Sailing in a Sea of Obscurity: The Growing Importance of China’s Maritime Arbitration Commission

I. INTRODUCTION

II. BACKGROUND
   A. International Shipping and China
   B. The History of Dispute Resolution in China
      1. The Pre-Modern Dynastic Period and Evolution of Dispute Resolution
      2. Chaos, Conflict, and Change
      3. Dispute Resolution in the Communist Era
   C. CIETAC
      1. Introduction
      2. History and Purpose
      3. Rules and Procedures
      4. Jurisdiction

III. ANALYSIS OF CMAC’S MARITIME DISPUTE RESOLUTION
   A. Introduction
   B. China’s Code of Maritime Law: Adapting to Change
      1. Introduction
      2. An Attempt at Comprehensive Coverage
      3. Adjusting to Change
   B. Maritime Courts: Preparing for the Future
      1. Introduction
      2. Jurisdiction and Appeals
      3. Internal Conflicts of Law
   C. CMAC: Making Fair and Equitable Decisions
      1. Introduction
      2. CMAC Rules and Procedures
      3. CMAC Tribunals
      4. Choice of Law
      5. Agents and Lawyers
      6. CMAC Proceedings
      7. CMAC Conciliation and Mediation
   D. CMAC Cases and Decisions
      1. Introduction
      2. A Civil System’s Look at Common Law Precedent
      3. The Role of Conciliation
      4. All Things Maritime
      5. The Value of a Good Reputation
   E. Conflicts of Law and Jurisdiction

IV. SUGGESTIONS FOR ARBITRATING MARITIME DISPUTES
   A. Introduction
   B. Conciliation
C. Arbitration and Chinese Attorneys
D. Guanxi

V. CONCLUSION

I. INTRODUCTION

International commerce depends upon the timely and efficient movement of goods and passengers to and from the ports of maritime nations. Consequently, the maritime transport services industry is a vital component of the global economy. Because of its tremendous profit-generating potential, this industry is highly competitive. Shipping companies construct new port facilities, build larger, faster ships, and fund research to develop state-of-the-art, cargo-handling equipment to stay competitive. The promulgation of new laws and regulations often accompany changes in the physical characteristics of the industry. These sizable investments in time and money intensify competition for market share and ultimately lead to conflict and confrontation. To some extent, the future of international trade will depend on how these disputes are resolved.

Many predict China’s accession to the World Trade Organization (WTO) will lead to an exponential increase in world trade. The maritime transport services industry will continue to account for the carriage of a significant percentage of that trade. While the maritime transport services industry is important to all nations, it is particularly important to China. China is committed to becoming the world’s leading provider of ships and

---

1 See Frances Williams, Shipping Liberalisation Push, FIN. TIMES, Oct. 6, 2000, at 12.


shipping services and has invested heavily in improving its shipyards, ports, and port facilities. The Chinese have also revised their regulatory schemes to answer criticisms questioning the fairness and openness of their laws and procedures, and to facilitate their entry into the WTO.

A growing number of litigants, both foreign and domestic, are asking Chinese courts to review and adjudicate disputes; however, the Chinese have traditionally preferred to resolve conflicts by mediation and arbitration. In discussing the issues that arise concerning the arbitration or mediation of disputes between Chinese nationals and foreign parties, most scholarly articles focus on China’s International Economic and Trade Arbitration Commission (CIETAC) and neglect China’s Maritime Arbitration Commission (CMAC). Because of China’s growing

---

5 Maritime Courts Shift to Nation’s Judicial System, CHINA DAILY, July 1, 1999 [hereinafter Maritime Courts Shift]. The 1993 International Shipping Registrar ranked the People’s Republic of China (PRC) as the 9th largest maritime transport service nation in terms of registered vessels. Hong Kong was 14th. Naturally, Hong Kong’s reversion to Chinese control in 1997 augmented China’s already formidable presence as a shipping power. See John Shijian Mo, Shipping Law in China 3 (1999). However, China’s commitment to the growth of its shipping industry began long before the return of Hong Kong. Since the 1950s, China has encouraged and financed numerous projects designed to increase capacity and improve efficiency. During the last fifteen years, it has actively encouraged private investment and joint ventures with foreign firms. The China Shipping Group (CSG), for example, was formed from offshoots of the state-owned China Ocean Shipping Company (COSCO). CSG recently formed partnerships with various foreign agencies to open trade routes around the globe. Analysts predict CSG will become one of the world’s top five shipping firms. Shipping: Big League Hopes, CHINA ECON. REV., Dec. 23, 1999 [hereinafter Big League Hopes]. In addition to its service interests, China is also one of the world’s largest providers of new vessels. As of June 2000, China had orders totaling 8.82 million metric tons, on par with Japan and South Korea, the world’s leading shipbuilding nations. China’s Socioeconomic Headache, THE NIKKEI WEEKLY, Sept. 4, 2000, at 18, available at http://www.nni.nikkei.co.jp.

6 See McKay, supra note 4; See also George Lauriat, China Shipping: The Great Leap Forward 121 (1983).

7 Maritime Courts Shift, supra note 5.

importance within the maritime shipping industry, it follows that CMAC will assume an increasingly important role in resolving maritime disputes. This article argues that CMAC’s unique role in China’s legal system merits closer scrutiny by legal scholars and practitioners hoping to understand the import of Chinese maritime policies.

Part II of this article explores the importance of shipping to world trade and examines China’s efforts to become the world's leading shipping and maritime services nation. A short history of mediation and arbitration in China follows to lay the foundation for subsequent discussions of current policies and procedures. A brief look at China’s Arbitration Law and CIETAC concludes this section to afford readers a contemporary comparative reference. Part III begins by examining China’s Maritime Code and maritime court system as the framework for understanding CMAC’s role in dispute resolution. An analysis of various CMAC rules and procedures and a review of CMAC cases follow to illustrate the logic and theory behind CMAC decisions. An explanation of the manner in which CMAC handles international conflicts of law issues completes this section to provide insights into CMAC’s interpretation of the principles of international law. Part IV takes a brief look at problems practitioners may encounter and at solutions that may prove effective when resolving disputes by mediation or arbitration. Part V summarizes the important points discussed and concludes that CMAC is an appropriate forum for legal practitioners looking to resolve maritime transport disputes.

II. BACKGROUND

A. International Shipping and China

According to the International Maritime Organization (IMO), there are literally thousands of ships engaged in providing transport services internationally. Estimates suggest that at least eighty-percent of the

---

world’s trade goods are transported by ships.\textsuperscript{10} In the U.S. alone, the waterborne cargo industry contributes seventy-eight billion dollars each year to the U.S. Gross Domestic Product.\textsuperscript{11} China’s shipping industry is equally important to its economy; nearly ninety percent of the goods China imports and exports arrive or leave through Chinese ports.\textsuperscript{12} Approximately seventy-five billion dollars in bilateral trade passes through U.S. and Chinese ports annually.\textsuperscript{13} In an address for World Maritime Day 2000, IMO Secretary-General William O’Neil observed that:

No matter where you may be in the world, if you look around you it is most probable that you will see something that either has been or will be transported by sea. There is every likelihood that the chair you are sitting on, the paper on which you are reading this message or the radio to which you may be listening or even the clothes you are wearing have something in their content that has been carried on board a ship.\textsuperscript{14} Shipping is truly an international industry\textsuperscript{15} and will play an increasingly important role in the growth of international trade.

Since its founding in 1949, the People’s Republic of China (PRC) has emphasized the development of a blue-water, globally-oriented shipping industry.\textsuperscript{16} Indeed, the growth of its merchant marine is one of the PRC’s success stories.\textsuperscript{17} In 1949, the Chinese Merchant Marine

\textsuperscript{10} Williams, \textit{supra} note 1; see also \textit{Marine Board Committee on Ship’s Ballast Operations, National Research Council, Stemming the Tide: Controlling Introductions of Nonindigenous Species by Ships’ Ballast Water} 22 (1996).

\textsuperscript{11} \textit{Cicin-Sain & Knecht, supra} note 3, at 213.

\textsuperscript{12} \textit{Mo, supra} note 5, at 2.


\textsuperscript{14} O’Neil, \textit{supra} note 9. According to the Secretary-General, most people never consider the impact shipping has on their lives. \textit{See id}.

\textsuperscript{15} \textit{See id}.

\textsuperscript{16} \textit{See Mo, supra} note 5, at 3.

consisted of only fourteen vessels. Since 1961, when the PRC established the China Ocean Shipping Company (COSCO) to oversee the development of its merchant marine, China has increased its tonnage at an average rate of 13.6% per year, a rate greater than any other country in the world. China currently owns approximately 1500 ocean-going vessels. In 1994, Chinese-owned and registered vessels were sailing to over 1100 ports in 150 countries. In the last twenty years, China has become a major maritime transport services provider, but while China’s emphasis on its shipping industry is relatively recent, its experience with alternative forms of dispute resolution is centuries old.

B. The History of Dispute Resolution in China

1. The Pre-Modern Dynastic Period and Evolution of Dispute Resolution

Contrary to what many believe, China has a lengthy legal tradition and promulgated its first law over 4000 years ago during the Xia Dynasty. However, the “rule of law” was never considered essential to effective government until the introduction of Western civilization during the 18th and 19th centuries prompted significant changes in the structure of Chinese society. Traditionally, the “rule of law” was viewed as ruinous because it resolved disputes through litigation, and litigation produced discord. One of China’s earliest philosophical texts, the I

---

18 Id.
19 Id.
20 MO, supra note 5, at 3.
21 Id.
24 Id.
Ching\textsuperscript{26} denounced litigation because it often proved disastrous for everyone involved.\textsuperscript{27} Centuries of social chaos and discord motivated the Chinese to develop a legal system that relied on alternative forms of dispute resolution.\textsuperscript{28}

The traditional Chinese view of dispute resolution has its origins in Confucian ethics.\textsuperscript{29} The Chinese philosopher, Confucius, taught that the way to achieve a harmonious society was through self-cultivation of ethical principles or \textit{li}.\textsuperscript{30} To Confucius, \textit{li} embodied the moral and
customary principles of conduct that guide the individual to do what is right, to act appropriately in any situation.

The alternative to *li* was *fa*, laws and regulations. Confucius believed laws could convict and execute people, but not teach them the humanity, kindness, benevolence, or compassion needed for a well-ordered society. Confucius taught that if *li* guided people’s actions, *fa* was not necessary.

Confucianism was not the only influential school of thought that played an important role in the development of China’s legal tradition. The Legalists believed that only strict laws and harsh punishments could hold a nation together and favored a system of *fa* that compelled obedience. Chinese history, from the Qin to Qing Dynasties, reveals that a synthesis of Confucian and Legalist philosophies eventually occurred. *Li*, by itself, could not order the empire; consequently the Chinese used *fa* to reinforce it. Confucian teachings exerted far greater influence than those of the Legalists, and as a result, the Chinese embraced compromise as the proper way to resolve conflict.

---

31 Perkovich, supra note 25, at 314.
32 See Confucius, The Analects (D.C. Lau trans., 1983). The underlying goal of *li* is social harmony. Lauchli, supra note 8, at 1058. Confucian philosophy encouraged individuals to settle their disputes privately or, if necessary, to involve their extended family, clans, and guilds. Colatrella, supra note 8, at 396.
33 Perkovich, supra note 25, at 315.
34 See Lauchli, supra note 8, at 1059.
35 Id.
36 Id.
37 Utter, supra note 8, at 384.
38 Id. Emperors used Confucian values to legitimize their authority. Peng, supra note 24. Legalist principles were incorporated as needed. For example, Chinese legal codes provided for different criminal penalties according to social status, members of privileged groups like the scholarly gentry received different punishments than peasants. Position within the family was also important, errant fathers received more leniency than wayward sons. Utter, supra note 8, at 384; see Xu Zhongwei, supra note 27.
39 Colatrella, supra note 8, at 397.
of the empire, mediation (tiaojie) and conciliation have served as China’s primary means of resolving disputes.

