for the unloading of the goods at the port of destination, and to bear all risks from the moment the goods have actually been loaded on board the vessel in the port of shipment.²¹

III. MEANS OF SETTLING DISPUTES

In foreign trade, as in domestic commerce, the basic purpose of making a contract is to define clearly the rights and obligations of the contracting parties so that the contract can be successfully performed and misunderstandings avoided. In practice, however, due to the very nature of merchandise transactions, disputes do occur, and when they occur, the means to adjust them are complicated by the distance between seller and buyer, by differing trade customs and laws, and sometimes by the absence of direct representation of the injured party himself.

The Peking regime has adopted various means to solve these problems. But, as indicated earlier, the regime has not published any actual case involving the settlement of foreign trade disputes.²² Hence, the following discussion deals only with some of the regime's basic attitudes toward reconciliation, mediation, and arbitration.

A. *Reconciliation and Mediation*

China, before 1911, had a quite comprehensive code of substantive

21. See THE PRACTICE OF FOREIGN TRADE 15-17; cf. Ramsaitsev, *F.O.B. and C.I.F. in the Practice of the Soviet Foreign Trade Organizations*, 1959 J. BUS. L. 315 (1959).

22. One of the possible exceptions is *The Bureau of Salvage Works of Shanghai v. Valdemar Skogland A/S of Norway*, in Tui-wai Mao-I (Foreign Trade) (The People's Republic of China), No. 3, 1963, at 4.

law, but lacked a fixed and elaborated procedure. Influenced by the Confucian concept of social and ethical conduct embodied in the rule of *li*, the Chinese society viewed the settlement of a pecuniary matter before a magistrate as something very distasteful and considered those aggressive lawyers who were accustomed to encourage court litigation as "pettifoggers" (*sung-shih*), deserving no community respect at all. Thus while legal avenues were always open for the adjudication of disputes, reconciliation and mediation were the preferred methods.

Although they are theoretically avowed Marxist-Leninist revolutionaries, officials of the Peking regime have accepted this traditional element of the Chinese way of life as the basic method of approach to the settlement of trade disputes. Surprised by the complete absence of arbitration records in the files of the Peking-controlled Chinese General Chamber of Commerce in Hong Kong, the present author asked a number of the regime's overseas trade representatives for an explanation. A standard reply was as follows:

It is true that some of our capitalist partners have occasionally showed bad faith in their transactions with us. But we did not think it necessary to go to the arbitration board. After all, the state now owns all productive property. It has an enormous capacity to lend money, to allow credit, and to absorb losses. The foundation of international trade is determined by politics. When trade terms are concluded, the application of law is decided by the strength of the contracting parties. In the case of a dispute which is usually our foreign partners' fault, we always try our best to reconcile it through direct negotiation with the other party in order to reach an amicable settlement. When this fails, we may call in a third party to mediate the dispute. But in either case, our aim is to settle the dispute in an amicable atmosphere and by friendly means. You do not do business again with a partner who has sued you in the court. Do you?

Aside from certain obvious ideological elements in the statement, this lecture-like reply appears to be consistent with Peking's own foreign trade practice. In nearly all agreements with socialist countries, there are provisions in the General Conditions of Delivery for the direct adjustment of disagreements between the parties with regard to quantity and quality of the goods. Usually, the buyer must present a complaint to the seller within a given period, stating the quantity and quality of the goods that differ from those stipulated in the individual contract. Upon receiving the complaint, the seller is obligated to reply within a specified period of time. Failing to do so, he shall be considered as agreeing to the complaint and thereby automatically subject to make up the differences in the complaint and to pay for all expenses involved.²³ In some instances, a review board is

23. *E.g.*, Protocol on the General Conditions of Delivery with the Foreign Trade

organized by representatives of the buyer's state organs which have no interest in the transaction to examine the validity of the complaint so as to facilitate the settlement of disagreements.²⁴ In trade agreements and contracts with non-socialist countries, there are also provisions for the amicable settlement of contractual disputes through direct negotiation between the parties before using the method of arbitration.²⁵

Peking's preference for amicable settlements is, however, not uniquely Chinese. The International Chamber of Commerce has also encouraged "conciliation" as an option to arbitration.²⁶ What appears to be typically Chinese in Peking's practice, as in the case of dynastic legal practice, is the lack of concern for formal procedures. In contrast to the rules of the International Chamber of Commerce, which provide definite procedures for conciliation, none of Peking's trade agreements and contracts stipulates the process by which amicable settlement may be obtained through reconciliation and mediation. On the basis of the present author's interviews, the Chinese have generally followed two methods. In the case of a face-to-face negotiation, they sit down and talk with the other party over tea and occasionally over wines and dinner. In the case of negotiation through

Organization of the People's Republic of Hungary for the Year 1962, March 30, 1962, art. 23, in 11 TYC 40, 50-52 (1962).

24. *E.g.*, Protocol on the General Conditions of Delivery with the Ministry of Foreign Trade of the People's Republic of Poland for the Year 1959, December 31, 1959, art. 22, in 8 TYC 56, 66-67 (1959).

25. Trade Agreement with the Government of the Republic of Finland, June 5, 1953, art. 7, in 2 TYC 35, 36 (1952-53); Sino-Japanese Trade Agreement, Oct. 29, 1953, art. 7, in 2 TYC 369, 370 (1952-53); Trade Agreement for the Exchange of Goods Between the China Import and Export Corporation and the French Industrial and Commercial Trade Delegation, June 5, 1953, art. 7, in 2 TYC 377, 378 (1952-53); Trade Agreement with the Republic of India, October 14, 1954, art. 8, in 3 TYC 28, 30 (1954); Agreement on the Exchange of Goods and Payments with the Kingdom of Afghanistan, July 28, 1957, art. 5, in 6 TYC 139, 140 (1957); Trade Agreement Between the China Council for the Promotion of International Trade and the Eastern Commission of German Economy, Sept. 27, 1957, art. 9, in 6 TYC 323, 324 (1957); Chinese and Japanese Private Trade Contract, 1963, art. 10, in Appendix A; Chinese and Japanese Private Trade Contract, 1965, art. 7, in Appendix B and Chinese and Japanese LT Trade Contract, 1962, art. 23, in Appendix C.

