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Practice in the People's Republic of
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Summary

China is a large country with over 18,000km coastline. It owns more than 700 ports and has a strong maritime tradition. Since the China Maritime Arbitration Commission (CMAC) was established in 1959, it has been more than 50 years for both China and CMAC in developing China's Maritime Arbitration. From the basic point of view, it would be easily expected that the arbitration institutions of China could accept and hear a lot of maritime cases every year due to its advantages in coastal geography and developed international economy. However, the situation is not as good as expectation. It is because of the short history of the contemporary maritime arbitration in China or the lagging behind of Chinese maritime arbitration regime? Considering that China has ratified most of important international conventions, what is the reason for the halt in the development of the maritime arbitration of China?

The purpose of this dissertation is to find out any probable reasons and simultaneously introduce China's Maritime Arbitration to the readers who are interested in this ancient maritime country.

This dissertation will not be very explicit in each particular issue, and the emphasis of this dissertation is to introduce the framework and the situation of China's Maritime Arbitration. Meanwhile, the range of introduction is also not complete, since it focuses mainly on the differences in maritime arbitration legislation between China and other prevailing maritime countries. When the legislation and procedure of the CMAC are the same or quite similar with British process and the one performed international conventions, they will be omitted for prevention of cumbersome repeat.

Preface

In the two years' study in Sweden, I have cultivated the interest in maritime law. It is a special subject with its international, strict and efficient characteristics. The reason for choosing maritime arbitration as the topic of this master dissertation is because my experience of internship in China International Economic and Trade Arbitration Commission before this master program. With the great enthusiasm on maritime law and arbitration law, I do lot of research on China's maritime arbitration. With the conclusion of these researches, it comes out that China's maritime arbitration is not in its expected position. China owns a huge tonnage of ship in the world, but only a small proportion of maritime arbitration cases in China were dealt through CMAC. This phenomenon makes me more curious to write this particular topic as the last and the most important essay in my master study. As CMAC is in its term of development, I hope to conclude some new opinions for contributing my bit to the development of CMAC.

It is exciting that CMAC Shanghai sub-commission had been successfully established in 2003 for the increasing cases on the background of the unique agency of CMAC in Beijing. Moreover, because of its outstanding advantages in coastal location and paramount economy, Shanghai was nominated to be developed as an international shipping center in 2009. This news really lightens maritime practitioners and lawyers in Shanghai. As a law student from Shanghai, I certainly hope Shanghai can arrive at this inspiring goal with its advantaged geographical position and economic position in Asia-Pacific.

I'm grateful for the great patience and all the help of Mr. Abhinayan Basu.

Last but not least, I would like to dedicate my final words to my family, classmates of maritime law, and all my friends.

The author is responsible for all the mistakes and errors in the dissertation.

List of Abbreviations

CCOIC (ICC China)	China Chamber of International Commerce
CCPIT	China Council for the Promotion of International Trade
CIETAC	China International Economic and Trade Arbitration Commission
CMAC	China Maritime Arbitration Commission
CMI	Comité Maritime International
FETAC	(China) Foreign Economic and Trade Arbitration Commission
FONASBA	The Federation of National Associations of Shipbrokers and Agents
ICC	International Chamber of Commerce
ICMA	International Congress of Maritime Arbitrators
ICSID	International Centre for Settlement of Investment Disputes
LMAA	London Maritime Arbitration Association
NPC	National People's Congress
PRC	People's Republic of China
RMB	Renminbi (Chinese Currency Unit)
UNCTAD	United Nations Conference on Trade and Development

Table of legislation

International Conventions

Arbitral Awards 1958

Convention on the Settlement of Investment Disputes between States and Nationals of Other State 1965 (the Washington Convention)

Inter-American Convention on International Commercial Arbitration 1975

The New York Convention on the Recognition and Enforcement of Foreign

Legislation of China

Arbitration law of the People's Republic of China (1994)

Arbitration Fee Collection Measures (1995)

China Maritime Arbitration Commission Arbitration Rules (2004)

Civil Procedure Law of the People's Republic of China (1991)

Contract Law of the People's Republic of China (1999)

Criminal Law of the People's Republic of China (1997)

Judges Law of the People's Republic of China (1995)

Public Procurators Law of the People's Republic of China (1995)

Special Maritime Procedure Law of the People's Republic of China (1999)

United Kingdom

Arbitration Act (1996)

LMAA Rules (2006)

Chinese Judicial Opinions

Some Opinions Concerning the Application of Civil Procedural Law, (1992)

CHAPTER 1

INTRODUCTION

1.1 Purpose of the dissertation

China has over 18,000km of coastline and more than 700 ports and, as such, has a strong maritime tradition.¹ In 1980, China had only 955 ships totaling 6 million gross tons (gt). By 1990, this had increased to 1,948 (13 million gt), and by 1998, to 3,175 (16 million gt).² The annual growth rate is about 13% in number of ships and 7.7% in tonnage, and this is much higher than the world average of 1.1% and 1.3% respectively.³ Meanwhile, China's foreign trade is predicted to be worth about US\$ 550-600 billion by 2005, and this was about US\$ 320 billion in 1998.⁴ Studies reveal that China could supply about 91,000 officers and 150,000 ratings, exceeding the Philippines as the top maritime labor supplier.⁵ It is believed that China must act as or be on the way of a most important maritime country in the world. The Maritime Law of China is valuable and vital interest to those who trade with China.

¹ Zhang Jinxian, P1

² Lloyd's Register: World Fleet Statistics and Statistical Tables (annum). Ships referred to are those being more than 100gt and registered in China. Ships registered outside the countries are not included. China had 378 ships (above 1,000 gt) registered under open registry (UNCTAD: Review of Maritime Transport, 1997). As cited in KX Li and CWM Ingram, P 1

³ Li, KX and Wonham, J, 'Who is safe and who is at risk: a study of 20-year-record on total accident loss in different flags' (1999) 26(2) Maritime Policy & Management 137-44. As cited in KX Li and CWM Ingram, Maritime Law and Policy in *China* (Cavendish Publishing Limited 2002) P 1

⁴ 'Battling agencies block industry growth' (2001) *South China Morning Post*, 19 November. As cited in KX Li and CWM Ingram, Maritime Law and Policy in *China* (Cavendish Publishing Limited 2002) P 1.

⁵ Li, KX and Wonham, J, 'Who mans the world fleet? A follow-up to the BIMCO/ISF manpower survey' (1999)26(3) Maritime Policy & Management 295-303. As cited in KX Li and CWM Ingram, P 1

Maritime arbitration as an effective way to resolve maritime disputes, since its professionalism, technicality and international characteristics, got a lot of international attention. It has become a prevailing system with its vitality, particular features and advantages, which lead it to be accepted by more and more practitioners in maritime and international trade.

Maritime arbitration in China began comparatively late if compared with European countries. The formal debut of Maritime Arbitration in China is the establishment of the China Maritime Arbitration Commission in 1959, and with several decades of practice, a considerable development has been made to maritime arbitration. Especially after Arbitration Law of China was promulgated in 1995, a unified and standardized system of arbitration is being gradually formed. At the same time, it is a fact that, in the legislation and practice of maritime arbitration in China, there still exist some defects which are not matched with the China's steady economic development especially with the assumption that China is a large maritime country.

In April 2009, Chinese State Council promulgated a state program⁶ to build an international shipping center in Shanghai. After then, it has become a top priority for Shanghai to develop a contemporary shipping service system for matching the state program.

From the worldwide aspect, current annual marine loan is about 3,00 billion U.S. dollars, the global trading for ship chartering is about 70 billion dollars, equity and bond financing related with shipping is about 15 billion U.S. dollars, derivatives of shipping freight of about 150 billion dollars, and marine insurance market is about 25 billion dollars. The proportion of these

⁶ National development (2009) 19 promulgated by State Council of the PRC.
<http://www.gov.cn/zwggk/2009-04/29/content_1299428.htm> accessed 18 May 2011

areas that Shanghai gets involved is very little, which is less than 1% of the global market share.⁷

In 2007, Shanghai sub-commission of CMAC accepted 33 cases which is an increase of 1.14 times with last year. The amount of the subject-matter is RMB 88.53 million.⁸ Shanghai has become the third city in the field of maritime arbitration just after London and New York if only considering the number of accepted cases. However, the number of accepted maritime arbitration cases for London Maritime Arbitrators Association per year ranges from more than 1,000 to as many as over 2000, and the average amount of subject matter is many times than that of Shanghai. It is obviously that Shanghai is still far away behind London and New York as the internationally recognized maritime arbitration center.⁹

Cai Hongda who is the general secretary of CMAC hold the point of view that the hardware facilities of Shanghai international shipping center has reached the world advanced level, but soft environment including maritime arbitration is relatively lagging behind, and which is the main reason caused Shanghai International Shipping Centre not so competitive as London, and even Hong Kong.¹⁰

To build a contemporary shipping service system, a first-class legal service regime is indispensable, and maritime arbitration is the paramount part of this professional legal regime. With the escalation of Shanghai shipping

⁷ See the website of CMAC <<http://www.cmac-sh.org/news/414news.htm>> accessed 18 May 2011

⁸ The average exchange rate in 2009 and 2010 1 USD= 6.8 RMB the official exchange rate of the World Bank <<http://search.worldbank.org/data?qterm=exchange&language=&format=>> accessed 27 May 2011

⁹ See the website of CMAC <<http://www.cmac-sh.org/news/414news.htm>> accessed 18 May 2011

¹⁰ See the website of CMAC <<http://www.cmac-sh.org/news/20100712news.htm>> accessed 18 May 2011

center, disputes arising from shipping in east China are also increasing. However, most of these disputes are solved through litigation, which cause courts more overloaded than before, and such burdened litigations are almost impossible to meet the needs of shipping business as fast and efficient.

Therefore, in the context of international trade becoming much more frequent, especially when Shanghai is now being developed an international shipping center in the Asia-Pacific, a better comprehensive study of Chinese Maritime Arbitration regime is undoubtedly worthy and significant. Base on this reason, the writer here try to through comprehensive and systematic research of the Chinese maritime arbitration regime, introduce and interpret it mainly from the arbitration clause, arbitration procedure, arbitral awards and some other important aspects that is different with international custom, with combination of the new CMAC Arbitration Rules implemented in 2004 and the trend of the international development of maritime arbitration. The writer will also analyze the current situation of Chinese maritime arbitration regime, and try to conclude some feasible legislative proposals.

1.2 Research methodology

This dissertation adopts an analytical and comparative approach in discussing maritime arbitration. It purposely focuses on the whole frame of China's Maritime Arbitration. Comparison with UK and other world custom will be used, and which is for easily conscious of the differences of China's maritime arbitration regime. Some special regulations that are only used in China will be introduced and analyzed. Pros and cons will be concluded after comparison, and thus better amendment recommendations will be concluded at the end the dissertation.

1.3 Structure of the dissertation

The body of this dissertation is divided into seven chapters. The first chapter is a general introduction of the dissertation. It consists of purpose of the dissertation, methodology and structure for better reading and comprehension.

Chapter 2 is about the background of maritime arbitration including meaning, history and the development of maritime arbitration. At the end of this chapter, the characteristics of maritime arbitration will be introduced with the comparison of general arbitration and litigation.

