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The China Trade Revisited.

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Dear Mr. Nolte,

In an earlier Newsletter I discussed the gradual development of trade between the Chinese People's Republic and various Western countries, in particular Britain. In the last few months the trend towards expansion continued, and was in some important respects strengthened. The French recognition of the People's Republic, the expected easing of restrictions on long term credit and the organization of a number of trade exhibitions in China all seem to confirm the trend towards the "normalization" of commerce between China and Western Europe. These qualitative changes are accompanied by enlarged trade figures, apparently a sign of gradual improvement in the Chinese economy as well as continued economic disengagement from the Soviet bloc. From the point of view of the merchants who trade with China, or aspire to do so, and of those who underwrite their activities, there are still obstacles which stand in the way of an easy trading relationship, despite all these developments, and I shall devote the greater part of this Newsletter to discussing these, after outlining the more important changes in atmosphere.

The political importance of General de Gaulle's decision to establish diplomatic relations with the People's Republic has somewhat overshadowed the economic implications in public discussion, despite the fact that the first overtures were made to look very much like trade negotiations - so successfully that only a few days before the General's purpose became known it was assumed that only commerce was involved for the time being. Nonetheless, the commercial element in the whole operation was a strong one, and one result of it is that French businessmen are showing more interest in the China trade. This interest was first stimulated by the long-term wheat contract signed with China in 1962, which raised the value of French exports to China by some 80%. It was heightened by an increase in trade between the two countries in 1963.

In September 1963, M. Guillaume Georges-Picot, a retired French diplomat who combines business interests with acting as a part-time adviser to the Government, headed a trade mission which spent two weeks in Peking with the object of "promoting industrial contacts between the two countries". He was followed a month later by a further mission, led by the former Prime Minister and Minister of Finance, Edgar Faure. At this time many observers seemed to think that future recognition might depend on increased trade. How far this was the case remains problematical, for it is not yet clear how much firm business has been done, though a number of negotiations are reported to be going on. It is most unlikely, in my view, that the Chinese would bind themselves in advance in such a way as to limit their freedom to shop around. But there have been some tangible results of the new relationship and several sales of

industrial and scientific equipment, including two complete plants for the manufacture of alcohol, an agreement for the exchange of trade exhibitions, and, interestingly, the conclusion of a treaty of commerce and navigation, together with a trade agreement for 1964, between France and Albania, in December 1963.

As one might expect, the rumours are more interesting. They include a strong probability of aircraft sales by Sud-Aviation, together with a probable interline agreement and possibly an operating agreement between Air France and the Chinese Government. Here there is strong competition with B.O.A.C., who sold six Viscounts to the Chinese last year, and who have also been negotiating passenger agreements. It certainly seems as though China intends to enter the field of airline operation, having established an air link with Pakistan recently through Pakistan International Airlines, and also with Cambodia, and having re-negotiated her operating agreement with the Soviet Union to allow for joint rather than all-Soviet operation.

Another rumour concerns oil, which the Chinese Government are reputed to want to buy from France, and also from Algeria. Should agreement be reached with France on this issue, the Chinese would have gone a fair way towards their objective of breaking the embargo on the export of strategically valuable goods, which the countries of Western Europe apply according to their various interpretations. Too much doubt surrounds the whole question of the nature and extent of the Chinese oil supply for it to be possible to say conclusively whether a serious strategic question is involved here or not. It is certain that one of the principal Soviet exports to China was oil, and it may well be that considerable amounts are still shipped. In any case, it seems safe to assume that an important factor for the Chinese Government to consider in emancipating themselves from Soviet economic control would be the assurance of an independent oil supply; if some Indian commentators are to be believed, a Soviet threat to the Chinese oil supply was instrumental in cutting short the Chinese invasion of India in 1962, and it is quite clear that this sort of pressure would be very effective. In this light the recent enquiries made by the Chinese in Indonesia, Iraq and Algeria about the possibility of buying oil may be seen as attempts to cater for a strategic need of basic importance.

