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Main Features of Chinese Court Arbitration and Maritime Litigation in China

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I. INTRODUCTION

Arbitration is often thought to be a quick and efficient method for determining controversies. It is recognized worldwide as being beneficial to both the parties and the public in avoiding the enormous costs of litigation. In the People's Republic of China ("China"), arbitration is a primary method of resolving international commercial and maritime disputes. Currently, the majority of such disputes are arbitrated or settled through either the China International Economic or Trade Arbitration Commission ("CIETAC") and the China Maritime Arbitration Commission ("CMAC").[1] However, with the rapidly growing volume of foreign trade and acceleration of investment activities in China, CIETAC and CMAC will soon be overburdened.[2]

In 1984, the First Session of the National Working Conference of the Adjudication of Economic Lawsuits was held in Beijing, China.[3] In addressing the problems of an overburdened CIETAC and CMAC, the scope of the people's court's adjudication of foreign interest lawsuits in China was clarified. Such clarification of the court's competence indicates that the people's courts will play an increasingly important role in the judicial arena of international economic and maritime disputes.[4]

In view of the burgeoning trade between China and other countries, it is important that foreign countries trading with China under-

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1. Renmin Ribao (The People's Daily) (overseas ed.) [hereinafter People's Daily], June 26, 1988, at 3.

2. Zhaohuang, *The Judicial Resolutions of Foreign Investment Disputes Before the Chinese People's Courts: A Study of the Questions of Jurisdiction and Applicable Law*, 23 WILLAMETTE L. REV. 719, 719 (1987).

3. *Id.*

4. *Id.*

stand the guidelines and procedures used by both the court and CIETAC or CMAC in dealing with cases involving foreign interests.

The subject of this Article is international commercial arbitration and maritime litigation in China. By discussing the specific ways in which China's current legal system deals with international economic and maritime disputes, including arbitration, the reader will hopefully gain some insight into how the system works. It should be noted that dealing with international economic and commercial cases, especially maritime cases, through the court system in China is fairly new; therefore, there are not very many treatises, books, legal comments, writings or reported cases in connection with this to which one may refer. Such reports that do exist are kept on a non-systematic basis.

II. JUDICIAL SYSTEM

There are three types of courts in China. First is the Supreme People's Court in Beijing. The Supreme People's Court is the highest judicial agency.[5] In addition to supervising the administration of justice through the local people's courts and special people's courts,[6] it has original jurisdiction in major cases which affect the entire nation.[7]

Next are the local people's courts, which are composed of three levels. The "higher" level courts (provincial or city-wide in major cities such as Beijing, Tianjin and Shanghai) have appellate jurisdiction over the judgments or decisions of the intermediate courts in both civil and criminal matters.[8] They have original jurisdiction in insurrectional and civil cases which are considered to be of regional

5. The Law on the Organization of the People's Court of the People's Republic of China, art. 30 [hereinafter Law of the People's Court]. For the English translation of the Law of the People's Court, see 26 CHINA, THE AMERICAN SERIES OF FOREIGN PENAL CODES 84 (1985).

6. P.R.C. CONST. art. 127; Law of the People's Court, *supra* note 5, art. 30. For the English translation of the Constitution of the People's Republic of China, see 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 36 (1984).

7. *See* Code of Criminal Procedure of the People's Republic of China, art. 17 [hereinafter Code of Criminal Procedure]; Law of Civil Procedure of the People's Republic of China, art. 19 [hereinafter Law of Civil Procedure]; Law of the People's Court, *supra* note 5, art. 32. For the English translation of the Code of Criminal Procedure, see 26 CHINA, THE AMERICAN SERIES FOREIGN PENAL CODES 33 (1985). For the English translation of the Law of Civil Procedure, see 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 227 (1984).

8. *See* P.R.C. CONST. art. 127; Code of Criminal Procedure, *supra* note 7, arts. 129, 130; Law of Civil Procedure, *supra* note 7, art. 144; and Law of the People's Court, *supra* note 5, arts. 26, 28.

importance.[9] The "intermediate" level courts (essentially in prefectures and city-wide in major cities) usually act as courts of last resort in minor civil and criminal cases.[10] They have original jurisdiction in cases involving foreigners or foreign interests and in other insurrectional and civil cases which are considered to be important within the districts.[11] The "basic" level courts (typically in rural counties or in districts of major cities) are the courts of general original jurisdiction in minor civil and criminal cases.[12]

Finally, there are the special courts, which are comprised of military courts, railway transport courts, water transport courts, forestry courts, and other unspecific type courts.[13] The special people's courts, except the military courts, like the intermediate courts, are the courts of general original jurisdiction in special cases. The appellate courts of the special people's courts are the higher people's courts in the places where the special courts are located. The people's courts are the judicial agencies of the state; they exercise the judicial power of China.[14]

Cases of first instance, with the exception of minor cases, are adjudicated before a panel of judges and "assessors" chosen from among the citizenry.[15] In such cases, the principle of majority rule prevails.[16]

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9. Law of the People's Court, *supra* note 5, arts. 26, 28; Code of Criminal Procedure, *supra* note 7, art. 16; Law of Civil Procedure, *supra* note 7, art. 18.

10. *See* P.R.C. CONST. art. 127; Code of Criminal Procedure, *supra* note 7, arts. 129, 130; Law of Civil Procedure, *supra* note 7, arts. 144, 156; and Law of the People's Court, *supra* note 5, art. 25.

11. *See* Law of Civil Procedure, *supra* note 7, art. 17; and Code of Criminal Procedure, *supra* note 7, art. 15; and Law of the People's Court, *supra* note 5, art. 25.

12. Law of the People's Court, *supra* note 5, arts. 21, 22; Code of Criminal Procedure, *supra* note 7, art. 14; and Law of Civil Procedure, *supra* note 7, art. 16.

13. Law of the People's Court, *supra* note 5, art. 2.

14. *See* P.R.C. CONST. art. 123.

15. For example:

> In civil cases of first instance in the People's Court, justice is administered by a collegiate bench made up of either judges and assessors or only of judges. Members of the collegiate bench must be in odd number.
>
> In simple civil cases, justice is administered by one judge independently.
>
> Assessors during the exercise of their functions in the People's Court have equal rights with the judges.
>
> In civil cases of second instance in the People's Court, justice is administered by a collegiate bench made up of judges. Members of the collegiate bench must be in odd number.
>
> The trial *de novo* of a case returned by the People's Court of second instance shall be conducted by a newly-organized collegiate bench in the trial court in accordance with the procedure of first instance.
>
> A case originally of first instance shall be tried *de novo* by a newly-organized collegiate bench in accordance with the procedure of first instance; a case originally

Within the courts, judicial committees exercise supervision, evaluate judicial experience, and discuss major difficulties in cases and other issues regarding judicial work.[17]

All cases before the courts are open to the public, except those involving state secrets, personally shameful secrets (i.e., cases of rape, incest, etc.), and juvenile delinquencies.[18] The accused has the right to be defended by himself, by lawyers, or other persons designated by him or appointed by the court.[19]

In the administration of justice, the people's courts allow one appeal to a higher court, with the decision of the second court being final except in cases involving the death penalty.[20]

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of second instance shall be tried *de novo* by a newly-organized collegiate bench in accordance with the procedure of second instance.

The presiding judge of the collegiate bench shall be appointed by the president of the court or by a chief judge from among the judges; where the president of the court or the chief judge takes part in the trial, he shall act as the presiding judge.

Law of Civil Procedure, *supra* note 7, arts. 35, 36, 37.

Trial of [criminal] cases of first instance in the basic-level people's courts and middle-level people's courts shall be conducted by a collegiate bench composed of one judge and two people's assessors, except in cases of private prosecution and other minor criminal cases where a single judge sitting alone may try the case independently.

Trial of [criminal] cases of first instance in the high-level people's courts or the Supreme People's Court shall be conducted by a collegiate bench composed of one to three judges and two to four people's assessors.

Trial of cases involving appeals and protests in the courts shall be conducted by a collegiate bench composed of three to five judges.

