The Industrial Cooperation Contract in East-West Trade

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I. INTRODUCTION TO THE INDUSTRIAL COOPERATION CONTRACT

The industrial cooperation contract is considered to be one of the most important legal institutions in the East-West trade. In the early 1960s, this institution began to be used in contractual practice between the enterprises of capitalist and socialist states. The 1970s witnessed particular and extensive development of this type of contract. Even the cooling of political and economical relations between East and West in the late 1970s and early 1980s had no considerable negative effect on the significance of industrial cooperation contracts in the trade between states belonging to different socio-economic systems.¹

The popularity of the industrial cooperation contract stems from advantages arising from the very phenomenon of international industrial cooperation. The socialist state considers industrial cooperation with a highly developed capitalist state a means of securing rapid economic modernization and development. Industrial cooperation reduces the technological gap that the socialist experiences vis-à-vis capitalist states. In addition, the socialist state considers this kind of cooperation a vehicle to stimulate its exports to the West. Cooperation secures the advantageous structure of such exports, and consequently may improve the balance of payments in relation to the West.

Economic improvement is considerable due to all the new technology provided by the Western partner in the shape of licenses and know-how which reaches the socialist state. This influx reduces the research and development costs of the socialist partner and stimulates implementation of technical innovations. The new technological and organizational methods are often responsible for a rise in quality, competitive capacity and attractiveness of products manufactured in the socialist state. These methods frequently lead to a reduction of raw materials consumption, and lay the foundation for technical and organizational progress at the national as well as enterprise level. Such progress allows

the state to meet native consumption needs more fully, and to advantageously affect the restructuring of the socialist economy, contributing to a gradual decrease in foreign indebtedness.

Often Western economic units cooperate with Eastern enterprises in order to extend raw material supplies, as well as to open new markets. Western enterprises are attracted by the relatively lower production costs, especially in the area of labor, that are characteristic of the less industrialized countries. This labor factor allows Western enterprises to shift less profitable production processes to Eastern states, thereby freeing domestic production capacity for more profitable types of manufacture. Moreover, production responsible for greater environmental pollution is doubtlessly more likely to be shifted somewhere else—such as to Eastern states.

These economic advantages have resulted in a convenient legal pattern in industrial cooperation agreements concluded between Eastern and Western governments; a pattern particularly found in long term contracts for economic, industrial, scientific and technical cooperation which are included in the category of public international law contracts. Government safeguards that extend to increased import and export quotas, as well as those pertaining to tariffs vis-à-vis trade transactions recognized as industrial cooperation, reflect this convenient pattern.

The pattern does not, however, provide for precise forms of cooperation. In practice the form may be that of a simple draw-back, subcontract or license for resultant products. The form may be an exchange of complete plants or production lines for payment in resultant products, or it may be more complicated such as coproduction and joint ventures.

East-West industrial cooperation is expected to materialize in the

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4 S. Szczypiorski, supra note 2, at 153-54; A. Wieczorkiewicz, supra note 2, at 63-68.


shape of enterprises formed on the basis of private law contracts concluded among potential contractors. These enterprises are the entities which decide the form that the cooperation will take. Consequently, cooperation is limited by such circumstances as production possibilities; technological and organizational levels; raw materials availability; and market conditioning.

Both Western and Eastern enterprises tend to qualify simple trade transactions, such as sale and delivery, as industrial cooperation contracts. This classification artificially expands the notion of industrial cooperation. In view of this tendency, it has become urgent to precisely define the terms “international industrial cooperation” and “industrial cooperation contract” in East-West relations.

The problem is not simple, as no definition has been accepted, in either doctrine or practice by both East and West. Analysis indicates that industrial cooperation may make up a separate economic institution with a scope narrower than that of its etymological counterpart, the Latin word “cooperare.” Attempts to arrive at the essence of international industrial cooperation invariably refer to improvised drafts of definition suggested by conference specialized United Nations (“UN”) organizations such as the Committee on Trade and Development (“UNCTAD”) or the Economic Commission for Europe (“ECE”). In the definition drafts, the contract—a legal category—is invoked to explain economic phenomenon. It would be of no avail, therefore, to create two separate definitions for the word “cooperation” in international in-

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dustrial cooperation and industrial cooperation contracts in East-West relations.

The terms found in the most representative document generalizing contractual practice in industrial cooperation will be used in this Article. This document is the 1976 ECE Guide on Drawing Up International Contracts on Industrial Cooperation ("ECE Guide"). The ECE Guide provides for the following definition:

[T]he contract of industrial cooperation means operations which go beyond the straightforward sale on purchase of goods and services and which involve the creation between parties belonging to different countries—of a lasting community of interests designed to provide the parties with mutual advantages. Such contracts relate to, _inter alia_, the following:

1. transfer of technology and of technical experience,
2. cooperation in the field of production including, where appropriate, cooperation in research and development in the specialization of production,
3. cooperation in developing natural resources, and
4. joint marketing or marketing on joint account, in the countries of parties to the contract or in the third markets, of the products of international cooperation.

This definition draft is a starting point for the following analysis. This Article starts with a review of contracts recognized as industrial cooperation contracts in contractual practice, then goes on to the content of the model of industrial cooperation contract, and concludes with the question of legal regulation of contract in international and domestic law.

