INSTITUTE OF CURRENT WORLD AFFAIRS

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ARD-10
A Discourse on Arbitration

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New York 17, N.Y.

Dear Mr. Nolte,

There are several reasons for taking an interest in the two arbitration bodies which are run under the auspices of the China Council for the Promotion of International Trade - the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission. In the first place, it is ultimately to these institutions that the majority of companies and individuals all over the world that have commercial relations with China are obliged by the terms of their contracts to look for justice should disputes arise out of their dealings. While by no means all contracts to which the Chinese state trading corporations are parties provide for arbitration in Peking, in most cases, where the non-Chinese party has no specially strong bargaining position, the corporations insist on arbitration of all disputes by one of these two Commissions. In the second place, these two Commissions, having been delegated by the Chinese Government with the task of solving certain kinds of international disputes (to which, in effect if not technically, it is a party), represent a rare Chinese institutional contribution to the international legal field, and have a certain interest on that account. Constantly drawn to the attention of foreign businessmen, they are, in a sense, that part of the Chinese legal system which is put into the shop window, for the inspection of the outside world. Lastly, in the absence of much specific information about courts and the judicial function in China generally, any information that can be gleaned about the working of these specialized bodies may be thought to have a certain relevance to the study of the legal system of China as a whole.

Beyond the texts of the decrees which established the two Commissions, and the rules made by their authority, both of which are fairly widely available outside China, not much is known to foreign businessmen or lawyers about their functioning. I had only been able to secure details of a single case settled by either of them, that of the m.s. "Varild", a Norwegian vessel which was salvaged by the Shanghai Salvage Bureau after it had gone aground at Tungsha. From the serial number on the documents relating to that case - 011 of 1963 - I had imagined that there might have been others, though it seems unlikely that if they had concerned Western firms they would have remained unknown

to the various chambers of commerce and other associations which concern themselves with the China trade.

On the last day but one of my visit to Peking in May I was invited to visit the offices of the two Commissions for an interview. As I explained in an earlier Newsletter, it did not prove easy for me to make contacts with lawyers of any kind in China, and I have the feeling that the invitation, which arrived at the last minute, was due less to my own request than to a letter of introduction to the Chairman of the M.A.C. by a prominent London shipbroker and member of the Arbitration Committee of the Baltic Exchange in London.

As it turned out, the Chairman was not able to see me, but I was received by Mr. Shao, a senior official of the Secretariat which, as he told me, is common to the two Commissions. Judging by his occasional corrections of his interpreter's translation Mr. Shao spoke quite good English, and he was clearly an expert in matters of international and commercial law. He received me coolly, with less than the usual enthusiasm shown when one visits an official or institution in China, perhaps because of his undoubtedly high rank. After offering me the usual cup of tea, he omitted the customary introductory talk and asked me what I wanted to know about the Commissions. I countered by asking for a general introduction to their work, after which, I said, I would like to ask some questions.

Mr. Shao's introduction was largely a brief account of the main provisions of the decrees which constituted the Commissions and their procedural rules. He said that the two Commissions were established within the framework of the China Council for the Promotion of International Trade - a non-governmental body which handles many of the functions appropriate to a chamber of commerce in a capitalist country - to meet the demands of a growing network of foreign trading contacts. The F.T.A.C. had been set up in 1956, the M.A.C. in 1959. Both bodies had had only a short history, but both had proved their worth by being called upon to handle disputes.

The two Commissions were permanent bodies, the F.T.A.C. consisting at any one time of between fifteen and twenty-one members, and the M.A.C. of between twenty-one and thirty-one. The members were all experts in the fields of foreign trade, banking, insurance, law or shipping. From among these members the parties to a dispute would select an arbitrator or arbitrators to form a tribunal. At the head of the F.T.A.C. was a chairman and two vice-chairmen, elected by the members for a term of one year. The M.A.C. had a chairman and three vice-chairmen, elected for two years at a time. Mr. Shao went on to say that there were differences in the procedures of the two Commissions, as well as these minor differences in their structure, for not only had the M.A.C. been set up three years later than the F.T.A.C., with the benefit of the latter's experience, but the two had quite different tasks to perform. In particular,

in the rules of the M.A.C. there was an express provision empowering the tribunal to make every effort to settle cases by conciliation, with the consent of the parties. The F.T.A.C. had no such provision in its constitution. In fact, however, the importance of these differences in the written rules should not be overestimated, for the practice of the two Commissions is very similar. Both, for example, normally settled disputes by conciliation, with what Mr. Shao said were excellent results. The parties apparently welcome a conciliatory procedure which settles their disputes in accordance with what is fair, reasonable and just. However, should they desire it, the parties may argue the case out contentiously and accept an arbitral award of the normal kind.