26. International Chamber of Commerce Rules of Conciliation and Arbitration, June 1, 1955, states: "The advantages to the business world of an international organization for the settlement of business disputes of an international character, without recourse to the formalities of court proceedings, are such that the International Chamber of Commerce feels in duty bound to do everything in its power to encourage conciliation and arbitration. The Chamber therefore places its services at the disposal of all businessmen whenever its good offices are likely to conduce to the settlement of such business disputes."

correspondence, they use carefully-worded letters and telegrams to reason with the other party. In either instance, the process is often lengthy and time-consuming. Japanese and others who are accustomed to the oriental way of life appreciate and enjoy this Chinese attitude. But to the average Western businessman and lawyer, it can well be a trial of patience.

B. Arbitration

Arbitration, as a means of settling commercial disputes, is usually the last recourse in international practice. The relative disadvantages of a lawsuit growing out of a contract are eloquently explained by F. E. Pratt as follows:

First, a lawsuit involves delays and the expenditure of large sums of money in the prosecution or the defense of a suit. Time and attention of the chief executives of a company are required, causing many indirect losses which cannot be put down either on a balance sheet or in a daily time schedule. Second, the inevitable result of a lawsuit is that the relationship between the two parties, which probably began in friendship and in the hope of developing a mutually profitable business, is wrecked. The American manufacturer or exporter has lost a valuable representative on whom expense and time in education and training have been spent; and the foreign representative has lost an American connection to which he has probably devoted much time, energy, and money. Under most circumstances, therefore, a lawsuit concerning the interpretation of a contract in foreign trade is to be avoided at all cost.²⁷

This line of reasoning coincides with Chinese tradition. Indeed, the Republic of China was the first country with which the United States (in 1946) entered into a general and reciprocal commitment concerning commercial arbitration.²⁸ The new regime on the mainland, while accepting the legacy of traditional China, also borrowed some alien elements from the Soviet Union. Thus, as far as the basic structure of the regime's foreign trade and maritime arbitration organs is concerned, it belongs to the socialist system.²⁹ Since the organization and general procedure of these organs has been discussed elsewhere,³⁰ the following consideration is confined to one

27. PRATT, *FOREIGN TRADE HANDBOOK* 1237 (3d ed. 1952).

28. See Walker, *Commercial Arbitration in United States Treaties*, 11 *ARB. J.* (n.s.) 68 (1956), reproduced in 1 S. METZGER, *LAW OF INTERNATIONAL TRADE* 165 (1966).

29. There are four major systems of commercial arbitration in the world: the British system, the International Chamber of Commerce system, the socialist system, and the Western Hemisphere system. See *COMMERCIAL ARBITRATION AND THE LAW THROUGHOUT THE WORLD* (1964). For a discussion of the socialist system, see Pissar, *The Communist System of Foreign-Trade Adjudication*, 72 *HARV. L. REV.* 1409 (1959).

30. Hsiao, *Communist China's Foreign Trade Organization*, 20 *VAND. L. REV.* 303, 314-17 (1967).

principal aspect of the arbitration clause in Peking's trade agreements and contracts, namely, the location of arbitration.

In private international law, as in public law, the location of arbitration has importance for a number of reasons. First and foremost, it involves the question of jurisdiction as to which party's tribunal has the right to hear and to decide the dispute. This in turn involves the question as to whose law, both substantive and procedural, is to apply. Secondly, the convening of a tribunal for the adjudication of a dispute involves the choice of arbitrators and an umpire. Although all arbitrators and umpires are supposed to be impartial judges, it is a fact of life that the inherited instincts, traditional beliefs, and acquired convictions of a judge have a great deal to do with his decisions.³¹ In some instances, national arbitration laws expressly require the observance of local justice and customs by arbitrators.³² Moreover, the attitude of the general public in the location where the hearing is conducted sometimes has an important bearing on the outcome of the arbitration.³³

In trade relations with the Peking regime, the complexity of these problems is compounded by the philosophical and political gaps between the regime and non-socialist countries. The Peking regime believes that all economic, political, and social institutions in these countries invariably serve the interests of the ruling classes. In consequence, the regime believes that it cannot possibly obtain a fair hearing and an equitable arbitration award from a non-socialist tribunal.³⁴ Thus, like the Soviet Union in the early years, the regime has always preferred Peking over other places as the ideal location of arbitration. However, the regime is also prepared to accept a compromise if the other party should refuse to agree with its proposition and if the transaction involved is important to the regime. This is unlike the Soviet Union, which did not change its policy

31. *See generally* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1960).

32. For example, the British arbitration law provides: "The Arbitrator must apply the principles of English justice, and unless otherwise agreed by the parties, observe, as far as possible, the rules of ordinary procedure. The law does not authorize the parties to relieve the arbitrator from the observance of the law and customs of England. For this reason, there are no 'amisables compositeurs'." England, Wales and Northern Ireland, 111, in *COMMERCIAL ARBITRATION AND THE LAW THROUGHOUT THE WORLD*.

33. *See generally* Gardner, *Economic and Political Implications of International Commercial Arbitration*, in *INTERNATIONAL TRADE ARBITRATION* 15 (Martin Domke ed. 1958); Mezger, *The Arbitrator and Private International Law*, in *INTERNATIONAL TRADE ARBITRATION* 229 (Martin Domke ed. 1958).