The president of the court or the head of a division shall designate one judge to serve as the presiding judge of the collegiate bench. When the president of the court or the head of a division participates in the trial of a case, he himself shall serve as the presiding judge.

Code of Criminal Procedure, *supra* note 7, art. 105. *See also* Law of the People's Court, *supra* note 5, arts. 9, 10.

16. Code of Criminal Procedure, *supra* note 7, art. 106; Law of Civil Procedure, *supra* note 7, art. 38.

17. Code of Criminal Procedure, *supra* note 7, art. 109.

All major or difficult cases that the president of the court considers necessary to submit to the judicial committee for its discussion shall be submitted to the committee for discussion and decision. The collegiate bench must execute the decision of the trial committee. *See also* Law of Civil Procedure, *supra* note 7, art. 39; Law of the People's Court, *supra* note 5, art. 11.

18. P.R.C. CONST. art. 125; Code of Criminal Procedure, *supra* note 7, arts. 8, 111; Law of Civil Procedure, *supra* note 7, arts. 8, 103; Law of the People's Court, *supra* note 5, art. 7.

19. The accused has the right to defend. He may exercise the right to defend himself or he may seek assistance from lawyers, persons recommended by people's organizations, other citizens authorized by the court, or from persons with whom he has a close family relationship. The courts have authority to appoint a defender for those without legal assistance. *See* P.R.C. CONST. art. 125; Code of Criminal Procedure, *supra* note 7, arts. 26, 27; Law of Civil Procedure, *supra* note 7, art. 50; and Law of the People's Court, *supra* note 5, art. 8.

20. The Law of Civil Procedure allows no appeals beyond the second instance. While the Code of Criminal Procedure ordinarily allows no appeals beyond the second instance, special

III. A Comparison of the Chinese and United States Judicial Systems

The different historical and cultural backgrounds of China and the United States influence the evaluation of each country's legal system. The following summary sets forth the primary distinctions between the two judicial systems.

A. The Court System

China is known as a centralist country. The relationships between the local governments at various levels and the state government (central government) are such that the courts at the various levels are directly subordinate to those above.[21] On the other hand, the United States is a federalist country. The relationships between the state government and the federal government involve separate and interacting authority. China's system of government makes it possible for the Chinese to have a unitary litigation system to create a single judicial and procedural system for handling all civil and criminal lawsuits throughout China. Its singular simplicity contrasts with the United States' dual system of federal and state court procedures. In particular, China's system does not require the complex body of constitutional and subsidiary rules necessary to regulate federal-state judicial relations, especially in the areas of choice of law jurisdiction and enforcement of judgments from one court to another.

B. Personal Jurisdiction

Jurisdictional theory in China rejects the traditional United States idea that personal jurisdiction over the defendant is necessary

checking devices are created to handle the important question of cases of capital punishment. Generally, the Supreme Court reviews all death sentences. However, there are different procedures for a death sentence with immediate execution and a death sentence with a two-year reprieve. In view of an increased number of cases involving capital punishment, the mandatory review of such cases by the Supreme Court was temporarily suspended until the end of 1983 by virtue of a 1981 decision of the Standing Committee of the National People's Congress on approving the death sentence. *See* Law of Civil Procedure, *supra* note 7, arts. 8, 144-47, 156. For the English text of the 1981 decision, see 26 China, The American Series Foreign Penal Codes 129 (1985).

21. The State Council, the highest organ of the state administration, is responsible and accountable to the National People's Congress and its Standing Committee. The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. The local governments are responsible and accountable to the People's Congress at the corresponding level and the organ of state at the next higher level. The local people's courts are responsible to the organs of state power which created them. P.R.C. Const. art. 127, 128.

in personal actions. China requires notice to the defendant, but it is a procedural requirement, not a jurisdictional one.[22] Service of process in China is an official function of the court, and it may not be legally accomplished by non-officials.[23] In contrast, United States lawyers are accustomed to service by private persons or even by mail.[24] However, Chinese practice has little that corresponds to the basic United States concepts of *in rem* or *quasi in rem* jurisdiction. Courts act almost exclusively against the person. Without calling it *in rem*, the public peremptory notice proceeding and certain suits in the field of personal or family relations and admiralty cases may, however, resemble the United States' *in rem* practice.[25]

C. Judges

Judges in China may be characterized as "career judges." Normally, new judges are young professionals who are appointed to the bench immediately after completion of a four-year legal education.[26] These young professionals often serve an initial period as assistant judges before becoming full-fledged judges. Young judges normally

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22. *See* Code of Criminal Procedure, *supra* note 7, arts. 55-57; Law of Civil Procedure, *supra* note 7, ch. 7.

23. *See* Law of Civil Procedure, *supra* note 7, art. 69.

> The People's Court may use the following means to serve the litigant documents to the litigants not residing within the territory of the People's Republic of China:
>
> 1. Through diplomatic channels;
>
> 2. Where the litigants are of Chinese nationality, the documents may be entrusted to the service of the embassy or consulate of the People's Republic of China in the country where they reside;
>
> 3. Serviced by mail where the law of the country of residence of the litigant permits;
>
> 4. Where there is agreement on judicial assistance between the country of residence of the litigant and the People's Republic of China, the documents may be entrusted to a foreign court for service or be served by other means specified in the agreement;
>
> 5. Served by a litigant representative of the litigant;
>
> 6. Where the document can not be served by the aforesaid means, it shall be served by a public notice. It is deemed as served upon six months from the date of the putting up of the notice.

Law of Civil Procedure, *supra* note 7, art. 196.

24. *See* FED. R. CIV. P. 5.

25. For example, the enforcement of hypothec and other security interests under the Law of Civil Procedure starts with seizure or sale of collateral, or other realization of its value and distribution of its proceeds. The entire process does not take the form of an adversarial process even though the debtor and the owner of collateral may defend their interests by a variety of means. It seems that in the United States the same process would take the form of an *in rem* action.

26. In China, law students receive another four years of legal education after graduation from high school. Those who satisfy all requirements will hold an LL.B. after graduation from law school.

begin serving as judges at lower level courts and are subsequently promoted to higher level courts. Normally, a judge spends the remainder of his career as a lifetime judge on the bench. Whatever its merits and demerits, such a system of career judges seems to successfully avoid the vagaries of the United States' elective political bench and the irrationality that some experts feel a lay jury brings to the civil litigation process.

D. Bar Size

Today, there are approximately 27,000 lawyers in China, including those who practice part-time.[27] National leaders intend to increase that number to 100,000 by the year 2000.[28] In comparison to its large population, and the United States' bar size,[29] China's bar is very small. Consequently, Chinese courts, especially the basic courts, hear many more cases than do United States courts in which one or both parties plead their own cases without the aid of lawyers.[30] Thus, the parties must depend more or less on the judge for legal advice.

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27. People's Daily, June 8, 1988, at 4.

28. *Id. See also* People's Daily, May 7, 1988, at 1.

In China individuals are eligible to be lawyers after passing a bar exam if they have the following qualifications:

1. Have graduated from law school and have engaged for two or more years in judicial work, teaching or the research of law;

2. Have professional legal training or experience as judges or procurators in the courts and procuratorates;

3. Have received higher education, completed three or more years of economic, scientific and technological work, are proficient in their profession and relevant laws and decrees related to the profession, have gone through professional legal training and can do the job of a lawyer;

4. Have attained the same level as listed in items 1 and 2, possess the cultural level of higher schools and can do the job of a lawyer.

Those who have acquired the qualifications of a lawyer but are unable to leave their job can act as part-time lawyers. Personnel who are in active service in the courts, procuratorates, and public security agencies cannot be part-time lawyers.

Those who have graduated from law schools or have gone through professional legal training can act as apprentice lawyers after obtaining approval from the judicial agencies by passing an examination. This training period for apprentice lawyers is two years. The training period can be extended if the apprentice lawyer fails to pass the examination. Provisional Regulations on Lawyers of the People's Republic of China, arts. 8, 10, 11 (1980) [hereinafter Provisional Regulations on Lawyers]. For the English translation of the Provisional Regulations on Lawyers, see F. DE BAUW & B. DEWIT, CHINA TRADE LAW 425 (1982).