2. Chaos, Conflict, and Change

After the overthrow of the Qing Dynasty in 1911, China suffered through a period of unimaginable chaos. Warlords raised private armies and ruled entire provinces. The Japanese army marched confidently across the countryside killing anyone who stood in their way while China’s two main political parties, the Communists and the Nationalists, argued over who would rule what remained of the Qing empire. Eventually, the Communists and Nationalists united to fight the invaders; however, each continued to plan for the inevitable civil war that would follow the defeat of the Japanese. During this period, the world recognized Chiang Kai-shek and the Nationalists as the legitimate government of China and while they were in power, "[t]raditional, informal extrajudicial mediation remained the characteristic mode of dispute settlement."

Mao Zedong was the Communists’ leader. He realized that the Communists needed to mobilize the support of China's peasants. To

---

40 FOREIGN LANGUAGES PRESS BEIJING, CHINA’S CIVIL MEDIATION SYSTEM: A PRECAUTION AGAINST CRIME 4 (1988). The mediator was the person responsible for “solving disputes among the people and harmonizing their relationships.” See id.

41 Colatrella, supra note 8, at 395. Mediation allowed parties to seek their own solutions to the conflict rather than having one imposed. Perkovich, supra note 25, at 315. Mediation also relieved magistrates of their burden to resolve disputes and helped avoid friction between them and the people in their jurisdictions. Utter, supra note 8, at 385.

42 See HSU, supra note 27, at 465-86.

43 See id. at 540-73.

44 See id. at 578-613.

45 See id. at 540-613.

46 Utter, supra note 8, at 387 (quoting Stanley Lubman, Mao and Mediation: Politics and Dispute Resolution in Communist China, 55 CAL. L. REV. 1301, 1304-05 (1967) [hereinafter Lubman, Mao and Mediation]).

47 See generally JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA (2d ed. 1999); HSU, supra note 27.
appeal to the peasants, Mao developed the theory of the “mass line.”

The concept expressed the Chinese Communist Party’s (CCP or Party) dependence on the masses, and in particular, the peasants, to accomplish its objectives. Mediation was envisioned as a weapon of “struggle” against efforts to injure the masses. In areas under CCP control, mediation was required for civil disputes.

3. Dispute Resolution in the Communist Era

As expected, once the war with Japan was over, the Communist and Nationalist armies turned on one another. After the Nationalists’ defeat, the Communists envisioned creating a new legal system that would promote the development of a modern Chinese society, one in which law would serve as a tool for the masses, rather than a set of rules understood only by members of the legal profession.

---

48 Peasants were the overwhelming majority of China’s people. Utter, supra note 8, at 388.

49 Lubman, Mao and Mediation, supra note 46, at 1303. See infra note 60 and accompanying text.

50 Generally the emphasis was on “mass participation in the execution of Party policies rather than in their formulation.” Lubman, Mao and Mediation, supra note 46, at 1303; see also SHAO-CHUAN LENG, JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE’S REPUBLIC 1-26 (1967). The term “masses” referred to the common people, the workers and peasants, and not people belonging to the bourgeois or capitalist class.

51 Lubman, Mao and Mediation, supra note 46, at 1307.

52 Id. at 1306.

53 See SPENCE, supra note 47, at 459-88.

54 The Communists were extremely sensitive to Western criticisms that traditional Chinese law was backward. Utter, supra note 8, at 388.

55 Many Nationalists were retained to staff the new system, primarily because the Communists did not have skilled people within their own ranks who could run a complex legal system. A number of communist “cadre” were brought in; however, to learn the law because the Nationalists were considered politically unreliable. Although the cadre lacked legal skills, they did bring a fresh approach to the law. They stressed simplicity and argued that the law should be easy for anyone to understand, in part to rationalize their own lack of knowledge, but also because they believed that law should be broadly based, and not the special province of a small group of elitist professionals.
In 1954, China enacted its first constitution and established the Supreme People's Court (SPC), the Supreme People's Procuracy and the State Council, all under the authority of the Standing Committee of the National People's Congress (NPC).56 Unfortunately, the new constitution did not remain in effect for long. In 1957, many legal specialists were removed from their positions and the policies they advocated were denounced.57 Mao and the Party extended their influence and exercised exclusive and complete control of China’s legal system.58 In 1966, Mao ordered a “Cultural Revolution” to restore the revolutionary fervor of the war of resistance against the Japanese and Nationalists.59 “Mass line" techniques dominated;60 lawyers were attacked, and law schools closed.61 The civil strife that resulted almost drove the country into bankruptcy.62

During this period, law schools were reopened and legal books and periodicals published reflecting the new emphasis. *Id.* at 388-89.

---

56 *Id.* at 389. The Supreme People’s Court (SPC) (*zuigao renmin fayuan*) is the highest court in China. Immediately below it, there are a number of Higher-Level People’s Courts, one for every province, semi-autonomous region (e.g., Tibet, Xinjiang) and centrally-administered city (e.g. Beijing, Shanghai). The Intermediate-Level People’s Courts (IPC) are next in rank, and are situated in prefectures, provincially-administered cities and within centrally-administered cities. At the county level are the Basic-Level People’s Courts. In addition, there are several specialized courts. These include military, forestry, railway and the Maritime Courts. Clarke, *supra* note 28, at 377-78.

57 The “Anti-Rightist Movement” was designed to rid China of the old bourgeois elements exposed by the “Hundred Flowers” campaign. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA 16 (1985) [hereinafter LENG & CHIU].

58 Utter, *supra* note 8, at 389. See also LENG & CHIU, *supra* note 57, at 17.

59 See HSU, *supra* note 27, at 689-703. During the Cultural Revolution, the public security bureaus assumed the functions of the courts and the procuracy. Utter, *supra* note 8, at 389.

60 The "mass line" included administration of justice by "the masses," rather than by trained legal professionals. Utter, *supra* note 8, at 390; see also LENG & CHIU *supra* note 57, at 18; Lubman, *Mao and Mediation, supra* note 46, at 1303.

61 Particularly during the Cultural Revolution (1966-1976), the practice of law was viewed as revisionist, a dangerous remnant of Nationalist ideology. See Lauchli, *supra* note 8, at 1061.

During the Maoist era, mediators primarily served the interests of the State and the interests of the disputants were often subordinated to those interests; cadre often led and instructed more than they mediated. The idea that disputants could resolve their own problems with the assistance of “politically correct” mediators was, of course, consistent with Confucian practices. The Maoists; however, would have resented any implied reliance on traditional philosophy, everything was credited to Marxist-Leninist-Maoist ideology. Mediation was used to articulate the ideological principles and values of the CCP, to mobilize the people to increase their commitment to Party goals, and to suppress disputes between individuals that were regarded as interfering with the development of a socialist state. Disputes often led to long sessions of “thought reform” and embarrassing public criticism. Politization of mediation prompted many to avoid mediation altogether, to work things out quietly amongst themselves.

The death of Mao led to changes in the political climate of China. In 1978, a new constitution restored the provisions of the 1954 constitution and led to a movement to strengthen the legal system. Deng Xiao-ping and the rest of China’s leadership soon realized, however, that the old legal system would not help them achieve their goals of modernization. Consequently, a new Constitution was enacted and promulgated in 1982. Since then, China has enacted several new laws

---

63 Perkovich, supra note 25, at 318. Communist mediators were unyielding if they believed there were political and ideological factors in a dispute in need of “correcting.” Lubman, Mao and Mediation, supra note 46, at 1357.

64 Id.

65 Lubman, Mao and Mediation, supra note 46, at 1309. Cadre and activists conducted most neighborhood mediations and all of the mediations performed in organizations and courts. Standards were politicized, even the occurrence of a dispute was invested with political significance. Id. at 1340-42.

66 Id. at 1346.

67 Mediators were expected to act as sources of information on the activities and ideology of the disputants and to locate and inhibit antisocial behavior. Id. at 1348.

68 See Spence, supra note 47, at 618-46.

69 Lawyers could practice openly, law schools began classes and legal publications were made available. Utter, supra note 8, at 390.

70 Perkovich, supra note 25, at 321.
designed to deal with the issues created by its transition to a market economy. The new laws cover all aspects of Chinese society, including the criminal justice system, civil practice and procedure, and the elections of public officials. Nevertheless, despite an increase in the number of people seeking remedies through the courts, the formal legal system still handles only a small fraction of the cases that arise.

Informal methods like conciliation and mediation have remained the preferred method of dispute resolution. Accordingly, the Chinese government has taken steps to institutionalize this preference. The 1982 Constitution directed all resident and village committees to create Peoples' Mediation Committees to serve as an alternative to the Peoples' Courts. In addition, efforts were made to remove political ideology from the mediation process. By 1987, there were more than 950,000 mediation committees and six million mediators spread throughout China, its mediation system was the largest dispute resolution program in the world.

To further improve mediation procedures, new rules governing mediation committees were promulgated in 1989. These rules imposed more structure on the mediation committees while providing for even

---

71 See Utter, supra note 8, at 393.

72 Id.

73 Id. at 390-91.

74 Id. at 393.

75 "Persuasion and education" still takes place, but are mostly limited to educating disputants about the applicable law and possible conditions for settlement. Perkovich, supra note 25, at 321. The Chinese Communist Party (CCP) now allows elections of members to neighborhood committees to make the committees more accountable to their constituents. Calum MacLeod, An End to the Granny Snoops, SOUTH CHINA MORNING POST, June 1, 2000.

76 Perkovich, supra note 25, at 321.


78 Id. at 124.
greater independence from the influence of the CCP.\textsuperscript{79} Over seven million disputes were resolved satisfactorily through the use of mediation that year.\textsuperscript{80} Throughout their history, the Chinese people have realized that money cannot replace goodwill.\textsuperscript{81} The current international trend toward adopting arbitration and mediation as the preferred method of dispute resolution suggests that the rest of the world thinks so, too.\textsuperscript{82}

C. CIETAC

1. Introduction

China's mediation and arbitration policies and procedures have attracted worldwide attention.\textsuperscript{83} Because of China's growing importance as a trading nation, and because of increasing, widespread use of arbitration clauses in contracts, the focus of much of this attention is on China's foreign-related arbitration bodies, CIETAC and CMAC. While

\textsuperscript{79} Disputing parties can request mediation or the mediator can begin the process on his own initiative. Adult citizens who are "impartial to people, have a close connection to the masses and possesses basic knowledge of law and policies" are eligible for the position of mediator. \textit{Id.}

\textsuperscript{80} \textsc{Ronald C. Brown}, \textsc{Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics} at 23 (1997) (quoting \textsc{Law Year Book of China} 24 (1991)) [hereinafter \textsc{Brown}].

\textsuperscript{81} \textsc{Utter}, \textit{supra} note 8, at 394.