**II. CONTRACTS CONSIDERED INDUSTRIAL COOPERATION CONTRACTS IN CONTRACTUAL PRACTICE**

Despite essential differences in legal content, various types of contracts are deemed industrial cooperation contracts in contractual practice. All these contracts are reflective of the economic phenomenon known as international industrial cooperation. As there are a large number of these contracts, it would advisable to systematically analyze them to arrive at their more precise image. Three separate categories capable of covering all the industrial cooperation contracts occur. These categories include steered production, contracts for coproduction and joint venture contracts.

In steered production contracts, the economically stronger party

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10 _Id._
(usually the Western party), on account of its earlier contributions in shape of licences, know-how, equipment or even complete industrial structures, has a direct influence on the production of cooperative elements or final products manufactured by the economically weaker party. The stronger party receives compensation for earlier contributions in the form of an equivalent supply of a produced commodity.

In coproduction contracts, the parties' economic potentials closely approximate each other. As a result, they can establish closer economic cooperation such as separate production of specialized components of the final product.

In joint venture contracts, partners fully integrate their economic activities by joint actions. As a result, the partners' economic objectives are more than convergent—which is typical of the aforementioned systems—but actually nondivisible. Joint actions may often be bound by forming certain organizational structures.

A. Cooperation Contract within the Frame of Steered Production

(1) Subcontracting

Subcontracting is the simplest type of international industrial cooperation contract. In this contract the economically weaker partner ("subcontractor") produces and subsequently delivers an agreed quantity of semimanufactured or finished goods to the stronger partner ("contractor" or "principal"). To achieve this effect, the principal is expected to provide the weaker partner with technology, machinery, equipment and sometimes raw materials. The relative simplicity of the principal's obligations differentiates subcontracting from other types of cooperation contracts in the area of steered production.

Subcontracting exemplifies the type of contract in which the economic essence of industrial cooperation is most apparent as the effects of economic activity of one party are implemented in the economic activity of the other party. This results from the production process of the specific commodity being divided between the two. Production steering in the form of the transfer of technology is determinative of the synchronization of industrial cooperation, and thereby forms a complementary system.

Additional operations such as technical supervision, instruction of subsuppliers' employees, and subsuppliers themselves, strengthen the
nexus between the partners' durable community of interests.\textsuperscript{14} Durability of the enterprise is not limited by arbitrary time criteria, but only by the continuation of the partners' ability to gain mutual advantage from the relationship. The arrangement and content of tasks lead to the conclusion that without a longer cooperation period, optimal economic conditions could hardly be affected.

Subcontracting is applicable mostly in cases when the partners considerably differ in their economic potentials. Such a situation is characteristic for East-West industrial cooperation in which the stronger Western partner—the principal—provides modern technology and methods of organization while the weaker Eastern partner—the subcontractor—guarantees raw materials and lower production costs.\textsuperscript{15}

(2) Production Made to Order and Draw-Back

Two other simple forms of joint actions should be differentiated from subcontracting. These forms are production made to order (\textit{Auftragsfertigung}), the principal orders production of a specific commodity, and the subcontractor performs using exclusively its own technology, raw materials, machinery, equipment and employees.\textsuperscript{16} As there is no division of the production process, there is no need to synchronize the manufacturing process. Production is autonomous, performed entirely within the enterprise receiving the order. The principal has no impact on the course of production because no contributions are provided to further the manufacturing process. The principal is limited to paying for finished products. As a result, no complementar relationship, and consequently no lasting community of interests is created. For these reasons production made to order cannot be deemed true industrial cooperation.

Draw-back (\textit{Lohnverreldung}) is characterized by the subcontractor's contribution of labor only.\textsuperscript{17} First, improved product components or finished goods are returned to the principal, who pays for the labor. Unlike


\textsuperscript{15} W. von Lingelsheim-Seibicke, \textit{supra} note 14, at 70-72.


production made to order, division of production and synchronization, are present, creating a complementary arrangement of tasks. Consequently, draw-back must be recognized as a type of industrial cooperation, yet it cannot be categorized as subcontracting because production steering by earlier contributions of a principal is missing. Additionally, both production made to order and draw-back are not countertrade—i.e., compensatory—transactions, as clearing of accounts will follow in cash.

(3) Licensing with Payment in Resultant Products and Supply of Complete Plants of Production Lines with Payment in Resultant Products

Both licensing with payment in resultant products and supply of complete plants or production lines with payment in resultant products are steered production contracts. These contracts differ from subcontracting or draw-back in that the tasks performed by the principal are more complicated and complex in content.

When licensing in resultant products is used, the licensee is obligated to pay for the license in manufactured goods over time. In a contract for supply of complete plants or production lines with payment in resultant products, one partner—the executor or recipient of order—is obligated to perform all tasks necessary to create an industrial structure or technological line of specific parameters, and successively transfer it to the investor. The investor is obligated to gradually compensate the executor with goods produced. Often, the executor's tasks include geological examination of the investment area; preparing works connected with site location; elaboration of project documentation; supply of materials, machinery and equipment; construction of facilities; assembly of machinery, equipment and management; setting the structure in mo-

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tion; carrying out production simulation test; instruction of personnel; and securing a supply of spare parts.

The earlier contributions of one party in the form of licensing or supply of complete plants or production lines being repaid by the other party with goods produced exclusively on the basis of these very contributions do not, however, make these compensatory transactions counter-trade contracts.\textsuperscript{20} Other elements must, therefore, be the cause of the long term cooperative nature of industrial cooperation contracts. Such elements would indicate that the parties did not pursue merely one extended transaction, but entered into long term cooperation, giving rise to lasting synchronization of economic activities.