Chapter 3 is about the history and development of China's maritime arbitration, the establishment of CMAC will be introduced explicitly. After that, the great efforts made by CMAC will be introduced in different catalogues.

Chapter 4 is to introduce all the legislation concerning China's Maritime Arbitration. And thus introduce the international convention concerning arbitration ratified by China.

Chapter 5 is the most important part of this dissertation. It introduces and analyzes interesting and valuable issues of China's Maritime Arbitration procedure including arbitration agreement, the requirement of arbitrators and China's special system of conciliation.

Chapter 6 is to introduce and analyze the challenges of CMAC by LMAA and China's Maritime Court.

The last Chapter is another important part, The writer will conclude all the analysis made all over the context in this part. Practical advices for promoting China's Maritime Arbitration will be proposed.

Chapter 2

Introduction of maritime arbitration

2.1 History of maritime arbitration

Different from other industries, practitioners in shipping field tend to chose arbitration as the preferred means of resolving disputes in an effective, economic and commercially sensitive manner rather than resorting to Court proceedings.¹¹ This is normally reflected as most charter parties contain a arbitration clause whereby the parties agree to resolve by arbitration disputes that arise under the charter party.¹²

The present situation of the popularity of arbitration in maritime is quite relative with its history in Europe. In the maritime industry, it has been a long history for the practice of resolving disputes by arbitration.

From the history of arbitration, there are records of arbitration's use in Ancient Egypt and latterly in the Greek City States and the Roman Empire. Recorded history suggests that mainly merchants and traders used arbitration.¹³ Some bibliographies show arbitration as a means of dispute resolution, originated in ancient Rome, formed and developed in the United Kingdom, Sweden and other European countries, and then be spread to other countries in the world.¹⁴ If considering the two different criterions of

¹¹ See Corin Ricketts, English Law Maritime Arbitration, Law Update, 2009.

¹² Robert Force, 2004, P51.

¹³ See a lecture by Bruce Harris, Maritime Arbitration in the U.S and the U.K, Past, Present and Future: The View from London.

¹⁴ China Maritime Commission Secretariat, p7.

legal history research, these two historiography conclusions for arbitration are compatible with each other. It can be concluded that arbitration emerged in Ancient Egypt, and ancient Rome is another important period for the spread of arbitration to Europe Countries.

From the history of maritime, some specific maritime regulations have found in Ancient Egyptian Code and the code of *Hammurabi*. These two ancient codes are acknowledged as the oldest statute law. Therefore maritime law has a very long history. According to some documents, the oldest systematic maritime code may be *Lex Rhodia*, also known as Rhodian Sea Law.¹⁵ Rhodian Sea Law is developed in Rhodes between 1,000 BC and 600 BC. Even no copy of Rhodian Sea Law is found, some meager provisions still can be found through *Julius Paulus* and the *Digests of Justinian*. Such as the provision of cargo jettisoning by the *Lex Rhodia* that “if merchandise is thrown overboard for the purpose of lightening a ship, the loss is made good by the assessment of all which is made for the benefit of all.”¹⁶ This provision shows that the emergency cargo jettisoning is just like general average in contemporary maritime law. After the collapse of Ancient Rome, Europe entered into a period of chaos, and this situation forced Mediterranean and west coast of France to be self-sufficient. This period caused a great advantage of international trade specially in maritime commerce, and such phenomenon not only saved international trade after Roman Empire, but also made a significant development to maritime law.¹⁷ Three noted codes of maritime law were formulated during this special time, from A.D. 1000 and A.D. 1500. The first is the Laws of *Oleron*, which prevailed in France and England. The content ranges over general average, ship collision, marine salvage and Crews’ rights and duties. It acted as a

¹⁵ See, Liu Ying, , P 39-40

¹⁶ See Benedict, R., P 40

¹⁷ See, Liu Ying, Deng Rui Ping , P 40

bridge for maritime law being spread to Scandinavian and the Baltics, as the basis of the Laws of Wisby. The second is *Consolato del Mare*, which was adopted by the cities on the Mediterranean. It was called as the most complete maritime customary law. The third is the laws of Wisby enacted by Hanseatic League on the Baltic, and it prevailed in Scandinavian and the Baltics, which exerted a great influence to contemporary maritime law in these places.¹⁸

Analyzing the history of arbitration and maritime law, it is obvious that they have the same developmental sequence in terms of territory. Recorded history suggests that mainly merchants and traders appreciate arbitration.¹⁹ For assumption, maritime commerce was as developed as other inland commerce, it can be concluded roughly that the development of maritime arbitration is similar with that of general commercial arbitration, and the history of maritime arbitration could be traced back to Ancient Egypt or Ancient Roman. Nevertheless, without consideration of assumption, maritime arbitration had been recorded in maritime codes in Mediterranean in thirteen century.

¹⁸ *Ibid.*, P40 P41

¹⁹ See a lecture by Bruce Harris

2.2 Development of maritime arbitration

As an important part of Commercial arbitration, maritime arbitration generated and gradually developed with the development of maritime transport, in reverse, promotes the steady development of the maritime industry. Since twentieth century, along with the constant growing of shipping industry and continuing increase of worldwide sale of good, maritime arbitration as an effective way for maritime disputes has been developing in various countries. Such development has shown some features that are unique to this period:

- 1) Increase of maritime arbitration cases, more diversity of type

As the globalization of economic, trade and commercial activities was becoming more diverse, the type and number of maritime arbitration was gradually increasing simultaneously. At the beginning of twentieth century, cases of maritime arbitration ranged mainly in charter party, marine transport, and marine insurance. Nowadays, charter party still is the important part of maritime arbitration, but many cases involving in ship collision, salvage and pollution also enter into the range of arbitration with a gradual growth.

- 2) The emergence of new maritime arbitration center and decentralization of arbitration location.

With a long history as a maritime arbitration center, UK is always in the firmly leading position in maritime arbitration. However, with the change of national power of UK and the development of economics in other countries,

the position of London as the world's maritime arbitration center has been slightly weakened. Especially after World War II, Asia-Pacific region has enhanced their maritime forces.²⁰ Although the battlefield of world maritime arbitration center becomes very fierce, London is still the most important maritime arbitration. It is obviously to confirm this point of view from the case number received by LMAA that about 90% maritime arbitration cases in the world are submitted to LMAA every year.²¹

3) Ad hoc arbitration to Institutional Arbitration

Institutional Arbitration is a standing arbitration body to manage the arbitration proceedings, usually arbitrates under their own rules; Ad hoc arbitration is not managed directly by any established institutions. Parties appoint arbitrators for a specific case, and the arbitration tribunal is thus built up to hear the case. Since ad hoc arbitration is an early form of arbitration which lacks stability, institutional arbitration emerged in middle and later period of nineteenth century and developed rapidly in twenty century, and is gradually challenging the dominant position of ad hoc arbitration. Until now, USA, UK, Germany, Tokyo, Australia, Hong Kong and mainland China have set up their own maritime arbitration institutions²², and these coastal countries or region have been the main maritime arbitration center in the world. Because of the stably improved professional arbitration made by these institutions, the standard of international maritime arbitration has become better than ever.

²⁰ Si Yuzhuo, P 630 (according to statistics, 4096 tonnage of ship are controlled by Asian company)

²¹ See Cai Hongda, Issues on Development of Chinese Maritime Arbitration, Chinese Arbitration Consulting, 2005, p 1 (on an international arbitration conference held in Malaysia in 2003 march, Professor Yang Liangyi stated: five years ago or earlier, in terms of maritime disputes, 60% in London, 20%-25% in New York, the rest in Hamburg, Tokyo, Beijing, Hong Kong, Singapore. However, as estimated in recent five years, it would be 90% in London.)

²² See supplement A

2.3 Characteristics of Maritime Arbitration

Black's Law Dictionary defines the legal term of arbitration as: in practice, the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called "arbitrators" or "referees."²³

What is maritime arbitration? There seems no unified definition yet made by law experts. Some scholars define it as a regime that one party submits maritime disputes to a maritime arbitration institution or arbitrators for decision.²⁴ British Scholars deem that every arbitration involves shipping disputes can be regarded as maritime arbitration.²⁵ Actually, these two definitions express similar opinion regardless of wording. To give out a more comprehensive definition, maritime arbitration is a non-governmental arbitration regime for resolving maritime disputes, and it is a regime that maritime institution or arbitrators make an arbitral award for maritime disputes with the application by one party and arbitration agreement or arbitration clause.

To define essence, maritime arbitration is an important component of international commercial arbitration. Therefore, it must inherit the general characteristics of international commercial arbitration, such as autonomy, flexibility, economy, security, and ease of implementation. Consummate maritime arbitration regime should not only reflect and perform the inherent

²³ Black's Law Dictionary, P 83

²⁴ See Zhang Xianglan, P 369

²⁵ See Ronald Bernstein & Derek Wood, P 346

advantages of international commercial arbitration to achieve fairness and efficiency, but also to fit the characteristics of maritime disputes to ensure a proper and especial solution for maritime disputes.

There exist two ranges for the definition of maritime disputes: narrow and broad. Narrow definition expressed maritime dispute as a dispute caused by the maritime accident (especially means casualty resulted as property damage and personal injury); Broad definition explicate it as a dispute refers to all maritime matters, including maritime trade and ships and ship-related activities. Generally, the broad definition is more acknowledged and more appropriate.²⁶

Therefore, in terms of maritime arbitration, those can be submitted include contractual or non-contractual disputes that occur during maritime transport, offshore operations. They have the following characteristics:

- 1) Professional and technical. Almost all the maritime disputes related with ships or generated around the ships where strong professionalism and technicality are required.
- 2) Complexity. Another feature of maritime disputes is that legal relation is very complex. It is very normal in shipping field to sign a purchase & sales contracts and multi-chain sublet contract. Once one part of the chain had a dispute, all the seller, buyer, lesser and charterer will be dragged in, and form a complex multi-party disputes.
- 3) Real time, because of the mobility of ship and the fluidity of water, it is difficult to preserve the scenes of disputes that occur in shipping transport

²⁶ See Wu Huanning, p 391

and operation. Because of the immediacy of maritime disputes, an efficient resolution is required.

The characteristics of maritime disputes decide the maritime arbitration has its own particular feature that different from other kinds of international commercial arbitration. 1) The arbitrator of maritime arbitration must be familiar with professional legislation and have wealth practical experience in shipping industry. 2) It is important to settle multi-party with appropriate procedure and manner. 3) Maritime arbitration is required to be more flexible, efficient and economical. Meanwhile, because of these requirement, although institutional arbitration has increased in recent year, most maritime arbitration choose ad hoc arbitration in London or New York as a more flexible way. In 13th International Congress of Maritime Arbitrators, most countries have reached the consensus that maritime arbitration is international, and its characteristics determine it not to follow today's international commercial arbitration with the trend of increasing institutional arbitration. Moreover, it is also acknowledged by ICMA that Maritime arbitrators are mainly performed by maritime experts, and maritime arbitration culture should be vigorously promoted.²⁷ Nowadays, with the numerous researches by law scholars in the world, regime of maritime arbitration is nearly ideally integrated and stable. It is reasonable to believe the appeal of ICMA will be satisfied in the recent future.