\textsuperscript{82} Disatisfaction with litigation prompted international interest in ADR. Litigation is usually more expensive, time consuming and psychologically taxing. In highly complex commercial disputes, litigation subjects businesses to the limited expertise of juries and judges. Moreover, it may take years before a final decision is made. Also, litigation is frequently well-publicized, making it difficult to maintain any semblance of privacy. Jane L. Volz & Roger S. Haydock, \textit{Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser}, 21 \textit{Wm. Mitchell L. Rev.} 867 (1996). As a result of the growing preference for alternatives to litigation, training in alternative dispute resolution (ADR) has become a growth industry. ADR is widely accepted in East Asian and former Socialist countries and is increasingly more popular in the United States and Western Europe, and in some parts of Africa. Lauchli, \textit{supra} note 8, at 1048-51. International arbitration has become the recognized process by which international business disputes are resolved. Jun Ge, \textit{supra} note 77, at 130-31; see \textsc{Ben Beaumont et al., Chinese International Commercial Arbitration} (1994).

\textsuperscript{83} As former U.S. Chief Justice Warren Burger noted, many nations could employ the unique Chinese model of ADR to stem the flood of litigation afflicting the world's court systems. Jun Ge, \textit{supra} note 77, at 122.
CIETAC is the subject of numerous scholarly articles, CMAC is often neglected. Some authors suggest that CMAC and CIETAC policies and procedures are essentially the same, but generally, they fail to consider the unique character of admiralty and maritime law. Different rules and procedures govern the settlement of maritime disputes. This section looks at CIETAC and China’s Arbitration and Civil Procedure Codes to provide background for a comparison.

2. **History and Purpose**

   CIETAC was founded in 1956 under the auspices of the China Council for the Promotion of International Trade (CCPIT) to aid CCPIT in promoting foreign investment by providing an impartial forum for the resolution of foreign-related disputes. To secure CIETAC’s place in the international community and establish it as a fair and just tribunal, China joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). During the years that followed, however, China’s chaotic political situation limited CIETAC’s opportunities to grow and develop. Eventually, changes in leadership prompted an emphasis on economic reform and guaranteed CIETAC an increasingly important role in China’s future. Because Deng and other Chinese leaders were determined to strengthen China’s presence in global markets, in 1987, China finally

---

84 Id. at 131.

85 The China Council for the Promotion of International Trade (CCPIT) was part of the old Ministry of Foreign Trade (since renamed the Ministry of Foreign Trade and Economic Cooperation (MOFTEC)), and although it is still commonly known as CCPIT, in 1998 its name was changed to China Chamber of International Commerce. CIETAC was originally called the Foreign Trade Arbitration Commission. CIETAC conducts its hearings and renders judgments independent of CCPIT; however, CCPIT retains some degree of control because it appoints CIETAC commission and arbitration panel members and many CIETAC officials hold concurrent positions in CCPIT’s Legal Affairs Department. CCPIT is also responsible for formulating rules governing foreign-related arbitration. Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China*, 1 ASIAN-PAC. L. & POL’Y J. 12 (Summer 2000) [hereinafter Peerenboom, *Regulatory Framework*].

signed and ratified the New York Convention, and thereby expanded the enforceability of CIETAC awards to over 100 countries.

In 1988, CIETAC promulgated new arbitration rules to make itself even more attractive as a forum for resolving international disputes. Thereafter, the number of cases submitted to CIETAC increased dramatically, due in part to the substantial improvement these rules brought to CIETAC proceedings. Since 1988, CIETAC has changed its rules and procedures many times. The continual revision of China’s arbitration laws and regulations has resulted in CIETAC’s transformation from a quasi-judicial dispute resolution body to a truly modern institution of international commercial arbitration. Currently, CIETAC is the largest and busiest international arbitration tribunal in the world.

87 Volz & Haydock, supra note 82, at 902.
88 Jun Ge, supra note 77, at 131.
89 Since 1988, CIETAC’s authority is no longer limited to contract disputes and Chinese is not the only language used at hearings and meetings; parties may use English or any other foreign language that those involved in the dispute agree upon. Foreign parties may nominate a foreign panelist to sit on the three-member tribunal that will hear the dispute and may use their own non-Chinese attorneys in the proceedings. The tribunal has nine months to conduct a hearing and render an award; however, CIETAC can grant an extension if the delay is "indeed necessary." Arbitral awards are final and binding upon both parties. Neither party may bring a suit before a court to alter the award. Jun Ge, supra note 77, at 132-33. While China has made significant changes to its international arbitration process in an effort to conform to international standards, critics still argue that the Chinese arbitration process is protective of local interests. Charles Kenworthey Harer, Arbitration Fails to Reduce Foreign Investors’ Risk in China, 8 PAC. RIM L. & POL’Y 393, 395 (1999). Supporters counter that although arbitration in China is imperfect, it remains the best alternative for international investors. Fredrick Brown & Catherine A. Rogers, The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People’s Republic of China, 15 BERK. J. INT’L LAW 329, 330 (1997) [hereinafter Brown & Rogers].
92 Ozren Bakovic, Combining Arbitration with Conciliation: The Unique Chinese Experience, 6 CROAT. ARBIT. YEARB. 109, 125 (1999). CIETAC panels include
3. **Rules and Procedures**

To initiate proceedings under CIETAC, a plaintiff must submit an application for arbitration and evidence to support the claim including any arbitration agreement on which the application is based.\(^94\) Once a nominal fee is paid, the plaintiff, the defendant and CIETAC each select an arbitrator and a hearing is conducted.\(^95\) After the hearing, CIETAC has thirty days to reach a decision.\(^96\)

Once CIETAC renders a decision, like most arbitral institutions, it has no authority to enforce an award.\(^97\) CIETAC’s rules are similar to those of China’s Arbitration Law, but not identical;\(^98\) and neither provides arbitrators from Hong Kong, Macau, foreign countries and mainland China. Many of its newest members are legal professionals. Lauchli, *supra* note 8, at 1067. The CIETAC list of potential arbitrators has expanded to include younger arbitrators who have exposure to foreign legal systems and are more inclined than the senior bureaucrats to find "legal" rather than "practical" solutions. Brown & Rogers, *supra* note 89, at 339-340. Nevertheless, although international commercial arbitration in China is conducted by universally accepted standards, old practices still exist. For example, China does not allow ad-hoc arbitration. Bakovic, *supra*.


\(^94\) The application is similar to a complaint for litigation. Volz & Haydock, *supra* note 82, at 903. "In general, parties to international transactions have the right to choose arbitration rather than litigation to resolve their disputes in virtually all situations." Lauchli, *supra* note 8, at 1067.

\(^95\) CIETAC selects the arbitrator that will preside. Volz & Haydock, *supra* note 82, at 903.

\(^96\) Id.

\(^97\) Id.

\(^98\) ARBITRATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA [AL] (Adopted at the Ninth Standing Committee Session of the Eighth National People's Congress), http://www.qis.net/chinalaw/prclaw47.htm (last visited Apr. 19, 2002). The Arbitration Law was modeled after the United Nations Commission on International Trade Law (UNCITRAL) to enhance China’s image and make its arbitration commissions appear more amenable to foreign corporations. Volz & Haydock, *supra* note 82, at 904. The law established numerous arbitration commissions and formed the China Arbitration Association as a non-governmental, self-regulating organization of commissions. Brown & Rogers, *supra* note 89, at 338. Although the commissions are supposedly independent of the judiciary, they are subject to registration by the Ministry of Justice and local authorities, and the chairmen of several commissions are current or former members of
effective rules or procedures for enforcement. Only China’s Civil Procedure Code (CPC) has provisions that mandate compliance. CPC Article 195 provides that,

> When one party concerned fails to implement the ruling made by the PRC foreign affairs arbitration organ, the other party concerned may request that the ruling be carried out in accordance with this law by the Intermediate People's Court of the place where the arbitration organ is located, or where the property is located.

However, even when CPC rules apply, enforcement is frequently problematic.

Although the law clearly grants the Intermediate People’s Courts the authority to enforce arbitral decisions, they are frequently unwilling to do so against local persons or firms, citing the need for a “public policy” exception. Other countries make “public policy” exceptions, but

---

99 **CODE OF CIVIL PROCEDURE OF THE PEOPLE’S REPUBLIC OF CHINA [CPC]** (Adopted by the Fourth Session of the Standing Committee of the Seventh National People’s Congress), available at http://www.qis.net/chinalaw/lawtran1.htm (last visited Apr. 19, 2002); Before the CPC and the Arbitration Law were enacted, arbitration was regulated by the CCP, government decrees, statutes, regulations and custom. Lauchli, supra note 8, at 1067.

100 See CPC, supra note 98; Volz & Haydock, supra note 82, at 903.

101 Volz & Haydock, supra note 82, at 903-904 (1996). Chinese courts do not have jurisdiction over a dispute if the parties have an effective arbitration agreement. Lauchli, supra note 8, at 1068.

102 See Peerenboom, Regulatory Framework, supra note 85 (discussing the problems of enforcement under the current regulatory scheme and examining proposed remedies); Courts Getting Tougher But Fairer, CHINA DAILY, Dec. 15, 1999 [hereinafter Courts Getting Tougher]. Critics often accuse Chinese courts of unfairly refusing to recognize and enforce foreign and foreign-related arbitral awards. See Harer, supra note 89, at 395.

103 See Lauchli, supra note 8, at 1068-69; Volz & Haydock, supra note 82, at 879-80. The public policy exception is only one excuse for refusing to enforce an award. “Article 260 of the Act provides six conditions under which Chinese courts can refuse to enforce an award: (1) there is no arbitration agreement; (2) the arbitration is beyond the scope of the agreement or the arbitration institution has no jurisdiction; (3) the composition of the arbitral body or the arbitration procedures violate statutory procedure; (4) evidence is concealed resulting in an unfair hearing; (5) an arbitrator seeks or accepts a bribe, misbehaves, or bends the law; or (6) the award violates public policy.” Volz & Haydock, supra note 82, at 904-05; see AL art. 260.
excessive use of this principle to block enforcement may lead to a backlash of refusals to honor Chinese awards.\textsuperscript{104} For example, when the Shanghai Intermediate Court initially refused to recognize and enforce the decision of the Arbitration Institute of the Stockholm Chamber of Commerce in the well publicized Revpower case,\textsuperscript{105} only the Supreme People’s Court’s intervention saved an international incident.\textsuperscript{106} Decisions setting aside or refusing to enforce or recognize foreign arbitral awards are now subject to the SPC’s strict scrutiny.\textsuperscript{107} China hopes the SPC’s decision in the Revpower case will assure foreign firms that it is working to improve enforcement.

As far as the foreign-related arbitration process itself is concerned, statistics show that CIETAC awards are fairly and equally distributed among foreigners and Chinese nationals.\textsuperscript{108} Although problems may

\textsuperscript{104} Lauchli, supra note 8, at 1068-69.

\textsuperscript{105} Xian Chu Zhang, Chinese Law: The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects, 29 HONG KONG L.J. 463, 468 (1999). Revpower, a U.S. battery maker, applied for arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce. The Institute awarded Revpower $9 million dollars against a Shanghai factory, but it took 6 years for Revpower to get a Shanghai court to accept its application for enforcement. By then, the factory had transferred all of its assets to other companies. See Brown & Rogers, supra note 89, at 341-42; Randall Peerenboom, Enforcement of Arbitral Awards in China, CHINA BUS. REV., Jan. 1, 2001, available at 2001 WL 13260942.

\textsuperscript{106} The case prompted a motion in the United States Congress against China’s accession to the World Trade Organization (WTO). Zhang, supra note 105, at 468 n.33.