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toward the location of arbitration until 1956 when it entered into an agreement with Japan providing for arbitration in the country of the defendant's domicile.³⁵

Five forms of the arbitration clause concerning the location of hearing and the selection of arbitrators have thus far appeared in Peking's foreign trade documents. First, the initial two trade agreements with Japan both provide for arbitration within the territorial boundaries of China regardless of which party is the defendant.³⁶ No mention was made of the composition of the arbitration tribunal, nor the method by which the arbitrators were to be selected. As far as is known, this provision of arbitration exclusively within China has not appeared in any other of Peking's foreign trade agreements.

The second form provides for arbitration in the country of nationality of the defendant. This is the standard clause in all of Peking's trade agreements with socialist countries and some non-socialist countries like Finland, France, and Japan.³⁷ However, the composition of the arbitration tribunal is not the same in all cases. On the socialist side, each party is entitled to choose a number of arbitrators from among the members of the defendant country's national foreign trade arbitration commission. These then choose an umpire from the remaining members of the arbitration commission. Or, by mutual agreement, the disputing parties may jointly choose, or entrust the chairman of the arbitration commission to appoint, a sole arbitrator. Both the arbitrators and the umpire are thus nationals of the country of the defendant.³⁸ This is basically the rule of the Soviet Union.

On the non-socialist side, the rule varies. In the Trade Agreement

35. Agreement of April 30, 1956, in *The Japanese Annual of International Law*, No. 1, at 167 (1957), quoted in Hazard, *State Trading and Arbitration*, in *INTERNATIONAL TRADE ARBITRATION* 97 n.10 (Martin Domke ed. 1958).

36. Chinese-Japanese Trade Agreement, Dec. 31, 1952, art. 6, in 2 TYC 367, 368 (1952-53); Chinese-Japanese Trade Agreement, Oct. 29, 1953, art. 7, in 2 TYC 369, 370 (1952-53).

37. *E.g.*, Protocol on the General Conditions of Delivery with the USSR, Feb. 12, 1955, art. 28, in 4 TYC 46, 59 (1955); Trade Agreement with the Government of the Republic of Finland, June 5, 1953, art. 7, in 2 TYC 35, 36 (1952-53); Trade Agreement Between the China Import and Export Corporation and the French Industrial and Commercial Trade Delegation, June 5, 1953, art. 7, in 2 TYC 377, 378 (1952-53); Chinese-Japanese Trade Agreement, May 4, 1955, art. 8, in 4 TYC 258, 259-60 (1955); Chinese-Japanese Trade Agreement, March 5, 1958, art. 8, in 7 TYC 197, 198-99 (1958). Also see the Chinese and Japanese Private Trade Contracts in the appendices.

38. See the pertinent arbitration laws of the socialist countries in *COMMERCIAL ARBITRATION AND THE LAW THROUGHOUT THE WORLD*.

with Finland, June 5, 1953, it was provided that each party is entitled to appoint one arbitrator and the umpire is to be chosen by agreement of the two arbitrators so appointed. Both the arbitrators and the umpire must be citizens of either China or Finland.³⁹ In the Trade Agreement with the French Trade Delegation, June 5, 1953, a different provision was adopted. While accepting the country of nationality of the defendant as the location of arbitration, the agreement stipulates that if the arbitration is conducted in France, each party is entitled to appoint an arbitrator of French nationality, and an umpire is to be chosen by agreement of the arbitrators. If the arbitrators cannot agree, the umpire is to be appointed by the President of the Civil Court of Seine Province. However, the nationality of the umpire, appointed either by the arbitrators or the Court, is not mentioned.⁴⁰ On the other hand, if the arbitration is conducted in Peking, then the prevailing rules are those of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade.⁴¹ In the third and fourth trade agreements with Japan, dated May 4, 1955 and March 5, 1958, respectively, the Chinese also accepted the country of nationality of the defendant as the location of arbitration and agreed that if the arbitration is conducted in Japan, the rules of the Japan International Commercial Arbitration Association will prevail. However, the arbitrators whom the parties may choose are not limited to those listed by the Association. They may be persons of Chinese and Japanese nationalities or persons of a third country agreed upon by the parties.⁴²

The third form of arbitration clause provides for arbitration at the port of destination. The arbitration tribunal consists of two arbitrators appointed by the disputing parties and an umpire chosen by the arbitrators. This provision is said to be formulated according to international customs.⁴³ No actual examples can be found, however, in Peking's foreign trade documents to substantiate this claim.

The fourth form provides for arbitration in another socialist

39. 2 TYC 35, 36 (1953).

40. 2 TYC 377, 378 (1953).

41. See Hsiao, *supra* note 30, at 314-16.

42. 7 TYC 197, 198-99 (1958). Also see Commercial Arbitration Rules of the Japan Commercial Arbitration Association, revised on June 14, 1963; Arbitration Procedure, Extract from THE CODE OF CIVIL PROCEDURE, JAPAN, 1962.

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country if Peking's capitalist partner refuses to accept China as the location of arbitration.⁴⁴

The fifth form, and perhaps the one most frequently used in Peking's foreign trade contracts with capitalist countries, provides for arbitration in a third country agreeable to both parties. An example of this is the Trade Agreement with the Eastern Commission of German Economy, September 27, 1957, which designates Zurich as the location of arbitration, irrespective of the nationality of the defendant.⁴⁵ As far as the selection of arbitrators is concerned, the local rules are not binding upon the parties. Under a supplemental agreement between the Chinese and the West Germans, when one of the parties fails to appoint an arbitrator within a month, then the local Chamber of Commerce can appoint an arbitrator for that party upon the request of the other party. Likewise, the Chamber of Commerce can appoint the umpire upon the request of either party when the arbitrators themselves have failed to reach an agreement on the appointment of the umpire.⁴⁶

IV. CONCLUSIONS

Commenting on the similarities and differences in the general principles of law between the Soviet Union and the West, Professor John N. Hazard once observed:

If there is to be definition of general principles in the public law field, it is possible that the synthesis will be relatively easy on details of law and procedure, for the Soviet lawyers have fully indicated their interest in Western means of controlling arbitrary officials. The rock on which the ship is likely to founder is the sharp contrast in concept of the role of the supreme executive, for really different views on this subject pervade each system of law.⁴⁷

To a given extent, this observation is also applicable to the present study. With the exception of the state planning system which governs the formation of trade agreements, the General Conditions of Delivery, and contracts, the legal forms and techniques which the Peking regime has employed to execute its international transactions are generally similar to those used by Western nations.⁴⁸ In the area

44. *Id.* at 109-10. No details are available concerning this form.