²⁷ Cai Hongda, Comment on the 14th International Congress of Maritime Arbitrators in New York, P 369

Chapter 3

History and Development of China's Maritime Arbitration

There didn't exist an arbitration institution can accept and hear maritime case until MAC was founded in 1959. Before this time, it was marine management committee²⁸ deal with all the disputes concerning salvage and ship collisions with foreigners or foreign affairs that occurred in the territorial waters of China. Because this kind of decisions is a kind of administrative resolution, it was easily to incur dissatisfaction by foreign ship owners. It is admitted that, to seek arbitration in other countries was a more proper way for foreign ship owners who met maritime disputes happened in China. In 1950s, two cases caused great shock in Chinese maritime industry. One is "Bei Lan Pu", in 1953, "Bei Lan Pu" was registered in UK, and she got aground in the sea out of Dalian harbor. Considering the situation was very dangerous and an urgent salvage is needed, China government of Dalian dispatched ships for salvage without salvage agreement. After "Bei Lan Pu" was successfully towed to Dalian harbor, foreign ownership rejected the Chinese party the requirement with 15% of salvages. Chinese party believed it was reasonable to require such award according to international maritime custom. However, British party thought they should go to London for arbitration to resolve this dispute. But at that time, Chinese party was unwilling to seek arbitration out of China. In this case, the salvage place was in China, salvors were Chinese, because there had not any maritime arbitration agreement and recommendable

²⁸ Marine Management Committee is a governmental agency under port authority, which is under the management of China Ministry of Communications.

standard format for salvage agreement, besides there was not any arbitration institution in China, it was impossible for two parties agree to arbitrate in China. At last, it was the marine management committee that made the decision, which led a strong dissatisfaction of British party. It is acknowledged that it's quite unfair for foreign parties to accept a decision made by a governmental institution. The second case just happened in the next year, British ship "Cha Pu Lin" got aground in Yulin harbor, and Chinese party sent ships for salvage, but British party disagree with the Chinese salvage program. British party assert to sign Lloyd's rescue standard contract, and to be salvaged by Hong Kong ship.²⁹ These two cases directly affected Chinese government to promote maritime arbitration. On November 21, 1958, the State Council of the People's Republic of China decided to accept the application of the establishment of a Maritime Arbitration Commission (CMAC) to serve as a site for maritime arbitration.³⁰ CMAC was formally established on January 22, 1959. The foundation of the CMAC followed by four years the State Council's establishment of FETAC³¹ to act as a center for arbitrations involving trade disputes.³² CMAC of CCPIT is the only permanent organization for maritime arbitration in China. The CCPIT was established in May 1952. This is a national non-governmental, economic and trade organization

²⁹ Only Chinese introduction of these two cases can be found, see Ding Hanli, Research of the bottleneck of Mainland China's Maritime Arbitration, Natioanl Sun Yat-sen University, 2005.

³⁰ See Decision of the State Council of the PRC concerning the establishment of a maritime arbitration commission within CCPIT (hereinafter cited as the CMAC Decision), reprinted in the China Investment Guide 1986, at 762-763 (China International Economic Consultants, Inc.1985). as cited in CURTIS E. PEW, ROBERT M. JARVIS AND MARK SIDEL, The Maritime Arbitration Commission of the People's Republic of China: Option and Strategies, Journal of Maritime Law and Commerce, Vol.18, No 3, July, 1987.

³¹ It was changed name by State Council of the PRC in June of 1988 as CIETAC

³² See Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade, reprinted in China Investment Guide supra note1, P757-758. as cited in CURTIS E. PEW, ROBERT M. JARVIS AND MARK SIDEL, The Maritime Arbitration Commission of the People's Republic of China: Option and Strategies, Journal of Maritime Law and Commerce, Vol.18, No 3, July, 1987

composed of representatives from China's economic and trade circles.³³ Therefore, although the establishment of CMAC was decided by State Council of the PRC, it is a non-government arbitration institution under CCPIT. The founding of CMAC was prompted by the PRC's decision to modernize and strengthen its merchant marine.³⁴ In the early stages of or the promotion of China's maritime arbitration, the main task of CMAC was to resolve foreign maritime disputes. To consist with CIETAC's common practice, CMAC adopted the practice of voluntary arbitration which requires arbitration agreement and the regime of "a single and final award". It can be said that CMAC walk in the frontier of China's arbitration from the very start. Although maritime arbitration was generated very late in China, it has made a significant progress in these several decades. It also forms an arbitration regime with Chinese features, like arbitration combined with conciliation etc, which will be analyzed in the following text.

In terms of the case number, CMAC accepted 93 cases from 2001 to 2004³⁵, the total amount of subject matter reached RMB 312 million, which has increased to some extent comparing with 1990s.³⁶ The types of cases have broken the common range as charter party and shipping agency. It also included bill of lading, salvage, collision, logistics, ship building, and ship insurance, and these types of cases have a trend of gradual increase.

In terms of institution building, to meet the needs of the market, CMAC made a series of measures. Under the discipline that maritime arbitration center is better to have the location together with shipping center, CMAC Shanghai sub-commission was built on January 1, 2003. Since then,

³³ Maritime arbitration in China, P 27

³⁴ CURTIS E. PEW, ROBERT M. JARVIS AND MARK SIDEL, P 352

³⁵ 16 cases in 2001, 14 cases in 2002, 28 cases in 2003, and 35 cases in 2004

³⁶ Cai Honda, Development of China Maritime Development: situation and related issues, P 145

Shanghai sub-commission has accepted and heard 150 cases and the subject matter amounts to RMB 750 million.³⁷ CMAC and Shanghai sub-commission both have secretariats with the leadership of general secretaries, which deal with all the daily affairs including accepting and managing the arbitration case. Until now, CMAC has set offices in Tianjin, Dalian, Guangzhou, Ningbo, and Qingdao. The task of these offices is to publicizing, consulting and communication. They cannot accept cases as a sub-commission. In recent years, CMAC has established the Fishery Dispute Resolution Center, Logistics Dispute Resolution Center and Maritime Mediation Center.³⁸

In terms of research and publication, CMAC has published China Maritime Arbitration Commission Awards which has some influence in both China and abroad.³⁹ Moreover, CMAC staffs have visited many shipping and logistics companies to introduce the advantages of maritime arbitration and the importance of drafting a standard arbitration clause.

CMAC Arbitration Rules was enacted in 1959. Through the amendment in 1989, 1995, 2001 and 2004, the latest valid edition is 2004 CMAC Arbitration Rules. These timely amendments are to meet the requirement of improving institutional settings, enlarging the range of acceptable cases, matching the national legislation. Moreover, these amendments tried to emphasize on respecting party autonomy, giving more rights to tribunal for speeding up the arbitration process. Although maritime arbitration in China has made a great progress in the past decades, there still exist some deficiencies compared with Europe countries and USA.

³⁷ Gu Guowei, Preliminary Exploration of China's Maritime Arbitration, Volume XXII, p 98

³⁸ Ibid. p 98

³⁹ CMAC has published seven editions for this series including one English version See Liang Meifen, Cai Hongda, China Maritime Arbitration Commission Awards, EMIS Professional Publishing Ltd, 2004

Chapter 4

Legislation of China's Maritime Arbitration

4.1 CMAC Arbitration Rules

Since the establishment of CMAC, in order to constantly adapt to the development of the practice of maritime arbitration, CMAC had amended five times for its arbitration rules, which has brought vigor and vitality for China's maritime arbitration. The latest version is ratified and promulgated on July 5 of 2004 by CCOIC⁴⁰

CMAC Arbitration Rules (2004) ⁴¹is enacted into four chapters like the former edition, and which includes arbitration proceeding, summary procedure and supplementary provisions. It amounts to 89 articles which had 4 more articles than the former edition. Arbitration Rules 2004 made the following main modifications on the base of the edition.

1) Enlarging the range of acceptable case, being compatible with Fishery Dispute Resolution Center, Logistics Dispute Resolution Center.

Arbitration Rules 2004 become a comprehensive rule that not only has the specialty in maritime case, but also other disputes inland.⁴² CMAC extend its jurisdiction to shipping-related logistics from only the maritime disputes. Considering Logistics Dispute Resolution Center has been set up. CMAC

⁴⁰ China Chamber of International Commerce. It is the member of ICC at China, also called ICC China when commence business related with ICC. It is also in the charge of CCPIT

⁴¹ Abbreviated as Arbitration Rules 2004

⁴² Deng Shijie, P 2

provides the content of logistics in its jurisdiction.⁴³ Moreover, to fit with the pursuit of Fishery Dispute Resolution Center, Arbitration Rules 2004 also add provisions for disputes occur in fishery production and fishing.⁴⁴

2) Further respecting the autonomy of the parties.

The provisions of Arbitration Rules 2004 express parties' autonomy, and give the parties more options. It allows parties to choose the contents of provisions in the rules,⁴⁵ which will help to gradually change the situation that arbitration proceeding became more similar with the litigation proceedings that lack flexibility. The right to choose arbitrator is one of the most important rights owned by the parties. When the parties haven't agreed on the presiding arbitrator, how to further give the expressing rights to the parties. In some other countries, arbitration institutions have the practice as provide the list of presiding arbitrator candidates to the both parties, for their sooner selection. Arbitration Rules 2004 draw on this successful practice to

⁴³ Arbitration Rules 2004, Article 2 (6): The Arbitration Commission shall take cognizance of cases relating to the following disputes: Disputes arising from freight forwarding, non-vessel operating carriage, transport by highway, railway or airway, transport, consolidation and devanning of containers, express delivery, storing, processing, distributing, warehouse distributing, logistics information management, or from construction, sale and leasing of tools of transport, tools of carrying and handling, storage facilities, or from logistics center and distribution center, logistics project planning and consulting, insurance related to logistics, tort or others related to logistics; Also see article 7 to the Logistics Dispute Resolution Center of the Arbitration Commission or to the Fishery Dispute Resolution Center of the Arbitration Commission for arbitration, the arbitration proceedings shall be conducted under these Rules

⁴⁴ See Arbitration Rules 2004, article 2 (7): Disputes arising from fishery production or fishing.

Also see article 25: In case of the fishery disputes, the arbitrators can only be appointed from among the arbitrators on the Panel of Arbitrators in Fishery.

Also see article 7 the Special Provisions On Fishery Disputes Cases of CMAC Arbitration Rules shall also apply to fishery disputes arbitration proceedings.

⁴⁵ See article 7: However, if the parties have agreed otherwise, and subject to consent by the Arbitration Commission, the parties' agreement shall prevail.

The parties may shorten or extend by an agreement the procedural deadlines stipulated in these Rules or modify the arbitration procedural matters concerned to meet the special needs of their specific case; and they may also authorize by agreement the arbitration commission or the arbitration tribunal to make any necessary procedural adjustment as see fit while the arbitration procedure is underway.

make the similar provisions.⁴⁶

3) Speeding up the arbitration process; improving the efficiency of handling cases.