\textsuperscript{107} Id. In August 1995, the SPC issued a circular entitled, “Concerning the Handling of Issues Regarding Foreign-Related Arbitration and Foreign Arbitration Matters by the People's Courts,” in response to the increasing number of problems encountered by foreign parties seeking enforcement through the lower courts. Lower courts must now report decisions concerning foreign, Hong Kong, Macao or Taiwan related economic, maritime or admiralty disputes involving the validity of an arbitration agreement to a higher court for review before they can refuse to enforce the judgment. Dispute Resolution, supra note 98. According to the 1995 circular, if an Intermediate People's Courts intends to refuse either to recognize or enforce a foreign or foreign-related award, it must submit a report to the High People's Courts (HPC). If the HPC agrees, the HPC must report the case to the SPC. An IPC can refuse to recognize or enforce the award only if the SPC authorizes the refusal. Peerenboom, Regulatory Framework, supra note 85.

\textsuperscript{108} See Zhang, supra note 105, at 463; Courts Getting Tougher, supra note 101.

\textsuperscript{109} Volz & Haydock, supra note 82, at 903.
continue to plague enforcement, apparently foreign parties can expect a fair hearing before a CIETAC tribunal.\textsuperscript{110}

Foreign parties may find China’s alternative dispute resolution practices unusual, because in China, arbitration and mediation are “two sides of the same coin.” The practice of combining arbitration and mediation is a distinctive feature of Chinese arbitration proceedings.\textsuperscript{111} The laws governing China’s arbitral organizations, both domestic and international, require or permit them to attempt mediation before proceeding to arbitration.\textsuperscript{112}

CIETAC’s rules allow mediation if either party requests it and the other party does not object.\textsuperscript{113} This arrangement may, in many cases, facilitate quick and equitable settlements. Since the parties know that the arbitrators are ready to issue an award if mediation fails, they are more likely to seek a compromise than in a pure mediation setting.\textsuperscript{114} After the first meeting, parties may find that compromise is worth considering, in particular, after assessing the strong and weak points of their case.\textsuperscript{115} Moreover, no additional fee is required; therefore if mediation is successful, considerable time and money are saved.\textsuperscript{116} The arguments against combining mediation with arbitration center around parties' fears that arbitrators may become biased or even corrupted during the mediation process since arbitrators may meet \textit{ex parte} with the parties to promote settlement.\textsuperscript{117} In any event, mediation currently solves between 30 to 50 percent of the international arbitration cases CIETAC accepts.\textsuperscript{118}

\textsuperscript{110} Even Revpower has stated that it would invest in China again once its arbitral award is enforced. Brown & Rogers, \textit{supra} note 89, at 351.

\textsuperscript{111} Jun Ge, \textit{supra} note 77, at 127.

\textsuperscript{112} \textit{Id.} at 125-26.

\textsuperscript{113} Harer, \textit{supra} note 89, at 395.

\textsuperscript{114} Peerenboom, \textit{Regulatory Framework}, \textit{supra} note 85.

\textsuperscript{115} Bakovic, \textit{supra} note 92, at 125.

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} At a minimum, parties have an opportunity to provide information that the formal arbitration process might exclude or the other party may challenge. Parties are also justly concerned that the arbitrators could base their decision on equity rather than strict application of the law. Once the arbitrators have indicated their views, the parties may feel pressured to settle even if they think they are entitled to a more favorable award.
4. **Jurisdiction**

CIETAC was the sole organization authorized to hear non-maritime commercial arbitrations between Chinese and foreign parties. Provisions of the 1995 Arbitration Law restricted CIETAC and CMAC to cases “involving a foreign element;” domestic arbitration commissions, like the Beijing or Shanghai Arbitration Commissions, were to handle only domestic cases. In 1996, domestic commissions won the right to hear international cases, a Notice from the State Council contained provisions ending CIETAC’s exclusive jurisdiction over foreign-related disputes and made it more difficult to designate CIETAC in arbitration clauses in standard-form government contracts. Despite the change, CIETAC and CMAC continue to handle most of the foreign-related cases.

The prevalence of arbitration clauses in China's business-related legislation and the busy dockets of its arbitral organizations are testament to arbitration’s importance to China. As Ren Jianxin, former President under the law for fear of angering the arbitrators. Peerenboom, *Regulatory Framework*, supra note 85.


119 Lauchli, *supra* note 8, at 1066.

120 Gasper, *supra* note 91.

121 *Id.*

122 Harer, *supra* note 89, at 406. Currently, the PRC arbitration system consists primarily of CIETAC, CMAC and over 140 local arbitration commissions set up in cities throughout China. Peerenboom, *Regulatory Framework*, *supra* note 85. CIETAC has since successfully lobbied the State Council to get the rules amended so it can hear domestic cases. The new rules went into effect on October 1, 2000. Gasper, *supra* note 91.


124 Jun Ge, *supra* note 77, at 128-29. China has taken the lead in inventing new mediation methods such as "joint mediation." Under "joint mediation," a Chinese party may apply to CIETAC and the foreign party to a corresponding arbitral organization. The arbitral organs each appoint one or more mediators on an equal basis to mediate the case jointly. *Id.* at 126-27.
of the SPC stated, “‘[N]egotiation and mediation’ are traditional ways . . .
Chinese have always used to solve civil disputes.”125 CIETAC
combines classical Chinese attitudes toward dispute resolution and a well-
developed expertise in contemporary international practice. It is a
modern embodiment of the Chinese tradition.

III. ANALYSIS OF CMAC’S MARITIME DISPUTE RESOLUTION

A. Introduction

Evidence suggests China’s tradition of sea travel and ocean-related
commerce began long before the fabled Xia (c.2100-c.1600 B.C.)
Dynasty; however, the extent to which the Chinese used their vessels for
commerce and exploration during the pre-historical period is still a
mystery.126 During the Shang (c.1600-c.1050 B.C.) and Zhou (c.1050-221
B.C.) Dynasties, Chinese merchant ships sailed regularly to Japan, Korea
and Southeast Asia.127

As maritime commerce grew more important, Chinese emperors
began searching for ways to obtain a share of the profits. The Han (206
B.C.-220 A.D.) Dynasty established special markets for “boat-traders.”128
Both the Tang (618-907) and Song (960-1279) Dynasties had special
administrative offices to handle vessel-related issues.129 Song
officials collected the first customs duties from “boat-traders.”130 With the
invention of the compass during the Yuan (1260-1368) Dynasty,131 China
seemed ready to explore new continents and opportunities.

China’s seaward expansion came to an abrupt halt when the first
Ming Emperor, fearful of losing power, prohibited Chinese vessels from

125 Ren Jianxin, Mediation, Conciliation, Arbitration and Litigation in the
People’s Republic of China, in CONTRACT, GUANXI, AND DISPUTE RESOLUTION IN CHINA
at 363 (Tahirih V. Lee ed., 1997).

126 Mo, supra note 5, at 5.

127 Id.

128 Id. at 5-6.

129 Id. at 6-7.

130 Id.

131 Id. at 7.
sailing abroad. These restrictions were eventually relaxed because the Ming needed new sources of revenue; however, the Qing (1644-1911) Dynasty that immediately followed the Ming, also prohibited ocean-borne commerce. China did not renew its interest in the development of a shipping industry until the early 1960s. Maritime law was subsumed within larger Dynastic Codes until the beginning of the 20th century when Western influence prompted the introduction of a modern system of law. Although the Qing promulgated a few laws regulating transportation and shipping companies, its Commercial Code, which contained a chapter on Shipping Law, was never completed. The Nationalists promulgated a revised version of the Shipping Law; but endless warfare prevented their developing a viable shipping industry. When the Communists gained control, there was little need for a Shipping Law; there were few ships and like the Ming and Qing, they prohibited citizens from engaging in overseas trade.

B. *China’s Code of Maritime Law: Adapting to Change*

1. *Introduction*

Since China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations. Within the last twenty years, it has enacted over twenty shipping-related laws and regulations including a Code of Maritime Law

132 The Ming Dynasty lasted from 1368 to 1644. *Id.* at 9. Years later, another Ming Emperor ordered hundreds of ships on successive trips to Southeast Asia, the Middle East and North Africa to show off his power and authority. Many Chinese wonder what might have happened had these expeditions engaged in commerce and trade. *Id.* at 7-9.

133 *Id.* at 9-10.

134 See Pew et al., *supra* note 17.

135 MO, *supra* note 5, at 11-12.

136 *Id.* at 12.

137 *Id.* at 13.

138 See Pew et al., *supra* note 17.

139 Li, *supra* note 22.
China started drafting a maritime law in 1952 and actually completed a first draft in 1963, but did not have a formal or official Code until 1993. To create its Maritime Code, China borrowed heavily from the Hamburg Rules of 1978 and the Hague/Visby principles regulating the carriage of goods by sea. The Chinese also examined various other international accords, adopting some provisions as written and changing others before incorporating them into the final document. The current Code is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China’s unique circumstances.

2. **An Attempt at Comprehensive Coverage**

China’s Maritime Code has 278 articles. In addition to general and miscellaneous provisions, the Code regulates vessels, crew, charters, towage, salvage, collisions, general average, limitation of liability, marine insurance and carriage of passengers. It was the largest statute China

---


144 MO, supra note 5, at 16 (MO provides an English translation of China’s Maritime Code at pages 429-474).

145 Id.

146 Id.
had ever enacted until the new Criminal Code in 1997 and while it regulates a wide range of maritime shipping interests, the Code only applies to inbound and outbound international trade, coasting trade is subject to national law. Given the world’s reliance on maritime transport and China’s increasing importance as a provider of maritime transport services, China’s Maritime Code could have a profound influence on international commerce.

3. Adjusting to Change

China’s Maritime Code is a constructive attempt to standardize its regulations so foreign shipping agents and owners can understand and comply with its regulatory scheme. Because the Code is relatively new, China can expect to modify or make additions to its provisions to accommodate changing conditions within the shipping industry. Indeed, China recently amended the Code to incorporate substantial provisions of the International Convention on Arrest of Ships of 1999. This willingness to conduct periodic reviews of the Code, to listen to criticisms and make changes where necessary, indicates that the Chinese are prepared to amend the Code when and where appropriate.

Already problems with the Code have prompted a fundamental shift in China’s approach to maritime regulation. For example, jurisdiction and arbitration procedures are not regulated under the rules of the Maritime Code. Prior to July 1, 2000, provisions of the Civil

---

147 Id.


149 See Williams, supra note 1; see also Big League Hopes, supra note 5; Mo, supra note 5.

150 China to Draft Law on Maritime Lawsuits, CHINA BUS. INFO. NETWORK (CBNET), Aug. 25, 1999 [hereinafter Maritime Lawsuits].


152 Tetley, supra note 141, at 610 n.40.
Because the CPC did not adequately address the special needs of maritime law, the Supreme People’s Court frequently found it necessary to supplement the CPC by promulgating ad hoc procedures for dealing with uniquely maritime problems. Consequently, a Maritime Procedure Law (MPL) was enacted. The new Maritime Procedure Law was designed to assist the implementation of the existing Maritime Code by providing "detailed procedural rules tailored to maritime litigation." While the MPL "affirms the unique status of the maritime courts" and extends their jurisdiction to injunctive relief in support of maritime claims, it does not give maritime courts exclusive jurisdiction over maritime cases. This omission may give rise to additional problems, particularly when the adjudicative panel or arbitral tribunal does not know or understand maritime issues and maritime law. By enacting the MPL, China has signaled its recognition of the unique nature of maritime issues and suggested that it will continue to improve its

---

153 See CPC, supra note 99, arts. 243-246 & 257-261; Claire Morgan, The PRC’s New Maritime Procedure Law, THE BULL. OF THE JAPAN SHIPPING EXCHANGE, INC., Sept. 2000, at 33 [hereinafter Morgan, Maritime Procedure Law]. One of the early problems with maritime litigation in China was the tendency of local courts to accept cases, even though the judges were inexperienced in maritime law. Foreign parties legitimately questioned their impartiality because pressure from influential local companies normally prompted their decision to hear the case. Consequently, China set up a network of maritime courts in 1984 to create centers of maritime law expertise. Id. at 34.