On the other hand, sources in Hong Kong quoted by the London "Times" took the view that it was unlikely that there was a serious oil shortage in China at the moment, on the evidence available. The evidence, it is pointed out, is all the other way. In the first place, possible military considerations apart, there is probably not yet a very great need for oil in the largely unmechanized, agricultural economy, however great the need may eventually be. Furthermore, in view of the undoubted presence of important oilfields in China, it would be unlikely that they would be neglected in favour of expensive imports. There is in fact some evidence despite the absence of official statistics, that the domestic oil industry is expanding fairly rapidly; the same Hong Kong source estimated that production in 1963 had risen to about 6.5 million tons, as against about

5.5 - 6 million tons in the previous year. Whatever the value of these estimates, a new light seems to be cast on the problem by a statement made on February 18th by Chao An-po, Chinese secretary of the China - Japan Friendship Association announcing the discovery of a new oilfield near Chinchow, at the northern end of the Gulf of Chihli, with an estimated annual capacity of 3 million tons. Mr. Chao predicted that "hundreds of thousands of tons of crude oil would be available for export to Japan". If there is indeed a possibility that oil can be exported, particularly from an oilfield so conveniently near the coast (the rest of China's known deposits are in the remote North-West) then a major new source of foreign exchange will become available. Lastly, further evidence of movement towards greater, if not complete, self-sufficiency as regards oil supplies is the placing of substantial orders for oil refining machinery with Italian and British firms.

Nonetheless, there is apparently still an interest in foreign oil, perhaps to be explained on the ground that large-scale production is not possible. In this connexion the new French attitude could be of decisive importance. It seems that China's earlier attempts to buy oil abroad foundered on her lack of foreign exchange. In respect of Algeria, however, French involvement might make possible a three-cornered arrangement of the kind that Communist countries have sometimes used between themselves; a French long term credit to Algeria would enable that country to import Chinese goods, or services, such as the building of highways across the Sahara, on a scale sufficient to enable China to pay for Algerian oil. The French decision on the strategic question involved will be of great interest.

The conclusion of three-cornered agreements of this kind might also prove to be the solution for a basic obstacle in the way of any serious increase in trade between China and France herself. The adverse trade balance which China usually encounters in her dealings with the countries from which she wishes to buy equipment is particularly stubborn in the case of France. Whereas in her trade with Britain, for example, even disregarding the massive shipments of silver bullion in some recent years, China has been able to maintain a reasonable proportion in the balance of imports against exports, with a balance favourable to herself in the last two years (most of it spent on wheat, of course), her volume of exports to France has remained small in proportion to imports for several years past. Unable to interest French buyers in her industrial products, China is not likely to make much headway with foodstuffs in France either. The great bulk of China's foreign exchange, too, is earned in sterling in Hong Kong. An outlet for industrial exports in the franc area of Africa would thus be of great interest to China, and this was no doubt a factor behind Premier Chou En-lai's recent visit to several countries in Africa. The French Government could hardly subsidize African buying from China, however, without injuring their own export interests in Africa, where they have a strong position, and this factor will probably have been carefully considered. If this analysis is correct, the provision, if any, of French credit for Chinese sales in Africa will be a useful index of the fervour of French feeling for China.

France is by no means the only country to which the Chinese are looking with a view to easy credit terms, however, and, important as the new relationship with France will doubtless be from the point of view of China's foreign trade, the marked tendency on the part of countries less committed than France to think in terms of extended credit may well mark an even more important turning. It is true that so far, if the wheat sales are left on one side, only the Japanese sale of a \$20 million vinylon plant, agreed last summer, has provided for long term payment. Significantly, the sale, which was subject to the approval of the Japanese Government, was not immediately approved, presumably for fear of the reaction in Washington. And approval came only when the rather advantageous interest rate of 4½% which was first offered was increased to 6%, presumably on the assumption that an expensive loan would cause less offence to the United States than a cheap one. Even so, as far as Japan's industrialists are concerned, the precedent is there, and it is doubtful whether their rivals in Western Europe will rest content with a Japanese monopoly in the field. As far as London is concerned, a good deal of whispering seems to have gone on, but so far a 12 month credit is the longest that has been permitted. It is highly probable, however, that a decision one way or the other will have to be taken before the two impending industrial exhibitions in Peking, for their effect might be frustrated if easy terms were not made available.