Arbitration Rule 2004

In Arbitration Rules 2004, it shortens the ordinary procedure of 45 days for submission of defense to 30 days, 20 days for appointing arbitrators to 15 days, 30 days for notice of trial to 15 days, 9 months for rendering an award to 6 months. Meanwhile, the time limitation of summary procedure is further less as 20 days for submission of defense, 10 days for appointing one sole arbitrator, 10 days for informing parties the date of hearing.⁴⁷ Moreover, the new summary procedure the limitation of the amount of the claim totals to RMB 1,000,000 from RMB 500,000.⁴⁸ In addition, to speed up the arbitration process, Arbitration Rules 2004 renders tribunal more discretion.⁴⁹

4) Further strengthening the independence and impartiality of arbitrators.

Arbitration Rules 2004 further increase the transparency of arbitrators. Firstly, new Arbitration Rules 2004 defines the self-monitoring system

⁴⁶ Ibid. article 26 In case the parties fail to jointly appoint or jointly entrust the Chairman of the Arbitration Commission to appoint the presiding arbitrator within 15 days from the date on which the Respondent receives the Notice of Arbitration, the presiding arbitrator shall be appointed by the Chairman of the Arbitration Commission. The presiding arbitrator and the two arbitrators as appointed above shall jointly form an arbitration tribunal to jointly hear the case.

The parties may, within the time limit stipulated by the paragraph above, nominate more than one candidate for the presiding arbitrator from the presiding arbitrator candidate list provided by the Arbitration Commission. The candidate nominated by both parties shall act as the presiding arbitrator. If more than one candidate are nominated by both parties, the Chairman of the Arbitration Commission shall appoint one from them as the presiding arbitrator.

⁴⁷ Ibid. article 72 and article 75

⁴⁸ Ibid. article 71

⁴⁹ See article 38 During the process of arbitration proceedings, the arbitration tribunal may issue procedural orders, send out questionnaires, hold meetings before hearing, convene preliminary hearings, draw up Terms of Reference, etc

clearly for arbitrators.⁵⁰ Secondly, it stipulates explicitly for which circumstances that an arbitrator shall request a withdrawal from his office, in order that arbitrators dispose himself or parties submit.⁵¹ Thirdly, according to the international arbitration custom, minority opinion and reason may be recorded on file and written in the award when three arbitrators cannot make the opinion of the unanimity. Arbitration Rules 2004 also made progress in terms of this aspect.⁵² It is a good guarantee for the parties to supervise, and increase the transparency of arbitration process, which can force arbitrators to exercise their rights prudentially.

5) Arbitration fee being more reasonable and normalized.

Arbitration Rules 2004 was amended according Arbitration Fee Collection Measures (1995)⁵³ that arbitration fee consists of fees for accepting the case and fees for processing the case. It cancels the old provision for docketing fee RMB 10,000. The new criterion for arbitration fee has an average 40% reduction compared with the old provision. When the amount of the subject matter is very high, the reduction will even reach 75%. Therefore, the new criterion of arbitration fee is more reasonable and standardized, which is also more acceptable by the parties.⁵⁴

To sum up, the latest amendment of CMAC Arbitration Rules is further match with international standard as respecting the parties' autonomy,

⁵⁰ See article 29: The arbitrators shall sign the Arbitrator's Declaration if they accept the appointment by the parties or the Chairman of the Arbitration Commission. The Declaration shall be delivered to the parties.

⁵¹ See article 30 that four circumstances will be regard as any possibility of impartiality.

- a. the arbitrator is one of the parties or relative or attorney of the party;
- b. the arbitrator has any interests related to the case;
- c. the arbitrator has other relationship with the party or the attorney which may affect the impartiality of the arbitration;
- d. the arbitrator has met the party or the attorney privately, or accepted invitation or gifts from the party or the attorney.

⁵² Ibid. article 61

⁵³ Promulgated by the State council of the PRC on July 28, 1995

⁵⁴ the new CMAC arbitration fee schedule is in Supplement B

supervising arbitrators to be impartial, advancing the social credibility of arbitration. These moves must promote maritime disputes to be resolved in a fair and efficient way, and will make a further progress of China's shipping trade and economics.

4.2 Conventions and China's Arbitration Law

To make a maritime arbitration in China, besides the parties can choose Arbitration Rules of CMAC, they will be regulated and bound by any concerning international conventions that China has entered and the arbitration law enacted by Chinese government. In the range of maritime arbitration, these legislations are also important components of China's Maritime Arbitration system, and they plays a vital role in assisting and guiding the parties to commence a maritime arbitration in China.

There are several international conventions concerning maritime arbitration, such as the New York Convention 1958⁵⁵, European Convention on International Commercial Arbitration 1961, ICSID Convention 1965⁵⁶, and the Panama Convention 1975⁵⁷. There also exist some international standard rules made by United Nation such as UNCITRAL Arbitration Rules 1976, UNCITRAL Model Law on International Commercial Arbitration 1985.⁵⁸ It

⁵⁵ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

⁵⁶ Convention on the Settlement of Investment Disputes Between States and Nationals of Other State, also called Washington Convention 1965.

⁵⁷ Inter-American Convention on International Commercial Arbitration 1975

⁵⁸ 2010 - UNCITRAL Arbitration Rules (as revised in 2010)

2006 - Recommendation regarding the interpretation of article II (2), and article VII (1), of the

2002 - UNCITRAL Model Law on International Commercial Conciliation

1996 - UNCITRAL Notes on Organizing Arbitral Proceedings

is notable that these rules do not bind the parties unless they choose them as their arbitration rules. These model rules are designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.⁵⁹

The most important and influential international convention China has ratified is New York Convention 1958. It entered into force on 7 June 1959, and 145 countries have ratified it until now, and this convention has been the most influential and widest international convention with most party countries in arbitration field. China ratified New York Convention on 22 April 1987, China claim reciprocity reservation and commercial reservation when ratified it.⁶⁰ The entry into New York Convention facilitates the exchange and cooperation within party countries, and this step is also an important progress made by China for the modernizing and internationalizing Chinese maritime arbitration.

In terms of domestic legislation, there is currently no specific code of legislation for maritime arbitration except the CMAC Arbitration Rules. However, those special provisions for maritime arbitration still can be found in other relative legislations. Arbitration Law⁶¹, Civil Procedure Law⁶²

1985 - UNCITRAL Model Law on International Commercial Arbitration (amended in 2006)

1982 - Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules

1980 - UNCITRAL Conciliation Rules

1976 - UNCITRAL Arbitration Rules

⁵⁹ United Nations Commission on International Trade Law see:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

⁶⁰ Deng Shijie, P 461

⁶¹ Arbitration Law of the People's Republic of China 1994

⁶² Civil Procedure Law of the People's Republic of China 1991

Maritime Procedure Law⁶³ and judicial opinions made by the Supreme People's Court⁶⁴ of China consist a systematic domestic legislation for regulating maritime arbitration.

Arbitration Law 1994 clearly has provided the basic principles of arbitration, arbitration institution, arbitration agreement, arbitration supervision and other important issues. It has fully reflected the general arbitration features like voluntary, independent and non-governmental.⁶⁵ However, there are still some issues in Arbitration Law that need to be improved. These weak points include the excessively strict requirement of a valid arbitration agreement; disallowing ad hoc arbitration; different treatments to the judicial supervision to international arbitration⁶⁶ and domestic arbitration, and so on. These are obviously not conducive to China Maritime Arbitration.

The article 257 to 261 of Civil Procedure Law makes a clear and particular provision for arbitration concerning foreign affairs. To enhance the operability of these provisions and make sure it can be applied correctly and effectively, the Supreme People's Court promulgated a judicial opinion⁶⁷ in 1992. This judicial opinion gives out a further interpretation for arbitration concerning foreign affairs. According to Civil Procedural Law, Chinese courts have the right to make judicial review to the arbitration awards made by China's international arbitration commission and domestic arbitration commission, but the criterions (reasons and qualifications) that made on these two kinds of arbitration commissions are different. With further

⁶³ Special Maritime Procedure Law of the People's Republic of China 1999

⁶⁴ Chinese Court called Chinese People's Court because of the political regime

⁶⁵ Deng Shijie, P 461

⁶⁶ International and domestic here is classifies by the nature of the issuing arbitration institution. For example, CIESTAC is international arbitration even if the case doesn't concern any foreign affairs.

⁶⁷ Some Opinions Concerning the Application of Civil Procedural Law, (1992) 22, adopted through the 528 conference of Supreme People's Court Judicial Committee.

explication, the range of review to the arbitration award made by domestic commission is wider and stricter. International arbitration award only receive a procedural review, while domestic arbitration award is required both procedural review and substantive review.

There are sixteen articles in Maritime Procedure Law providing maritime arbitration and arbitration concerning foreign affairs, and this is an important guide and protection for maritime arbitration.⁶⁸ The provision of property preservation before arbitration is enacted on the base of international maritime custom, and this is a great progress made by China. This provision not only provides a clear legal basis for the parties to get the property preservation before arbitration, but also make the property preservation of China's maritime arbitration more complete than ever. In addition, Civil Procedural Law⁶⁹ and Arbitration Law⁷⁰ also have the provisions for property preservation in arbitration.⁷¹ However, these provisions require the arbitration commission to submit an application to court with the prior application from the parties. This kind of provisions is controversial with the developing trend of maritime arbitration that the rights of arbitral tribunals should be strengthen and the intervention by courts should lessen. Further analysis and the corresponding proposals will be explicated in Chapter 7.

⁶⁸ These articles focused on the following issues for maritime arbitration: (1) issues of the implementation of maritime arbitration award by Maritime Court or the Intermediate People's Court. (2) issues of the assistance by Maritime Court to property preservation and evidence preservation. (3) issues of maritime injunction by Maritime Court and Constituting a Limitation Fund for Maritime Claims Liability. (4) Procedures for Registering Creditors' Rights and Repayment of Debt.

⁶⁹ China's Civil Procedural Law Article 258: provision is in 7.1.4

⁷⁰ China's Arbitration Law Article 28: provision is in 7.1.4

⁷¹ Legislations and explicit analysis are in 7.1.4 of this thesis

Chapter 5

China's Arbitration Procedure

5.1 Arbitration Agreement

Arbitration agreement is the cornerstone of the entire arbitration system, the arbitration agreement made by the parties is the basis for the jurisdiction of the arbitration institution. It is said that it never emphasize arbitration agreement too much.⁷² An agreement to arbitrate may take many different forms such as agreement refers existing disputes, including express and implied arbitration agreement.⁷³ In most maritime or shipping contracts, the agreement to resolve disputes through arbitration is usually expressed in a written arbitration clause, often in a standard printed form contract.⁷⁴ China's Arbitration Law promulgates provisions for arbitration agreement with a whole chapter to show the importance

According to the provision of China's Arbitration Law, an agreement for arbitration shall include three elements

1) The expression of application for arbitration.

According to China's Arbitration Law, the parties should make a clear expression to submit the disputes for arbitration. Otherwise, such agreement or clause will be invalid because of lacking establishment requirement. It will leave the possibility that the parties still can take litigation through People's Court or seek other resolution after dispute occurs.

⁷² See Song Lianbin, P 331

⁷³ See *Gulf Import & Export Co v Bunge SA* [2007] EWHC 2667 (Common)

⁷⁴ Clare Ambrose, Karen Maxwell, P43.

2) Matters for arbitration.