I was told that there was no set composition for an arbitral tribunal - it was up to the parties to select either a single arbitrator between them, or to choose one or more each, in which case the arbitrators, if it was so wished, could select an umpire in order to ensure a majority decision. Should a defendant fail to select an arbitrator, the chairman was empowered to select one in default. If an arbitral award was made, there had to be a majority decision, but in the normal course there was simply a negotiated conciliation agreement, every term of which had to be approved by both parties. This would be drawn up as a "Conclusion of Conciliation", an authenticated document which, Mr. Shao emphasized, was always issued as a matter of practice though it was not provided for in the rules.

The jurisdiction of the Commissions in any particular case was of course founded entirely on consent. Neither Commission, I was told, would take cognizance of a case unless there was either a special arbitration agreement between the parties, or else an appropriate arbitration clause in another contract. The M.A.C. itself has a standard form of salvage contract, as well as a standard arbitration agreement for use in cases of maritime collisions.

At this point Mr. Shao paused and asked me for my questions. It was difficult to know where to begin. In the course of the three hours which I spent with Mr. Shao, what may seem surprisingly little ground was covered, but the going was heavy, with frequent repetition of both questions and answers to check their accuracy. I set out below the major part of our conversation. It is perhaps worth adding that the continual repetition of certain themes, which I have reduced but not eliminated, is very much a part of the atmosphere of any discussion of this kind in China.

I started off by saying that to myself, as well as to other people in the West who were interested in the work of the Commissions, and who knew something of their organizational structure but little of their working, the most puzzling question was, what law would the arbitral tribunals apply? In the absence of a written code of commercial law in China, it was

very difficult for us to see how disputes would be settled, and in particular what kind of legal arguments could usefully be addressed to the Commissions' arbitrators.

Mr. Shao said that the sources of law on which the Commissions drew were (a) the law of the Commissions themselves, as contained in the decrees of the State Council authorising the China Council for the Promotion of International Trade to set them up, together with the rules of procedure, and (b) other sources, depending on the facts of each case. The tribunal had to settle each case in accordance with the contracts made by the parties, as was the case in England. The contracts were accordingly a source of law. International practice would also be taken into account if it was reasonable. Of course, the Chinese situation, the legal principles of China, had also to be considered.

Still somewhat mystified, I tried to put the question another way. I told Mr. Shao that when advising their clients about contracts, many Western lawyers would tend to look upon a clause providing for arbitration in a particular country as implying the choice by the parties of the law of that country as the law to govern the contract itself, unless it was otherwise clearly stated. Would the Commissions regard a Peking arbitration clause as implying a choice by parties of Chinese law?

Mr. Shao did not approach the question from the viewpoint of choice of law, but preferred to state the basic principle thus: "If a case is to be settled in China, it must clearly be settled in accordance with Chinese law. Of course, a particular concrete dispute may be very complex in character, so that other considerations may have to be taken into account in settling it, and other rules applied. There is no single legal procedure which will suit every case. But the first matter for consideration is Chinese law, after which we take into account the international practice."

I asked whether this meant that the first step was to look for the Chinese rules of private international law, or conflict rules, to see whether they provided for the application of a foreign law. I was told that the written regulations and the practice of Chinese law as a whole were examined; there were no written rules of private international law in China, the solution of conflicts of law was a matter of practice.

I said that in England also, with a few minor exceptions, we had no written rules for the conflict of laws, but that the law applied by the courts was fairly clearly set out in the cases and textbooks. How was the foreign lawyer confronted with a Chinese problem to discover the rules and the practice of Chinese law?

Mr. Shao said that there were certainly textbooks in foreign countries, but that as they were all by different authors, so they contained different views of the law. In China there were no written textbooks on the conflict of laws, but in concrete cases submitted to the Commissions for decision, the parties would have no difficulty in understanding what law was to be applied. It was a matter of practice. He was emphatic that the whole way of settling disputes was quite different from that of other countries, for conciliation was used, with much more opportunity for negotiation by the parties. In England, where such disputes are settled by the courts, different lawyers had different opinions of the way in which a dispute should be handled, and thus all sorts of different results were possible. "We think this is a bad system, and that our conciliation system is much better; that is my personal opinion, at least."