The success of the exhibition held last summer by four firms in Peking, which I mentioned in my earlier Newsletter, seems to me the third major event in the area in the last few months, as it has led to the arrangement of two more ambitious trade exhibitions in the coming summer and autumn. The first of these will be held in the second half of April by twenty-eight member firms of the British Scientific Instruments Manufacturers' Association. The equipment to be shown is said to cover a wide field, including measuring instruments for industry, teaching instrumentation and analytical instrumentation, and the total value of the exhibits will be worth about £500,000. The exhibition will, it is hoped by the organizers, lead ultimately to dealing in much larger sums.

The British Industrial Exhibition to be held in November is a much larger affair. Arranged by the Sino-British Trade Council even before the smaller exhibition last summer, the original plans have been enlarged on to provide about 48,000 square feet of indoor exhibition space, and also a further large area out of doors for heavy machinery. It is said that the space has been fully taken up. The exhibits will include power, agricultural, mining, metallurgical and textile machinery, motor vehicles, machinery for the food and pharmaceutical industries, electrical equipment, excavation equipment, and many other kinds of machinery. It was made clear from the beginning that only advanced industrial techniques should be exhibited, and some exporters have noted with interest that China is showing great interest in automation, despite her great supply of potential labour. No consumer goods at all will be shown, so far as I can discover; there is no sense in which the exhibition will be intended as a display of the British standard of living.

In the meantime, an exhibition has been arranged by a group of French manufacturers for September next, when scientific and automation equipment will be shown, and a larger and more general exhibition has

been planned for 1965.

The value of these exhibitions from the point of view of the Western trader is clear enough. Besides being able to introduce his own goods to the Chinese market rather than waiting for enquiries, often made after his rivals have already tendered, he is put in contact with the end-users of his products to an extent which is simply impossible in the normal course of dealing with Chinese trade missions. From the Chinese point of view also there seem to be solid advantages. Last year, despite the fact that the general public were not admitted to the show - this rule remains in force - over 15,000 people saw the exhibits in 12 days. They comprised not only the executives of Chinese industrial enterprises and of the trading corporations, but also officials from various ministries and instructors and students from universities and technical colleges. This reflects another apparently important function of the exhibitions, which is to introduce new technical ideas to the Chinese industrial planners, who, in accordance with the policy of gradual industrial development which replaced the policies of the "Great Leap Forward", are being highly selective in their decisions as to the likely winners for Chinese industry. There has been an increasing interest in the idea of buying processes and "know-how", a noticeable feature of recent Soviet bloc trading with the West.

To sum up, it is perhaps worth quoting from a comment which appeared in the Board of Trade Journal on the results of last summer's exhibition, written by the Commercial Secretary to the British Chargé d'Affaires in Peking:

"The exhibition has acted as a bridge over which the Chinese could come and see, and benefit from what was on offer, and the British companies were able to gain first-hand experience of the magnitude of the market and the size and scope of the problem which is before any group or firm which wishes to sell its products in this field.

"Both sides got to know each other better and the importance of this can hardly be over-emphasised. China is still a long way from the United Kingdom; it is a vast country, there can be no advertising, and given the structure of industry and administration, it is rare for foreign companies to have direct dealing with 'end-users'. The exhibition was the stage for this and provided the opportunity. The visitors to the exhibition were all persons who had a genuine interest in the goods and processes displayed, their questions were shrewd and the British manufacturers who were present probably felt that they were getting to grips with the eventual user of their product.

"Was it worth it? That, in one sense, is for each participating company to decide; but for the good which has been done to British industry as a whole, the answer must be undoubtedly yes."

The holding of such exhibitions, particularly if they come to be held regularly, will clearly do much to smooth the course of trade with China. But the firm that wishes to do business with China still faces a number of problems that take this trade out of the category of ordinary commerce. Not all of them are easily to be solved; some cease to be obstacles to the experienced merchant. As the possibilities of

trade with China become rosier, however, some of these problems become more pressing. In the remaining part of this Newsletter I shall review some of them. The treatment will not be a very systematic one, nor will it be anything like exhaustive. I shall deal with problems that I have encountered in one way or another, enlarging on those that have seemed to me most interesting, chiefly from a legal standpoint. Since some of the information on which I rely is confidential, I shall not be able to be as specific or as detailed as I should like on some points.