45. 6 TYC 323, 324 (1957).

46. Exchange of Notes Between the China Council for the Promotion of International Trade and the Eastern Commission of German Economy Concerning the Procedure of Arbitration, Sept. 27, 1957, in 6 TYC 328-29 (1957).

47. Comment, *The General Principles of Law*, 52 AM. J. INT'L L. 91, 96 (1958).

48. For example, compare Peking's FOB and CIF terms with 5 SASSOON, BRITISH SHIPPING LAWS (1968).

of settling disputes, the Chinese preference for the method of reconciliation and mediation represents only a question of emphasis, often resulting in only minor technical differences from the practice of other countries, including the Soviet Union.⁴⁹ Subtle problems related to Peking's foreign trade practice—as in the case of the Soviet Union—lie in its ideological predilections, its political motivation, and the turmoil of its internal politics.

The ideological predilection is manifested in Peking's preference to hold the arbitral proceedings in its own country or some other socialist country. Logically, this approach is inconsistent when applied to trade agreements with non-socialist countries. If a socialist disputant cannot obtain a fair hearing from a capitalist tribunal, how can a capitalist disputant be assured that he can obtain a fair hearing from a socialist tribunal?

The political motivation of the Peking regime demonstrates itself in the choice of arbitration locations. Under the trade agreements with West Germany, which does not recognize diplomatically the Peking regime, and some of the contracts with England, which has recognized the regime since 1950, the arbitration locations are in Zurich and Stockholm respectively.⁵⁰ However, in its earlier trade agreements with Japan, Peking was the sole location of arbitration. In its later agreements and contracts with Japan, Peking agreed to hold arbitral proceedings in the country of domicile of the defendant. Ostensibly, this is consistent with the general rule of private international law. In reality, due to the absence of diplomatic relations between the two countries, the holding of an arbitral proceeding in Tokyo in the presence of the Embassy of the Republic of China would inevitably create troubles for Japan in her diplomatic relationship with Taipei and thereby lead to a situation favorable to Peking. This view was substantiated by the present author's interview with some Japanese trade officials in Tokyo. When asked whether or not the Japanese government was prepared to honor the arbitration clause in the May 4, 1955, and March 5, 1958, trade agreements and some private contracts with Peking, which provide for arbitration in

49. Perhaps because of its traditional background in Roman law, the Soviet Union has certainly showed more interest than Communist China in observing certain formalities in the settling of foreign trade disputes. See, e.g., Ramsaitsev, *The Application of Private International Law in Soviet Foreign Trade Practice*, 1961 J. Bus. L. 343 (1961).

50. The agreements with West Germany have been mentioned above. The contract with the British firm, Vickers-Zimmer, which provides for arbitration in Stockholm, was reported by FEER, July 28, 1968, at 223.

Tokyo if the defendant is a Japanese, the reply was that such a situation was "unlikely to occur" and therefore the Japanese government "has not thought about the problem."

Finally, the effect of internal politics on foreign transactions is best illustrated by the events that have occurred during the "cultural revolution." As a leading British business review in Hong Kong observed:

In previous years they [the Chinese] had established an unmatched reputation for business and financial probity. The *Review* has in the past often drawn attention to the business acumen displayed by their trading officials and their meticulous adherence to the highest standards of trading practice, particularly when any dispute arose. That reputation has now been damaged, perhaps beyond repair, since in the last year or so the Chinese authorities have gone back against their signature on almost every contract which they have signed.

In view of the continued flow, though at slightly lower rates than previous years, of Peking's foreign trade in 1968,⁵² and in light of Britain's recent unhappy relations with Peking over a series of incidents arising out of the riots in Hong Kong, the imprisonment of certain British and other European engineers and correspondents, and the confinement of some British diplomats in Peking, the implication in the above statement that the Chinese authorities have committed a breach of nearly all contracts is perhaps an exaggeration. However, it is unquestionable that the turmoil of the "cultural revolution" has impaired the Peking regime's trade reputation overseas. Until the dust of this political upheaval is settled, it will be difficult to predict the regime's future performance in foreign transactions.

51. Davies, *Twisting the Lion's Tails*, FEER, July 28, 1968, at 228, 233.

52. Tretiak, *Trade Ebbs, Aid Flows*, FEER, July 14, 1968, at 156.

APPENDICES

APPENDIX A

CHINESE-JAPANESE PRIVATE TRADE CONTRACT

The China XX Corporation (hereinafter named Seller) and the Japan XX Company (hereinafter named Buyer); desirous of promoting friendly relations and economic intercourse between the peoples of China and Japan; in keeping with the Chinese-Japanese Three Trading Principles* set forth by Premier Chou En-Lai; and through friendly negotiations; have agreed to conclude and sign this contract, the terms of which are as follows:

Article I

The commodities, commodity names, quantity, specifications, unit price, total value, packing, shipping marks, shipping time, and the loading port of this contract shall be all handled according to the provisions of the Annex of this contract. The Annex is an inseparable part of this contract.