I argued that the English system was not fraught with quite so many uncertainties as it might seem. Apart from many very clear precedents in the cases, there were some textbooks that had great authority, such as Dicey's Conflict of Laws in the field of private international law. I said that except in a few areas where there was a lot of doubt, commercial lawyers were usually able to advise the businessman with a good deal of certainty, which was what he most wanted if he was to conduct his business prudently. I did not feel that, if called upon to do so, I would be able to give such certain advice about Chinese law. How could I improve my knowledge in this field?

Mr. Shao replied that in China no such authoritative works as Dicey existed, but of course there were plenty of written laws and regulations in other fields which supplied the general rules - such as the procedural rules of the two Commissions. In foreign countries there were many people specializing in legal affairs and writing books of reference. Their differing opinions served the businessman for reference only, as they were no sure guide to the results of cases. In fact, it was very difficult to predict the result of a case in a foreign court. In his opinion, the disputing parties would be much more sure about the result and nature of a settlement in China, as her foreign trade was based on certain firm principles - the principles of mutual benefit and equality, and the settlement of disputes according to what was fair, reasonable and practical. The conciliation method supplies a greater opportunity to listen and and harmonize the views of both parties. He said that the Commissions were also very careful in their work, making a very detailed study of each case.

I said that of course I accepted that the Commissions took the greatest care, but that it was a pity that the results of all this careful work were not summed up so that people in my position could benefit from the Commissions' experience and learn more of how they operated. Mr. Shao told me that some cases had been published, in the journal Foreign Trade, for

example; the m.s. Varild was only one of several, he assured me. He thought that businessmen would understand the practice of the Commissions more clearly when they made more frequent contacts with them.

I pressed the point somewhat that despite such publications as had appeared about the Commissions, the foreign business community, in the experience of lawyers at least, was not very happy with what was regarded as the uncertainty surrounding the Commissions and their activities. By making more information available on their practice, in particular detailed reports of the cases that had been settled, the Chinese could do much to ease the minds of foreign businessmen and perhaps even thus facilitate the task of their own foreign trade negotiators. There had been one or two good monographs on the topic of public international law published recently in China, and I asked whether we could look forward to other such works in the future, particularly relating to commercial law.

Mr. Shao, whose curiosity was aroused at my being acquainted with Chinese legal literature, said that the works I had mentioned were largely comparative in nature, analysing the laws and practices of different countries, and he was at pains to emphasize that they were merely the expression of the personal views of their authors - "personal views may, of course, be expressed." There were at present no such works in the field of commercial law, and he had no idea whether there was any likelihood of any being published, for it was matter for scientific or academic study, with which he was apparently not concerned.

I mentioned that I had noticed that the rules of both the Commissions allowed foreign parties to be represented by either foreign or Chinese lawyers, which he confirmed, and I asked what books, if any, a foreign lawyer might be advised to bring if he had to argue a case in Peking, in the absence of authoritative Chinese books. He said that in the majority of cases the facts were the decisive factor. This was particularly true of maritime cases. Facts were more important than law in these cases, and the Commissions were accordingly not much concerned with law.

Mr. Shao gave the wan smile of a man who had wrestled with such problems himself when I asked him what happened when the dispute concerned some fearsomely technical question, general average, for example, when a decision was only possible on the basis of a rather detailed and predetermined set of rules. "That is a special question and we have specialists who deal with it. It is mainly a matter of international law and practice, which we apply if it is reasonable, but it must be left to the specialists."

This mention of international law led Mr. Shao into a discourse on international law in general. "The basic principles of international law must be observed by persons in charge of legal affairs, but in some cases imperialists, especially the U.S. imperialists, have not observed these principles." He gave the examples of a vessel flying the Lebanese flag which had been attacked in the high seas off Vietnam, resulting in the death of several members of the crew, including one of British nationality, and of the nine Chinese who had been imprisoned in Brazil in defiance, as he said, of international law. If the U.S. imperialists and the Brazilian reactionaries did not observe international law, then it was evident that cases that were supposed to be settled by international law were likely to be settled in different ways in different countries. "In China, at least, we can be sure that our commercial relations are based on the principles of mutual benefit and equality, and we can be sure that disputes are settled according to what is fair, reasonable and practical."