Mention has already been made of the disadvantages of remoteness of contact between the ultimate producers and users of goods. Although the trade exhibitions will do something to reduce the effects of this as it affects the firms who make use of them, the problem remains an important one both for buyers from Chinese producers and for exporters. In even the simplest sales, there can be misunderstandings about the nature of a product described by letter, or worse, and quite as common, in a cabled offer or order. Such misunderstandings are often, of course, unnoticed until they reach the end-user, with the result that the costs of making good the mistake run unnecessarily high. This sort of trouble tends to occur with the simpler commodities; more complex orders, insofar as they emanate from the Chinese side, are usually made by purchasing missions sent out by the foreign trade corporations. Here the difficulties caused by lack of contact are more or less as described above; although the trading corporations are staffed by experts in the various fields for which they cater, this is no substitute for the thorough discussions between designers and users which would take place before a whole plant or other major piece of equipment was sold in the West. The trend towards increasing contact will doubtless continue as the planning of industrial expansion in China becomes more sophisticated, as appears to be the case, and as the need to "tie-in" new installations accurately and without making expensive mistakes becomes more pressing. The trend probably reflects the present policy, of which many other indications have been found in the past two or three years, of giving more initiative to professional experts, under much less rigid Party control, in certain areas of economic and technical development. If this is the case, then provided the policy is not suddenly reversed, a more adequate contact may well build up between suppliers of equipment in countries like Britain and the consumers in the Chinese industrial enterprises. However, it would probably be unrealistic to expect major changes in the economic administration of China as a result of this trend.

Buyers from Chinese producers meet much the same trouble in reverse. A degree of contact with the Chinese State selling agencies has existed for some years past in the form of the Spring and Autumn Trade Fairs held at Canton, to which merchants go from all over the world. Direct contact with producers is small or non-existent on these occasions, and as a result the goods on display often diverge more than is necessary from the requirements of buyers. The importance of this is small, of course, when one is dealing in natural commodities or agricultural products, but it affects the market in traditional and other handicraft goods, in silk, and, of course, in the newer Chinese manufactures. There has been a tendency for these things to be turned out with little or no apparent prior investigation of the market. The result is sometimes a curious assortment of wares advertised in trade

journals. However, as the planning of large scale production gets under way in China, there will surely be improvements in the system, from which at the moment the Chinese suffer more than their customers.

Whatever the changes made, however, they are unlikely to be so far-reaching as to disrupt the present system of State trading organizations. Modelled no doubt on the Russian and East European systems, it concentrates virtually the whole of China's import trade, and the bulk of her export trade, into the hands of State controlled specialist companies. The main exceptions are a number of Joint State-Private Companies still operating in the export trade from Canton, the majority of the commodities exported by them being foodstuffs, Chinese traditional medicines, and the like. With the exception of these firms, there seems to be little attempt to tie the State trading corporations into the diversified economic life of the various regions of China. All of them are run from Peking, and few of them have more than one or two branch offices in the whole of the rest of China. With the exception of Hong Kong, few of them maintain anything like permanent representatives abroad, nor do they have authorised agents abroad (an exception here is Sinofracht, the State ship-chartering corporation). So long as this system operates the opportunities for contact will remain occasional and circumscribed.

The conduct of business often demands great perseverance on the part of the businessman. Correspondences are frequently long drawn out, and there is always a carefully but discreetly cultivated sense of competition. The Chinese buyers make a very large number of enquiries before they even ask for firm offers. For example, the purchase of oil refining equipment mentioned above was preceded by such an exhaustive round of enquiries that they became a standing joke in the trade, according to the correspondent of the "New York Times". The result is that the Chinese do appear to get the very best prices and terms, some of which I shall discuss below. Very narrow profit margins are often accepted by traders, chiefly in the hope of building up a relationship with the Chinese corporations. How far this policy is realistic in the majority of cases is doubtful; it seems clear that the best price will always win. On the other hand it is undeniably true that the Chinese do like to deal with individual personalities whom they feel they can trust from long experience; for instance, the senior members of one or two of the long established merchant and shipping firms are clearly given privileged positions, and where a particularly delicate transaction is required, like the purchase of six British aircraft last year, they may even be used as brokers. The establishment of this kind of relationship, however, is not something that can be achieved easily.