Article II

Methods of Payment: After the conclusion of this contract and within fifteen days before delivering the goods, Buyer shall issue through the bank agreed by Seller a sight letter of credit in pounds sterling to Seller or his branch office as the beneficiary. This letter of credit shall be irrevocable, transferable, divisible and [in the form of] a T/T Reimbursement L/C payable in London. This letter shall be due to expire in China fifteen days after the shipment. Seller shall be allowed to have the option of either increasing or reducing the quantity and sum of the shipping goods specified in the letter of credit by five percent, and also shall be allowed partial shipment and transshipment.

Article III

Terms of Shipment:

1. Within forty-eight hours after loading the export goods, Seller must inform Buyer by telegram of the contract number, commodity name, quantity, the invoice amount, and name of the vessel.

2. Seller has the right to increase or reduce the amount of the goods in each shipment by five percent. The differences arising from the increase or reduction shall be settled according to the price stipulated in the contract.

Article IV

Insurance: Seller shall purchase insurance for All Risks and War Risk in the sum of 110% of the total invoice amount. If Buyer desires to purchase additional insurance or to raise the amount of insurance coverage, he shall bear all additional or increased insurance expenses.

Article V

Commodity Inspection: Due to the fact that the goods are being sold on a trial basis and in a small amount, the quality of the small samples which have been examined by Buyer at the time of negotiation shall serve as the basis of the quality for delivery.

Article VI

Documents: Seller must present to the negotiating bank the following documents: one original copy of the invoice with two duplicates, three original copies of the clean bill of lading with four duplicates, and one original copy of the insurance policy with two duplicates.

* The Chinese-Japanese Three Trading Principles set forth by Premier Chou En-lai call for the conclusion of governmental agreements, private contracts, and individual transactions. For a discussion of this matter, see Hsiao, *Communist China's Trade Treaties and Agreements (1949-1964)*, 21 *VAND. L. REV.* 623, 640 (1968).

Article VII

Buyer shall be responsible for compensation of Seller's losses resulting from the non-performance of this contract because of Buyer's failure to issue the letter of credit provided for in this contract. The amount of compensation shall be five percent of the total value of this contract or five percent of the undelivered portion of this contract. Unless due to *force majeure*, if Seller has failed to make the delivery according to this contract, he shall compensate Buyer's losses. The amount of compensation shall be five percent of the total sum of this contract or five percent of the undelivered portion of this contract.

Article VIII

Force Majeure: If due to incidents of *force majeure*, Seller is unable to make the delivery according to schedule, he may postpone the delivery, wholly or in part; or he may cancel this contract as a whole. However, [in either case] Seller must present to Buyer documents of proof issued by the China Council for the Promotion of International Trade, showing the cause of the incident.

Article IX

Disagreement and Claim: Within ten days after the arrival of the goods at the port of destination, if Buyer disagrees with the quality, quantity, or weight of the goods, he may present his disagreement to Seller on the basis of the inspection report issued by the Japanese commodity inspection administration agreed upon by both parties. (Buyer shall pay the inspection fees.) Seller may refuse to accept any claim for compensation of the losses resulting from natural causes or incidents which belong to the responsibility of the shipping or insurance company.

Article X

Arbitration: All disputes arising from the execution of this contract or related to this contract shall be settled by the contracting parties through negotiation. If no settlement can be made after negotiation, the parties may ask for arbitration. The location of arbitration shall be in the country of domicile of the defendant. If it is in China, the arbitration shall be conducted by the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade in accordance with its arbitral procedures and regulations. If it is in Japan, the arbitration shall be conducted by the Japan International Commercial Arbitration Association in accordance with its arbitral rules. The candidates of arbitrators shall not be limited to those listed by the Japan International Commercial Arbitration Association, but shall be limited to persons of nationality of the People's Republic of China and Japan and persons of nationality of a third country agreed by both parties. The arbitration award is final. Both contracting parties shall obey the award. Each party is to obtain consent from his own government to provide the other party with all facilities for the conduct of arbitration and the entry and exit of arbitral persons and to assure their safety. Unless otherwise provided for by the arbitration commission/association, the losing party shall pay for all arbitration fees.

This contract is concluded and signed in Peking on X month XX day, 1963, with two original copies, one for each party.

ANNEX OF THE CONTRACT

- Section I Commodity Name:
- Section II Specifications:
- Section III Quantity:
- Section IV Unit Price: CIF
- Section V Total Value:
- Section VI Packing:
- Section VII Shipping Marks:
- Section VIII Date of Shipment: partial shipment and transshipment allowed.

APPENDIX B

CHINESE-JAPANESE PRIVATE TRADE CONTRACT

The China XX Corporation (hereinafter named Buyer) and the Japan XX Company (hereinafter named Seller); Desirous of promoting friendly relations and economic intercourse between the peoples of China and Japan; in keeping with the Chinese-Japanese Three Trading Principles set forth by Premier Chou En-lai; and through friendly negotiations; have agreed to conclude and sign this contract:

Section I—Name of Object and Specifications:

Section II—Quantity:

Section III—Unit Price: FOB

Section IV—Total Value:

Section V—Insurance: To be handled by Buyer.

Section VI—Packing:

Section VII—Loading port, Port of Destination, and Shipping Marks:

(1) Loading Port:

(2) Port of Destination:

(3) Shipping Marks:

Section VIII—Date of Shipment:

Section IX—Country of Origin and Manufacturer:

Section X—Terms of Payment: Upon concluding this transaction, Buyer shall issue an irrevocable letter of credit in pounds sterling payable to the order of Seller through the Bank of China in Peking. Seller may negotiate payment with the issuing bank in accordance with the documents provided for in Article I of the Delivery Conditions attached to this contract. The letter of credit is valid for fifteen days after the date of shipment.