For these reasons licensing and the supply of complete plants or production lines cannot be an exclusive contract target. The licensor or supplier of complete plants must show an interest in the product of their partner that goes beyond mere qualitative and quantitative receipt.\textsuperscript{21} This interest may be manifested in activities which induce persistent improvement of technology, product quality and a reduction of raw materials consumption. The parties may undertake the improvement actions separately, provided that they are mutually obligated to inform each other of the means of performance and results attained. They may also undertake joint actions. The latter case lays a foundation for stricter cooperation in the future within a more complex cooperative framework.

\textbf{B. Coproduction Contract}

The coproduction contract consists of parallel production of the same final product by two partners of equal technological and organizational abilities; each of them producing a different component of the product.\textsuperscript{22} Research indicates that coproduction is a higher and more complex form of cooperation.\textsuperscript{23} In East-West relations, two most frequently occurring types of coproduction are based on a license being provided by the Western partner. In the first type of licensing arrangement, the Eastern partner assembles components received from the Western partner in accordance with the Western partner's directions. In the second type, the Eastern partner produces a fixed number of components of the future final product and supplies them to the Western partner, who focuses exclusively on manufacturing the remaining components and

\textsuperscript{20} \textit{Analytical Report}, \textit{supra} note 7, at 7-8; \textit{The Scope of Trade-Creating Industrial Cooperation}, \textit{supra} note 8 at 8-9; \textit{East-West Industrial Cooperation}, \textit{supra} note 8, at 4-5; \textit{Industrielle Ost-West Kooperation}, \textit{supra} note 16, at 107-11; W. von Lingelsheim-Seibicke, \textit{supra} note 14, at 76.

\textsuperscript{21} \textit{Analytical Report}, \textit{supra} note 7, at 10; \textit{The Scope of Trade-Creating Industrial Cooperation}, \textit{supra} note 8, at 9-11.

\textsuperscript{22} F. Levčik & J. Stankovsky, \textit{supra} note 6, at 49.

\textsuperscript{23} W. von Lingelsheim-Seibicke, \textit{supra} note 14, at 73-75.
supplying them, in exchange, to the Eastern partner. Consequently, both partners independently assemble the final product.

Coproduction is strictly bound to specialization. This relationship is reflected in the way this contract is referred to in the documents of international organizations—i.e., coproduction and specialization.24 This wording means that the provisions of the contract pertaining to specialization are as important as those relating to synchronization of the partners' operations. As an element of cooperation, specialization may refer both to the production of respective parts and to variants of the final product.25 Specialization of parts requires the parties to exchange a pre-determined quantity of produced cooperation elements, so that each may manufacture the same final product. Specialization of variants exceeds these borders because, irrespective of the circumstances stated above, each party focuses on assembling different models of the final common product.

The coproduction contract constitutes a separate category of commercial activity than that of steered production for two reasons. Primarily, in coproduction each party is the producer of both the final product and its respective components, while in steered production one party is the final product maker, the other is a producer of components. In addition, specialization has an independent and equal nature, while steered production relies on the synchronization of economic operations of the two parties.

C. Joint Venture Contract

The distinctive feature of the joint venture contract is the obligation of the parties to perform joint actions in order to attain a common economic effect created while economic and legal separateness of the parties is preserved. In order to reach the common economic effect, that the parties must have, not merely convergent, but identical objectives. The common nature of the their actions is reflected by combined parallel economic activities, instead of reciprocal tasks. The activities of joint venturers are limited related exclusively to the common undertaking.26

The joint venture is considered identical to capital cooperation, an activity based on the merger of capital outlays as well as technical, organizational and commercial skills. A joint account of losses and gains from capital cooperation reflects the joint sharing of risks involved in the

24 See supra note 20 and accompanying text.
25 W. von Langelheim-Seibicke, supra note 14, at 75-76; F. Levcek & J. Stankovsky, supra note 6, at 49; Industrielle Ost-West Kooperation, supra note 16, at 122; M. Schmitt, supra note 14, at 82-83.
26 The Scope of Trade-Creating Industrial Cooperation, supra note 8, at 10-11; East-West Industrial Cooperation, supra note 8, at 13-16.
undertaking.\textsuperscript{27}

The distinctive feature of joint ventures is the sharing of the newly created economic unit. The partners jointly govern this economic unit and keep a common account of losses and gains, all of which leads to the identification of their objectives. In an economic sense, the unit is separate, but as a rule it has no separate legal status.\textsuperscript{28}

No common view has been adopted vis-à-vis the legal content of a joint venture, which is widely understood to be a contractual joint venture, a partnership or a proprietorship.\textsuperscript{29} However, most authors view joint ventures in narrow terms, considering them a separate legal class close to partnership.\textsuperscript{30} Yet, they differ from partnership in being more limited in range and durability and being less formal.\textsuperscript{31} Though a contract makes up the basis of the rights and duties of the parties in a joint venture—i.e., joint venture comes to being only \textit{ex contractu}—partnership rules still may be applicable. This result is possible since a joint venture constitutes no new specific legal regulation when compared to a partnership. Some authors equate joint ventures with partnerships.\textsuperscript{32} Others stress that joint ventures should be narrowed to mean contractual joint ventures which would limit the parties’ rights to the contract, any unresolved questions resolved by the general principles of contract law.\textsuperscript{33} The latter view is the best reflection of the contract of manufacture cooperation, a new legal category, which has been made distinctive from partnership or proprietorship through contractual practice.