CMAC Rules has provided that matters for arbitration should be maritime, shipping, logistics and fishery disputes no matter contract or non-contractual. CMAC Rules also gives out eight types of disputes that can be accepted by CMAC.⁷⁵ When the arbitration agreement is being drafted, it is recommended to widen the range of matters for arbitration, in case some unexpected disputes that occur within the contract will be out of the fixed scope.

3) The arbitration commission chosen.⁷⁶

The requirement of two elements is quite similar with the international custom that is acknowledged by most developed countries' arbitration systems. However, to require the name of arbitration commission chosen is a special requirement in China's arbitration regime. The reason is because China's Arbitration Law doesn't regulate ad hoc arbitration, but only institutional arbitration. China has set up more than 200 arbitration institutions of various kinds and intention⁷⁷, if the parties don't agree the commission chosen, controversies will be caused. It is very normal to see arbitration clause as "Arbitration in London" in maritime or shipping relative contracts.⁷⁸ With the same condition, Chinese shipping parties like drafting as "Arbitration in Beijing". There are different opinions on the validity of such phrase, but to widen the interpretation of arbitration agreement has been the main trend in the world including China. Before the Arbitration Law was promulgated, such vague clauses used to be acknowledged by China Maritime Court according to international custom,

⁷⁵ CMAC Rules Article 2

⁷⁶ China's Arbitration Law article 16

⁷⁷ These kinds include CMAC, CIETAC, Chinese commercial arbitration commission and the institution for laboring arbitration

⁷⁸ GENCON 1994

what is reflected when the controversial parties apply to the courts to determine the validity of arbitration clauses, China Maritime Courts usually give out the positive decisions even if without exact name of arbitration commissions. After then, some different opinions existed: they claimed that CMAC should accept cases strictly according the article 16 of Arbitration Law. However, CMAC hold that arbitration agreement should be regarded as valid as long as the clause is executable with presumption. This opinion is acknowledged by China's judicial institution (court), and this is unanimous in the international custom.

The article 17 (3) of Chinese Arbitration Law provides that an agreement for arbitration shall be invalid when an agreement forced upon a party by the other party by means of coercion. On the other hand, according to China's Contract Law "if a party induced the other party to enter into a contract against its true intention by fraud or duress, or by taking advantage of the other party's hardship, the aggrieved party is entitled to petition the People's Court or an arbitration institution for amendment or cancellation of the contract." The different is the arbitration law regarded that case as invalid directly, the latter require petition of the aggrieved party. Contract Law also provides the situations that contract will be regarded as invalid directly in article 52. These provisions are only applicable when concluding such contract will harm the state interests. To respect the autonomy of contract and to consider the right to petition for amendment or cancellation is enough of security for the aggrieved party, the provision of the article 17 of Arbitration Law could be amended as compatibly with Contract Law.

5.2 Arbitrators in arbitration procedure

Arbitrator is an essential part of the arbitral tribunal. Arbitrator, chosen by the parties, hears case with his profession and discretion within the range of

arbitration rules. Arbitrator plays a decisive role for the impartiality and authority of arbitration award in the arbitration process.

China's Arbitration Law provides that "members of an arbitration commission shall be appointed from among the people who are fair and justice."⁷⁹ As we all know, judges and public procurators will receive administrative penalty or criminal liability considering the mistake or crime they have done. China's Judges Law provides special crimes for judges.⁸⁰ China's Public Procurators Law also has similar provisions to regulate procurators.⁸¹ However, the arbitrators' liability regulated by China Arbitration Law is not explicit enough and even impractical. Article 38 provides "Whereas a case provided for in section 4 of Article 34 of this law is found with an arbitrator and the case is very serious or a case provided for in section 6 of Article 58 of this law is found with an arbitrator, the

⁷⁹ See China's Arbitration Law, article 13: 1. At least eight years of work experience in arbitration. 2. At least eight years of experience as a lawyer. 3. At least eight years of experience as a judge. 4. Engaging in law research and teaching, with a senior academic title.

⁸⁰ See China's Judges Law, article 13: If a judge is found to be in any of the following circumstances, a report shall be submitted according to law concerning the removal of his or her post: (1) having forfeited the nationality of the People's Republic of China; (2) having been transferred out of this court; (3) having no need to maintain his or her original post after a change of post; (4) being determined to be incompetent in the post through appraisal; (5) being unable to perform the functions and duties of a judge for a long period of time due to poor health; (6) having retired from the post; (7) having resigned the post, or having been dismissed; or (8) being disqualified from continuing to hold the post because of violation of discipline, law or commission of a crime.

And Article 33: A judge who has committed any of the acts listed in Article 32 of this Law shall be given sanctions; if the case constitutes a crime, he or she shall be investigated for criminal responsibility.

⁸¹ See China's Public Procurators Law article 14: If a public procurator is found to be in any of the following circumstances, a report shall be submitted according to law concerning the removal of his or her post: (1) having forfeited the nationality of the People's Republic of China, (2) having been transferred out of this procuratorate; (3) having no need to maintain his or her original post after a change of post; (4) being determined to be incompetent in the post through appraisal; (5) being unable to perform the functions and duties of a public procurator for a long period of time due to poor health; (6) having retired from the post; (7) having resigned the post, or having been dismissed; (8) being disqualified from continuing to hold the post because of violation of discipline, law or commission of a crime; or (9) other circumstances that call for removal of the post. And article 36 A sanction shall be authorized and procedures gone through in accordance with the relevant regulations. Chapter VII Salary, Insurance and Welfare.

arbitrator shall bear the legal responsibility according to law and the arbitration commission shall remove him from the panel of arbitrators.” Article 34 provides “the arbitrator meets the parties concerned or their attorneys in private or has accepted gifts or attended banquets hosted by the parties concerned or their attorneys.” Article 58 provides “Things that have an impact on the impartiality of ruling have been discovered concealed by the opposite party.” From these provisions, it can be summarized that removing from the panel of arbitrators is the only practical penalty provided directly by arbitration law no matter how serious the case would be. Nevertheless, the phrase that “bear the legal responsibility according to law” is still a somewhat protection.

To analyze the practicality of this phrase, the possible legislations concerned will be determined. Neither Arbitration Law nor Civil Procedural Law provides special punishment or civil liability for arbitrators when arbitrators don’t fulfill their duties. Moreover, according to article 14 of Arbitration Law “An arbitration commission shall be independent of any administrative organ, without any subordinate relationship with administrative organs.” Therefore, arbitrators won’t get any administrative penalty like judges and Public Procurators. The only possible punishment is criminal liability. It is undoubtedly that a judicial officer will get criminal punishment according to the China’s criminal law article 399⁸² “a judicial officer who bends the law for the benefits of his own or bends the law for the benefits of his relatives or friends, and subjects to prosecution a person he clearly knows to be innocent and intentionally protects from prosecution a person he clearly

⁸² In terms of the course of civil jurisdiction, “A judicial officer who, in the course of civil or administrative trial, intentionally twists the law and makes judgments or orders which are contrary to the fact and law, shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention if the circumstance is serious; and if the circumstance is especially serious, to fixed-term imprisonment of not less than five years and not more than ten years.”

knows to be guilty shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention; if the circumstance is serious, to fixed-term imprisonment of not less than five years and not more than ten years; and if the circumstance is especially serious, to fixed-term imprisonment of not less than ten years.” This is the first paragraph of this article which is a general provision, and specific provision for judicial officers in criminal course and civil course is following. The question now is whether an arbitrator is a judicial officer. Considering the interpretation of arbitrator that “chosen by the parties” and “discretion within the range of arbitration rules”, besides, CMAC is a non-governmental organization, it is more reasonable to exclude arbitrators out of the range of judicial officers. Therefore, the provision of China’s Criminal Law cannot be applied to arbitrators, and it can be given out that there is not enough legislation for restricting arbitrators not to abuse their authority. This is a hidden trouble for the impartiality of arbitration procedure.

5.3 Conciliation Combined with Arbitration of CMAC

The conciliation combined with arbitration is an important feature of CMAC. It means arbitral tribunal can promote the parties to reach a conciliation agreement according with the parties’ desire. An arbitration award can be made according with the conciliation agreement, and such award can also be implemented by China’s Court the same as the normal one. According to CMAC Rules, in the process of maritime arbitration, on the basis of ascertain the essential facts, with the application of one party, arbitral tribunal can with the assent of another party mediate the case. Because this kind of conciliation is in process of arbitration, it can be also

called “conciliation in arbitration”. There are many advantages of such conciliation:

1) More respect for party autonomy.

Conciliation is not a necessary procedure, but is under the premise of two parties consent. The parties also can make contrary agreement like apply to withdraw the application for arbitration. Even conciliation is unsuccessful, the statement by parties do not have any validity for quotation.

2) Efficient and economic

Parties do not have to make a conciliation before submit the dispute to arbitration, which means that conciliation is not a necessary process. If the conciliation is successful, arbitration process will not be continued. If the conciliation is not successful, arbitration tribunal will return to arbitration proceeding as soon as possible, and it won't cause too much waste of time. Meanwhile, no extra fee is paid.

3) The possibility of success of conciliation is high.

Because the arbitrator has known the basic facts and clarified the legal issues before conciliation, it is easier for arbitrator to act as a mediator to promote two parties' conciliation. Meanwhile, actually, most businessmen want to deal with disputes in a fast and amiable way. It is proven that conciliation agreement is easier to be implemented because it is made by consensus by both parties.

4) The settlement agreement is protected.

Simple settlement agreement is difficult to be implemented by People's Court, but conciliation agreement can be acknowledged and protected by People's Court if arbitral tribunal makes an arbitration award according with

the content of settlement agreement.⁸³ The court can implement with such arbitration award directly without another extra litigation or arbitration.

5) Maintain friendly relations between two parties.

Conciliation in arbitration enables the parties to resolve the dispute amicably, which can maintain friendly relation and cooperation.

China's conciliation within arbitration process has attracted more and more attentions by other countries with an increasing trend, and these countries are most in Asia. This is because it is the trend of maritime arbitration development, as well as Asian countries are more affected by Chinese traditional thought.⁸⁴

However, there exists difference between the conciliation regimes by common law countries and China. Common law country like UK divides arbitration process and conciliation process strictly. If the conciliation is not successful, the mediator cannot be the arbitrator afterward. This provision is for preventing partiality by the arbitrator after he knew the basic fact of the case, and this may cause serious problem and even the eventual withdrawing of arbitration award.

Although there are some conflicts between these two kinds of conciliation, it is obvious that the combination between arbitration and conciliation meet the need of maritime arbitration's development, or at least in China. Both regimes achieved some progress. It is believed that, through every country's

⁸³ See China's Arbitration Law, Article 51: Any party of a amicable settlement agreement resulting from consultation or mediation may nominate a mutually agreed sole arbitrator, or request the Chairman of the Arbitration Commission to appoint one sole arbitrator, to make an award in accordance with the contents of their amicable settlement agreement and the arbitration clause stipulated therein; and the actual procedure and time limits are not confined by other stipulations of these Arbitration Rules.

⁸⁴ Si Yuzhuo, P 640

contribution, conciliation combining with arbitration will be improved constantly, and will be acknowledged by legislations in different countries.