However tough the Chinese may be thought of as negotiators, they have an excellent reputation for the performance of contracts once signed. This to a great extent offsets some of the apparent legal difficulties which I shall discuss, and partly explains the willingness of so many Western businessmen to engage in what is often a difficult and frustrating trade. As buyers in particular the Chinese reputation is high (as is the case with most of the countries of the Eastern bloc).

In the course of a number of conversations with merchants and bankers I have been unable to discover a single case of late payment or other default. As sellers, too, the Chinese seem in the majority of cases to have behaved impeccably, failures being almost always explicable by circumstances beyond their control, e.g. the bad harvests of 1958 and 1959.

The position of advantage which the trading corporations have in a highly competitive trade is used to secure very special and favourable terms for the Chinese, however. There is great inequality as to the terms imposed on buyers and sellers - a fact particularly noticeable, of course, to those merchant firms which trade both ways. A particularly obvious example would be shipping terms. China, a country with a small ocean-going merchant fleet, is now an important charterer of foreign tonnage. In particular she is interested in long time-charters, of which she makes full use to save her as much money as possible, imposing Chinese shipping both on buyers of her produce and sellers. From a buyer's point of view this can be less economical and, depending of course on the nature of the shipping involved, may reduce the commercial possibility of sale of the goods while afloat, etc. From the point of view of exporters to China the stipulation may be even more onerous. Since inspection by the China Commodity Inspection and Testing Bureau is always insisted on as the contractual determination of proper performance, full control over the handling of goods - often delicate machinery - before and during the long sea voyage would seem a most important protection for the exporter, yet it is denied him.

The inequalities between obligations imposed on buyers and sellers could be multiplied. Since the great majority of contracts are concluded on the basis of standard forms drawn up unilaterally by the corporations, there is little that the average trader can do except take it or leave it. As A. Boone, a merchant with many years' experience in the China trade, put it in an article in the "China Quarterly":

"It was not long after they commenced operations that the Chinese corporations began to insist on using their form of contract for both buying and selling for all 'run of the mill' transactions. A number of changes have been made unilaterally during the course of the years and the present terms give the maximum of protection to the Chinese side. There is a striking difference between the wording of their contracts of purchase and of sale. The former binds the seller very tightly whilst the latter is in effect little more than a statement of intent."

Not all traders would take quite such a strong view, maybe, but there is no doubt that this is to a great extent true.

The insistence upon Chinese testing and inspection of quality and quantity in cases of both purchases and sales can be quite burdensome. Certificates given by the Bureau are among the few bi-textual documents used in the China trade which actually stipulate that in case of doubt the Chinese text shall be regarded as authoritative. In a number of cases

the Bureau's personnel seem to have been uninformed as to the normal characteristics of the type of goods that they were testing, and some misunderstandings have arisen on this basis. On the other hand the Bureau is fairly flexible in its operation, allowing goods to pass despite fault where the parties so agree, and in practice penalties are apparently rarely exacted for anything but important failures to conform to standard. However, it is doubtful whether many Western merchants would agree with the words of Trade With China: a Practical Guide:

"Persons engaged in Commodity inspection and testing work in China have won good prestige and confidence in international market by dint of their impartiality and faithfulness in carrying out their duties..... The U.S.S.R. and many other countries all demand that goods be inspected and tested by China's Commodity Inspection and Testing Bureau at the time of delivery, being aware of the fact that certificates and survey reports issued by the Bureau are having high prestige in the world."

A much more complex problem is presented by the arbitration clauses which appear in the Chinese forms of contract. At the present time these invariably call for arbitration of disputes which may arise under the contract in Peking. This form, which has to be accepted in the great majority of cases, always excluding shipping contracts, where the Chinese normally comply with the forms of arbitration laid down in the standard forms of document, has been in use since about 1957, a year after the establishment of the Foreign Trade Arbitration Committee of the China Committee for the Promotion of International Trade, though different trading corporations appear to have introduced it at different times. Before that time, third country arbitration was usually accepted, or the country of arbitration was left unspecified. (I have only been able to discover a single instance of arbitration actually taking place in a third country, and I have only heard that it was in Oslo and that the other parties were Finnish.)