154 For example, the arrest and forced sale of vessels. Claire Morgan, New China Maritime Law to Impact on Shipping Litigation, LLOYD’S LIST INT'L, June 28, 2000, § Law, at 6.

155 MARITIME PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA [MPL] (Adopted by the Thirteenth Session of the Standing Committee of the Ninth National People’s Congress), available at http://www.com-law.net/findlaw/marine/maritime1.htm (last visited June 9, 2002); See also Li, supra note 22. Not only is China seeking to rectify the problems associated with using the CPC for maritime matters, it is once again signaling its desire to provide a predictable and transparent maritime regulatory scheme for international trade.

156 Morgan, Maritime Procedure Law, supra note 153, at 33.

157 Id. at 34.

158 Although such a provision was suggested, the Standing Committee of the NPC did not put it in the final draft. Id. at 34 n.5; see also infra note 183 and accompanying text.
rules and procedures, perhaps increased trade will prompt another fundamental shift in policy.

B. **Maritime Courts: Preparing for the Future**

1. **Introduction**

   In addition to changing its Maritime Code, China has changed its maritime court system to prepare for the anticipated increase in foreign investment and trade that should accompany its accession to the WTO. Xiao Yang, President of the Supreme People’s Court, recently promised that Chinese courts will pay special attention to maritime cases. Yang’s comments acknowledge the crucial role Maritime Courts will play in adjudicating the disputes that will arise as a result.

2. **Jurisdiction and Appeals**

   China has long recognized the unique nature of maritime disputes. In 1954, it set up special courts to handle disputes arising from the use of China’s waterways. Nearly thirty years later, the present system of Maritime Courts was established. China’s Maritime Courts are authorized to hear any type of maritime dispute that may arise under the

---

159 Recent increases in admiralty actions are making new procedures for handling lawsuits necessary, particularly with the rise in the number of foreigners filing cases. *Maritime Lawsuits, supra* note 150.

160 *See Maritime Courts Shift, supra* note 5; *Courts Getting Tougher, supra* note 102.

161 *Courts Getting Tougher, supra* note 102. From 1990 to 1995, the number of maritime cases heard by Chinese courts increased by over 343%; the figures for 1994-95 alone show an increase of over 56%. *Brown, supra* note 80, at 131-32.

162 In 1957, these courts "merged with local courts as part of [a] judicial reform" movement. *Mo, supra* note 5, at 362.

163 *Id.* These courts are located in Guanzhou, Shanghai, Qingdao, Tianjin, Dalian, Wuhan, Haikou, Xiamen, Beihai and Ningpo. *Morgan, Maritime Procedure Law, supra* note 153, at 34 n.4. Each court is divided into three departments, one handles commercial disputes, another maritime accidents, and the last, enforcement. The courts are assisted by an administrative office and a research office. *Mo, supra* note 5, at 362 (Chapter Thirteen of this book provides a detailed description of the structure of the Maritime Courts, resolution of maritime disputes, and the framework and procedures of CMAC).
Maritime Code or under the national laws applicable to disputes involving vessels in navigation upon inland waters.\footnote{Mo, supra note 5, at 362.} They are the court of first resort in these matters and have the same status as an Intermediate People’s Court.\footnote{Id. at 363.} Appeals from Maritime Courts normally go to the closest Provincial Supreme Court or its equivalent; however, since a party only gets one appeal, sometime an appellant will take his appeal directly to the SPC.\footnote{Under Chinese law, a party is entitled to only one appeal. Id.}

To review appeals submitted to the SPC and to supervise the handling of disputes by lower courts, the SPC established the Court of Transportation and Communication (CTC).\footnote{The SPC established the Court of Transportation and Communication in 1987. Id.} The CTC is authorized to respond to the request of a party or on its own initiative, issue a directive to clarify a point of maritime law.\footnote{Id.} In special circumstances, it can serve as a court of first resort for cases that fall within the SPC’s jurisdiction.\footnote{Id.}

\section{3. Internal Conflicts of Law}

Although China’s Maritime Courts were not given exclusive jurisdiction over maritime disputes by the MPL, they may exercise exclusive jurisdiction under the authority of the SPC.\footnote{Article 2 of the SPC’s “Notice Concerning Further Implementation of the Decision on the Scope of Cases to be Handled by the Maritime Court” (Notice) ordered courts of general jurisdiction not to try cases that fall under the definition of maritime cases provided by the SPC’s 1989 Decision on Maritime Disputes. Arguably, in the SPC’s opinion, maritime cases are reserved for Maritime Courts. Article 3 of the Notice does provides that when a minor maritime dispute takes place far from a Maritime Court, the local court will not have jurisdiction.} Article 2 of the SPC’s “Notice Concerning Further Implementation of the Decision on the Scope of Cases to be Handled by the Maritime Court” (Notice) ordered courts of general jurisdiction not to try cases that fall under the definition of maritime cases provided by the SPC’s 1989 Decision on Maritime Disputes.\footnote{Id. at 367.} Arguably, in the SPC’s opinion, maritime cases are reserved for Maritime Courts. Article 3 of the Notice does provides that when a minor maritime dispute takes place far from a Maritime Court, the local court will not have jurisdiction.
court may hear the case after consulting the relevant Maritime Court with jurisdiction.\footnote{Local courts of general jurisdiction are required to consult with either a Maritime Court or their own superior court if there is any ambiguity concerning jurisdiction. \textit{Id.}}

The SPC’s order reserving jurisdiction to maritime courts creates a potential conflict with the Maritime Procedure Law because the MPL permits local courts discretion to assert jurisdiction over maritime cases.\footnote{Morgan, \textit{Maritime Procedure Law}, \textit{supra} note 153, at 34 n.5.} The disparity between MPL regulations and the SPC Notice illustrates the difficulties sometimes encountered when attempting to determine the current status of a Chinese legal precept. While the SPC order reaffirms the special place of the Maritime Courts within China’s judicial system, it conflicts with MPL regulations in a way that creates a question of legitimacy. Because the SPC answers to the National People’s Congress,\footnote{\textit{Brown}, \textit{supra} note 80, at 31-32; \textit{See} P.R.C. \textit{Const.} ch. III, pt. I, arts. 57 & 62(11) (amended 1993), available at http://www.qis.net/chinalaw/lawtran1.htm (last visited Apr. 19, 2002).} and the NPC enacted the Maritime Procedure Law, logically the SPC’s order to reserve maritime cases for Maritime Courts would not control. Nevertheless, one of the primary responsibilities of the SPC is to administer China’s courts;\footnote{\textit{See supra} note 155.} therefore it could require that Maritime Courts have exclusive jurisdiction over maritime cases as a matter of administrative policy. Absent clarification from the Chinese government, legal professionals representing foreign parties providing maritime shipping services will need to prepare for the possibility of adjudicating maritime disputes before local courts.

Ironically, the arguments for utilizing Maritime Courts for maritime cases are relatively simple. Unlike judges in local courts, Maritime Courts judges have developed technical and legal expertise from repeated exposure to maritime cases and experience interpreting maritime law.\footnote{\textit{Brown}, \textit{supra} note 80, at 37.} This enables Maritime Court judges to resolve disputes quickly and efficiently. In addition, the central government appoints Maritime Court judges; they are, therefore, somewhat immune to pressure from local authorities and corporations. Moreover, like their arbitration
counterparts, Maritime Court judges generally have a better understanding of international maritime law and can more easily resolve conflicts of law issues. Consequently, foreign firms involved in a maritime dispute requiring adjudication should make every effort to have the case tried before a Maritime Court.

C. **CMAC: Making Fair and Equitable Decisions**

1. **Introduction**

China’s historical preference for alternative forms of dispute resolution prompted the State Council to create the Maritime Arbitration Commission (“MAC”) in 1958 as an autonomous part of the China Council for the Promotion of International Trade to help CCPIT modernize and strengthen China’s Merchant Marine. Although MAC’s jurisdiction later broadened, it was limited to issues of maritime law. In 1988, MAC amended its rules and changed its name to China Maritime Arbitration Commission (CMAC), but its jurisdiction remained limited to maritime matters. Moreover, CMAC, like the Maritime Courts, does not have exclusive jurisdiction; CIETAC and local arbitration commissions are permitted to hear maritime cases. Nevertheless,

---


179 Pew et al., supra note 17, at 355. Like CIETAC, although some of its personnel are listed as government employees, CMAC is financially independent. Mo, supra note 5, at 402.

180 The State Council modeled its Maritime Arbitration Commission (MAC) after the USSR’s Soviet Maritime Arbitration Commission. MAC was created November 21, 1958. Pew et al., supra note 17, at 353-54.

181 Peerenboom, Regulatory Framework, supra note 85.

182 Although CMAC functions independently of CCPIT in its handling of arbitration proceedings, like CIETAC, it maintains a close relationship to the parent organization. Id. CMAC’s main office is the same building as CCPIT’s. Pew et al., supra note 17, at 356. The members of CMAC also maintain a good relationship with the members of CIETAC. BOB BEAUMONT & PHILIP YANG, CHINESE MARITIME LAW AND ARBITRATION 7 (1994).

183 Mo, supra note 5, at 405; see also supra notes 119-22 and accompanying text. The International Chamber of Commerce's International Court of Arbitration recently expressed concern that local arbitration commissions are not prepared to handle the complex issues raised by international disputes. Evans, supra note 178.
because of its expert panels and experience, CMAC attracts the vast majority of the applications for arbitration of maritime disputes.

2. **CMAC Rules and Procedures**

CMAC arbitrations are conducted in accordance with CMAC’s procedural rules, China’s Maritime Code, statutory law, international treaties and SPC judicial interpretations. CMAC Arbitration Rules (CMAC’s Rules or Rules) permit CMAC to set up branches in any Chinese city, but for now, CMAC only operates in Beijing, Shanghai and Guangzhou.

The Rules that currently govern CMAC proceedings were revised and amended to include Arbitration Law provisions in September 1995. These Rules authorize panel members to conduct their own investigations, collect evidence, call witnesses, or ask any questions they deem appropriate. CMAC’s Rules do not have the force of law, but are binding on the parties and arbitrators involved in CMAC proceedings.

CMAC’s Arbitration Rules incorporated Article 16 of the Arbitration Law which requires a written agreement to arbitrate. CMAC’s Rules require the agreement to include either a contractual clause or to attach an independent contract describing the parties' intention.

---

184 Mo, *supra* note 5, at 405.

185 CMAC can also handle domestic and inland water, vessel-related disputes that do not fall within the scope of the Maritime Code. *Id.* at 403-04.

186 Moser, *supra* note 90, at 84.


189 Mo, *supra* note 5, at 411.

190 *Id.* at 412.

191 Moser, *supra* note 90, at 85.

192 Mo, *supra* note 5, at 406. The parties may have included an arbitration clause in a contract prior to the conflict or may draft an agreement to arbitrate after a conflict has occurred. *Id.*
to arbitrate and the matter for arbitration. The parties must also designate CMAC as the institution conducting the arbitration. If a party wishes to challenge CMAC’s jurisdiction by questioning the validity of the arbitration agreement, it must do so prior to the first hearing. The failure of a respondent to object to CMAC’s assertion of jurisdiction is generally viewed as a willingness to submit to CMAC authority. Under the CPC, parties can apply to an Intermediate People’s Court for a decision on the validity of the agreement, but that may have changed under the new MPL regulations. The parties may also submit the issue of validity to CMAC for a determination, but its decision is not reviewable.