5.4 China's Summary Procedure

Summary procedure in CMAC is a kind of simplification of ordinary procedure, and it is a simple arbitration process used by arbitration institution that is applicable in simple arbitration cases.⁸⁵ Compared with the normal procedure, summary procedure has the features of the tribunal being simple, the trial being closed in short term, low cost. Summary procedure is a flexible resolution way special for those cases with small amount of subject matter and simple fact. It can further improve the efficiency and reduce arbitration fees.⁸⁶

As in favor of small maritime disputes, most international maritime arbitration institution including LMAA, SMA, CMAC all regulate this special procedure in their arbitration rules. In UK, to use the summary procedure is very popular in arbitration, especially in maritime arbitration parties. LMAA has worked on improving the efficiency and reducing the costs of arbitration for a long time. It promulgated two summary procedures: small claims procedure & fast and low cost arbitration rules (FALCA). It should be admitted that LMAA's summary procedure received a great success. It helps LMAA to consolidate its leading position of maritime arbitration. CMAC had provided summary procedure since Arbitration Rules 1995, and it had been amended some in Rules 2004.

In conclusion that, before the expensive and bureaucratic process of ordinary procedure is improved, parties are more likely to choose the summary procedure if it is possible. The improvement and development of summary procedure matches the interests of maritime practitioners, and corresponds with the development of shipping field. It has become as the

⁸⁵ Huang Jin, Xu qianquan, Song Lian, P 144

⁸⁶ Cai Hongda, development in shipping field, conciliation combined with arbitration.

most trend of the development of maritime arbitration.

Chapter 6

Challenge and Improvement

As introduced above, China's Maritime Arbitration has built up a complete regime through decades' practice and improvement. CMAC has successfully resolved a number of domestic and international maritime disputes in the past 40 years. It is improving its status in the international community constantly, and enjoying a certain reputation in the world.

However, China's Maritime arbitration is still lagging in the world. Until now, the most obvious problem in the practice of CMAC is the number of cases. There is a big gap for the number of annual accepted cases between China and other major international maritime arbitration institution. Moreover, even bigger gap exists when compared with the top ten China's Maritime Courts⁸⁷. According to a study, there are about thousand cases accepted and heard by major maritime arbitration institutions in the world, but China can only deal with twenty of the total.⁸⁸ What is worth mentioning is that this number has been changed into sixty in recent year after the Shanghai sub-commission is established⁸⁹. Analysis with these two comparisons will be clarified separately as followed.

⁸⁷ These Maritime Courts are Dalian, Tianjin, Qingdao, Wuhan, Shanghai, Ningbo, Xiamen, Guangzhou, Haikou, Beihai.

⁸⁸ Gu Guowei, P 98

⁸⁹ See supplement C

6.1 Challenge from LMAA

6.1.1 Introduction of LMAA

It seems likely that maritime arbitration in London became popular because of the existence of the Baltic Exchange. It is a kind of bourse where a majority of the world's contracts for the charter parties were negotiated by broker representing ship-owners on the one hand and charterers on the other.⁹⁰ These kinds of brokers do the job as negotiating for the parties of disputes, if they also unsuccessful, a senior colleague of theirs would act as umpire. This is the early time of arbitration, and LMAA was formed almost fifty years ago from now. People normally choose full members of LMAA to underway ad hoc arbitration. Because of the confidentiality of arbitration and the characteristics of ad hoc arbitration, the precise number of the cases LMAA accepts every year is difficult to calculate. As the date publicized by LMAA, in 2006, all the full members of the association received 2500 appointments, and they made 361 arbitration award.⁹¹ Certainly, because of some cases is heard by two arbitrators and one umpire, so 2500 times don't means the actual number of cases. However, besides these full members, LMAA has other arbitrators. Therefore, the annual number of case is estimated about 2000.⁹² From the analysis of case number, London is deemed to be the best maritime arbitration center in the world. To analyze the situation, some reasons can be found for why LMAA is so successful.

⁹⁰ See a lecture by Bruce Harris, Maritime Arbitration in the U.S and the U.K, Past, Present and Future: The View from London.

⁹¹ See supplement C, from [http:// www. Lmaa.org.uk/intro.asp](http://www.Lmaa.org.uk/intro.asp)

⁹² Bruce Harris, Report on the English Arbitration Act 1996, International Congress of Maritime Arbitration XVI

6.1.2 Advantages of LMAA

1) developed maritime law and maritime arbitration regime

UK has a high level team of judges, who made a lot of classic cases describing the spirit and principles of maritime law. Lloyd's Law reports have been the must-read books in maritime field. Its updated case reports lead the new direction of international maritime law. Some scholars pointed out that, most kinds of shipping contract, when important as charter party, must have a case to explain for each article. That's the reason why ship-owner, charter party and cargo owner would like to sign contracts with London arbitration. They hope each article of their contract has a definite meaning, and can pre-define the respective rights and obligations and the interpretation.⁹³

LMAA Rules first promulgated in 1987, after repeated amendments, the valid version is 2006. To full member of the association, for the past years, they have insisted on only accepting parties' appointments according to LMAA Rules, what means the arbitration procedure must be applied with LMAA Rules if it is heard by member of LMAA.⁹⁴ In addition, LMAA design small claims procedure for cases with small subject matter, which emphasize on the flexibility and efficiency. This fully meets the needs and characteristics of maritime disputes, and followed by other countries. Similarly, China designed a summary procedure for small subject matter case. It is LMAA who updates its Rules timely made the London as the world's leading maritime arbitration center. Moreover, association makes a very high and strict requirement of the qualification of full members to

⁹³ ONATHAN S L. Maritime arbitration in London, Arbitration in Maritime & transport disputes, 2007.

⁹⁴ Dispute resolution in England and the impact of ADR, International Conference on Maritime Law IV, as cited in Gu Guowei, Preliminary Exploration of China's Maritime Arbitration, Annual of China Maritime Law, Volume XXII, 2009 p97.

make the most cases are in the hand of only several tens members. This method can ensure the quality and professionalism of LMAA Maritime Award. Meanwhile, LMAA greatly softens the qualification of contributor member for abstracting more practitioners of maritime field to publicize and promote London Maritime Arbitration.

2) British Courts supporting Maritime Arbitration

The parties always use simple words when drafting arbitration agreement. For example: “resolved by London Arbitration”, “proper arbitration clause”, “London arbitration” and “arbitrate in London according ICC Rules”. British courts normally would give out supplementary interpretation to acknowledge it as a valid arbitration clause.⁹⁵ In the *Star Texas*⁹⁶, the arbitration clause in the charter party was that any disputes with this contract will be arbitrated in Beijing or London. This kind of clause is the result of compromise, British Supreme court and court of Appeal both adjudged such clause valid, and thus stopped the litigation process. This case was finally arbitrated in Beijing. As professor Schmitthoff said British Courts had realized that the arbitration clause was different from other clauses in a contract, it should be interpreted in a wider way.⁹⁷

3) International shipping intends to use London arbitration clause standard contract.

For the convenience of practical operation, and saving the cost of negotiation, the parties generally use a standard form of contract, and the LMAA arbitration clause always is recommended in these standard form contracts. Such as GENCON contract 1994, NYPE contract 1993, LOF

⁹⁵ See *Tritonia Shipping Inc. v. South Nelson Forest Products Corporation* [1996] 1 Lloyd’s Rep. 114, *Smith Ltd. V. H&S International* [1991]2 Lloyd’s rep. P127, *Nerano* [1994]2 Lloyd’s Rep P51.

⁹⁶ *Star Texas* [1993] 2 Lloyd’s Rep. P445

⁹⁷ Clive Schmitthoff, P 615

contract 2000 and NSF contract 1993 and so on.⁹⁸ These standard form contracts usually recommend LMAA arbitration clause which makes the parties be accustomed to choose London as the arbitration locality. Then, choosing LMAA gradually became the custom of maritime field. What worth mentioning is that the reason why most standard form contracts recommend LMAA arbitration clause is because British government and British maritime lawyers participate actively in conferences held by IMO, CMI, UNCTAD and actively provide advices for the drafting of these contracts raised by Baltic and International Maritime conference, International Shipping Federation and FONASBA.

6.1.3 Conclusion

Due to historical, geographical reasons, London as an international shipping center has a long history. It collects a large number of shipping organizations and corporation headquarters. Simultaneously, insurance coverage, shipping finance, ship trading, ship leasing, and brokers' management business are quite prosperous. The well-developed maritime economy provides an important foundation for maritime arbitration in London. Moreover, the advanced British maritime Law attracts the parties to choose London arbitration. After then, perfect Arbitration Act 1996 and LMAA Rules ensure the arbitration procedure successfully underway. Supports from British courts, government maritime and lawyers make London always be in the leading position as international arbitration center.

⁹⁸ Gu Guowei, P 97

6.2 Challenge from China Maritime Court

6.2.1 Introduction of China Maritime Court

In order to meet the needs of the development of the country's maritime transport and in its economic relations and trade with foreign countries, as well as to ensure the lawful rights and interests of both Chinese and foreign parties, the Standing Committee of NPC, on 14 November 1984, approved a decision to establish Maritime Courts in coastal port cities.⁹⁹ On 28 November 1984, the Supreme People's Court promulgated specific rules on several questions concerning the establishment of these courts. After then, six Maritime Courts were founded. As an integral part of the China's jurisdiction system, each Maritime Court is of parallel importance with the local Intermediate People's Court.¹⁰⁰ In 2007, the case number of first instance and second instance by Maritime Court was 8865, which had a 17.87% increase than last year. In this data, fist instance is 8004 with an increase of 20.47%.¹⁰¹ To compare the case number by the court and CMAC, Shanghai chosen as the sample, in 2008, Shanghai Maritime Courts accepted 1630 case for first instance, in which 279 are cases concerning foreign affairs.¹⁰² CMAC Shanghai sub-commission accepted 34 cases in 2008 with the total amount of RMB 750 million. Even without the specific amount of subject for cases in Shanghai Maritime Courts, it almost can be estimated that the amount will exceed RMB 750 million. Nevertheless, if only analyze the number of case, Shanghai Maritime Court accepted about 48 times than Shanghai sub-commission in the same year 2008.