29. In 1986, the number of practicing attorneys in the United States was 527,000. Based on low assumptions, the number of practicing attorneys in the U.S. will reach 676,000. *See* U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 375, table no. 626 (108th ed. 1988).

30. In 1987, 1.8 million cases were concluded through court precedence, but seven out of ten of the parties pled their cases without lawyers.

This puts a heavier burden on the judge and requires him or her to exercise more control over the proceedings than required of judges in the United States.

One point should be clarified: In China, everyone is entitled to have lawyers plead cases.[31] It is a person's choice to plead his or her own case with or without the aid of lawyers.[32]

E. The Lawyer's Role[33]

Although a lawyer's role in China continues to change, lawyers do not seem to play as important or as useful a role for the people or for society as they do in the United States. The reasons for this may be rooted in China's history, culture, society, and political and economic systems. First, China is a socialist country; private property is very limited under the state and collectively-owned economic systems.[34] This ownership makes most of the disputes involving economic and property issues arising between the state-owned entities easier to resolve through negotiation or through administrative procedure, rather than through court procedure. Second, as a result of China's limited private ownership, the vast majority of civil cases arising between citizens are relatively small in size, and socially and economically unimportant. Thus, these disputes may be easily resolved through mediation committees or administrative organizations. Third, the Chinese are still not accustomed to resolving their disputes through court proceedings with the aid of lawyers. The Chinese seem reluctant to initiate lawsuits because it is deemed an unfriendly method of resolution and they also fear paying high litigation fees. Fourth, the Chinese can easily obtain help from a legal scholar or from books. Without a jury system, people may easily try their own cases without the help of lawyers.

F. Pleadings

Pleadings play quite a different role in China since amendment is

31. *See supra* note 19.

32. *Id.*

33. Lawyers in China are the state's legal workers, who give assistance to state agencies, enterprises, establishments, mass organizations, and citizens. Particularly, they are to act as legal advisers; to serve as representatives in civil litigations, as advocates and representatives in criminal cases; to give legal assistance or act as representatives in mediation and arbitration; to draft legal documents and other related legal affairs. Provisional Regulations on Lawyers, *supra* note 28, arts. 1, 2.

34. *See* P.R.C. CONST. arts. 6-13.

liberally allowed at any session up until the close of oral hearings. Under the United States' jury system, pleadings coupled with discovery enable the parties to prepare for a single concentrated trial before the jury, so amendments must at some point be limited.[35] Yet, the United States theory of an action has become quite broad and promotes liberal pleadings compared to the pleading pitfalls of China's rigid definition of an action or claim which combines with a lack of collateral estoppel to make the effect of a Chinese judgment quite narrow.

G. Discovery

Chinese practice has virtually no discovery procedures. The only procedure available is for preserving testimony of ill or departing witnesses, and then only under very limited circumstances. In comparison, a United States attorney can take early recorded depositions of parties and witnesses and gather documents to the point that excessive discovery becomes a major problem. Since trials in China start soon after filing, the successive short sessions actually serve one of the functions of discovery—early clarification of issues for the lawyers as they progress, instead of discovering evidence while awaiting a trial date, which is necessary in the United States' system. The Chinese courts do, however, have the power to order the production of documents in the control of the opponent or witness.[36]

H. The Jury System

There is no "jury system" in China,[37] therefore, there is no need to sharply distinguish between fact (for the jury) and law (for the judge). Judges decide both fact and law, but three-judge panels or

35. As an example, Rule 15(a) of the Federal Rules of Civil Procedure provides that:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

FED. R. CIV. P. 15(a).

36. Code of Criminal Procedure, *supra* note 7, art. 34; Law of Civil Procedure, *supra* note 7, art. 57.

37. In trying a case of first instance, the courts require participation by people's assessors, except in simple civil cases or minor criminal cases. Law of the People's Court, *supra* note 5, art. 9.

judicial committees are common when handling appellate cases or extremely complex cases.[38]

Other major differences in Chinese procedure can be traced to the lack of a jury. In handling cases of first instance, the people's courts have adopted a system of "people's assessors."[39] Assessors are Chinese citizens (except judges) recommended and selected by the people, the staff of institutions, the people's organizations, and by enterprises. People's assessors are component members of the courts and have the same power as judges when they are on duty in the people's courts.[40]

I. Evidence

The Chinese law of evidence is simple compared to the complex United States rules against opinion, hearsay, and the like. In the United States, such rules are thought to be necessary to insure credibility and avoid misleading the jury. China's career judges, with their experience and strong control over the proceedings, can either reject or discount the probability of dubious evidence. There is little need for a complex and artificial screen of rules to filter evidence, thus making the Chinese system refreshingly simple and effective. However, some individuals complain that Chinese rules of evidence need development.

The same simplicity and effectiveness is also true of the Chinese court's handling of expert witnesses. Such experts are appointed by the judge,[41] although he or she normally consults the parties about acceptable appointments. This practice can avoid the more unseemly aspects of an adversary system where an "expert" for the plaintiff may testify that something is "black," and, just as dutifully, the "expert" for the defendant may testify that it is "white"—or so it may seem to the inexpert jury.

J. Compromise

Compromise settlements agreeable to the parties may be encouraged by the Chinese judge at any stage of a trial or an appeal,[42] and the judge may summon the parties to appear for the purpose of

38. *See* Code of Criminal Procedure, *supra* note 7, arts. 105-107; Law of Civil Procedure, *supra* note 7, arts. 36, 39; and Law of the People's Court, *supra* note 5, arts. 10, 11.

39. Law of Civil Procedure, *supra* note 7, art. 35.

40. *Id.*; Code of Criminal Procedure, *supra* note 7, art. 105.

41. Law of Civil Procedure, *supra* note 7, art. 63.

42. *Id.* arts. 97, 111, 153.

discussing a compromise. In an American trial, the judge may not compel a settlement and has less active power to promote a settlement. The Chinese practice of giving the judge power to facilitate a compromise is consistent with Chinese traditional practices.

K. Appeal on the Facts

The Chinese appellate system is one-tiered.[43] On appeal, the appellate court must consider the whole case again including both the facts and the legal issues.[44] In contrast, in the United States, the findings of fact by a jury must stand on appeal except in rare instances. There is, therefore, no way to reexamine jury findings on appeal except on the narrowest of grounds. Whether the added expense, burden and delay of Chinese dual levels of fact finding yield enough in certainty and justice is arguable, especially if lawyers are as competent and attentive as they should be at first instance. But because many suits in China are brought without lawyers, this may be one reason for reexamination of the facts at appeal.

L. Creditor Equality in Executions

According to Chinese practice in compulsory execution, the judgment creditor who finds the debtor's property and moves against it does not have priority over all other unsecured creditors, but must allot with other creditors of equal rank when there is not enough to distribute.[45] On the other hand, in most instances in the United States, the diligent judgment creditor is rewarded with priority. The creditor's claim on the defendant's property, which he finds and brings to execution, is usually superior to that of other unsecured creditors, unless bankruptcy results within ninety days.

IV. ARBITRATION IN CHINA

Like negotiation and conciliation, arbitration is also encouraged by Chinese legislation. For example, the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment[46] provides that: "Disputes arising between the parties to a joint

43. *Id.* arts. 144, 156; Code of Criminal Procedure, *supra* note 7, arts. 129, 143.

44. Law of Civil Procedure, *supra* note 7, art. 149; Code of Criminal Procedure, *supra* note 7, art. 134. Because the second instance is a continuation of the first instance, new evidence is admitted and the mode of procedure is the same as in the first instance.

45. *See* Law of Civil Procedure, *supra* note 7, ch. 17.