I broached the question of international arrangements for commercial arbitration: what did Mr. Shao think of the new arbitration rules of the International Chamber of Commerce? They were accepted in many countries - would they be regarded as reasonable in China?

Mr. Shao's view was that the International Chamber of Commerce was under the control of the U.S. imperialists, and was unfriendly to China, espousing the "two China's policy". "As a result," he said, "we refuse to take part in its activities, and so of course we do not recognize its rules." I explained that I entirely understood their position over non-participation in the activities of the Chamber, but I wondered whether he thought that the rules, as such, were good rules. "We have read them, but our view is that the main purpose of the rules is to monopolize commercial arbitration. As a legal worker I cannot always look at rules and regulations on their own; sometimes we have to look at their practical application, at the full factual context."

The conversation turned to the discussion of the Arbitration Committee of the Baltic Exchange, the centre of shipping arbitration for London and much of the rest of the world. Mr. Shao had a question for me. He understood that the Baltic was an important market for the chartering of ships, but what was my explanation of the wholly unreasonable practice of always providing for arbitration in London in the charter parties negotiated there? I suggested that there were both historical and practical reasons behind it. At present London arbitration was accepted widely in the shipping world, both in Britain and in foreign countries, because it was fairly quick, reasonable in its results and relatively cheap. There was available in London a large body of maritime lawyers and other experts such as surveyors and adjustors, and there were specialized courts. I made again my earlier point that there was also a fairly high degree of predictability about London arbitration.

Mr. Shao said that the Baltic Exchange was a monopoly organization of shipowners, and that they insisted on applying English law and having London arbitration. History might explain but could not excuse such an unreasonable situation, which ought to be changed. Why should all disputes go to London?

I pointed out that the market was not altogether a shipowners' monopoly, for in chartering the charterers and shippers also had their brokers. This was also true of the arbitrators, many of whom acted on occasion both for owners and charterers or shippers. It could not be said that the owners were doing unreasonably well out of the arbitration system. It was a system that worked in practice and was widely accepted, so that naturally enough English businessmen, who were rather conservative about such things, would not favour changing it. Mr. Shao reiterated the unreasonableness of the system once or twice more. He admitted that some arbitrators (he mentioned the name of the gentleman who had written the letter of introduction on my behalf) can do something for the charterers, but he said that he knew little of the day to day business of the arbitrators there. Nonetheless, it was wrong that this monopoly should exist.

I asked what sort of system he would like to see replace the present arrangements. He said that each country had its own arbitration machinery. The place of arbitration should be negotiated. When a particular country was concerned, arbitration should take place there. I asked him whether he thought that this process of negotiation might make it more difficult to make quick fixes in the shipping market; even if theoretically unfair, the present clause had the advantage of being widely accepted and thus unnecessary to negotiate each time. A new system, to be accepted as widely, would have to be very well known. Mr. Shao said that he did not think all clauses in the standard shipping contracts were unreasonable, but some, like the arbitration clauses, were. They could be changed without damaging the contracts as a whole, and this would have to be done in time, for many of the unreasonable results of history could and should be rectified.

Mr. Shao came next to a subject which neither I nor the interpreters could at first catch; in faultless and rapid English he told us - "shipowners' mutual protection and indemnity associations." There were many of these in London, he said. The shipbrokers on the Baltic Exchange said that these associations (generally known as "P. & I. Clubs") would not permit changes in the arbitration clauses. He saw this as a good example of the way in which the shipowners exercised their monopoly, ordering other enterprises about in this way. He was not impressed by the argument that the advantage was not all on one side, that in view of the very strict liabilities to which modern shipping law subjected shipowners and against which they had to insure somehow, if the clubs did not exist the price of shipping would doubtless be higher. He insisted that the clubs

were the villains of the piece. If they were needed, why should they only insure ships which were chartered under London arbitration clauses? It was historically understandable but nonetheless wrong. I found myself once again arguing that London arbitration was insisted on by the insurers because they felt that they knew what they were dealing with, it was predictable for them.