⁹⁹ Zhang Jinxian, P 3

¹⁰⁰ Ibid., P4

¹⁰¹ China Law Yearbook, 2007, P189

¹⁰² Shanghai Yearbook, 2008, P513

6.2.2 Relationship between China Maritime Courts and CMAC

In China, the Maritime Courts and CMAC are of parallel importance and independent of each other.¹⁰³ The Maritime Courts have no right to supervise the CMAC. As mentioned above, the arbitral awards made by CMAC are final and effective. It is said there is no need for parties to bring a lawsuit in a court after get the arbitration award.¹⁰⁴ However, China's Maritime Court still has close relationship with the whole procedure of maritime arbitration. Firstly, maritime court has the right to decide the validity of an arbitration agreement or clause with the application by each party. Secondly, an arbitration award may be implemented by the Maritime Court depending whether the implementation subject is related with maritime. Thirdly, maritime court has the jurisdiction on cases concern the validity of an arbitration award on the application by each party, which means maritime court has the right to revoke an arbitration award made by CMAC. The normal but most important is that the courts cannot oust an arbitration clause or arbitration agreement if the parties have included an arbitration clause in their contract or reached a written arbitration agreement.¹⁰⁵

If one party fails to perform the arbitration award, the other can apply to the Maritime Court with the jurisdiction of the location where the property is to be enforced.¹⁰⁶

¹⁰³ Zhang Jinxian, P 61

¹⁰⁴ Ibid., P62

¹⁰⁵ Ibid., P63

¹⁰⁶ Ibid., P63

Not only the implementation of arbitration award involves the Maritime Courts, but also the CMAC should refer the application of preservation of property to the Maritime Court who has the jurisdiction of the place concerning the property.¹⁰⁷

The recognition and implementation of foreign maritime arbitration award are important tasks of the Maritime Courts. When a party is going to apply the implementation of an arbitration award, the party should apply to the maritime court located in the place of domicile of the defendant party or the place where his property is located.¹⁰⁸ The Maritime Court should review the award made by a foreign arbitration institution after the receipt of the application for the recognition and enforcement.¹⁰⁹

When talking the duty of the Maritime Court to recognize the foreign arbitration award, one question is worth mentioning here, because Arbitration Law disallow and don't recognize the validity of ad hoc arbitration, China don't recognize ad hoc arbitration award. Ad hoc arbitration has the advantages of flexibility and efficiency that is quite suit for small claim case. Therefore, it is widely used in the practice of international maritime arbitration. It really influences China's maritime industry when China doesn't acknowledge the legal effectiveness of ad hoc arbitration. According to New York Convention, China's Courts have the obligation to recognize and implement the foreign award, and this also includes award made through ad hoc arbitration. On the one hand, presume that ad hoc arbitration award is also valid in China, CMAC don not make ad hoc arbitration award, but China's Maritime Court have to recognize these

¹⁰⁷ Ibid., P63

¹⁰⁸ Ibid., P64

¹⁰⁹ Ibid., P64

kind of award. It makes the obligations and rights not equal for China in terms of the New York Convention. Moreover, On the other hand, as the fact that China does not recognize ad hoc arbitration, it is unfair for the parties who have got ad hoc arbitration award.¹¹⁰ This situation requires CMAC and maritime practitioners, for promoting maritime arbitration, pay attention on ad hoc arbitration, to change China's practitioners' conception on ad hoc arbitration, and which will eventually impact on the CMAC and maritime court. It is expected that both of them will recognize ad hoc arbitration award and CMAC will apply ad hoc arbitration in Chinese arbitration regime.

¹¹⁰ Han Jian, Vol 2.

Chapter 7

Tentative ideas and Conclusion

7.1 Tentative ideas for improving China's Maritime Arbitration

The lagging of China's Maritime Arbitration is caused by several reasons: challenge from LMAA, challenge from China Maritime Courts, lacking enough attention by relevant authorities, imperfect legislation. The author will, in the following, discuss separately the problems of the China's Maritime Arbitration regime. Then, give out the corresponding feasible suggestions with the consideration of abovementioned development trend of maritime arbitration.

7.1.1 Widening the criterion of interpreting arbitration agreement

As introduced in the context, China's Arbitration Law provides a strict criterion for arbitration agreement in article 16, and further provides in article 18.¹¹¹ The provisions are too rigid that is in the contrary side with international developing trend.

Firstly, it is not precise for Arbitration Law to use the phrase "arbitration

¹¹¹ Article 16: The following contents shall be included in an arbitration agreement: 1...2...3. The Arbitration Commission selected by the parties.

Article 18: whereas an agreement for arbitration fails to specify or specify clearly matters concerning arbitration or the choice of arbitration commission, parties concerned may conclude a supplementary agreement...

commission” to express all kinds of name for arbitration institutions when it is still possible that they are not CMAC. Although it bases on the fact that CMAC is the main maritime arbitration institution in China, it still occurs that two parties choose an arbitration institution whose name is committee or association such as LMAA and SMAC¹¹². To analyze further, according to article 16 that “arbitration commission selected by parties” is required for a valid arbitration agreement, how to determine the validity when parties choose LMAA whose name is not with the title of “arbitration commission”. Therefore, it is not precise for legislation, but not a rule of CMAC, to use the phrase of one particular name of arbitration institution. There are many names that may be used by foreign arbitration institutions like, arbitration center, arbitration association. With the leniency of the interpretations made by judges, there is almost no trouble in practice even when the arbitration institution chosen by parties is not with the title of “arbitration commission”. It becomes acceptable that in practice, phrase “arbitration commission” probably equals phrase “arbitration institution”. Nevertheless, to amend this phrase more precise as “arbitration institution” is still necessary.

Secondly, it is too strict for Arbitration Law to require the precise name of arbitration institution in arbitration agreement or clause. The mentioned judgment made in the *Star Texas* made a great influence in the international maritime industry. As mentioned above, in practice, China’s judicial institutions have admitted a vague expression of arbitration institution.¹¹³ It still leaves some possible controversies for scholars and parties of disputes. When practice doesn’t correspond with the legislation, it means the practice is wrong or the legislation should be amended. Considering the custom of

¹¹² See Supplement A

¹¹³ The Supreme People’s Court, Judicial Opinion on the Application of Civil Procedural Law. 1992. It provides that uncertainty of arbitration agreement does necessarily not lead to the invalidity, the case will be hear by Courts only if it is unrealizable, and it also renders the courts to assist the parties to define the arbitration agreement.

widening interpretation by UK, China may amend this provision next time. To widen the interpretation of the arbitration agreement or clause shows more respect of the parties' autonomy. When "Arbitration in Beijing" is agreed by both parties, it is obvious that the parties would like to choose arbitration as their resolution method. If this arbitration agreement or clause is regarded as invalid, it will be a big frustration to parties' autonomy. Therefore, to amend the legislation to fit with the practice is required necessarily.

7.1.2 Enacting and promoting the China's Maritime Arbitration Clause

It is effective for promoting China's maritime arbitration to use and promote China's Maritime Arbitration Clause. In practice, especially in voyage charter party, the parties usually sign one piece of paper by fax that is called voyage charter party confirmation. In such confirmation, the wording is very brief and abbreviations are extensively used. Only key provisions are set out, and the other provisions are invoked from the standard contract. Without the consideration of history, the main reason for London to be the world maritime arbitration center is because that the British Government has been paying a great attention in promoting maritime arbitration in international shipping field including active participating in world maritime conferences by assembled delegations, and recommending London Maritime Arbitration clause. UK Protection and Indemnity Club (P&I Club) also have every effort to promote British Maritime Arbitration, they require the members use the London Arbitration Clause in relevant shipping contacts. Another effort is made by British Maritime lawyers that activities by them for publicizing and promoting London Arbitration Clause are quite

frequent in China presently. For dealing the common situation that the Chinese parties generally neglect the importance of arbitration clause in shipping contracts, the Chinese government and relevant industry associations have responsibilities to review all types of extant shipping contracts and thereafter to recommend the corresponding China's arbitration standard arbitration contracts. In addition, Chinese maritime lawyers should also do efforts in the promotion of Chinese maritime arbitration. Actually, they are supposed to strive for the advantages in arbitration place for their parties in contract negotiation. Therefore, they should introduce the China's Arbitration Clause to clients and draft shipping contracts with such arbitration clause. To promote the universal application of China's Arbitration Clause, Chinese government, relevant associations and Lawyers are all play an essential role, and their vigorous efforts will certainly change the present status of Chinese Maritime Arbitration in the recent future.

7.1.3 Recognizing and developing ad hoc arbitration

In the field of maritime arbitration, ad hoc arbitration is almost in the dominant position. In such arbitration agreement, the place of arbitration is prescribed, but the name of arbitration institution is rarely needed. According to China's Arbitration Law, it requires the chosen arbitration commission as the criterion of valid arbitration agreement or clause. This reflects that China only recognizes institutional arbitration.

There exist many problems for not to acknowledge ad hoc arbitration. It is unfavorable for the development of China's Maritime Arbitration. As mentioned above that ad hoc arbitration is very fit for small claim maritime case. Without consideration of the advantages of ad hoc arbitration, it is the fact that this kind of arbitration is very popular in maritime field. It is

necessary to adopt this regime to compatible with other maritime countries and this also can promote China's Maritime Arbitration. It can be expected that ad hoc arbitration will be very popular in China if it can be adopted by CMAC. On one hand, it is unfair for other party countries of New York Convention that China doesn't recognize their ad hoc arbitration award. On the other hand, it is unfair for China to recognize the ad hoc arbitration award made by HK while HK only recognizes award made by arbitration institutions in mainland.¹¹⁴ However, the situation has some indications to be changed in the future. It was on 20 October 1995, in the reply to Guangzhou Maritime Courts made by the Supreme People's Courts, it was said that courts should not accept case with arbitration agreement to have ad hoc arbitration abroad. It is because of the ad hoc arbitration clause make the courts do not have the jurisdiction. From this statement, at least an indication that China's Court acknowledges the existence of ad hoc arbitration and the effectiveness of such arbitration agreement. However, this happened in 1995, and nothing substantive has been improved in terms of ad hoc arbitration in this past fifteen years. Another important case is two Chinese companies both appoint Professor Hu Zhengliang from Dalian Maritime University to be their arbitrator. This contract disputes was resolved by ad hoc arbitration successfully, and the parties voluntarily performed the arbitration award.¹¹⁵ This case is regarded the first case of China's ad hoc arbitration. Still, it will be certainly a long period for ad hoc arbitration to be developed in China on the basis of none.

¹¹⁴ Reciprocal Enforcement of Arbitral Awards between the HKSAR and the Mainland, 1999.

¹¹⁵ Kang Ming, successful practice of ad hoc arbitration and its reflection, International Business Law Forum, Vol V, Law Press, 2003.

7.1.4 Rendering Arbitral Tribunal the right to decide whether to take the property preservation

According to Maritime Procedural Law, maritime preservation is, for protecting the civil rights of applicants on the basis of maritime claim, to take enforcement measures against property or behavior of the respondents. It includes arrest of ship, arrest of cargos, frozen freight and rent, and other property preservation, as well as ordering the respondents with action or forbearance.

China's Civil Procedural Law provides if any party has applied for the adoption of property preservation measures, the foreign affairs arbitration agency of the People's Republic of China shall submit for an order the party's application to the intermediate People's Court in the place where the person against whom the application is filed has his domicile or where the said person's property is located.¹¹⁶ According to China's Arbitration Law, if one of the parties applies for property preservation, the arbitration commission shall submit to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law.¹¹⁷ From these provisions, it is clear that People's Court is the only institution can decide whether to take property preservation including maritime affairs. CMAC only performs the obligation to submit application for the parties.

There are several reasons why these provisions are unfavorable for China's Maritime Arbitration. Firstly, arbitral tribunal is the handler of the case, who is most familiar with the case, and must be clear whether to take property preservation. Secondly, it is difficult for foreign arbitration institution to

¹¹⁶ China's Civil Procedural Law, article 258

¹¹⁷ China's Arbitration Law, article 28

submit the application, it even happened in practice that a court rejected the application of withdraw property preservation, just because the arbitration institution didn't submit the application in time. It hinders the successful process of arbitration.¹¹⁸

For these reasons, it is necessary for Arbitration Law to render the right of deciding whether to take maritime property preservation. In maritime case, the property needs to be preserved is very likely to be located abroad. It will be difficult for the implementation of the decision made by China's Courts. However, if arbitral tribunal can make an interim award, it will be exercisable for foreign courts to implement.