46. The Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment was adopted by the Second Session of the Fifth National People's Con-

venture which the board of directors fails to settle through consultation may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties."[47]

Very similar language is used both in the Law of the People's Republic of China on Economic Contracts Involving Foreign Parties ("FECL"),[48] the Law of Chinese-Foreign Co-Operative Enterprises of the People's Republic of China ("Co-Operative Enterprises Law"), and the General Rules of Civil Law of the People's Republic of China.[49] Both the FECL and the Co-Operative Enterprises Law provide that if the parties are not able to resolve their disputes through consultation or conciliation, "they may submit the case to Chinese or other arbitration bodies."[50] A further option under the same circumstances is for the parties concerned to bring the dispute before the people's court.[51]

The General Rules of Civil Law refer briefly to arbitration. In the event that a civil act is obviously unbalanced or the actor has materially misunderstood the content of the act, then either party shall have the right to request the people's court or a domestic arbitration institution to vary or annul the act.[52] The Regulations of the Shenzhen Special Economic Zone on Foreign Economic Contract[53] establish a preference for arbitrating special economic zone disputes in China according to Chinese law, but if both parties agree, other

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gress on July 1, 1979, and promulgated on July 8, 1979. For the English translation of the Law on Joint Ventures, see 1 LAW AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 36 (1982).

47. Law on Joint Ventures, *supra* note 46, art. 14.

48. The Law of the People's Republic of China on Economic Contracts Involving Foreign Parties [hereinafter FECL] was effected on July 1, 1985. For the English translation of the FECL, see 4 COMMERCIAL, BUSINESS AND TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 7 (O. Nee ed. 1987). The Law of Chinese-Foreign Co-Operative Enterprises of the People's Republic of China [hereinafter Co-Operative Enterprises Law] was effected on April 15, 1988. *See* People's Daily, Apr. 16, 1988, at 4.

49. The General Rules of the Civil Law of the People's Republic of China [hereinafter General Rules of Civil Law] were adopted by the Fourth Session of the Sixth National People's Congress of April 12, 1986, and were effective January 1, 1987. For the English translation of the General Rules of Civil Law, see 3 COMMERCIAL, BUSINESS AND TRADE LAW OF THE PEOPLE'S REPUBLIC OF CHINA 60 (O. Nee ed. 1987).

50. *See* FECL, *supra* note 48, art. 37.

51. *Id.* art. 38.

52. *See* General Rules of Civil Law, *supra* note 49, art. 59.

53. The Regulations of the Shenzhen Special Economic Zone on Foreign Economic Contracts were promulgated on January 11, 1984. For the English translation of the Regulations on Foreign Economic Contracts, see 2 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 103 (1984).

arbitral bodies may be chosen.[54]

Even in the early 1950s, arbitration clauses appeared in many China-related contracts such as:

> [T]he case under dispute may . . . be submitted to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade for Arbitration. The arbitration shall take place in Peking and shall be executed in accordance with the Provisional Rules of Procedure of the said Commission and the decision made by the Commission shall be accepted as final and binding upon both parties.[55]

A. Arbitral Bodies and Their Cognizances

A system of international commercial arbitration in China was set up in the 1950s.[56] There are two arbitral bodies dealing with the international commercial and maritime arbitrations. They are the Foreign Economic and Trade Arbitration Commission ("FETAC") and the Maritime Arbitration Commission ("MAC").[57] The FETAC has been renamed China International Economic and Trade Arbitration Commission ("CIETAC") and the MAC has been renamed China Maritime Arbitration Commission ("CMAC").[58] Both CIETAC and CMAC are set up within the China Council for the Promotion of International Trade ("CCPIT"), China's national chamber of foreign commerce.[59]

The Foreign Trade Arbitration Commission of the China Coun-

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54. *Id.* art. 35.

55. *See* McCobb, *Foreign Trade Arbitration in the People's Republic of China*, 5 N.Y.U.J. INT'L L. & POL. 164, 211 (*citing* Reghizzi, *Legal Aspects of Trade with China: The Italian Experience*, 9 HARV. INT'L L.J. 115 (1986)).

56. *See* Zhunlai, *Committee on Continuing Legal Education, Maritime Arbitration and Litigation in China*, Maritime Law Association Doc. No. 671 at 8710 (1986).

57. *Id.*

58. The Foreign Trade Arbitration Commission (FTAC) was renamed the Foreign Economic and Trade Arbitration Commission (FETAC) on February 26, 1980. *Id.* In September 1988, FETAC was renamed the China International Economic and Trade Arbitration Commission ("CIETAC"). *See* People's Daily, Sept. 13, 1988, at 1.

59. The Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade [hereinafter CIETAC Provisional Rules] were adopted on March 31, 1956 at the Fourth China Council for the Promotion of International Trade. The Provisional Rules of Procedure of the Arbitration Commission of the China Council for the Promotion of Maritime International Trade [hereinafter CMAC Provisional Rules] were adopted on January 8, 1959, at the seventh committee meeting of the China Council for the Promotion of International Trade. Zhunlai, *supra* note 56, at 8710. For the English translation of the CIETAC Provisional Rules, see L. CHAOJIN & W. LINSHENG, CHINA'S FOREIGN TRADE: ITS POLICY AND PRACTICE 75 (1986).

cil for the Promotion of International Trade was set up on May 6, 1954 in accordance with the 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.[60] Two years later, on March 31, 1956, the CCPIT adopted a set of Provisional Rules of Procedure for CIETAC.[61]

The Maritime Arbitration Commission of the China Council for the Promotion of International Trade was set up in 1958, in accordance with the Decision of the State Council Concerning the Establishment of a Maritime Arbitration Commission within the China Council for the Promotion of International Trade.[62] One year later on January 8, 1959, the Provisional Rules of Procedure of CMAC were adopted at the Fourth Session of the Seventh China Council for the Promotion of International Trade.[63]

B. Jurisdiction of the China International Economic and Trade Arbitration Commission and Procedure

CIETAC is an arbitral body established to deal with disputes arising from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies, individuals, or other economic entities and Chinese entities.[64] In other words, CIETAC deals with commercial disputes involving foreign interests.

In this context, "foreign interests" means:

1. Both parties in dispute are foreign enterprises, foreign organizations or foreign citizens;

2. One of the parties in dispute is a foreign enterprise, a foreign organization or a foreign citizen; or

3. The case involves foreign elements or foreign interests even though both disputing parties are Chinese enterprises or organizations. An example of such a case is one which may be brought by an insurance company of China against a Chinese carrier or a Chinese partner.

CIETAC exercises its jurisdiction for the arbitration of all com-

60. Decision on the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade adopted at the 215th Session on May 6, 1954.

61. *Supra* note 59.

62. *See supra* note 56.

63. CMAC Provisional Rules, *supra* note 59.

64. CIETAC Provisional Rules, *supra* note 59, art. 2.

mercial disputes described above upon the written applications of one of the disputing parties, and in accordance with written arbitration agreements between the disputing parties both before or after the dispute arises.[65] When the plaintiff submits the application for arbitration, the plaintiff must pay a sum of .5 percent of the total amount of the claim as a deposit for the arbitration fee.[66]

In his application, the plaintiff must provide the following information:

1. The names and addresses of both the plaintiff and the defendant involved;

2. The plaintiff's claim and the facts and evidence upon which the claim is based;

3. The name of the arbitrator chosen by the plaintiff from among the members of CIETAC or a statement authorizing the chairman of CIETAC to appoint the arbitrator for the plaintiff;[67] and

4. The original or certified copies of the relevant contracts or arbitration agreement.[68]

The Arbitration Commission shall notify the defendant upon receipt of the application.[69] The defendant has fifteen days from the date of receipt of the notice from the Arbitration Commission to either choose an arbitrator from among the members of CIETAC and to notify the Arbitration Commission of his choice, or to authorize the chairman of CIETAC to appoint an arbitrator.[70] If both parties agree upon a period different than the fifteen-day notice time, such agreed period of time shall prevail.[71] If the defendant requests the Arbitration Commission to extend the period of fifteen days' notice time, such extension may also be permitted.[72] If the defendant fails to choose an arbitrator within the time specified, the chairman of CIETAC shall appoint an arbitrator for him upon the plaintiff's request.[73]

The chosen or appointed arbitrators select a presiding arbitrator from among the members of CIETAC within fifteen days from the

65. *Id.* art. 3.
66. *Id.* art. 6.
67. *Id.* art. 4.
68. *Id.* arts. 4, 5.
69. *Id.* art. 8.
70. *Id.* art. 9.
71. *Id.*
72. *Id.*
73. *Id.* art. 10.