\textsuperscript{27} E. Tabaczyński, \textit{Kooperacja przemysłowa z zagranica} (Industrial Coopera-
tion Abroad) 92 (1976).

\textsuperscript{28} See, e.g., Brown, \textit{International Joint Venture Contracts in English Law}, 5 \textit{Droit et Pratique du Commerce Int’l} 155 (1979); P. Norton, \textit{Successful Negotiation of Commercial Contracts} 58-61 (1979); E. Herzfeld, \textit{Joint Ventures} 7 (1983); C. Melcher, \textit{Die Joint venture Vereinbarung unter besonderer Berücksichtigung ihres Bestandes nach In-
korporation} 5 (1971); Erhardt, \textit{Joint East-West Ventures}, in \textit{OSTEUROPA, GEMEINSCHAFTSUN-


\textsuperscript{31} J. A. Crane & A. R. Bromberg, \textit{supra} note 30, at 189-95; Sive, \textit{supra} note 30, at 481-84; C. Rohrlích, \textit{Organizing Corporate and Other Business Enterprises} 2, 28-31 (1986).

\textsuperscript{32} W. G. Friedmann & G. Kalmanoff, \textit{Joint International Business Ventures} 5-6 (1961); G. Cabanelas, \textit{supra} note 29, at 6-8.

\textsuperscript{33} McPherson, in \textit{Equity and Commercial Relationship} 19-47 (P.D. Finn ed. 1986); G. Stedman & J. Jones, \textit{supra} note 29, at 150-51.
Due to the following factors, joint ventures have rapidly expanded in East-West as well as East-West-South practice. First, foreign capital is provided with stronger security because it merges with local capital. This security guarantees state support of the joint venture, instead of a restrictive policy. Second, the receiving state, as a rule the socialist or developing state, does not formally limit its authority to the imperious ("imperium") sphere only, but as a co-owner of the undertaking extends its rights to the private law sphere ("dominium"). For these reasons joint ventures have become almost routine in cases of tripartite East-West-South cooperation, thereby comprising most joint tendering and joint projects. Recently, joint ventures are becoming more common in East-West relations since most socialist states now admit foreign capital on their territory.

The need of special laws providing express regulation of joint ventures is needed because the socialist state has a monopoly over foreign trade. When adopted, such special laws are called "legal regulations of joint venture with foreign capital shares." These regulations vary as these are parliament-created enactments in Poland and Yugoslavia; statements provided by the Head of State in the USSR, Bulgaria and Rumania; and ministerial department dispositions in Hungary.

The regulations provide limits on foreign capital import, which may consist of: obligating the parties to the joint venture to obtain the appropriate administrative branch permission; excluding the joint venture from certain domains of economic life; demanding only a minority share be owned by the foreign investor; and introducing upper limits for foreign investment, foreign capital outlays, and for the transfer of gains abroad. These regulations are constantly changing, with the tendency towards the liberalization and cancellation of the aforementioned limits. Regardless of the potential for improvements, at present the situation is far from being satisfactory.

Each of the above regulations focuses on controlling the content of

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34 The Scope of Trade-Creating Industrial Cooperation, supra note 8, at 17-21; East-West Industrial Cooperation, supra note 8, at 29-50.

35 Kuss, Das Joint-venture-Recht der osteuropäischen Staaten Rechtsgrundlagen und Praxis im Überblick, 51 Rabelszeitschrift 548-602 (1987); Rajski, Rozwój prawa dotyczącego zagranicznych inwestycji gospodarczych w państwach socjalistycznych (Development of Legal Regulations Concerning Foreign Economic Investments in the Socialist States), 3 Pánswi Prawo 60-71 (1986); Legal Aspects of Doing Business in Eastern Europe and the Soviet Union 32 (D. Campbell ed. 1986); Buzescu, Joint Venture in Eastern Europe, 32 Am. J. Comp. L. 407-47 (1984). The only country that has no such a regulation is the GDR.

36 See supra note 35 and accompanying text. For example, the requirement of minority share by the foreign investor can still be found in the legal regulations of the Soviet Union, Czechoslovakia and Rumania, as well as in Hungary, although the laws of the latter provide, in exceptional cases, for a possibility of giving up this requirement. The requirement was abandoned by Yugoslavia, Bulgaria and Poland.
the joint venture contract but fails to provide for socialist state guarantees to foreign capital, and answers to questions on the governance and taxation of joint ventures. As for the problems unsolved by the contract, some regulations point to partnership law as being applicable. Often, these provisions of commercial law date back prior to 1945, and thus include norms pertaining to partnership under capitalist commercial laws—i.e., partnership, limited liability company and joint stock company.\textsuperscript{37}

As industrial cooperation contracts constitute a separate legal category, they differ from steered production or coproduction contracts. The parties to industrial cooperation contracts pursue a common goal while in the other two contracts, the goals pursued by the parties are, at best, merely convergent but not identical. In joint ventures, the tasks of each party focus on a commonly achieved goal, not tasks providing reciprocal benefits to the achievement of parallel goals. The joint nature of the actions performed by the parties, as well as the pursued common goal, account for considering joint ventures to be the most developed form of industrial cooperation.