7.1.5 Unifying the Supervisory Review on Maritime Arbitration Award.

As mentioned in the context, the treatments to the judicial supervision of China's international arbitration and domestic arbitration are different. The difference is about whether to supervise the substantive fact of the arbitration award. To China's international arbitration award, even the question of the violation of public interest is not included in the review range. With the unification of international arbitration legislation, many countries have unified the review criterion for international affairs arbitration and domestic affairs arbitration. It will finally cause negative factors if China continues to use different treatment between China's international arbitration and domestic arbitration. Firstly, such substantive review violates the principle of "a single and final award". Actually, substantive review can be regarded as the second instance in court. Secondly,

¹¹⁸ Si Yuzhuo, P 664

this kind of regulation will lead complication in practice, for the reason that both international arbitration institution and domestic arbitration institution can accept case concerning foreign affairs and domestic case. The result is different criterion of review will be made to the same institution. It can be comprehended that court believes one institution when it is resolving international case, and the court doesn't believes the same institution when it is resolving domestic case. This is an illogic result, and will cause complexity for legal practice. A unified criterion should be applied to the two kinds of arbitration cases that is only review the procedure of arbitration awards. Such practice will ensure "a single and final award" of arbitration regime.

7.2 Conclusion

Since twenty century, with the fast development of international trade and shipping industry, maritime arbitration has shown the new development trend. Respecting the parties autonomy, raising the efficiency, limiting the interference by court have become the same goal for most countries in the maritime arbitration industry. It can be concluded that, with the hardworking by practitioners of international shipping industry and maritime law, a culture of maritime arbitration is gradually generated.

It cannot be denied that although China has developed its maritime arbitration for several decades, the situation is still not as good as expected, which is not correspondent with its image of large maritime country. Some practicable ideas should be raised by Chinese lawyers or practitioners in shipping industry to change the present situation and enhance the influence of China's Maritime Arbitration. It is undoubted that it will be a long and

hard period for Chinese lawyers and shipping practitioners to improve China's maritime arbitration. CMAC as the only professional maritime arbitration institution should learn more from LMAA that participates in different kinds of conferences actively, and voluntarily gives advices for drafting standard form contract. CMAC should continue to strengthen the bond with different countries and different non-governmental institutions for promoting the development of the world maritime arbitration.

Supplement A¹¹⁹

Maritime arbitration in different countries

Sovereignty	Name of institution	Funding or valid Time
ICC&CMI	Standing Committee on Maritime Arbitration	1978
UK	London Maritime Arbitration Association (LMAA)	1960
Germany	German Maritime Arbitration Association (GMAA)	1983
Japan	Tokyo Maritime Arbitration Commission (TOMAC)	1962
USA	Society of Maritime Arbitrators (SMA)	1963
USA	Miami Maritime Arbitration Council (MMAC)	1996
USA	Houston Maritime Arbitrators Association (HMAA)	1990
Australia	Sydney Maritime Arbitration Committee (SMAC)	1991
Russia	The Maritime Arbitration Commission	1930
Ukraine	The Maritime Arbitration Commission	1994
China	China Maritime Arbitration Commission (CMAC)	1988

¹¹⁹ See Maritime Arbitration Institution, Taiwan Association of Maritime Safety & Security, National Taiwan Ocean University, 2006

Supplement B

CHINA MARITIME ARBITRATION COMMISSION ARBITRATION FEE SCHEDULE¹²⁰

(Revised and Adopted on July 5, 2004 by China Chamber of International
Commerce. Effective as from October 1, 2004.)

1. Registration Fee

Amount of Claim (RMB)	Amount of Registration Fee (RMB)
1,000 Yuan or less	100yuan
1,000Yuan to 50,000Yuan	100 Yuan plus 5% of the amount above 1,000 Yuan
50,000 Yuan to 100,000 Yuan	2,550Yuan plus 4% of the amount above 50,000 Yuan
100,000 Yuan to 200,000 Yuan	4,550Yuan plus 3% of the amount above 100,000 Yuan
200,000 Yuan to 500,000 Yuan	7,550 Yuan plus 2% of the amount above 200,000 Yuan
500,000 Yuan to 1,000,000	13,550Yuan plus 1% of the amount above 500,000 Yuan
1,000,000 Yuan or more	18,550 Yuan plus 0.3% of the amount above 1,000,000 Yuan

¹²⁰ See the website of CMAC < <http://www.cmac-sh.org/en/fee-schedule.asp>> accessed 30
May 2011

2. Handling Fee

Amount of Claim (RMB)	Amount of Handling Fee (RMB)
200,000 Yuan or less	5,000 Yuan
200,000 Yuan to 500,000 Yuan	5,000 Yuan plus 2% of the amount 200,000 Yuan
500,000 Yuan to 1,000,000 Yuan	11,000 Yuan plus 1% of the amount above 500,000 Yuan
1,000,000 Yuan to 5,000,000 Yuan	16,000 Yuan plus 0.4% of the amount above 1,000,000 Yuan
5,000,000 Yuan to 10,000,000 Yuan	32,000 Yuan plus 0.3% of the amount above 5,000,000 Yuan
10,000,000 Yuan to 20,000,000 Yuan	47,000 Yuan plus 0.25% of the amount above 10,000,000 Yuan
20,000,000 Yuan to 40,000,000 Yuan	72,000 Yuan plus 0.2% of the amount above 20,000,000 Yuan
40,000,000 Yuan or more	112,000 Yuan plus 0.1% of the amount above 40,000,000 Yuan

The Amount of Claim referred to in the Arbitration Fee Schedule shall be based on the sum of money claimed by the Claimant or counterclaimed by the Respondent. If the amount claimed is different from the actual amount in dispute, the actual amount in dispute shall be the basis for calculation.

Where the amount of claim is not ascertained at the time when application for arbitration is handed in, or there exists special circumstances, the amount of arbitration fee shall be determined by the Secretariat of the Arbitration Commission.

Where the arbitration fee is charged in foreign currency, an amount of foreign currency equivalent to corresponding RMB value specified in the Arbitration Fee Schedule shall be paid.

Apart from charging arbitration fee according to the Arbitration Fee Schedule, the Arbitration Commission may collect other extra, reasonable and actual expenses pursuant to the relevant provisions of the Arbitration Rules.

Supplement C

Number of cases accepted by full members of LMAA ¹²¹(1997-2007)

year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
appointment	3076	3022	2477	2622	2686	2030	2445	2747	2864	2500	2559
arbitration award	437	515	441	480	472	432	405	408	440	361	344

Numbers of cases accepted by CMAAC (2000-2008)

year	2000	2001	2002	2003	2004	2005	206	2007	2008
Number of case	16	16	14	26	35	46	20	49	60
Amount of subject matter (million RMB)	13.87	37.88	16.98	99.35	141.85	113.49	128.33	140.86	112.57

¹²¹ Gu Guowei, P97&98

Bibliography

Book

Cai Hongda, *Issues on Development of Chinese Maritime Arbitration*, Chinese Arbitration Consulting, 2005

China Law Yearbook, Yearbook Press, 2007

China Maritime Commission Secretariat, *A Guide Book of Maritime Arbitration*, China University of Political Science and Law Press, 2001

Clare Ambrose, Karen Maxwell, *London Maritime Arbitration*, Lloyd's Shipping Law Library, 2009

Deng Shijie, *Research on the Regime of London Maritime Arbitration*, Law Press, 2002

Huang Jin, Xu qianquan, Song Lian, *Arbitration Law*, Chinese University of Political Science and Law Press, 1999

KX Li and CWM Ingram, *Maritime Law and Policy in China*, Cavendish Publishing Limited, 2002

Liang Meifen, Cai Hongda, *China Maritime Arbitration Commission Awards*, EMIS Professional Publishing Ltd, 2004

Liu Ying, Deng Rui Ping, *International Economic Law*, Citic Press, 2003

Robert Force, *Admiralty and Maritime Law*, Federal Judicial Center, 2004

Ronald Bernstein & Derek Wood, *Handbook of Arbitration Practice*, Sweet & Maxwell, 1993

Shanghai Yearbook, Yearbook Press, 2008

Si Yuzhuo, *International Trend and Countermeasures of Maritime Legislation*, Law Press, 2002

Wu Huanning, *Maritime Law*, Law Press, 1996

Zhang Jinxian, *China's Maritime Courts and Justice*, WITHERBY & Co. Ltd, 1997

Zhang Xianglan, Deng Ruiping & Yang Songzhu, *Maritime Law*, Wu Han University Press, 1996

Article

Benedict, R., *The historical Position of the Rhodian Law*, XVIII Yale Law Journal 4 (1909)

Bruce Harris, *Maritime Arbitration in the U.S and the U.K, Past, Present and Future: The View from London*

Bruce Harris, *Report on the English Arbitration Act 1996*, International Congress of Maritime Arbitration XVI, Singapore, 2007

Cai Hongda, *Comment on the 14th International Congress of Maritime Arbitrators in New York*, Annual of China Maritime Law, Volume XII, Dalian Maritime University Press, 2001

Corin Ricketts, *English Law Maritime Arbitration*, Law Update, 2009

Ding Hanli, *Research of the bottleneck of Mainland China's Maritime Arbitration*, Natioanl Sun Yat-sen University, 2005

Gu Guowei, *Preliminary Exploration of China's Maritime Arbitration*, Annual of China Maritime Law, Volume XXII, 2009.

Han Jian, *Agreement on Arbitration Institution in Arbitration Agreement: Commend on China's Arbitration Law*, Arbitration and Legal Newsletter, 1997, Vol 2

Kang Ming, *Successful Practice of Ad Hoc Arbitration and its Reflection*, International Business Law Forum, Vol V, Law Press, 2003.

ONATHAN S L. *Maritime arbitration in London, Arbitration in Maritime & transport disputes*, 2007.

PEW, ROBERT M. JARVIS AND MARK SIDEL, *The Maritime Arbitration Commission of the People's Republic of China: Option and Strategies*, Journal of Maritime Law and Commerce, Vol.18, No 3, July, 1987

Zhao Xiuwen, Encyclopedia of china Publishing House, 1993

Website

National development (2009) 19 promulgated by State Council of the PRC.
<http://www.gov.cn/zwggk/2009-04/29/content_1299428.htm> accessed
18 May 2011

The website of CMAC <<http://www.cmac-sh.org/news/414news.htm>>
accessed 18 May 2011

The website of CMAC <<http://www.cmac-sh.org/news/20100712news.htm>>
accessed 18 May 2011

The website of CMAC < <http://www.cmac-sh.org/en/fee-schedule.asp>>
accessed 30 May 2011

The World Bank Data
<<http://search.worldbank.org/data?qterm=exchange&language=&format=>>
accessed 27 May 2011

United Nations Commission on International Trade Law
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 18 May 2011

Case

Nerano [1994]2 Lloyd's Rep

Shipping Inc. v. South Nelson Forest Products Corporation [1996] 1 Lloyd's
Rep

Smith Ltd. V. H&S International [1991]2 Lloyd's Rep

Star Texas [1993] 2 Lloyd's Rep

Dictionary

Black's Law Dictionary, edited by Henry Campbell Black, M.A., WEST
PUBLISHING CO., 2nd, 1910