date of receipt of the notice from the chairman of CIETAC.[74] If no agreement is reached between the chosen or appointed arbitrators regarding the selection of the presiding arbitrator, the chairman of CIETAC will appoint one for them.[75] The plaintiff and defendant may also jointly choose or authorize the chairman of CIETAC to appoint for them a common arbitrator to arbitrate their dispute.[76] The date of hearing shall be set by the chairman of CIETAC in consultation with the presiding arbitrator.[77]

On matters relating to the proceedings, the disputing parties may confer with the Arbitration Commission either in person or by attorney, either of whom can be Chinese or foreign.[78]

According to the Provisional Rules of CIETAC, the arbitration fee is determined by the Arbitration Tribunal.[79] In any case, this amount shall not exceed one percent of the amount of the total claim.[80] Whether the arbitration fee should be borne entirely by the losing party or proportionally by both parties may also be determined by the Arbitration Tribunal based on the circumstances of the case.[81]

C. Jurisdiction of the China Maritime Arbitration Commission and Procedure of Arbitration

The Maritime Arbitration Commission is the sole arbitral body in China. The commission functions to resolve maritime disputes involving foreign interests in accordance with written agreements providing for arbitration by the Commission between disputing parties.[82] Such agreements may be made either before or after the disputes arise.[83] CMAC's procedure is very similar to that of CIETAC. The only difference may be that in maritime arbitration, CMAC requires the plaintiff to provide a sum equivalent to one percent of the claimed amount as a deposit on the eventual arbitration fee upon the submission of the application for arbitration.[84]

In maritime arbitration, CMAC, like CIETAC, also permits

74. *Id.* art. 11.
75. *Id.*
76. *Id.* art. 12.
77. *Id.* art. 16.
78. *Id.* art. 18.
79. *Id.* art. 33.
80. *Id.*
81. *Id.*
82. *See* CMAC Provisional Rules, *supra* note 59, art. 3.
83. *Id.*
84. *Id.* art. 6.

either one or three-person tribunals, depending on the express preference of the parties and the complexity of the case.[85]

D. Application of Substantive Law In Arbitration

Chinese law fails to provide for either a comprehensive private international law code or a comprehensive maritime code in establishing guidelines for the application of substantive law in arbitration. Conflicting rules are scattered among the General Rules of Civil Law and other existing substantive laws and regulations.[86] Under the current rules, which fall short of perfection, the guidelines of applicable law for international arbitration may be founded on a combination of Chinese municipal laws, including the Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment,[87] the Foreign Economic Contract Law of the People's Republic of China, the General Rules of Civil Law, international treaties, general principles of private international law and customs and practices in international shipping, trade or other economic activities.[88]

In determining the appropriate choice of law, CIETAC or CMAC may rely primarily on chapter VIII of the General Rules of Civil Law[89] as well as articles 5 and 6 of the FECL.[90] The rules regarding choice of law, found in the General Rules of Civil Law and the FECL, are as follows:

1. Civil Activities within Chinese Territory

All civil activities performed within the territory or under the

85. *Id.* art. 22.

86. *See* General Rules of Civil Law, *supra* note 49, *Application of Law to Civil Relationships Involving Foreign Elements*, ch. VIII and art. 8.

87. The Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment was promulgated by the State Council on September 20, 1983, of which article 15 provides: "The formation of a joint venture contract, its validity, interpretation, execution and the settlement of disputes under it shall be governed by the Chinese law."

88. Referring to international customs and practices when settling disputes that arise in foreign transactions has long been one of the fundamental principles adopted by Chinese arbitration bodies. *See* Yougan, *A New Stage in the Development of Foreign Economic Trade and Maritime Arbitration in the People's Republic of China, reprinted in* CHINESE YEARBOOK OF INT'L LAW 286-87 (1984).

89. Chapter VIII of the General Rules of Civil Law provides the general principles of Chinese conflict rules for the choice of law. General Rules of Civil Law, *supra* note 49, arts. 142-50.

90. While articles 5 and 6 of the FECL provide the choice of applicable law, such provisions only apply to economic contracts; they do not apply to international transport contracts. *See* FECL, *supra* note 48, art. 2.

jurisdiction of China shall be governed by Chinese law, with the exception of certain instances provided by law.[91]

2. Contract Dispute

a. The parties to a contract involving foreign interests may choose the relevant law to be applied to the settlement of any disputes arising from the contract.[92] In other words, where a provision as to the applicable law is made directly by the parties in the relevant contract, the settlement will be made in accordance with the provision agreed upon;

b. In the case where no choice is made by the parties, the law of the country which has the closest connection with the contract applies.[93] Consequently, in the absence of any provision or agreement made between the parties as to the applicable law, the relevant Chinese law will be applied to the settlement in a case where the civil action occurred in China.[94]

c. Where the applicable law is Chinese law but there are no appropriate stipulations or relevant provisions in Chinese legislation or in international treaties in which China has been included or participated in, international customs and practices may apply.[95] It is also possible that international conventions, foreign laws, court judg-

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91. *See* General Rules of Civil Law, *supra* note 49, art. 8.

92. *Id.* art. 145; FECL, *supra* note 48, art. 5.

93. General Rules of Civil Law, *supra* note 49, art. 145; FECL, *supra* note 48, art. 5. In such an instance, courts or arbitral bodies must determine which law is applicable by applying their own choice of law rules. The most common approach today among the various countries is to settle contractual disputes in accordance with the law of the particular jurisdiction having the most significant relationship to the dispute. For example, in the United States, the Restatement of Conflicts directs application of the law that "has the most significant relationship to the transaction and the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188(1) (1971). Section 188 of the Restatement provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6 [Principles for Choice of Law].
>
> (2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 188 (1971).

94. *See* General Rules of the Civil Law, *supra* note 49, art. 8.

95. *Id.* art. 142; FECL, *supra* note 48, art. 5.

ments, or arbitration awards will be adopted if considered appropriate and not in violation of the social interests of China.[96]

3. International Treaties

When an international treaty, which relates to the disputes and to which China has acceded, contains provision(s) that differ from the law of China, such provision(s) shall prevail, with the exception of clauses to which China has reserved.[97]

According to Chinese practice, when an international treaty is ratified by the National People's Congress of the People's Republic of China, it automatically becomes operative as part of the law of the land without further implementation.[98]

In Chinese practice, particularly in salvage or collision cases submitted to CMAC, the major provisions of the 1910 Convention on Salvage[99] and the 1910 Convention on Collision[100] are usually applied. In disputes under bills of lading, the Hague Rules[101] or the Hague-Visby Rules[102] are always applied. The stipulations of these rules are applied as either international practice or contract provisions. For example, China Ocean Shipping Company's (COSCO) Combined Transport Bill of Lading, clause no. 7 provides that: "In respect to carriers' liabilities, responsibilities, rights and immunities the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on August 25, 1924, shall be applied."[103] For oil pollution damage disputes, the International Convention on Civil Liability for Oil Pollution Damage is applicable since China has already acceded to that Convention.[104]

With regard to charter parties and marine insurance contracts, the forms drawn up by the Chinese partners incorporate clauses also familiar in the international shipping and marine insurance circles. This occurs in light of the fact that the majority of chartering and insurance businesses involving Chinese partners, have, for a considerable length of time, been concluded in London or other international

96. General Rules of Civil Law, *supra* note 49, art. 150.
97. *Id.* art. 142; FECL, *supra* note 48, art. 6.
98. *See* P.R.C. CONST. art. 67, § 14.
99. Zhunlai, *supra* note 56, at 8712.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* China Ocean Shipping Company's Combined Transport Bill of Lading and General Cargo Bill of Lading.
104. Zhunlai, *supra* note 56, at 8713.

ship chartering and marine insurance markets.[105] Therefore, resolving disputes through Chinese arbitrators involving charter parties and marine insurance contracts is also internationally acceptable.