III. CONTENT OF INDUSTRIAL COOPERATION CONTRACT

Two groups of issues must be addressed in every industrial cooperation contract: preparatory tasks—preparation of cooperation, and mutual tasks to be performed by the parties should be determined (implementation of cooperation).\textsuperscript{38} If these two groups can be addressed in one document, the result is the complex industrial cooperation contract.\textsuperscript{39} This consolidation is possible usually only in cases of simple co-

\textsuperscript{37} In Poland the limited liability company and the joint stock company are governed by some remaining provisions to the Commercial Code of 1934. In Rumania the joint stock company is ruled by the provisions of the Commercial Code of 1887. In Hungary the limited liability company is governed by the Law of 1930, but the joint stock company by the Commercial Code of 1875. For more details on this subject, see Kuss, supra note 35, at 562-65 and the literature mentioned therein.


\textsuperscript{39} Włodyka, Die internationalen Kooperationsverträge in den Wirtschaftsbeziehungen zwischen Ost und West, 25 JAHRBUCH FÜR OSTRECHT 71-75 (1984) [hereinafter Włodyka, Die internationalen
operation such as draw-back or subcontracting. In such cases the contract has a lasting and composite character. If, however, the preparatory actions are regulated by a series of agreements and not by one contract, the arrangement is labelled a cooperation contract concluded by stages. This contract is used in more compound cases of cooperation such as delivery of complete plants or production lines. This pattern should be defined as a chain of contracts.

A. The Complex Industrial Cooperation Contract

The complex industrial cooperation contract is contained in one document. Following the regular contractual pattern, this contract consists of a preamble, essential section and concluding statements. Its title states the designation of the contract and precise definition of the parties. The preamble is particularly important, as it gives the objective of the cooperation and defines contract terms, thus useful in filling in future contract gaps. In the essential section, the so-called major and accessory or side clauses are differentiated.

The major clauses focus primarily on the manner and synchronization of the tasks to be performed, as well as on the settling of accounts between the parties. The content may differ depending on the type of industrial cooperation. Each task to be performed requires quantitative and qualitative determinations and specifics as to place, date and the way of receiving the tasks. These determinations often require special technical knowledge which accounts for a number of subject-matter annexes to the contract.

(1) Synchronization Clauses

Among the major clauses of industrial cooperation contracts there should be synchronizing clauses which prepare the exchange of mutual tasks. They should contain standardizing agreements relating to the production operations as well as specialization agreements. By means of the latter the parties are obligated to focus their economic activity on manufacturing determined goods or rendering determined services in order to improve quality and reduce cost (positive specialized obligation) or stop activities in the domain of the other cooperator (negative specialized obligation).
gation). In both cases, the cooperators may secure for themselves the delivery of specialized products in the form of cooperation elements or market guarantees for their products within the cooperation relationship.\(^{43}\)

Synchronization clauses may list certain elements of joint actions such as shared research, joint marketing or joint servicing of a product. These actions testify to a specific community of interests between the parties; a community resulting entirely from the synchronized operations.\(^{44}\)

(2) Account Settling Clauses

The last group of major clauses contained in the industrial cooperation contract are the account settling clauses which regulate the way the value of performed tasks is registered, and the way each partner is to be rewarded. In East-West relations the settling accounts mechanism in the form of counter-performed tasks is of particular importance. The mechanism results in the economically weaker partner being granted the means for production (deliveries and financial supplies) on credit conditions provided by the stronger partner. The credit is subsequently repaid by the weaker partner manufacturing final products for the benefit of the stronger partner. Compensatory settling of accounts may also take form of an appropriate division of jointly achieved profits.\(^{45}\) The compensatory character of accounts settling is not necessarily an attribute of cooperation. Yet the repayment of the obtained credit (utilized as the means for purchasing technology, machines and equipment) through the return of manufactured goods has become almost a routine in East-West cooperation transactions. This repayment method proves particulary advantageous for the socialist partner whose currency is, as a rule, nonconvertible.

(3) Accessor Clauses

The bulk of the contract is occupied, however, by accessor clauses. They regulate the legal entity formed between the parties as a result of preparing and performing the tasks envisaged by the major clauses. The following groups of contractual statements should be listed among the accessory clauses:

a. clauses pointing to the establishment between the parties of the lasting community of interest;

\(^{43}\) ECE Guide supra note 9, ¶¶ 24-25; see also Poczobut & Wiśniewski, supra note 38, at 199-201.

\(^{44}\) ECE Guide, supra note 9, ¶ 25.

\(^{45}\) Id. ¶¶ 48-49.
b. clauses referring to the long term character of industrial co-
operation contract;
c. clauses binding the international nature of industrial coopera-
tion contract; and
d. clauses that may be found in other economic contracts.

Among the clauses indicating that a lasting community of interests is coming into existence between the parties, it is possible to list the consultation clause, protection clause, the clause demanding that tasks be performed by each partner, and the loyalty clause. These clauses prove particularly significant in legally identifying the industrial cooperation contract because they are illustrative of a lasting community of interests between the parties. Though expressed in the content of the discussed clauses in an indirect manner, this feature is nevertheless their logical consequence.