A good deal of thought seems to have been given to the drafting of the rules of the Foreign Trade Arbitration Committee, for although only finally established in March 1956, its establishment had been authorised by the Government Administration Council some two years earlier. On 21st November 1958 the State Council of the People's Republic (successor to the G.A.C. under the 1954 Constitution) authorised the establishment of a Maritime Arbitration Commission within the China Council for the Promotion of International Trade, as it is now called, and rules for the Commission were adopted in January 1959. They are in many respects similar to those of the Foreign Trade Committee.

Before examining some of the characteristics of these two bodies it ought to be said that they have scarcely been used, as far as Western countries are concerned. The first claim made before one of them which I have heard was finally settled after it had taken 18 months to agree on an umpire. The only other case that I have been able to trace came before the Maritime Arbitration Commission by way of a salvage contract concluded between the Norwegian owners of the m/s "Varild" and

the Bureau of Salvage Works of Shanghai, in respect of the vessel. The application for arbitration came from the Bureau, and the sole matter in dispute was the amount of remuneration due for salvage services under the contract. According to reports, the Tribunal was duly constituted, but before hearings took place the Tribunal managed to effect conciliation between the parties after "negotiating repeatedly" with them, and an agreement was eventually reached which fixed the amount payable at ¥270,000.00, about £39,000. Conciliation of this sort is expressly provided for in the Rules of the Commission. These two cases - neither of which actually reached arbitration - apart, disputes have never been allowed to reach the stage of starting arbitration proceedings and those with long experience point to what they regard as the traditional Chinese dislike of open conflict as the main factor in the Chinese reluctance to go to arbitration. They are no doubt right. The result is that the Chinese corporations sometimes go out of their way to interpret their strict contractual rights generously, or settle disputes for sums substantially larger than they would be likely to have to pay as a result of an arbitral award.

In this light any discussion of the nature of the arbitral bodies which the Chinese Government has set up may seem highly artificial, and I have certainly found people in the commercial world who have thought so. It seems to me, however, that there are several reasons which make such an analysis worth while. In the first place, there is a real possibility that they will be used at some time in the future, either on account of a change in Chinese policy or because some foreign firm refuses to rest content with a settlement. This being so, the nature of the proceedings is something that must be taken into account in the actuarial side of commerce, the more so as bigger projects and sums are involved and the stakes get higher. Second, some light is thrown on the whole legal background of foreign trade in China by the system. Third, there is often as much value in the study of a carefully fostered fiction, of which there are quite a number in the history of Chinese law, as there is in the study of the more obviously functional and functioning institutions.

In the case of both the arbitral commissions, jurisdiction is derived directly from the State by ordinary legislation, which not only constitutes the bodies and empowers the China Council for the Promotion of International Trade to make rules for them, but also goes some way to specifying what the rules should be. Thus in the case of the F.T.A.C. a Committee of between 15 and 21 members is established, which may take jurisdiction (based of course on consent) over such disputes as may arise from contracts and transactions in foreign trade, and in particular "disputes between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies and economic organizations on the other." In the rules this is expanded slightly to make it clear that disputes between foreign firms or between Chinese firms could also be the subject of proceedings. Provision is made for the appointment of arbitrators by the parties, or of a single arbitrator, and of an umpire by the arbitrators; it is provided that all these functions can be carried out by the Chairman of the F.T.A.C. in default of agreement. It is provided that both parties may be represented by attorneys, or agents, Chinese or foreign. The Award of the Tribunal is to be final, and not subject to review in a court of law or elsewhere,

but in the event of non-performance by either party the Award is to be enforced by the Courts of the People's Republic at the request of a party. I do not intend to describe the Rules adopted - they are designated "provisional" - beyond saying that they set down the procedure in greater detail, providing for expert and other evidence, etc., and noting that unlike those of the M.A.C. there is no express provision to the effect that the Tribunal may take steps to secure conciliation, though a procedure is laid down in the event that the parties spontaneously reach a settlement themselves during the course of proceedings.

Both bodies have procedures whereby the Tribunal may prescribe provisional measures in respect of property, security, etc., for the protection of the parties pending final decision, but in the case of the M.A.C. the decision may be taken by the Chairman of the M.A.C. even before the establishment of the Tribunal for the particular case, and his decision is enforceable by the People's Courts. This gives the M.A.C. virtually the same power to seize ships as security as is enjoyed by the admiralty courts of most states. In other respects the two commissions are rather similar in structure .