It may be worthwhile to point out that in China arbitration is secondary to negotiation and conciliation. In other words, arbitration will take place only when the parties involved cannot reach an agreement by way of negotiation or conciliation. The same occurs with CIETAC and CMAC, which attach great importance to the settling of disputes by way of conciliation. During conciliation, the conciliators from CIETAC or CMAC try to discover and analyze the facts and point out strengths and weaknesses of each side's position for the parties. The parties are then allowed to consider their positions and decide whether or not they wish to reach a settlement. Conciliation is an informal method of dispute resolution and participation is completely voluntary. Either party is free to accept or reject a conciliator's proposal so long as it is not stipulated as binding. If the proposal is unacceptable to the parties arbitration will be necessary.

In China, conciliation and arbitration procedures can be separated or combined. Also, the conciliators are allowed to be appointed as arbitrators if conciliation fails, and arbitrators can act as conciliators during arbitration proceedings.

The disputing parties may also negotiate for settlement between themselves and apply to the arbitration commissions for withdrawal of the case if such a settlement is reached before the closing session of the arbitration proceedings.[106] According to the Law of Civil Procedure, in disputes which involve a written arbitration agreement between the parties (regardless of whether that agreement was made before or after the dispute surfaced), the parties involved are not entitled to institute legal proceedings in the people's court.[107]

An award by CIETAC or CMAC is final and binding upon both parties to the dispute. Neither party is allowed to demand amendment or pursue further legal actions in the people's court.[108] In the event that one of the parties fails to execute the award of CIETAC or CMAC, the other party may apply for enforcement with the intermediate people's court or the water transport courts where the arbitral

105. *Id.*

106. CMAC Provisional Rules, *supra* note 59, art. 37; CIETAC Provisional Rules, *supra* note 59, art. 35.

107. *See* Law of Civil Procedure, *supra* note 7, art. 192.

108. *Id.* art. 193.

body or the property is located.[109]

For security measures (i.e., bonds, guarantees, arrests of vessels or other properties), the Provisional Rules of Procedure of CIETAC and CMAC originally provided that the Chairman of each Commission had the power to decide on security measures at the request of one of the parties, and that such security measures would be enforced by the people's court upon application by that party. However, implementation of the Law of Civil Procedure may have deprived the Commissions of that power. CIETAC or CMAC may not recommend security measures to the court for decision. Instead, the parties involved must apply directly to the courts where the property of the applicable party or the arbitral body is located.[110]

V. Maritime Litigation in China

As noted earlier, prior to 1985 almost all maritime disputes in China were resolved through negotiation, conciliation or arbitration. It is difficult to find any formal reports on maritime disputes that were settled through court procedure. Maritime litigation is comparatively new in China.

A. Water Transport Courts

In 1984, the Standing Committee of the Eighth Session of the Sixth National People's Congress set up water transport courts in China's coastal ports.[111] The decision resulted in the establishment of water transport courts in Shanghai, Tianjin, Dalian, Qingdao, Guangzhou and Wuhan.[112]

Water transport courts specialize in the examination of maritime cases and do not accept other civil or criminal cases.[113] Water transport courts have primary jurisdiction over maritime disputes arising "between Chinese parties or between Chinese and foreign parties."[114] Appeals from judgments or decisions of water transport courts are within the jurisdiction of the Higher People's Court in the place

109. *Id.* art. 195.

110. *Id.* art. 194.

111. The Standing Committee adopted the "Decision of the Standing Committee of the NPC on the Establishment of Water Transport Courts in Some Coastal Cities." *See* People's Daily, Nov. 15, 1984, at 1.

112. *See* People's Daily, Apr. 28, 1988, at 4.

113. Zhunlai, *supra* note 56, at 8714.

114. *Id.*

where the water transport court is located.[115] For instance, when the trial court is the Qingdao Water Transport Court, the appellate court should be the Shangdon Higher People's Court because the Qingdao Water Transport Court is located in and under the administration of Shangdon Province.

B. Jurisdiction of Water Transport Courts

The water transport courts, unlike CMAC which only handles maritime disputes involving "foreign interests," accept any maritime cases involving the following:

1. Domestic interests only, where disputes arise between domestic enterprises, organizations or individuals;[116]

2. Domestic interests and foreign interests, where disputes arise between Chinese entities and foreigners;[117] or

3. Foreign interests only, where disputes arise among foreign enterprises, organizations or individuals.[118]

In referring to jurisdiction over maritime actions involving foreign interests, the Judicial Committee of the Supreme People's Court, pursuant to the Law of Civil Procedure (for Trial Implementation) and the Marine Environmental Protection Law of the People's Republic of China, as well as some relevant international treaties in which China has participated (and international practices), adopted the Specific Rules Relating to the Jurisdiction over Maritime Actions Involving Foreign Interests on January 31, 1986.[119] These rules provide details concerning the jurisdiction of water transport courts over maritime cases involving foreign interests.

According to the Specific Rules, the water transport courts may have jurisdiction over the following types of cases:

1. Collision cases, where:

a. Collision or allision occurs within the harbors, internal waters or territorial waters of China;[120]

b. The first arrival port of the vessel suffering or causing the damage is a port of China, the vessel causing the damage or one of the

115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *See* People's Daily, Mar. 16, 1986.
120. Specific Rules Relating to the Jurisdiction over Maritime Actions Involving Foreign Interests, art. 1(1) [hereinafter Specific Rules]. For the English translation of the Specific Rules, see Zhunlai, *supra* note 56, at 8719.

other vessels of the same owner is arrested at a port of China, or the registered port of the vessel suffering or causing the damage is a port of China;[121] or

c. Such a collision or allision causes loss of life or personal injury to Chinese citizens or damage to their property.[122]

2. Pollution damage cases, where:

a. The damage arising from pollution occurs within Chinese territorial waters or other areas under Chinese jurisdiction;[123]

b. The Chinese sea areas suffering the pollution from the accident exist outside the Chinese sea areas;[124] or

c. Any precautionary measures to prevent or mitigate damages arising from the pollution are taken by China.[125]

3. Salvage cases.

The water transport courts have jurisdiction over any actions for recovery of salvage renumeration or expenses,[126] where:

a. Salvage takes place within the territorial waters or seas under the jurisdiction of China;[127] or

b. The first port of arrival for the salvage vessel is a Chinese port.[128]

4. Contracts.

The water transport courts have jurisdiction over any disputes or claims arising from contracts (e.g., contracts for carriage by sea, charter parties, towage, ship agency, stevedoring or tallying, construction, repair or purchase of ships, exploration for an exploitation of marine resources, marine insurance and employment between crew and ship owners or employers), including:

a. Contracts relating to exploitation and multi-purpose utilization of the sea, where the contract is performed in China.[129]

b. Contracts relating to towage, where:

(1) The contract is concluded or performed in China;[130] or

(2) The ship of a party to the contract arrives at a Chinese port

121. Specific Rules, *supra* note 120, art. 1(2).
122. *Id.* art. 1(3).
123. *Id.* art. 3(1).
124. *Id.* art. 3(2).
125. *Id.* art. 3(3).
126. *Id.* art. 4.
127. *Id.* art. 4(1).
128. *Id.* art. 4(2).
129. *Id.* art. 5(1), (2).
130. *Id.* art. 6(1).

or enters China's seas.[131]

c. Contracts relating to carriage of goods by sea, where:

(1) The contract is concluded or performed in China;[132] or

(2) The cargo that is the subject of the contract arrives at a Chinese loading port, discharging port, transhipment port, arrival port or the destination port of passengers and their baggage;[133] or

(3) There is a clause in either the contract or bill of lading providing for jurisdiction of a Chinese court.[134]

d. Contracts relating to time charter party or demise charter party, where:

(1) The charter is concluded or performed in China;[135]

(2) The registered port of the chartered vessel is a Chinese port;[136] or

(3) The delivery or redelivery port of the chartered vessel is a Chinese port.[137]

e. Contracts relating to shipping agency, where:

(1) The contract is concluded or performed in China;[138]

(2) One of the contract parties has his or her place of business in China;[139] or

(3) The ship under agency management enters the sea areas of China or arrives at a port of China.[140]

f. Contracts relating to ship repair, where:

(1) The repair contract is concluded in China or the ship is in fact repaired in China;[141] or

(2) The ship is repaired in another country, arrives at a port of China, or enters Chinese seas.[142]

g. Contracts relating to marine insurance, where:

(1) The insurer has his principal place of business or a perma-

131. *Id.* art. 6(2).
132. *Id.* art. 7(1).
133. *Id.* art. 7(2).
134. *Id.* art. 7(3).
135. *Id.* art. 8(1).
136. *Id.* art. 8(2).
137. *Id.*
138. *Id.* art. 9(1).
139. *Id.* art. 9(2).
140. *Id.* art. 9(3).
141. *Id.* art. 11(1).
142. *Id.* art. 11(2).

nent establishment in China;[143] or

(2) The insured vessel or cargo arrives at a Chinese port.[144]

h. Contracts relating to operation of stevedore or tally, where the operation is performed in a Chinese port.[145]

i. Contracts relating to a ship's construction or sale, where:

(1) Such a contract is concluded or performed in China;[146] or

(2) The ship under construction or sale arrives at a Chinese port or enters Chinese seas.[147]

j. Contracts relating to employment, if:

(1) The employment contract between the crew and shipowner or employer is concluded or performed in China;[148]

(2) The vessel with the crew under the employment contract arrives at a Chinese port or enters Chinese seas;[149] or

(3) The crewmember, shipowner or employer under the employment contract is a Chinese citizen.[150]

5. General Average cases.

The water transport courts have jurisdiction over actions arising from general averages, where:

a. The general average occurs or is adjusted in China;[151] or

b. The destination of the ship is a Chinese port.[152]

6. Mortgage or Maritime Lien cases.

For actions arising from a ship's mortgage or maritime lien, the water transport courts have jurisdiction, where:

a. The mortgage or the maritime lien is established or takes place in China;[153] or

b. The ship arrives at a Chinese port or enters Chinese seas.[154]

In addition, the water transport courts have jurisdiction over maritime actions involving foreign interests, where:

(1) The defendant is domiciled or has his habitual residence or

143. *Id.* art. 12(1).
144. *Id.* art. 12(2).
145. *Id.* art. 10.
146. *Id.* art. 14(1).
147. *Id.* art. 14(2).
148. *Id.* art. 16(1).
149. *Id.* art. 16(2).
150. *Id.* art. 16(3).
151. *Id.* art. 13(1), (2).
152. *Id.* art. 13(3).
153. *Id.* art. 15(1).
154. *Id.* art. 15(2).

principal place of business or a permanent establishment within the boundaries of China;[155]

(2) A water transport court of China has arrested the ship or the party involved has provided security in China;[156]

(3) The defendant owns other property within the boundaries of China that can be attached;[157] or

(4) It is agreed between the parties that legal proceedings be instituted in a Chinese court.[158]

Aside from the lawsuits referred to in the Specific Rules, the water transport courts also have jurisdiction over applications for security in maritime arbitration cases dealt with by CMAC.[159] These applications include those for arrest of a ship in order to secure the execution of a future arbitral award and the application for enforcement of an arbitral award where one of the parties has failed in his performance and holds property in a ship docked in China or in waters within Chinese jurisdiction.[160]

On December 2, 1986, the Standing Committee of the National People's Congress adopted a Resolution of China Accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[161] Although China's decision to accede to the Convention is subject to two reservations that require reciprocity of enforcement and compatibility with Chinese law,[162] it is possible for the water transport courts to assist in the enforcement in China of foreign arbitral awards in maritime matters.

C. Security Before Action

On January 31, 1986, the Judicial Committee of the Supreme People's Court passed the Specific Rules Relating to the Detention of Vessels Prior to a Lawsuit.[163] Under these rules, the scope of maritime claims regarding which ships may be detained before an action is brought are defined.[164] The Rules specify twenty categories of mari-

155. *Id.* art. 17(1).
156. *Id.* art. 17(2).
157. *Id.* art. 17(3).
158. *Id.* art. 17(4).
159. *See* Law of Civil Procedure, *supra* note 7, arts. 167, 194.
160. *Id.* arts. 92, 93, 194, 195.
161. *See also* Zhunlai, *supra* note 56, at 8715.
162. *See* People's Daily, Nov. 28, 1986, at 1; People's Daily, Dec. 3, 1986, at 1.
163. People's Daily, Mar. 16, 1986. *See also*, Zhunlai, *supra* note 56, at 8716.
164. Zhunlai, *supra* note 56, at 8716.

time claims designating which petition for detention of a ship may be made before a lawsuit is brought.[165] Such claims include those involving the construction, purchase, chartering, operation, maneuvering or salvage of ships; carriage by sea; the general average; as well as the ship's ownership, possession, mortgage or lien.[166]

A party having a claim files a petition with a water transport court for detention of the vessel involved if the owner of the vessel is liable for the claim[167] and the vessel is under the same ownership when the petition for detention is made and the maritime claim has arisen.[168]

Water transport courts can also detain any other ships of the owner, at the time of arrest, if the owner is liable for the claim.[169] If the claim involves the ownership, mortgage, operation, or distribution of earnings of the vessel, only the particular vessel involved can be detained.[170]

The party who applies for the detention of the vessel must file a written petition and submit evidence to the water transport court.[171] Before the court grants the application for the detention of the vessel, the applicant must provide security against any loss that may be caused to the opposing party by wrongful detention.[172] No detention will be granted in a case where the applicant refuses to provide security as ordered by the court.[173]

The water transport court ordering the detention of the vessel has jurisdiction over the lawsuit based on the maritime claim under which the detention was effected.[174]

The water transport court will issue an order to release the vessel without delay upon provision of satisfactory security by the opposing party. After the vessel is released, the disputing parties may either bring the case before the court having jurisdiction in accordance with the original jurisdiction agreements, or they may submit the case for arbitration according to the original arbitration agreements.[175] In any

165. *Id.*
166. *Id.*
167. *Id.* at 8716-17.
168. *Id.*
169. *Id.* at 8717.
170. *Id.*
171. *Id.*
172. *Id.*; Law of Civil Procedure, *supra* note 7, art. 94.
173. *Id.*
174. Zhunlai, *supra* note 56, at 8717.
175. *Id.*

event, such agreements do not affect the application for arrest of a vessel.

The detention period of a vessel in order to secure a maritime claim is thirty days. The water transport court should release the detained vessel where the applicant does not institute the lawsuit within the thirty-day period. In the event that the applicant fails to institute the lawsuit within the period of detention and the opposing party has provided security, the latter may apply for release of the security.[176]

The application fee paid by the applicant for arrest of a vessel is RMB 1,000 (Chinese currency).[177] Expenses incurred in effecting the detention are to be paid by the opposing party.[178] In case of wrongful detention, such expenses will be borne by the applicant.[179]

Military ships or government ships used exclusively for public service cannot be detained.[180]

D. Example Cases

There have been a number of cases in China involving detention of vessels and liens on cargo which have initiated lawsuits and in which vessels were sold pursuant to court orders.

1. The Lago Alumina[181]

In January 1985, two Spanish companies, Compania Espania de Petroleos, S.A., and Petroquimica Espanola, S.A. (plaintiff), chartered the M/V Lago Alumina, owned by an Argentinian, Trafluem Compania Armadora, S.A. (defendant), to ship 4,500 tons of chemicals from Spain to Shanghai and Xingang, Tianjin.[182] After arrival at Port Said, Egypt, the Lago Alumina was detained over forty-five days as a result of defendant's failure to pay navigation, wage, and anchorage fees.[183]

Plaintiff, in order to safeguard the voyage, accepted bills on be-

176. *Id.*

177. *Id. See also* Law of Civil Procedure, *supra* note 7, arts. 94, 199, 200. RMB 1,000 is equivalent to about $270 (RMB 3.73 = $1).

178. Zhunlai, *supra* note 56, at 8718.

179. *Id.*

180. *Id.* at 8717.

181. Compania Espania de Petroleos, S.A.; Petroquincica Espanola, S.A. v. Trafluem Compania Armadora, S.A. *See* People's Daily, Nov. 27, 1985 and July 9, 1986. *See also*, Zhunlai, *supra* note 56, at 8718.