The consultation clause exists because the tasks to be performed on the basis of cooperation contract are complex, yet must be complementary. A division of a production process between the partners gives rise to the need for a synchronization of operations which, in a technical sense, may be reached only by a constant exchange of information. The need for exchange is heightened because modern technological processes are, as a rule, compound and complicated. The more complex the industrial cooperation contract is, the larger the need is to adopt consultation procedures. The consultation clause may be traced to the principle of partnership loyalty. It also may be traced to the long lasting nature and evolving character of the industrial cooperation contract. The ECE Guide, in an exempli gratia manner, hints at available consultation procedures such as joint meetings of representatives of both partners, joint commissions established in view of the necessity to maintain stable contacts between the partners or specially formed commercial consortia without separate legal status or with the status of a partnership. The content of the consultation clause may be considered tantamount to expressing a willingness to talk on specific subjects connected with the performance of obligations or to the duty to inform a partner of all the facts that are essential for joint production.

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46 Jakubowski, supra note 5, at 272; Calue, Pojed kooperacji przemysłowej w stosunkach Wschód-Zachód Aspekty ekonomiczne i prawne (A Notion of Industrial Cooperation in East-West Relations, Economic and Legal Aspects), 12 PROBLEMY ANDLÚ ZAGRANICZNEGO 70 (1979).
48 W. von Lingelsheim-Seibicke, supra note 14, at 104-05.
50 ECE GUIDE, supra note 9, ¶¶ 15, 32-33.
51 W. von Lingelsheim-Seibicke, supra note 14, at 104-05.
Inclusion of the protection clause in the contract obligates parties to protect technological and organizational information obtained from a partner within the scope of industrial cooperation. The clause may be extended by adding a duty to raise claims against third parties who transgress upon the protected information. The protection clause is tied to the clause requiring the performance of tasks by a partner; subcontracting is not permitted. In order to synchronize production parties must necessarily make the production secrets available to each other. As performance of some synchronization obligations by a third party would transgress upon the very substance of industrial cooperation, this clause is necessary. The clause does not prohibit the partners from contracting-out certain expected fragments of their tasks, the ordering partner being liable for the fragment costs as though they are self-performed.\textsuperscript{52} In this context the loyalty clause also becomes significant, requiring the one partner to consider the interests of the other whenever any economic decision bound with production cooperation is made. Thus, the principle of loyalty exceeds the boundaries of good faith, and acts as a directive controlling performance for tasks arising from the industrial cooperation contract.\textsuperscript{53}

Durability clauses of the industrial cooperation contract delineate the life span of the contract and list any hardship provisions. The latter exists because of the long lasting character of the industrial cooperation relationship and the tendency toward constant change of its content.\textsuperscript{54} As a result of unstable economic conditions, present contractual practice often consists of repeated transmutations of compound and long lasting contracts. It is argued that the negotiation phase is not ended upon the signing of the contract but is extended to the whole period of the contract. As a result, the content of such a contract cannot be unchanging but must be subject to specific evolution.\textsuperscript{55} Hardship provisions include the duty of the parties to renegotiate the contract in order to adopt it to changed circumstances. These provisions thus provide a mechanism for

\textsuperscript{52} M. Dubisson, Les groupements d'entreprises pour les marchés internationaux 21-22 (1979); Calue, supra note 46, at 39; Babiuc, supra note 49, at 180-81.

\textsuperscript{53} Dubisson, Les caractères juridiques, supra note 41, at 305-07; Mercadal, supra note 47, at 331-33.

\textsuperscript{54} Durand-Barthez, La durée des accords de cooperation et les clauses governant leur adaptation, 10 DPCI 357-58 (1984); Dabin, Accords de cooperation inter entreprises pour la réalisation de marchés internationaux, 5 DPCI 344 (1979); Dubisson, Les caractères juridiques, supra note 41, at 359; Jakubowski, supra note 5, at 274; Babiuc, supra note 49, at 19.

filling the contractual gaps. 56

The clauses of permission, applicable law, arbitration and language of communication between the parties belong to the category of clauses that are bound to the international character of the industrial cooperation contract. These types of clauses can be also found in other international contracts concluded between enterprises from different countries.

The permission clause deserves, however, particular attention when a partner to the contract comes from a country with a planned economy. In view of the monopoly of the socialist state in foreign trade, the validity in international relations of each contract concluded by the Eastern partner would depend on the permission obtained from appropriate government offices steering the country’s economy. Pursuant to the permission clause, the Eastern partner is obligated to the Western partner to earnestly apply to the appropriate authorities for the needed permission. 57

All contracts, international or not, include clauses regulating the liability of the parties for nonperformance or inadequate performance of obligations; clauses relating to the problem of exclusion of liability in case of, for example, force majeur; and clauses determining the principles of withdrawal from or cancellation of the contract.

B. The Industrial Cooperation Contract Concluded by Stages

The cooperation contract concluded by stages has four basic periods, though, in fact, the number and substance of stages may vary depending on the circumstances of a specific case. Among the basic portions are: the information agreement; the preparatory agreement; frame contract of industrial cooperation; and the implementation contract. 58

(1). Information Agreements

In information agreements, parties are obligated to examine the possibility and expediency of concluding an industrial cooperation contract between them. The negotiations of this examination must be carried on in good faith and include: a duty to inform the partner of all facts indispensable to a decision on accepting the contract; a ban on suggesting proposals aimed at obstructing the negotiations; a ban on impeding the


57 Wlodyka, Die internationalen kooperationsverträge, supra note 39, at 73; W. von Lingel- sheim-Seibicke, supra note 14, at 115.