Section XI—Other Terms: All other matters relating to this contract shall be handled according to the Delivery Conditions (on the reverse side of this contract). The Delivery Conditions is an inseparable part of this contract. In case [any of] the Delivery Conditions is in conflict with the Additional Terms provided for in Section XII of this contract, the provisions of the said Additional Terms shall prevail.

Section XII—Additional Terms:

(1) This contract is concluded on the basis of the negotiations between representatives of Buyer and Seller at the China Export Fair in the spring of 1965.

(2) This contract is written in Chinese in two copies, one for each party.

DELIVERY CONDITIONS

Article I: Documents

1. In order to negotiate payment, Seller must present to the paying bank the following documents:

a) Three copies of the clean bill of lading that is made out in blank order and blank endorsement and that can be used for the negotiation of payment of the goods already loaded on an ocean-going vessel. The clean bill of lading must record that notice will be served to the China Foreign Trade Transportation Corporation at the port of destination. (When the delivery is made according to FOB terms, note must be taken to the effect that "Freight Is To Be Collected." When the delivery is made according to C & F terms, note must be taken to the effect that "Freight Has Been Prepaid.")

b) Four copies of invoice with the serial number of the contract.

- c) Four copies of the packing list/weight note.
 - d) A certificate of quality and a certificate of quantity/weight issued by the Japanese commodity inspection administration or manufacturer.
 - e) A copy of the telegram which Seller has sent to Buyer after the completion of loading.
2. In addition to a copy of the telegram concerning the completion of loading, Seller must also send a complete copy of the documents mentioned above to Buyer's consignee, the China Foreign Trade Transportation Corporation at the port of destination by the vessel which carries the goods. Within two days after the departure of the vessel from the loading port, three additional copies of the documents must be sent by air mail: two copies to Buyer and one copy to the China Foreign Trade Transportation Corporation at the port of destination.

Article II: Terms of Shipment

1. When the delivery is made according to C & F terms:
- a) Seller shall, within the time provided for in Section VIII of this contract, be responsible for loading the goods on a vessel which will directly sail from the loading port to China and the port of destination in China. There shall be no transshipment en route; nor shall a vessel of American nationality be used [for shipment of the goods].
 - b) Before arriving at the port of destination provided for in paragraph (2), Section VII of this contract, the vessel that carries the goods shall not stop at any American port or at Taiwan or at areas nearby Taiwan.
 - c) When a Japanese vessel is used, regulations of the Government of the People's Republic of China concerning the sailing of Japanese vessels to China must be observed.
2. When the delivery is made according to FOB terms:
- a) Buyer or his shipping agent, the Sinofracht Chartering and Ship Broking Corporation (cable address: SINOFRACHT PEKING) shall charter freight space in a vessel for the shipment of the goods specified in this contract. Within the time provided for in Section VIII of this contract, and in accordance with the date designated by Buyer or his shipping agent, Seller shall be responsible for having the goods ready [for shipment] and for loading the goods on board the designated vessel.
 - b) Fifteen days before the shipment of the goods, Buyer or his shipping agent must notify Seller by telegram of the name of the vessel, the loading date, the loading port, the serial number of the contract, commodity name, quantity, and the name of agent of the vessel, so that Seller can have his goods ready for shipment. When there is a change in the name of the vessel, the loading date, and the quantity mentioned above, Buyer or his shipping agent must notify Seller promptly.
 - c) When the vessel chartered by Buyer has arrived at the loading port and Seller is unable to supply the goods for shipment on the designated date, Seller shall bear all expenses arising from [the cost of] empty freight space and the delay. [On the other hand], when the vessel chartered by Buyer has failed to reach the loading port on the designated date, then beginning the sixteenth day after the expiration of the loading period, Buyer shall pay Seller all losses resulting from warehousing and insurance. The payment of expenses by either Seller to Buyer or Buyer to Seller shall be all made on the basis of formal invoices.

Article III: Shipping Advice

1. No later than ten days before shipping the goods, Seller must by telegram inform Buyer and his consignee, the China Foreign Trade Transportation Corporation at the port of destination, of the contract number, commodity name, quantity of the goods to be shipped, sum of money, name of the vessel, loading port, and sailing schedule of the vessel.
2. After loading the goods, Seller must immediately inform by telegram Buyer and his consignee, the China Foreign Trade Transportation Corporation at the port of destination, of the contract number, commodity name, the quantity loaded and the gross weight, the number of units, the invoice value, name of the vessel, the shipping port, the date of departure of the vessel, and the port of destination.

3. When Seller has failed to give timely shipping advice to Buyer by telegram and Buyer has for this reason been unable to purchase insurance for the goods in time, Seller shall be responsible for the compensation of all losses resulting therefrom.

Article IV: Inspection

1. The goods delivered according to this contract must, before their delivery, be inspected by the Japanese commodity inspection administration or manufacturer with respect to their quality, specifications, and quantity/weight. [The inspector] must issue certificates of inspection. These certificates shall serve as part of the documents for the negotiation of payment.

2. Seller must guarantee that the quality and specifications of the goods delivered are entirely consistent with those specified in this contract. After the arrival of the goods at the port of destination, Buyer has the right to authorize the local Chinese Commodity Inspection Bureau to carry out reinspection of the quality, specifications, and quantity of the goods. If it is found that the quality and specifications of the goods are inconsistent with those specified in the contract, or that the quantity/weight of the goods is inconsistent with that indicated in the invoice, then unless the responsibility [for this inconsistency] belongs to the shipping company or the insurance company, Buyer may within sixty days after the arrival of the goods at the port of destination return the goods to Seller or claim compensation from Seller on the basis of the inspection certificates issued by the Chinese Commodity Inspection Bureau. Seller shall be responsible for all expenses and losses (including reinspection fees) resulting from the returning of the goods or the claim.