Many of the provisions of these statutes and rules could well figure in the arbitration rules of Western countries. One or two of them do call for mention, however. One of them is the provision, appearing both in the statutory regulations and in the rules, that the Award is to be final. This echoes a provision which appears in the arbitration clauses of Chinese contracts, and it seems that great importance is attached to it. The effect of the latter is sanctioned in China itself by the constitutions of the F.T.A.C. and the M.A.C. In a great number of states in the world, the effect of the contractual provision is also to oust the jurisdiction of their own courts; if a Chinese contract is brought before such a court it will decline to adjudicate on the ground that the parties have agreed on final arbitration. The Chinese contracts which contain this clause are thus sheltered from the jurisdiction of both the Chinese and probably the majority of foreign courts. (And in the case of many of the countries which, like England, do not regard arbitral awards as beyond the reach of the courts, a further rule, that of the sovereign immunity of foreign states, including state-owned trading corporations, will operate to prevent unwanted actions from disturbing the Chinese position.) Such contracts operate in a sort of legal vacuum.

The provisions for enforcement may well function chiefly to redress this situation in the eyes of foreign traders. Since the Chinese trading corporations only operate inside China, it is only in that country that they can be reached for the enforcement of an Award. It would seem that in view of their marked reluctance to get involved in the foreign courts Chinese corporations would be unlikely to attempt to get an Award enforced abroad, with the possibility that the foreign court might then feel able to examine the nature of the arbitration. On the other hand, except in the case where there is security in the shape of property owned by the foreign trader in China, it is scarcely possible for the Chinese party to use the People's Court to enforce an Award. Accordingly, one is left with the feeling that these enforcement provisions are part of a system which exists, and is meant to exist, purely on paper, to give a theoretical legal context to the arbitration machinery and to give a guarantee that

the Chinese trading corporations, immune as they are, for one reason or another, from the jurisdiction of the majority of the world's legal processes, can at least be nailed down in China.

Few of the merchants with whom I have talked seem enthusiastic about these arrangements. I have not heard of any cases where different arbitration clauses have been accepted, and there is at the moment a tendency to make the best of a bad job. Most traders see the arbitration problem as only part of the general question of legal security. I cannot, unfortunately, deal with all the various aspects of the Chinese legal system as it affects foreign traders on this occasion, even in outline. There is some evidence that the Chinese Government is not only aware of the problem but doing something about it - e.g. an approach to the tricky question of industrial property has been made with the recent promulgation of a law on the protection of trade marks. Whether the somewhat unsatisfactory law on patent protection will be revised before the British industrial exhibitions in the next few months is not yet clear, but it is clearly an object of possible concern.

There are three aspects of the legal security problem as it affects the kind of contracts that I have mentioned which are perhaps worth mentioning briefly.

The looseness of the Chinese drafting is the most glaring difficulty. Quite apart from the inequalities referred to earlier as between the tightly drawn obligations of sellers to Chinese corporations and the looser obligations of the Chinese as sellers to the West, some of the terms in these contracts seem to be very vague and in some cases ambiguous. It is not known to what extent precedents are used - clearly they are for the printed contracts - but it is interesting to speculate where they might have come from. While the majority are probably the work of what might be referred to as the 'old Western hands' among the former merchants and lawyers of Shanghai, it is possible that to some extent these documents are modelled on forms used in China's internal system of contracts, - the system that gives legal form to the 'horizontal' economic relationships of the various collectives, enterprises and firms which are subject to the 'vertical' control of the State planning authorities. Since there has not yet been introduced the State arbitration system which, in other Communist countries, regulates the application of this system, it is likely that the need for accurate provision and thus terminological precision has not yet been felt by those who make this system work; in case of doubt, execution of these contracts is subject to State administrative control. Insofar as the State import and export corporations employ lawyers trained in the principles of the internal system, this may be a partial explanation.