58 See supra note 40 and accompanying text.
negotiations without significant cause; a ban on carrying on simultaneous negotiations relating to similar contracts with another prospective partner; and a duty to keep the information on the negotiations (and the negotiations themselves) secret.\textsuperscript{59}

(2). Preparatory Agreements

In preparatory agreements, parties settle the question of whether the industrial cooperation contract can actually be concluded. Depending on the decision, parties may also perform certain preparatory operations within the framework of this agreement. For instance, parties may include standardizing or specialized adjustments, both positive and negative. Irrespective of the above, parties may have already at this stage, determined the consultation procedure related to the adaptation of economically weaker partner to the technological and organizational level of stronger partner.\textsuperscript{60}

(3). Frame Industrial Cooperation Contract

Pursuant to its name, the frame industrial cooperation contract provides the legal framework for the future industrial cooperation between the parties. The frame character of the contract is demonstrated by its general phraseology relating to the parties' tasks. The determination of tasks is limited to unspecified indications of the objective, and the means of implementing it (place and date, quantitative and qualitative examination, proofs testifying that they are being in fact performed). The bulk of a frame contract is occupied by accessory clauses. The latter are conclusively formulated and require no further specifying.\textsuperscript{61}

(4). Implementation Contracts

The generality of the frame industrial cooperation contract requires specification of the parties' tasks and duties in the implementation contract. Only this specification allows performance of the very task which prompted cooperation. Implementation contracts usually assume the form of a contract for carrying out specific tasks (sale or delivery) or for rendering specific services.

IV. THE PROBLEM OF LEGAL REGULATION OF THE INDUSTRIAL COOPERATION CONTRACT

The cooperation contract has been regulated neither in the domestic legislation of any country nor in international law. As a result, the con-

\textsuperscript{59} Morin, \textit{Le devoir de cooperation dans les contrats interationaux}, 6 DPCI 10-12 (1980).

\textsuperscript{60} Wlodyka, \textit{Die internationalen Kooperationsverträge}, supra note 39, at 76-77.

\textsuperscript{61} Jakubowski, \textit{supra} note 5, at 275-76; Babiuc, \textit{supra} note 49, at 187-90.
tent has been shaped exclusively by contractual practice. Certain stable and repeated features have laid foundations for recognition of the industrial cooperation contract as a separate and empirical type of contract. Yet the specific legal content of relationships arising from this contract can not be classified among these stable features because legal content varies depending on the circumstances of a specific joint venture. What is therefore determinative of the separateness of the industrial cooperation contract in contract law is a constant and repeated economic relationship, existing under the principle of equivalence. For this reason, regulation of industrial cooperation contracts in the international forum was attempted. These attempts by no means resembled the Code-like regulation of contracts in Continental law. The ECE Guide is an example of such an attempt. Other similar attempts are the CMEA General Conditions of Specialization and Cooperation in Production Between Enterprises of the Member State of the CMEA of 1979 ("CMEA Conditions"), and the CMEA Guide on Drawing up Contracts Concerning the Different Kinds of Cooperation in Production Between Economic Organizations of the Member-States of the CMEA of 1987 ("CMEA Guide").

Two of these attempts assumed the form of a guide on drawing up contracts, and one took the shape of addressing general conditions. All of them are of regional nature because they refer exclusively either to Europe in East-West relations or only to cooperation within the CMEA. The consequences of the latter may have impact on East-West relationships. The guides, in their substance, are conceived to be ancillary materials helpful to the parties drawing up the clauses of a specific contract. For this reason they usually determine the subject matter of the contract and subsequently focus, above all else, on indicating the content of the respective clauses that should be contained by the parties in a contract. When viewed in formal terms the guides use a descriptive method resembling a commentary rather than a set of legal rules. It is justifiably doubtful whether the guides on drawing up contracts may be at all classified as legal regulation. Such classification would be possible only by adopting a wide understanding of the sources of international trade law.

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62 Włodyka, Słownik pojęć, supra note 38, at 42-43.
63 ECE GUIDE, supra note 9. See supra note 9 and accompanying text.
64 CMEA GENERAL CONDITIONS OF SPECIALIZATION AND COOPERATION IN PRODUCTION BETWEEN ENTERPRISES OF MEMBER STATES OF THE CMEA OF 1979, Accepted by the Executive Committee of the CMEA, Jan. 18, 1979, The Secretariat of the CMEA, Moscow 1979 [hereinafter CMEA CONDITIONS].
66 CMEA GUIDE, supra note 65 § 1.
or by accepting the concept of *lex mercatoria*. The guides would then fall within the scope of "soft law." The aforementioned CMEA Conditions are the only source regulating industrial cooperation contracts that cannot be called into question. The CMEA Conditions were adopted in the shape of a resolution passed by an international organization and were subsequently incorporated into the domestic law of the member states. The Conditions should therefore be recognized as a normative act.

The ECE Guide is a relatively extensive act. It consists of six chapters and sixty-five sections. The two first chapters are general, determining the scope of the Guide and the basic features of international industrial cooperation contracts. These chapters also deal with the problems that should be examined before concluding such contracts, such as the nature of cooperation in the technological, production and market spheres. The subsequent chapters deal in detail with such problems as triparite cooperation and cooperation in exploiting natural resources. The last chapter is concerned with financial questions, such as the impact of changed circumstances on industrial cooperation contracts, termination of the contracts, appropriate law and settlement of disputes.