Although CMAC’s caseload is relatively small, the range of issues that come before it is not. Article 2 of CMAC’s Arbitration Rules lists the following categories of cases that parties may submit for arbitration: disputes arising from salvage services, general average, collisions, charters, mortgages, agency, towage, sales, repairs, building or dismantling of vessels, carriage contracts, bills of lading, marine insurance, pollution, and contracts for fuel, labor or fishing. Parties may submit almost any type of maritime dispute to CMAC for arbitration. Consequently, CMAC arbitrators are knowledgeable about a vast array of

193 Id.
194 Id.
195 Id.
196 Id.
Pew et al., supra note 17, at 358.
197 Mo, supra note 5, at 406.
198 Id. at 407.
199 Particularly, when CMAC’s caseload is compared to CIETAC’s. Peerenboom, Regulatory Framework, supra note 85.
200 Mo, supra note 5, at 404. CMAC hears numerous types of disputes including: damage to goods, delivery shortages, damage to vessel and equipment, demurrage charges, reasonable deviation, payment of dispatch fees, dead freight, personal injury, loss arising from the arrest of the vessel, loss arising from the negligence of the master and crew, cargo inspection charges, calculation of laytime, seaworthiness, late delivery of a vessel, negligence of stevedores and agency. Id. at 402.
201 Id. at 404.
maritime issues and sensitive to the commercial aspects of maritime disputes.  

3. **CMAC Tribunals**

CMAC panel members are selected because of their experience and expertise in maritime affairs. Article 3 of CMAC’s Arbitration Rules requires persons selected to sit on CMAC tribunals and panels to have “special knowledge in navigation, sea transportation, foreign trade, insurance and law,” possibly because panel members receive no formal training from CMAC. To help parties make an informed choice, CMAC prepares and publishes a list of its arbitrators which includes a brief biography of each arbitrator highlighting his or her specialized areas of knowledge. Parties must choose their arbitrators from CMAC's list. Since 1995, when foreigners were first permitted to join, CMAC’s group of arbitrators has shown a marked increase in experience and maritime expertise. Currently, CMAC has ninety-one arbitrators, six are foreign nationals.

Because CMAC seeks to play a key role in the development of China’s international maritime shipping industry, panelists tend to have a "greater awareness of the international impact of [their] actions," and moreover, are sensitive to the image CMAC projects to foreign companies and governments. CMAC’s Rules require arbitrators to declare any

---

202 In addition, most are familiar with international law and able to resolve complex legal arguments. Pew et al., supra note 17, at 364-65.

203 BEAUMONT & YANG, supra note 182, at 7.

204 Pew et al., supra note 17, at 357.

205 BEAUMONT & YANG, supra note 182, at 7.

206 Id. at 16.

207 Cohen, supra note 188, at 119.

208 Id.

209 Peerenboom, Regulatory Framework, supra note 85. Panelists generally considered it an honor to serve as a member of CMAC; however, they are not well paid compared to Western or even Hong Kong arbitrators, a fact that may deter eminent non-Chinese participants. BEAUMONT & YANG, supra note 182, at 9.

210 Pew et al., supra note 17, at 356.
conflict of interest to protect CMAC’s reputation as a fair and impartial tribunal.\textsuperscript{211} Although conflicts of interest are not defined and there is no express penalty for anyone who fails to declare, CMAC does review its list every three years and the conduct and performance of each arbitrator is evaluated.\textsuperscript{212} "Any party may challenge the impartiality . . . of an arbitrator prior to the first hearing . . . [However,] the challenge must be . . . in writing and [s]ubstantiated by evidence."\textsuperscript{213} A party may challenge after the first hearing, and may do so until the end of the last hearing, if it can prove that the evidence for the challenge only became available after the commencement of the hearing.\textsuperscript{214} After the last hearing, challenges are barred.\textsuperscript{215} Normally, the Chairman of CMAC decides whether to remove an arbitrator on the grounds of bias.\textsuperscript{216}

4. \textit{Choice of Law}

Because CMAC is mindful of the international perception of its proceedings, it is not inflexible.\textsuperscript{217} CMAC allows parties to choose the law that will apply to a dispute; parties may apply international law or defer to the laws of a particular nation.\textsuperscript{218} Although the parties may apply the law of any jurisdiction, they should use the law of another New York Convention signatory\textsuperscript{219} to provide procedures for international enforcement where necessary. If the parties cannot agree or the arbitration

\textsuperscript{211} Mo, \textit{supra} note 5, at 408.

\textsuperscript{212} Id.

\textsuperscript{213} Id. at 409.

\textsuperscript{214} Id.

\textsuperscript{215} Id.

\textsuperscript{216} Id. Some Western critics accuse Chinese arbitrators of bias, while others support the conclusion that CMAC attempts to conduct its arbitrations in a fair and impartial manner. Pew et al., \textit{supra} note 17, at 365.

\textsuperscript{217} Beaumont & Yang, \textit{supra} note 182, at 17.

\textsuperscript{218} Id. at 12.

\textsuperscript{219} Id.
agreement or clause is silent as to the law that applies to the issue in arbitration, by default, Chinese law will apply.  

5. **Agents and Lawyers**

Although CMAC is flexible in some areas, it maintains strict standards for others. For example, if a party fails to comply with CMAC’s rules and procedures without justification or fails to appear as required, CMAC panels have the authority and will rule for the non-offending party.

To help parties avoid costly mistakes, CMAC incorporated Article 29 of the Arbitration Law into its Rules. Article 29 states that; “a party may authorize a lawyer or agent to act on [its] behalf.” Because foreign parties use CMAC’s services, Article 21 of the Rules specifically provides that foreign nationals can act as agents, and Article 12 authorizes both Chinese and foreign attorneys to confer with CMAC if they submit documents from the parties providing them with the “Power of Attorney.” Parties should not interpret the "Power of Attorney" clause too broadly. Although Article 12 seemingly permits foreign lawyers to function as their clients’ legal representative, foreign lawyers are not licensed and cannot practice law in China, and therefore, cannot represent their clients as attorneys. Many foreign ‘agents’ are, in fact, lawyers; nevertheless, they can only act as agents. This may change, now that China has entered the WTO. Generally, parties facing arbitration before a CMAC panel should hire Chinese attorneys to provide legal assistance, to help deal with local panel members and for their experience with CMAC procedures. As a result of the restrictions on foreign lawyers, a number of

---

220 *Id.* at 13.

221 Mo, supra note 5, at 412.

222 *Id.* at 411.

223 *Id.*

224 BEAUMONT & YANG, supra note 182, at 51.

225 Mo, supra note 5, at 411. There are a few exceptions, but generally this is the rule.

226 *Id.*
Chinese law firms have acquired crucial experience and expertise representing foreign clients.  

6. CMAC Proceedings

After CMAC accepts an application for arbitration, the parties are notified, usually by mail, of the date on which proceedings will commence. Within 20 days of notification, the parties are required to choose an arbitrator from those on CMAC’s list. If they do not appoint an arbitrator, the Chairman of CMAC will do it for them. Collegial panels of three arbitrators usually hear CMAC cases; the parties each choose one and CMAC chooses the remaining member who will serve as the chairperson of the panel.

To start the arbitration process, CMAC may and often does assume when notice to the respondent arrived, consequently respondents should inform CMAC immediately of their receipt of notice in order to receive the maximum allowable time to reply. A respondent must reply with a statement of defense, including any relevant supporting documents, within 45 days of the receipt of copies of the application and the notice of acceptance from CMAC. The respondent also has 60 days from the receipt of the arbitration materials in which to file a counter-claim. CMAC’s Rules require parties presenting expert opinions to provide

---

227 Prior to 1982, foreign lawyers could represent clients before CMAC panels; however, the 1982 CPC barred foreign nationals from practicing law in China. Parties to CMAC arbitrations were required, therefore, to engage the services of PRC attorneys if they wanted legal representation. Pew et al., supra note 17, at 359.

228 MO, supra note 5, at 405. One drawback to CMAC procedural requirements is that the claimant must have virtually the entire case prepared at the time of application. BEAUMONT & YANG, supra note 182, at 17.

229 MO, supra note 5, at 405.

230 Id.

231 See Moser, supra note 90, at 87; see generally MO, supra note 5; Pew et al., supra note 17, at 375; BEAUMONT & YANG, supra note 182.

232 BEAUMONT & YANG, supra note 182, at 18-19.

233 Moser, supra note 90, at 89.

234 MO, supra note 5, at 405.
copies of the experts’ testimony to the other party for its consideration; however, CMAC tribunals reserve the right to decide on the admissibility of any evidence or expert opinion. CMAC must give the parties 30 days notice prior to the scheduled date of the first hearing and reasonable notice thereafter for all subsequent hearings. Hearings are usually held in secret, but the parties may request a public hearing. While CMAC arbitrators generally conduct hearings before reaching a decision, the parties may agree to ask the panel to rely solely on written submissions. CMAC has the final word on whether to forego hearing testimony and make a decision based on the submission of briefs, affidavits and other documentary evidence.

Article 51 of the Rules requires a panel to complete a case within nine months; however, the Secretary General of CMAC can extend the time allowed if the panel requests an extension. Panels must submit drafts of their decisions to CMAC for review before making a final award. Although CMAC cannot force panels to make a particular award, it can comment on the drafts and draw attention to any issues it believes are important. When a panel completes its final draft, CMAC

235 Id. at 412.

236 Id.

237 Id. at 411.

238 Id. In the years since CMAC’s inception, no one has ever requested an open hearing. BEAUMONT & YANG, supra note 182, at 30.

239 Mo, supra note 5, at 411.

240 Id.

241 Id.

242 To help resolve relatively minor disputes, CMAC has adopted simplified procedures with only a single judge, a single hearing and 90 days to reach a decision. Id. at 415.

243 Id. at 416.

244 Id.
stamps it and the award becomes effective. A panel’s decision is final and not subject to appeal.

7. **CMAC Conciliation and Mediation**

Parties seeking to resolve international maritime disputes are free to choose between regular arbitration or arbitration combined with conciliation. CMAC actively encourages the use of conciliation. Efforts at conciliation begin immediately after a panel is appointed. According to statistics for 1995, at least 11 of the 69 cases solved by CMAC were concluded after conciliation. In an article submitted to the *International Business Lawyer*, Ren Jianxin wrote, “[T]he Maritime Arbitration Commission . . . attach[es] great importance to conciliation . . .”

Article 45 of the Rules permits CMAC panels to mediate a dispute with the consent of the parties. CMAC allows either party to terminate the mediation at any time to ensure that the parties participate willingly. To facilitate the negotiation process, the procedural rules of CMAC do not apply. Parties may fear that if mediation fails, the other party will use

---

245 *Id.*

246 *Id.* at 418. After an award is made, a dissatisfied party may apply to a court to set it aside or ask the court to decline to enforce it. A court may set aside a foreign-related award if the parties’ contract did not have an arbitration clause, the parties did not execute a written agreement to arbitrate after the dispute occurred, the respondent was denied a chance to choose an arbitrator or failed to receive adequate notice, the panel did not comply with relevant CMAC rules or the issue was outside the scope of the agreement to arbitrate. *Id.* at 419-21.