Article V: Force Majeure

If Seller is unable to make the delivery according to schedule or cannot make the delivery at all because of *force majeure*, such as war and the grave natural disasters of flood or fire, in the process of either manufacturing, or loading, or shipping, he may decline to assume any responsibility. However, upon learning of the incident Seller must immediately notify Buyer by telegram, and within fifteen days after sending the telegram, he must send Buyer, by registered air mail for Buyer's examination, documents of proof issued to him by the Chamber of Commerce or the registered public notary in the area where the incident of *force majeure* has taken place. Under such circumstances, Seller must take necessary measures to make up the undelivered goods. If the incident of *force majeure* continues to exist for more than a month, Buyer has the right to rescind the contract.

Article VI: Penalties for Late Delivery

When Seller has delayed the delivery, Buyer has the right to rescind the contract. Or, with Buyer's consent, Seller may delay the delivery by paying a penalty. If the delay is less than two weeks, Seller shall pay a penalty of one percent of the total value of the delayed goods. Thereafter, the penalty shall increase by one percent for each two additional weeks of delay. However, the maximum amount of penalty shall not exceed five percent of the total value of the delayed goods. The penalties shall be deducted by the paying bank at the time of negotiation of payment [by Seller].

Article VII: Arbitration

[The same as the provisions of Article X of the Chinese-Japanese Private Trade Contract in Appendix A.]

APPENDIX C

CHINESE-JAPANESE L-T TRADE CONTRACT

In accordance with the memorandum and agreement of November 9, 1962, between Mr. Liao Ch'eng-chih and Mr. Tazunosuke Takasaki, the China XX Corporation (hereinafter

named Buyer) and . . . (hereinafter named Seller) have agreed to conclude and sign this contract, the terms of which are as follows:

Article I

Commodity Name and Specifications (material quality):

Article II

Technical Data: Thirty days before making the delivery, Seller shall send Buyer by mail the following technical data:

Article III

Country of Origin: Japan

Article IV

Manufacturer:

Article V

Quantity:

Article VI

Unit Price:

Article VII

Total Value:

Article VIII

Insurance: To be handled by Buyer.

Article IX

Packing: Packing shall be made with durable [materials] that can endure moving, are moisture-proof, shock and rust resistant, and will suit long-range ocean transportation. Manuals for the operation of [the machines delivered] and technical data shall be included in the package. External packing shall meet the normal standards, but Seller shall bear losses resulting from improper internal packing.

Article X

Shipping Marks: Seller must clearly indicate with ink/paint [on the package] the gross weight, net weight, box numbers, capacity, and such other shipping marks as follows:

Article XI

Loading Port: _____, Japan; this may be changed after agreement by both parties.

Article XII

Port of Destination: _____, China; this may be changed after agreement by both parties.

Article XIII

Date of Shipment:

Article XIV

Terms of Payment: Within two weeks after receiving from Seller the export license number and the name of the designated Japanese bank which has business relations with the Bank of China in Peking, Buyer must through the Bank of China in Peking directly issue an irrevocable, transferable, assignable, and divisible letter of credit in pounds sterling to Japan with the designated Japanese bank serving as the notifying bank and Seller as the beneficiary. The amount of the letter of credit shall be equal to the total value of this contract. Note must be

taken in the letter of credit that payments shall be made through a period of time with five percent interest. On the basis of this letter of credit, Seller must issue a time draft payable 547 days (i.e., one and a half year) after the date of the bill of lading with the issuing bank as the payer. Together with the documents provided for in Article XV of this contract, Seller must present the said draft to the notifying bank for acceptance and payment by the issuing bank when the draft is due. On the basis of Seller's interest receipts, the issuing bank also shall pay the interest from the date of issuance of the draft (this date cannot be earlier than the date of the bill of lading) to the date when the draft is due. The amount of interest shall be calculated at the annual rate of five percent. The letter of credit shall become void fifteen days after the shipment.

Article XV

Documents for Payment: In order to negotiate payment, Seller shall, after the shipment, present to the paying bank the following documents:

1. Three copies of the clean bill of lading that is made out in blank order and blank endorsement and that can be used for the negotiation of payment of the goods already loaded on an oceangoing vessel. Note must be taken that "Freight Has Been Prepaid," and that the China Foreign Trade Transportation Corporation at the port of destination will be notified.
2. Five copies of invoice with the contract number, commodity name, quantity, unit price, and total value. If the shipment is partial, the sequential number of each shipment must be noted.
3. Two copies of the packing list.
4. A certificate of quality and a certificate of quantity issued by the Japanese commodity inspection administration or manufacturer as agreed upon by the two contracting parties.
5. One copy of the manual explaining in detail the process of operation and one copy of the technical data specified in Article II of this contract, or a certificate showing that the above-mentioned documents have been included in the package of the goods.

By the vessel that carries the goods, Seller must send a copy of the documents mentioned in paragraphs 1, 2, and 3 of this Article to Buyer's consignee, the China Foreign Trade Transportation Corporation at the port of destination. In addition, within three days after the departure of the vessel [from the loading port], Seller must send by air mail a copy of these documents to both Buyer and the China Foreign Trade Transportation Corporation at the port of destination.

Article XVI

Terms of Shipment:

1. Within the period stipulated in Article XIII of this contract, Seller shall be responsible for shipping the goods directly from the loading port to the port in China. There shall be no transshipment en route.
2. Before arriving at the port in China, the vessel that carries the goods shall not stop at any American or Taiwan area, nor shall a vessel of American nationality be used [for shipment of the goods.]
3. If the vessel chartered by Seller is a Japanese ship, it must observe the regulations of the Government of the People's Republic of China concerning the sailing of Japanese vessels to China.

Article XVII

Shipping Advice:

1. No later than ten days before loading of each shipment, Seller must inform Buyer by telegram of the contract number, commodity name, quantity of the goods to be shipped, sum of money, name of the vessel, the shipping port, and sailing schedule of the vessel.