The CMEA Guide is characterized by a similar range of problems dealt with and by a similar arrangement of statements. The CMEA Guide consists of sixty-one chapters and covers such questions as characteristic features of contracts for international industrial cooperation, legal types and forms of such contracts, preparation of the process of concluding them, the conclusion itself and their entry in force. Most of the document concerns itself with systematizing the parties' tasks into three fields: scientific and technical cooperation; production; and marketing. Considerable space is devoted to the parties' liability for nonperformance or inadequate performance of tasks as well as organizational forms of cooperation. In addition, the CMEA Guide also deals with the settlement of disputes, appropriate law, change and termination of international cooperation contracts and the prolongation of the time for contract termination.

Though it is limited only to industrial cooperation between the enterprises of socialist states, the CMEA Guide may be deemed a remarkable step forward with respect to the legal separation of the industrial cooperation contract from other types of contracts. The CMEA Guide definition of the industrial cooperation contract as well as the parties' rights and duties confirm the typical separateness of the industrial coop-

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67 Id. § 2.
68 Id. § 3.
69 CMEA CONDITIONS, supra note 64 § 13, pos. 1.
eration contract.\textsuperscript{70} The CMEA Guide provides for basic types of industrial cooperation contracts such as subcontracting, which is tantamount to coproduction, and common production which may be identified with joint venture.\textsuperscript{71} The Guide also indicates variants of the industrial cooperation contract in the shape of a full contract as well as that of one concluded by stages.\textsuperscript{72} The practical value of the CMEA Guide is enriched by the fact that the CMEA Guide is not confined to instructing the parties on how to draft the respective contractual clauses but also provides completed formulations of some of the more complicated contractual fragments by enclosing exemplary solutions.

The CMEA Conditions provide a different presentation of the separateness of industrial cooperation contracts. The CMEA Conditions consist of eleven chapters and contain fifty-eight paragraphs. The chapters deal with the following problems: general provision; parties to the contract; conclusion of the contract; change and entry in force of the contract; parties' rights and duties; parties' liability; claims and their limitations; termination of the contract; arbitration; appropriate law; and miscellaneous provisions. Unlike the CMEA Guide, the CMEA Conditions do not pursue the goal of instructing the parties in how to draft contractual clauses but do contain completed statements relating, in particular, to the implementation of the contract. The CMEA Conditions are in fact not those of cooperation among socialist countries, but rather specialization. This situation is due to the specific traits of cooperation among socialist countries, which are based on planned economies and necessity to coordinate the plans. As a result, duties of the parties that would be bound with integrating the divided manufacturing process into one entity are not found in the CMEA Conditions. According to the CMEA Conditions, the specialized partner undertakes the obligation to secure the production of specialized products in order to meet the demands of the nonspecialized partner.\textsuperscript{73} The latter guarantees purchase the totality of the aforementioned products.\textsuperscript{74} The nonspecialized party may also be obligated to stop or refrain in the future from producing specialized products.\textsuperscript{75} As the CMEA Conditions are being found unfit

\textsuperscript{70} Id. § 15, pos. 1.
\textsuperscript{71} Id. § 15, pos. 2.
\textsuperscript{72} M. M. Boguslawski, Mieczdunarodnoje ekonomitscheskoje praw (INTERNATIONAL ECONOMIC LAW) 63-64 (1986).
\textsuperscript{73} The abundant literature provides for a lot of examples. See, e.g., Goldman, Lex Mercatoria, 3 F. INT'L 3-24 (1983); Lando, The Lex Mercatoria in International Arbitration, 34 INT'L & COMP. L.Q. 747-68 (1985).
\textsuperscript{75} In the case of Poland it was realized by the Resolution of the Council of the Ministers No. 161 of October 5, 1979, MONITOR POLSKI, No. 28, item 143 (1979).
for specific traits of industrial cooperation contracts, attempts are being made to amend them.

The International Polish Commercial Code project provides a normative example of the separateness of the industrial cooperation contract in domestic law.\textsuperscript{76} Chapter XIII of the Code is wholly devoted to the industrial cooperation contract which is treated as an equal type of contract vis-à-vis a series of contracts listed in the Code. The chapter begins with listing the essential elements of the industrial cooperation contract and proceeds to describe the contract in a typical code-like manner.\textsuperscript{77} The list of essential elements actually provides for features that are distinctive of the cooperation contract and prove sufficient to prevent classifying this contract as any other type of contract. When viewed in terms of earlier attempts, this solution may be considered unique. Such a thesis seems justified in view of the fact that the previous code regulations of international economic trade, as found in other socialistic countries, fully resigned from defining the industrial cooperation contract because the legislators detected in it no such traits that would allow for its typological separateness.\textsuperscript{78}\


\textsuperscript{77} In the Draft of the Law on Civil-Law Relations in International Trade, it is article 280 that provides for the definition of contracts for industrial cooperation. According to this article:

\begin{quote}
By a contract for cooperation the parties undertake to enter long-range collaboration aiming at the exchange of economically inter-related performances, in particular
\begin{enumerate}
\item They undertake to obtain and exchange specific information;
\item They undertake to introduce specific changes into their economic operations;
\item They determine principles of cooperation.
\end{enumerate}
\end{quote}


\textdagger By agreement, the \textit{Journal} has relied on the author for the veracity of the statements contained herein.