Mr. Shao still did not agree at all. It was only reasonable from the shipowners' point of view, he thought, for generally speaking it was the owner and not the shipper who benefitted from arbitration in London. Tacitly we agreed to disagree on this question of bias, and I next suggested that it might be worthwhile sending a Chinese lawyer to London to study commercial arbitration, not only in shipping matters but in other fields too, for there were many arbitration bodies belonging to various trades. Mr. Shao agreed about the large number of arbitral tribunals, which he said could be traced to the historical need to protect the buyer's interest in the import trade with colonial countries, but he made no comment on my suggestion. Rather, he turned again to the Commissions in Peking. I think he was genuinely puzzled that they were not immediately fully accepted by foreign businessmen, so that I once more made the point about predictability and the need to state the principles on which cases were settled in more detail. He laughed quite heartily at this and said that it was quite understandable that a legal worker like myself (I felt quite flattered at the description) should want to know the details, but the businessman was only interested in the results of arbitration. I told him that on such matters businessmen usually consulted their legal advisers, and that for that reason the lawyer's view might be important to those with whom the businessman dealt, even if it was not known to them.

I asked Mr. Shao whether he thought there was any future for the idea of international agreements, whether bilateral or multilateral, to govern commercial arbitration, whether by means of international machinery or otherwise. He said that the question was a very difficult one, as different states had different legal and arbitration systems, as well as different forms of contract, but he thought it was certainly a question to be studied. China did have some inter-governmental arbitration agreements with other countries, though not with capitalist countries at present. I learned that some of these arrangements provided for automatic execution of awards. They are generally incorporated in trade agreements.

As our talk came to an end Mr. Shao told me that he thought my research could have fruitful practical application if I made a study and comparison of arbitration arrangements in various countries and trades, suggesting changes where the existing practices were unreasonable. I said that I thought that comparative study of this kind, and the exchange of information on these technical matters could only lead to further

improvements in trade relations. In reply I was given the speech of welcome which I would normally have expected to hear at the beginning of the meeting. It was a mark, I think, of the way in which our relationship improved during the course of the morning's conversation, or argument, as much of it was.

Mr. Shao said that he hoped I would tell lawyers and commercial men about the Commissions when I returned to London, and he expressed the hope that foreign trade contacts and arbitration contacts between our countries would improve in the future. I agreed, with the reservation that it might be proper to hope that foreign trade contacts would be improved to the point at which they did not give rise to arbitration, for the role of the lawyer was to try to prevent disputes from arising by properly advising his client, though they had not been very successful in doing so to date. Mr. Shao laughed and nodded his agreement.

As we walked the few yards back to my hotel Mr. Hu, my interpreter, whose English was a good deal better than that of Mr. Shao's interpreter, told me that there was one point that he thought the latter had not made with enough force. Mr. Shao had said that with my research fellowship I could achieve excellent results by study and comparison of international commercial arbitration arrangements and their reasonableness or otherwise without necessarily changing my ideological standpoint.

Mr. Hu obviously found enough emphasis in the statement to think it needed careful translation, and he probably saw the implications. Although they will admit that Western scholars can write with varying degrees of frankness, their Marxist philosophy does not permit the Chinese, any more than it does the Russians, to admit that there can be truly objective or impartial research in the social sciences - everyone must have a standpoint. Was Mr. Shao, while maintaining this axiom, suggesting that in some fields at least, commercial law among them, rational compromises with the enemy were possible?

Yours sincerely,

Anthony Roberts

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TABLE OF MEMBERSHIP OF THE ARBITRATION COMMISSIONS BY PROFESSIONS

Foreign Trade Arbitration Commission:

Foreign Trade Experts	4
Officials of the China Council for the Promotion of International Trade	3
Law Experts	2
Officials of the All-China Federation of Industry and Commerce	2
President of the Peking Foreign Trade Institute	1
Insurance Expert	1
Economist	1
Specialist in Commodity Inspection and Testing	1
Transportation Expert	1
Banking Expert	1

Maritime Arbitration Commission:

Transportation Experts	14
Captains in the Merchant Marine	5
Legal Experts	5
Foreign Trade Experts	2
Officials of the China Council for the Promotion of International Trade	1
Professor (subject unspecified)	1
Marine Engineer	1
Navigation Expert	1
Insurance Expert	1

The Secretary-General of the China Council for the Promotion of International Trade is a member of both Commissions, together with one of the lawyers and one of the transportation experts.