247 Bakovic, *supra* note 92, at 125.

248 Pew et al., *supra* note 17, at 358.

249 *Id.*

250 Bakovic, *supra* note 92, at 125.

251 Ren, *supra* note 125, at 363.

252 *MO*, *supra* note 5, at 414.

253 *Id.*

254 *Id.*
the concessions or admissions it made during mediation against it. Article 50 of the Rules expressly prohibits a party from divulging or using anything revealed during mediation against the other party in any subsequent proceedings. Parties to a dispute should expect Chinese courts to strictly enforce this rule to ensure compliance.

Parties involved in on-going conciliation or mediation talks may settle their differences during arbitration. If they do, they can apply to withdraw from arbitration or ask the panel to incorporate the terms of the agreement into an award. Because an award is enforceable and an agreement by itself is not, to protect themselves in the event there are problems enforcing the agreement, parties should have the panel make an award.

The foregoing, brief discussion of CMAC and its provisions provides a glimpse at the complex structure and comprehensive nature of this organization. To better illustrate how CMAC’s provisions apply in the context of a real dispute, the next section examines actual decisions of CMAC tribunals.

D. CMAC Cases and Decisions

1. Introduction

In 1985, the Maritime Arbitration Commission released a book in both Chinese and English with a selection of past awards and conciliations to help parties, both domestic and foreign, understand its policies and procedures. While the publication of past decisions was motivated by

---

255 Id.

256 Id. at 414-15.

257 Id. at 415.

258 Id. at 413.

259 Id.

260 Id.

261 The book contained 22 cases covering a variety of disputes including charter-for-hire, salvage and cargo cases, a case defining what constitutes a safe port and a claim stemming from the delayed redelivery of a vessel. The earliest case was decided March 14, 1963 and the most recent, June 15, 1983. Pew et al., supra note 17, at 374 & n.60.
MAC’s desire to attract applicants for its services, its collateral effect was to implicitly promise prospective applicants that CMAC would make similar decisions in the future.

2. A Civil System’s Look at Common Law Precedent

Although China operates a civil law legal system and its courts and arbitration commissions are not bound by *stare decisis*, CMAC’s publication of its awards and conciliations could eventually lead to a shift in policy and increased reliance on the precedents set by past decisions. One case in particular demonstrates the attitude CMAC arbitrators may take toward common law precedent. In *Re M/V Tramontana*, the MAC panel was asked to resolve a disputed charter agreement between the hiring party and the *M/V Tramontana*. As part of its claim, one party submitted an English decision which it believed should govern. The CMAC panel wrote; “it should be pointed out that the tribunal is not bound by any precedents in any foreign courts, but it is always ready to take into account any reasonable arguments from all sources.” Although the panel refused to recognize a common law precedent, it did affirm a willingness to consider any reasonable and relevant legal argument. Parties should consider including the decisions of courts and arbitral tribunals in their briefs and oral arguments because the logic of these decisions may persuade the panel that international jurisprudence favors their position.

3. The Role of Conciliation

While CMAC does not recognize or rely on legal precedents to make its decisions, it does depend on traditional forms of dispute resolution to effect settlements; consequently, conciliation plays as an

262 *See* BROWN, *supra* note 80, at 78-83. Judges and arbitrators in civil law countries rely on the actual wording of the law to make their determinations. Consequently, the prior decisions of other courts or panels do not bind the judges or panelists in the current proceedings.


264 Pew et al., *supra* note 17, at 376. “M/V” is an acronym for motor vessel.

265 *Id.*

266 *Id.*
important role in CMAC arbitrations. Conciliation and arbitration are often intertwined, conciliation fostering equitable results, arbitration providing the finality of a decision on the merits. In *Dispute over Damage to Cargo Aboard M/V Liaoyang and M/V Hulin*, for example, a CMAC panel established the parties’ liabilities as an arbitral award and then used conciliation to fix the amount of damages.

The *M/V Liaoyang and M/V Hulin* dispute involved the contamination of a cargo of magnesite. The panel found that although the foreign substances were discernible during the loading process, the shipowner’s agent had issued a clean bill of lading. The panel also found that the shipowner had failed to prove that the consignees had prior knowledge of the contamination or had consented to the cargo’s condition before taking delivery. Consequently, the shipowner was held liable. Because the clean bill of lading was the principal reason for holding the shipowner liable, the panel suggested conciliation to determine the costs of cleaning the cargo, but cautioned that it would make an award if conciliation failed. The panel’s decision indicated it would make the award according to equity principles.

---

267 See *supra* notes 247-48 and accompanying text.


269 Bakovic, *supra* note 92, at 122.

270 *Id.*

271 *Id.*

272 *Id.*

273 The panel said it was immaterial whether or to what extent transport had aggravated the contamination. *Id.*

274 The consignees were allowed to recover for the reasonable expenses incurred cleaning the contaminated magnesite to the extent necessary to make the shipment acceptable to ordinary users. During the conciliation process, the shipowner agreed to pay half of the costs. This is probably what the panel would have awarded anyway. *Id.* at 122-23.

275 The conciliation/arbitration method used by CMAC is similar to the practices of the Zurich Chamber of Commerce arbitration tribunal where, after the principle procedures are finished, the tribunal holds an internal meeting to determine a position on
In cases where an objective factual basis for a decision is difficult to establish, arbitration panels frequently turn to conciliation to resolve the dispute. In *Re M/V Kolasin*, the dispute concerned allegations by a charterer that the vessel supplied for charter was too slow and burned too much fuel. The panel agreed that the insufficient speed claim was justified; however, since an earthquake had destroyed the engine log and other documents, it was almost impossible to determine if the calculations of fuel consumption were correct. Therefore, because the parties had a long-standing friendship and since the cost of collecting additional evidence was prohibitive, the parties agreed to a CMAC-directed conciliation. Eventually, each agreed to pay half. CMAC often encourages parties to make pragmatic decisions instead of strictly legal ones.

4. *All Things Maritime*

As mentioned, CMAC will hear vessel-related disputes that do not fall under the authority of the Maritime Code. In *Re Guanhekou*, two stevedores made personal injury claims against the owner of the Guanhekou after falling through an open hatch into the hold of the ship while the ship was loading. On behalf of the stevedores, the stevedore

---


277 *Id.*

278 *Id.*

279 See *Id.*

280 *Id.*

281 *Id.*

282 See *supra* notes 148, 185 and accompanying text.


284 MO, supra note 5, at 404.
company that employed the workers applied to CMAC and argued that the shipowner had failed to install protective devices as required by law and that his failure had caused their injuries. The panel held the shipowner 70% liable because of inadequate lighting and failure to install the proper fencing around open hatches; however, the stevedore company was held liable for the remaining 30% because the injured workers were new and the company had failed to properly warn them of the danger. Even though China’s Maritime Code did not govern the dispute, CMAC willingly applied internationally-accepted tort principles and made its awards based on the comparative negligence of the parties. Although a full arbitration proceeding was necessary, CMAC still made its decision according to equitable principles.

5. The Value of a Good Reputation

CMAC publishes its awards and conciliation statements in hopes of popularizing its use as a forum for resolving disputes, but it has not, as yet, done so in any systematic fashion. Given China’s desire to increase its stature in the maritime transport services industry, regular publication of decisions is a logical step toward making CMAC arbitration attractive to foreign parties.

Although it appears that CMAC tries hard to render fair and equitable judgments, because it has not published or widely promulgated copies of its decisions, critics still accuse CMAC of unfair practices and often refuse to submit to its authority. Recently, Cargo One Inc., a New York-based common carrier, asked the U.S. Federal Maritime Commission (FMC) to prohibit China Ocean Shipping Company (COSCO) from moving the arbitration of a maritime transport service contract dispute to China. Cargo One’s attorney argued that when

---

285 Id.

286 Id at 404-05. Other nations including the United State incorporate maritime torts like this within admiralty or maritime jurisdiction.

287 Bakovic, supra note 92, at 122.

288 See supra note 19 and accompanying text.

Congress passed the Ocean Shipping Reform Act (OSRA), it intended to prohibit state-owned carriers from using transport service contracts to select arbitration forums controlled by or affiliated with the carrier’s owner.\textsuperscript{290} He said that CMAC was “clearly . . . under the control of the Chinese government.”\textsuperscript{291} COSCO claimed that the service contract between the two parties explicitly required them to submit their disputes to binding arbitration in China.\textsuperscript{292} COSCO argued that although it is state-owned, OSRA restrictions do not apply because it is managed and run independently of the Chinese government.\textsuperscript{293} COSCO could have argued that even if the FMC rules COSCO is under the control of the Chinese government, CMAC is not.\textsuperscript{294} Regardless of how this case is ultimately resolved, CMAC should begin regular publication of its decisions to provide foreign governments with statistical evidence of its fundamental fairness and insight into how its policies and procedures apply in a variety of situations.

E. Conflicts of Law and Jurisdiction

China has adopted principles similar to those used by common law countries to decide conflicts of law issues.\textsuperscript{295} In China, parties’ choice of law usually governs unless its application is contrary to the public interest or is preempted by other laws; however, in the absence of an explicit agreement, a court or arbitral panel will attempt to ascertain and apply the law that has the closest connection to the controversy.\textsuperscript{296}

\begin{itemize}
\item\textsuperscript{290}\textit{Id.}
\item\textsuperscript{291}\textit{Id.} The FMC is reviewing COSCO’s status as a controlled carrier. Matthew Flynn, \textit{China: High Hopes for Reinstatement of Maritime Agreement}, Lloyd’s List Int’l, February 28, 2000, at 5.
\item\textsuperscript{292} Sansbury, \textit{NVO Objects}, supra note 290.
\item\textsuperscript{293} See Flynn, supra note 292.
\item\textsuperscript{294} Although he was not referring specifically to CMAC, COSCO’s attorney did say that OSRA did not prohibit arbitration before a forum not under the control of the government. Sansbury, \textit{NVO Objects}, supra note 290.
\item\textsuperscript{295} MO, supra note 5, at 393.
\item\textsuperscript{296} In joint venture contracts involving China, Chinese citizens or corporations, the application of Chinese law is compulsory. \textit{Id.} CMAC will apply foreign and international law as well as domestic Chinese law to an arbitration, but the parties must
\end{itemize}
Although a maritime court provided the forum, the next case aptly illustrates the analytical process used in determining jurisdiction or resolving conflicts of law. In *Yingsin Steamboat Company Ltd. v. Xiamen Branch of Overseas Chinese Bank*, the plaintiff was a Hong Kong company.

In December 1993, Yingsin concluded a carriage contract with Shengli Trading Company of Xiamen. The contract contained an arbitration clause that specified that all disputes were subject to arbitration under English law and were to take place in Hong Kong. Concurrently, Yingsin and Shengli concluded an agreement for payment of freight that specified Hong Kong and Hong Kong courts as the law and forum of choice. The Xiamen Branch of Overseas Chinese Bank provided a letter of guarantee on behalf of Shengli promising payment if Shengli breached this agreement. Subsequently, the parties disagreed on the amount of freight payable.

Yingsin sued in the Maritime Court of Xiamen. The bank challenged the court’s jurisdiction claiming that the letter of guarantee was collateral for the contracts of carriage and freight, and therefore, should fall under the jurisdiction of a Hong Kong court and the laws of Hong Kong. The Xiamen Maritime Court found that the contracts were parts of the same transaction and held that because both the arbitration clause in

provide CMAC arbitrators with detailed briefs discussing the proposed application of the foreign law. Pew et al., *supra* note 17, at 369.


298 *Id.*

299 *Id.* at 394.