A large proportion of the contract forms, so far as I can gather, are bi-lingual, a Chinese text being followed by an English one clause by clause. With the exception of a few documents such as the certificates of the China Commodity Inspection and Testing Bureau, to which I referred earlier, which provide that in case of doubt the Chinese text is to be authoritative, the two texts must be presumed to have equal force. I have not been able to examine enough examples to form any impression of

the extent to which this situation creates ambiguities, but some do without doubt. Of course the majority of traders ignore the Chinese text, and they are probably well advised to do so; I have not yet heard of a difference in the two texts being taken as a point of interpretation by either side, and the Chinese, as mentioned above, have a reputation for generosity in the interpretation of terms. But the Chinese text is nonetheless there.

A particularly obvious gap in the provisions of these contracts is the lack of a 'choice of law' clause. It is usual, in concluding international commercial contracts, for the parties to stipulate expressly that the contract shall be governed by the law of a particular country. This is not always done, however, the omission often being intentional; I suspect that this is the case here. Where there is no such clause, the so-called 'proper law' has to be inferred from the supposed joint intention of the parties. In the case of most of the contracts we are considering, I think that the inferences, as ordinarily drawn, point to the law of the Chinese People's Republic as the proper law.

As I wrote on an earlier occasion, many topics of civil law in China are still obscure to those who are not in a position to observe them in practice, for they are not defined in a civil code, nor are they the subject of statutes. The law of contract is such a topic, and although we know something of the principles by which contractual problems are solved in China, our knowledge is general and rather vague, and in many cases it would not be adequate to make predictions with any certainty.

An example of the kind of problem I have in mind would be the exception clauses which operate in Chinese foreign trade contracts. The object of an exception clause is to define the situations in which the performance of an obligation arising from the contract is excused when the party concerned is prevented from performing by circumstances beyond his control. In the West the usual practice is to employ for this purpose well known forms, incorporating such familiar phrases as 'act of God', 'force majeure', 'restraints of princes' and others which have been interpreted by the courts and have thus acquired a reasonably precise meaning. In the Chinese foreign trade contracts, as far as I can generalize, the expression 'force majeure' is always employed. In the Chinese texts the relevant expression is 'jen-li pu-k'o k'ang-chü', or '(a) thing or force) irresistible by human strength.' This expression is known to Chinese law, but it seems, on the basis of the examples given in a textbook at least, to apply to a much wider range of situations than would ordinarily be covered by the term 'force majeure' as used in the West. Which is to be regarded as the correct interpretation? The question becomes even more difficult if those contracts which only have an English text are presumed, as in certain circumstances might be the case, to be governed by Chinese law.

I do not mean to suggest that there is anything sinister behind a technical ambiguity like this, which could after all benefit either side, depending on whether they are buying or selling. Difficulties of this kind can be found in all branches of international trade. The

China trade is a more fertile breeding ground than most for such difficulties, though, and this is clearly a source of irritation to at least one side. As I suggested earlier, the direct trader with China is not necessarily the only victim of the system. The lack of legal security increases the risk element in the financing and insurance of the whole trade.

From this point of view it might be expected that the Chinese would themselves find it advantageous to improve the position. Even granted a traditional dislike of the conduct of open disputes, either in the courts or before arbitrators, there is much room for improvement in the direction of greater certainty without changing the arbitration position. As trade with the West increases and, as seems likely, is institutionalised in other respects, I do not think it unduly optimistic to hope for improvements, though it is true that the probable increase in competition amongst Western firms for the business will operate very much to the advantage of the Chinese in making their own terms.

In the absence of such an improvement, what can be done by the Western merchants? A century ago they solved their problems for a while by methods which are happily no longer open to them. Now some form of negotiation must presumably be their object, though to date I have heard of no collective effort made to alter the terms of trade. Apart from the efforts of individual firms to negotiate their own terms, which are unlikely to be successful except in very special circumstances, negotiation could take place on three levels:- it could be done by the national groups - such as the Sino-British Trade Council - which already negotiate such matters as the holding of exhibitions; it could be done by international groupings based on particular trades, like the shipping conferences; or it could be the subject of action by one or more of the governments which are interested in the trade, - the method which, through the agency of the U.N. Economic Commission for Europe, at last brought forth agreement as to standard terms to be used in the trade between Eastern and Western Europe. At the moment, competition for trade on any terms probably prevents any collective approach. As time passes, and depending on the continuance of the apparent wish on the part of the Chinese to avoid reliance for foreign trade on any one country, the outlook may become brighter.

Yours sincerely,

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