2. After loading the goods, Seller must by telegram immediately advise Buyer and the China Foreign Trade Transportation Corporation (cable address: "SINOTRANS") at the port of destination, of the contract number, commodity name, the quantity loaded and the gross weight, the invoice value, name of the vessel, the shipping port, the date of departure of the vessel, and the port of destination.

3. When Seller has failed to give timely shipping advice to Buyer by telegram and Buyer has for this reason been unable to purchase insurance for the goods in time, Seller shall be responsible for the compensation of all losses resulting therefrom.

Article XVIII

Guaranty of Quality: Seller shall guarantee that the quality, specifications, and technical conditions of the goods in this contract are consistent with those provided for in Articles I and II of this contract. The period of guaranty shall be X year after the arrival of the goods at the port of destination. During this period, Seller shall be responsible for damages arising from design or manufacturing defects, provided that Buyer has adhered to the conditions of machines set forth in the operating manual. On the basis of the inspection certificate of the Chinese commodity inspection administration and upon Buyer's request, Seller must repair the machines without charge, or replace the parts of the machines without compensation, or replace the whole machines without compensation. In this latter event, Seller shall pay in cash for all transport expenses arising from the replacement of the machines from [and to] the place where the machines have been [installed and] used. In addition, Seller shall pay in cash for Buyer's inspection fees and losses of interest. If Seller disagrees with Buyer's demand, he may within two weeks after receiving the demand ask for reconsideration. After that period, it shall be considered that Seller has accepted Buyer's demand.

Article XIX

Supply of Parts: Within five years after the date of delivery specified in this contract, and in accordance with the conditions of Buyer's order, Seller must guarantee the supply of parts and accessories of the goods in this contract at fair and reasonable prices.

Article XX

Inspection and Claim:

1. Before delivering the goods, Seller shall make precise and detailed inspection of the quality, specifications, and quantity of the goods through the Japanese commodity inspection administration or manufacturer as agreed upon by both parties. [The inspector] shall issue certificates of inspection, showing the technical statistical basis and conclusions of the inspection in accordance with the items of technical data provided for in Article II of this contract.

2. After the arrival of the goods at the port of destination, Buyer may authorize the Chinese commodity inspection administration to reinspect the specifications and quantity of the goods. If it is found that the goods have been damaged or the specifications and quantity of the goods are inconsistent with those provided for in this contract, Buyer may, within sixty days after the arrival of the goods at the port of destination, claim for compensation from Seller on the basis of the certificate of inspection issued by the Chinese commodity inspection administration. In accordance with Buyer's demand, Seller must replace that portion of the goods which is inconsistent with the provisions of this contract, make up the deficiencies, or reduce the prices of the goods. In addition, Seller shall bear all transport expenses arising from the shipment of the replacement to the port of destination, and shall pay for Buyer's inspection fees and losses of interest. All these expenses of Buyer's shall be sent to Buyer in cash. If Seller disagrees with Buyer's demand, he may within two weeks after receiving the demand ask for reconsideration. After that period, it shall be considered that Seller has accepted Buyer's demand.

3. Reinspection of the quality of the goods shall be carried out in accordance with the provisions of Article XVIII of this contract.

Article XXI

Force Majeure: Within the period of shipment provided in this contract, Seller may refuse to assume responsibility for failing to make the delivery according to schedule, or for being unable to make the delivery at all, because of incidents of *force majeure*, such as war and the grave disasters of flood, fire, wind, snow, and earthquake. However, upon learning of the incident, Seller must by telegraph immediately inform Buyer. Within fifteen days after sending the telegram, Seller must send, by air mail for Buyer's examination, documents of proof issued by the Chamber of Commerce or public notary at the place where the incident of *force majeure* has occurred. Under such circumstances, Seller must take necessary measures to make up the undelivered portion of the goods and inform Buyer the full details of the measures that Seller has undertaken. In accordance with the factual situation, Buyer may approve [Seller's measures] or rescind the contract. If the incident of *force majeure* continues more than ten weeks, Buyer has the right to rescind the contract of the goods.

Article XXII

Penalties for Late Delivery: With the exception of incidents of *force majeure*, if there is delay in delivery arising from Seller's responsibility, Seller must pay a penalty of one percent of the total value of the delayed goods for each two weeks of delay. If the period of delay is less than two weeks, the penalty shall be calculated on the basis of two weeks. After the first two weeks, the penalty shall increase by one percent for each additional two weeks. However, the total amount of penalties shall be no more than five percent [of the total value of the delayed goods]. Seller shall pay the penalties to Buyer in cash. In addition, fourteen days before the date of delivery provided for in this contract, Seller must present to Buyer a document showing the progress of production of the manufacturer and a new date of delivery. If the delay exceeds ten weeks, Buyer has the right to rescind the contract of the delayed goods without going through the process of arbitration. At the same time, Seller shall pay Buyer a penalty of five percent of the total value of the goods. If the rescission has resulted from Seller's delay in the delivery of the entire goods ordered, Seller must immediately pay the penalty.

Article XXIII

Arbitration: [The same as the provisions of Article X of the Chinese-Japanese Private Trade Contract in Appendix A.]

*Article XXIV**Additional Terms:*

1. Through the same Japanese bank specified in Article XIV of this contract, Seller must guarantee the payment of losses, compensation, and penalties provided for in Articles XVII, XVIII, XX, XXI, and XXII of this contract. The guaranty of the bank must show that the amount due to Buyer shall be calculated at the annual interest rate of five percent from the day when Buyer presented his disagreement to the day when the payment is due. The payment shall be sent to Buyer when Seller collects the payment of the goods.

2. Other matters relating to this contract shall be handled according to the provisions of the memorandum and agreement of November 9, 1962, between Mr. Liao Ch'eng-chih and Mr. Tazunosuke Takasaki.