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*
the carriage contract and the jurisdiction clause in the freight contract were invalid, it had jurisdiction. The bank subsequently appealed. The Provincial Supreme Court found that the two contracts were distinct and that the freight agreement specifying Hong Kong law and a Hong Kong court was valid. Subsequently, it reversed the lower court’s decision and ordered enforcement of the jurisdictional clause of the freight agreement. As this case demonstrates, parties to a maritime agreement may encounter problems determining the appropriate forum and governing law even where they have attempted to provide the applicable standard.

If parties fail to specify the applicable standard, they may find themselves subject to international law. China has established areas where international authority prevails in conflicts of law disputes. Article 268 of the Maritime Code provides that in cases of inconsistency, international conventions and treaties to which China is a party preempt relevant provisions of the Maritime Code except where excluded by a specific reservation made at the time of ratification.

The Chinese have not, however, completely abandoned their sovereign authority. Article 276 gives China the right to reject applications of foreign laws or international custom where they pose a threat to national security or unification, violate national sovereignty, or conflict with the Chinese Constitution. Article 276 suggests that China will accept limited international authority over domestic maritime policy, but it is not willing to forego its right to review and reject international laws that conflict with domestic laws it feels are essential to State security.

The arbitration clause in the carriage contract was invalid because it failed to specify a particular arbitration institution. The jurisdiction clause in the freight contract was invalid because it was inconsistent with the choice of jurisdiction in the carriage agreement. Id.

Id.

Id.

Id.

Id.

International conventions may apply directly if there is no appropriate domestic law or regulation. Chinese courts may also apply common international practices and commercial usage in the absence of local conventions and domestic practice. The party alleging the application of a common practice or commercial usage has the burden of proving that the customary rules are established and accepted by a majority of the international community of nations. Id. at 392.

Id. at 400.
This is not unusual, many nations reserve the right to reject international laws that may interfere with or threaten national security.\footnote{311} Article 268 indicates, however, that China will apply international standards to settling conflicts of law disputes where it has ratified the international agreement or where there is nothing in the agreement that conflicts with Chinese interests.

IV. SUGGESTIONS FOR ARBITRATING MARITIME DISPUTES

A. Introduction

Chinese arbitrators are the progeny of a long tradition of what is now called ‘alternative dispute resolution.’ Even today, the traditional Chinese attitude toward dispute resolution still motivates Chinese arbitrators to urge disputants to negotiate and amicably resolve their differences. Anyone contemplating arbitration in China, before CMAC or any other Chinese arbitration commission, should therefore understand the Chinese perspective on negotiation.\footnote{312}

B. Conciliation

\footnote{311}{The United States has stayed away from WTO talks directed toward bringing maritime transport services under the authority of the General Agreement on Trade Services because of its concern that other members may require it to relinquish its cabotage law. Fading Borders, supra note 148. Cabotage is “the reservation of a nation’s coastwise trade exclusively for that nation’s own vessels.” Cabotage is a common practice among maritime nations. An Introduction to Clyde J. Hart, Jr., Mar. Adm'r., and His Objectives for the Future of the Mar. Admin.: Hearing before the House Subcomm. on Coast Guard and Mar. Transp. of the Comm. on Transp. and Infrastructure, 105 Cong. (1998) (Statement of Clyde J. Hart, Jr., Deputy Mar. Adm'r. of MARAD), available at http://www.marad.dot.gov/Headlines/testimony/testim1.htm (last visited Apr. 19, 2002); See also JEANETTE GREENFIELD, CHINA’S PRACTICE IN THE LAW OF THE SEA 9-11 (1992).}

\footnote{312}{Li is still the primary focus of negotiations, not fa. In China, patience is the key to successful negotiations. Overly aggressive negotiators may find their Chinese counterparts unusually compliant in the face of aggressive advocacy. Eventually, they discover that the Chinese negotiator had no intention of honoring the commitment, but was merely acquiescing at the time in order to “preserve the peace.” Chinese negotiators can also take the opposite tack and refuse to yield to any demand. Foreign firms who are successful in China allot more time for negotiations than their unsuccessful competitors and concentrate their efforts on developing long-term relationships with their Chinese counterparts. See Lauchli, supra note 8, at 1069-71 Lauchli provides an excellent review of important considerations for anyone doing business in China, including some good advice for legal professionals. See id. at 1070-71.}
Conciliation is the preferred method of negotiation. CMAC arbitrators will often encourage parties to attempt conciliation, even if the parties have already engaged in extensive negotiations before one of them announced its intention to file an application with CMAC. Logically, a party arguing a weak case should ask CMAC to attempt conciliation since CMAC usually orders parties who conduct successful conciliations to share the cost of its fees, regardless of the strength of one party’s position relative to the other’s. Indeed, if the same case is decided by a panel and an award is made, CMAC’s reported decisions indicate that CMAC will order the losing party to pay the entire fee. Conciliation is also a useful way to gain insight into the opinion of the panel. During conciliation, CMAC panels sometimes make preliminary findings of fact that indicate how the panel might ultimately rule.

C. Arbitration and Chinese Attorneys

Although conciliation is effective, parties resolve their disputes through arbitration far more often. For whatever reason, conciliation cannot solve some disputes. When conciliation and mediation fail, parties turn to arbitration. Arbitration requires extensive preparation and research, and significant investments in time and money. Generally, the amount in dispute is quite large. Since navigating China’s legal system can prove challenging, foreign parties should select a Chinese attorney to assist them. To ensure that they are employing qualified legal

---

313 Pew et al., supra note 17, at 373.

314 Id. at 377. CMAC, like CIETAC, charges fees on a progressive scale depending upon the amount in controversy, and may charge parties for expenses incurred including the reasonable expenses of arbitrators, experts, witnesses or translators if applicable. In addition, CMAC treats claims and counter-claims as separate actions subject to separate charges. Mo, supra note 5, at 405-06.

315 Pew et al., supra note 17, at 377.

316 Id.

317 Id.

318 See Bakovic, supra note 92, at 125.

319 Mo, supra note 5, at 402-03.

320 See Pew et al., supra note 17, at 372.
representation, foreign parties should send their own lawyers to conduct the search. Foreign attorneys traveling to China to interview Chinese lawyers should speak to lawyers from several firms; lawyer shopping is expected and the best way to find competent legal help.\footnote{321} The interviewer should question the Chinese attorneys about the extent of their experience with maritime law and understanding of the substantive issues involved in the dispute, their expertise in international maritime law, their language skills and their record representing clients before CMAC.\footnote{322} If Chinese attorneys are hired to conduct independent factual or legal research, the foreign party should ask about the abilities of those responsible and obtain a relatively detailed estimate of the fees involved.\footnote{323}

As soon as a Chinese firm is retained to help with the arbitration, foreign counsel should clarify the legal or factual points they want raised and discuss with their Chinese counterparts the substance of their arguments and the most effective means of presenting them to the CMAC panel.\footnote{324} If the parties choose to try conciliation, the Chinese and foreign attorneys should cooperate and share their assessments of the arbitrators should conciliation fail and the dispute return to the arbitrators for a decision.\footnote{325}

It is also advisable for a party to have its own Mandarin-speaking interpreter to protect its interests and provide it with additional insights into the customs and behavior of Chinese officials.\footnote{326} Parties should choose interpreters who are not citizens of the PRC if possible, since they are less susceptible to undue influence or charges of impropriety.\footnote{327}

\footnote{321} Foreign parties can also solicit the opinions of other lawyers as to the comparative skills of the various Chinese firms and the legal skills of the individual lawyers within those firms. \textit{Id.}

\footnote{322} Because CMAC frequently looks to international maritime law as a guide, the Chinese firm should have a thorough grasp of the practice of international maritime law. \textit{Id.}

\footnote{323} \textit{Id.} at 373.

\footnote{324} The same principles apply to conciliation. \textit{Id.}

\footnote{325} A party should prepare a daily transcript of the proceedings. \textit{Id.} at 373-74.

\footnote{326} \textit{Beaumont} \& \textit{Yang}, \textit{supra} note 182, at 14. It is also a good idea if at least one of the foreign lawyers speaks Mandarin. Having one member of the foreign party’s legal team understand Mandarin is essential to adequately protect a client’s interests in the event that problems arise when the interpreter is unavailable or unable to help.

\footnote{327} \textit{Id.} at 14-15.
While Chinese attorneys can help with cultural nuances and the interpretation of Chinese laws and procedures, they cannot solve problems endemic to the Chinese legal system. For example, because Chinese arbitration procedures sometimes fail to provide adequate discovery mechanisms, foreign parties cannot learn enough about the facts of a dispute to sufficiently protect themselves during arbitration proceedings. If this continues, foreign parties may begin requiring clauses in their contracts with Chinese companies to specify either the Maritime Courts or foreign arbitration commissions as the choice of forum for disputes. Most bills of lading used by China’s shipping companies already have a clause giving Maritime Courts jurisdiction. Already, parties may go abroad to arbitrate if one of the parties is foreign. Chinese parties generally resist suggestions to arbitrate abroad; however, foreign parties may increase the chances of persuading their Chinese opponents by proposing a neutral venue.

D. Guanxi

Guanxi ("relationships") are still important in China and influence outcomes often enough that Chinese judges sometimes refer to cases where the result was influenced by the relationship between the judges and local officials as "guanxi cases." These "back-door" influences can degenerate into outright corruption and bribery and have the potential to cause serious perversions of justice. Logically, the problems of guanxi extend to arbitrations as well.

328 Harer, supra note 89, at 408-09.
329 Mo, supra note 5, at 403.
330 Peerenboom, Regulatory Framework, supra note 85.
331 Historically, the most popular foreign arbitration forum has been the Arbitration Institute of the Stockholm Chamber of Commerce, but Geneva, London, Paris, Vienna, Zurich, and New York are also popular. Hong Kong and Singapore are increasing in popularity because of their close proximity to the mainland and the large number of Chinese-speaking lawyers and arbitration personnel. Id.
333 Id.
Critics claim that in China the “rule of law” is “often held hostage to local interests,” particularly when an adverse ruling might impose serious economic consequences. This is a worldwide phenomenon. We should not hold the Chinese to a higher standard than we hold ourselves. If local protectionism is common among domestic arbitration tribunals, CMAC appears to offer a reasonable alternative in light of its record as a fair and impartial forum.

V. CONCLUSION

Scholars predict China is the “Asian world power of the future, . . . the superpower of the next century.” China has the potential, but it must continue to improve its laws and legal system if it hopes to attain a preeminent position as a world power. China’s recent efforts to improve its legal system have already borne fruit. Parties are no longer as afraid to take their disputes to Chinese courts and the quality of legal representation is improving. Still, the traditional attitudes toward dispute resolution linger. Chinese continue to settle their differences through alternatives to litigation. As a result, China is already recognized as a superpower in the world of mediation and arbitration.

Because China’s maritime shipping services industry is growing and trade with China is increasing, CMAC should grow in importance as long as it continues to provide applicants a fair and impartial forum to resolve their disputes. CMAC and other Chinese arbitration institutions use traditional and modern conciliation, mediation and arbitration techniques to help parties resolve disputes. It is this combination of the best of both worlds, the old and the new, that makes CMAC the future of international maritime arbitration.

Mark S. Hamilton

---

334 Brown & Rogers, supra note 89, at 333.
335 Id.
336 See Harer, supra note 89, at 409.
337 Lauchli, supra note 8, at 1055-57.
338 Mark S. Hamilton is an Adjunct Professor of History at Hawai‘i Pacific University and a Juris Doctorate Candidate (May 2002) at the University of Hawai‘i, William S. Richardson School of Law.