182. Zhunlai, *supra* note 56, at 8718.

183. *Id.*

half of the defendant.[184] But defendant failed to reimburse plaintiffs as promised.[185] When the ship arrived at port Xingang, the plaintiffs hired a Chinese lawyer to act as their agent and applied to the Tianjin Water Transport Court to have the ship impounded.[186]

The Tianjin Water Transport Court accepted the case and ruled that the defendant must provide a guarantee of $460,000 within seven days, or the ship would be taken into custody.[187] This order was issued by the court on June 28, 1985, based upon the plaintiffs' provision of a guarantee of $350,000 as security for the detention of the ship on June 27, 1985.[188]

The defendant failed to comply, and the ship was detained on July 5, 1985.[189] Subsequently, the court ordered the ship auctioned upon the plaintiffs' demand for the immediate judicial sale of the ship.[190] This sale was to enable recovery of the money advanced.[191] In an auction on August 26, 1985, the China Zhongyuan Engineering Corporation bought the ship for $460,000.[192]

In the first hearing of the case, the proceedings were halted when the defendant ignored a court summons to appear.[193] At the second hearing, the defendant again failed to appear.[194] Instead, he wrote a letter to the court stating that because of financial problems he preferred to explain his case in writing.[195] The court rejected his argument and entered a default judgment.[196]

The court examined the documents provided by plaintiffs, including the charter contract and receipts of the plaintiffs' payment on behalf of the defendant.[197] About $800,000 had been claimed by the

184. *Id.*
185. *Id.*
186. *Id.* According to article 191 of Law of Civil Procedure, if foreigners, stateless persons or foreign entities and agencies bring a lawsuit in the Chinese courts, they should entrust Chinese lawyers to act as their agents and sign an agreement of Power of Lawyers.
187. Zhunlai, *supra* note 56, at 8718.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 8719.
194. *Id.*
195. *Id.*
196. *Id.* According to article 113 of the Law of Civil Procedure, if the defendant ignores another final summons, he can be declared in default, and the court may decide how the auction proceeds should be distributed among creditors. Law of Civil Procedure, *supra* note 7, art. 113.
197. Zhanlai, *supra* note 56, at 8719.

ship's crew, an Argentine company, and the Tianjin branch of the People's Insurance Company of China.[198]

Proceeds from the sale of the ship were allocated among the plaintiffs and other creditors.[199] Finally, plaintiffs were allotted a sum totalling over $320,000 (of the proceeds), after taking into account the court fees and costs.[200] Thus, plaintiffs recovered over eighty percent of the money they had advanced ($390,000).[201]

The *Lago Alumina* case was the first one in which a Chinese court agreed to intervene in a dispute involving two foreign companies.[202] At the time, there was no law nor precedent governing this type of case. The court might have looked to international treaties and foreign laws or judgments in reaching its conclusion.[203]

2. The Opal City[204]

In *Opal City*, the plaintiff, T. J. Stevenson and Company, New York, U.S.A., brought an action in the Shanghai Water Transport Court.[205] This claim was brought against Zenith Transport, Inc., of the Republic of Liberia for reimbursement of prepayments to Zenith, the ship owner.[206] The court ruled that the defendant should provide a guarantee of payment within five days.[207] When the defendant failed to do this, the court issued an order to detain the vessel, the M/V Opal City.[208] Even after the Opal City's detention in Shanghai Harbor, the defendant still refused to provide any kind of guarantee.[209] Subsequently, the court ordered the ship auctioned on January

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* According to article 144 of the Law of Civil Procedure, the defendant has fifteen days to appeal; if he fails to do so, the court ruling will become final and binding. Law of Civil Procedure, *supra* note 7, art. 144. In the instant case, the defendant did appeal his case.
202. *See* People's Daily, Nov. 27, 1985.
203. Since China is still drafting its maritime code, the resolution would have to be based upon international treaties, the Law of Civil Procedure, the General Rules of Civil Law, relevant foreign laws, or international practice. The applicable international treaty gives priority to wages and voyage costs. Chinese law emphasizes wages only, giving other creditors a proportion of their claims from any money remaining. *See* People's Daily, July 9, 1986.
204. T.J. Stevenson & Company v. Zenith Transport Inc., People's Daily, Dec. 17, 1985. Nafziger & Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 675 (1987).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*

17, 1986.[210] The court sold the Opal City to Owen Trust Company for $1,301,000.[211]

3. Foreign Action Against a Chinese Company[212]

In this case, a Panamanian ship chartered by a Chinese import corporation carried cargo from the United States to Dalian, China.[213] Upon arrival at its destination, the ship duly tendered the Notice of Readiness to the charterer, but was unable to discharge the cargo in Dalian.[214] The ship was ordered to move to Qingdao for discharge which caused the ship to be delayed for over two months.[215] On May 9, the 1985 the plaintiff ship owners filed a petition with the Qingdao Water Transport Court for a lien on the ship's cargo, stipulating it be landed by the receiver to secure their claim for demurrage.[216] After investigating the matter, the court granted the plaintiffs' petition and ordered the charterer to provide bank guarantee.[217] On May 14, the charterer provided the guarantee required through the Bank of China and requested delivery of the cargo.[218] On that same day, the court accepted the bank guarantee and issued an order for the plaintiffs to deliver the cargo under lien.[219] Issues on the amount of damages and the manner of payment were settled afterwards through negotiations between the plaintiffs and defendant.[220] The case was closed upon payment by the defendant of over $450,000 in damages to the plaintiffs.[221]

4. The Pomona[222]

This was the first case in which the Chinese brought an action against foreigners in a Chinese court.[223] The Seaman Service Co. of Wuhan Yangtze Shipping Corporation had signed a contract in

210. *Id.*
211. *Id. See also* People's Daily, Jan. 18, 1986.
212. Zhunlai, *supra* note 56, at 8716.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. Seaman Service Co. of Wuhan Yangtze Shipping Corp. v. Soto Grande Shipping Corp., S.A., People's Daily, Dec. 12, 1985. *See also* Nafziger & Jiafang, *supra* note 204, at 674.
223. Nafziger & Jiafang, *supra* note 204, at 674.

Shanghai, in January, 1985, with Soto Grande to provide crew members for the M/V Pomona.[224] Soto Grande never paid the crew's monthly salaries pursuant to terms of the contract.[225] On September 22, 1985, the water transport court ordered the defendant to forfeit $200,000 in cash within five days as a guarantee of payment for the salaries owed to the crew.[226] When the defendant failed to provide the guarantee, the court detained the vessel.[227] After Soto Grande's continued refusal to provide a guarantee the court ruled that the ship should be sold at auction.[228] The ship was sold to Shanghai Xinghai Shipping, Ltd., for $430,000.[229]

E. Application of Substantive Law in Maritime Litigation

As previously mentioned, on the subject of the application of substantive law in maritime litigation, there is neither a comprehensive private international legal code nor a comprehensive maritime code in China. The conflicting rules are scattered among the General Rules of Civil Law as well as other existing substantive laws and regulations. In cases where there is no applicable Chinese law or regulation, courts may have to look to international treaties, international customs and practices, as well as foreign laws and judgments in reaching a conclusion.[230]

VI. CONCLUSION

Although the Chinese still emphasize settling international commercial disputes, maritime disputes and domestic civil disputes through negotiation or mediation, they seem increasingly inclined to litigate and arbitrate these disputes. For example, last year the courts in Shanghai only handled about 12,000 domestic civil cases and forty-eight economic cases involving foreign and Hong Kong interests.[231] In the past four years (1984-1988), the water transport courts in China handled 1454 maritime cases, with 1233 cases concluded, 146 of which involved foreign interests.[232] Comparatively, in 1985 and

224. *Id.* at 674-75.
225. *Id.* at 675.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *See* General Rules of Civil Law, *supra* note 49, ch. VIII.
231. People's Daily, Nov. 28, 1986, at 1.
232. People's Daily, March 29, 1989, at 4.

1986, CIETAC heard sixty-three cases and CMAC heard twenty-nine. By 1987 CIETAC had over ninety cases pending.[233]

It is certain that in the future Chinese courts will play a much more important role in handling disputes involving foreign interests, as a result of both the economic system reform and economic exchange.

233. People's Daily, Nov. 28, 1986, at 1.