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A Comparison of Soviet and American Maritime Arbitration

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I. INTRODUCTION

Maritime arbitration has a long history both in the United States, where it dates from the late 19th century,[1] and in the Soviet Union, where the permanent arbitration body known as the Maritime Arbitration Commission (MAC or Commission) has existed since 1930.[2] Although both countries have similar procedures for maritime arbitration, the history, ideology, and commercial goals of each country have created systems that differ markedly in approach and style. The American experience has fostered an ad hoc system where the parties establish arbitration panels as disputes arise and where the parties have almost unlimited discretion in choosing arbitrators and rules. By contrast, the Soviet system has established a permanent arbitration body with a limited choice of arbitrators and rules. The contrast between two such differing systems can shed considerable light on each of them.

This Note will discuss the major aspects of Soviet maritime arbitration with reference to the relevant portions of the MAC's statute and Rules of Procedure. It will then consider American maritime arbitration with particular emphasis on arbitration in New York under the rules and

1. *See, e.g.*, Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 122 n.3 (1924). The Court refers to an 1885 charter party which contained an arbitration clause.

2. The original Statute on the Maritime Arbitration Commission was passed on December 13, 1930, and was amended in 1933, 1936, and again in 1960. *See* THE MERCHANT SHIPPING CODE OF THE USSR (1968) 123 (W. Butler & J. Quigley eds. 1970). This source contains an English translation of the Statute as amended in 1960.

procedures of the Society of Maritime Arbitrators (SMA or Society). Finally, this Note will compare and contrast the two systems of arbitration.

II. SOVIET MARITIME ARBITRATION

After the 1917 Revolution, the West shunned the Soviet Union both politically and commercially.[3] When trade did occur, the terms were favorable to the Western trading party and thus provided for arbitration in the West. The Soviets believed that fair hearings were not available in the West, but because the Soviet Union did not have a system of maritime arbitration, there was often no choice other than a Western forum. Often, disputes were resolved abroad even when both flags were Soviet and Soviet insurance covered the foreign cargo.[4] One Soviet author wrote that it became intolerable that "the interests of exclusively Soviet organizations were subjected to consideration in foreign arbitration."[5] Furthermore, the Soviets recognized that foreign businessmen would not deal with them if ordinary Soviet courts would hear their disputes. The Soviets, therefore, created the MAC in 1930 specifically to address domestic and foreign maritime disputes, and then created the Foreign Trade Arbitration Commission (FTAC)[6] in 1932 to address foreign trade disputes.

At first the MAC's jurisdiction reached only cases of salvage and assistance at sea.[7] The MAC's jurisdiction expanded over the years and by 1936 included most types of civil law disputes arising in the area of merchant shipping.[8] For many years, however, cases involving the salvage of ships constituted the majority of the MAC's docket.[9] Finally, in

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3. The following discussion is based in part upon J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 28 (1978).

4. Lebedev, *Maritime Arbitration in the USSR*, in 1971 SOVIET YEARBOOK OF INTERNATIONAL LAW 226, 227 (1971) (In Russian) [hereinafter Lebedev, YEARBOOK].

5. *Id.*

6. A translation of FTAC's statute is available in W. BUTLER, INTERNATIONAL COMMERCIAL ARBITRATION: SOVIET COMMERCIAL AND MARITIME ARBITRATION bklt. 2 at 12 (1982). The Soviet Union also has an extensive domestic arbitration system, *Gosarbitrazh*, which deals largely with disputes between domestic enterprises. *Gosarbitrazh* also resolves a significant number of maritime disputes between exclusively Soviet parties. Letter by Sergei Lebedev, Chairman of MAC, to author (Mar. 24, 1987).

7. Lebedev, YEARBOOK, *supra* note 4, at 227.

8. *Id.* at 228. In recent years, the docket has consisted of disputes involving the shipment of freight (about 40% of the case load), marine insurance (about 30% of the case load), assistance at sea and collisions at sea (about 20%), and another 10% of varied disputes. Lebedev, *50 years of Soviet Maritime Arbitration*, in 10 MERCHANT SHIPPING AND MARITIME LAW 4, 10 (USSR Chamber of Commerce, 1982) (In Russian).

9. Jarvis, *The Soviet Maritime Arbitration Commission: A Practitioner's Perspective*, 21 TEX. INT'L. L.J. 341, 347 (1986).

October 1980 the Supreme Soviet passed a new statute (Statute) effectively codifying the MAC's jurisdiction to include nearly all maritime disputes.[10] In January 1982 the Soviet Union's Chamber of Commerce and Industry issued new Rules of Procedure (Rules of Procedure or Rules) for proceedings before the MAC.[11] Thus, although the MAC is perhaps the oldest permanent arbitration institution in the world, its rules and procedures are among the most recent.

The MAC, like the Chamber of Commerce and Industry to which it is attached, is not an official part of the state bureaucracy of the Soviet Union. Rather, the MAC is a "social organization" (*obshchestvennaia organizatsia*) funded by arbitration fees rather than by state contributions, in a manner similar to Soviet trade unions or sports clubs.[12] The MAC reviews about 100 cases a year; in sixty to eighty-five percent of the cases a foreign party appears either as a claimant or a respondent.[13]

The new Rules of Procedure closely track the new MAC statute upon which it is based, and much of the language in the two documents is identical. Many of the rules and procedures thus find support in both the Statute and Rules.

The MAC is composed of twenty-five members, each of whom is elected to a four year term by the Presidium of the USSR Chamber of Commerce and Industry.[14] The Presidium invariably reelects the members when their terms expire.[15] The Statute and Rules dictate that the Presidium choose the members "from among persons who possess the necessary special knowledge in the domain of settlement of disputes accepted for consideration by the Commission."[16] In practice, according to the Chairman of the MAC, Sergei Lebedev, the members come from the fields of shipping, trading, insurance, and maritime law.[17] The members

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10. Polozhenie o Morskoi Arbitrazhnoi Kommissii Pri Torgovopromyshlennoi Palate SSSR [Statute on the Maritime Arbitration Commission Attached to the Chamber of Commerce and Industry of the USSR], *"Vedomosty"* of the USSR Supreme Soviet, 1980, No. 42, art. 868, No. 44 art. 914, *reprinted in* 7 Y.B. COM. ARB. 246, 249 & n.2 (1982). Another translation is available in W. BUTLER, *supra* note 6, bklt. 2 at 46 [hereinafter MAC Statute].

11. *Reprinted in* 8 Y.B. COM. ARB. 219 (1983). Also available in W. BUTLER, *supra* note 6, bklt. 2 at 50 [hereinafter MAC Rules].

12. Lebedev, YEARBOOK, *supra* note 4, at 228.

13. Lebedev, *USSR*, 2 I.C.C.A. INT'L HANDBOOK ON COM. ARB. 4-5 (P. Sanders ed. 1984) [hereinafter Lebedev, HANDBOOK].

14. MAC Statute, *supra* note 10, at § 3; MAC Rules, *supra* note 11, at § 2(1).

15. Lebedev, HANDBOOK, *supra* note 13, at 10.

16. MAC Statute, *supra* note 10, at § 3; MAC Rules, *supra* note 11, at § 2(1).

17. Lebedev, YEARBOOK, *supra* note 4, at 229. A recent list of members of the MAC shows that 17 of the 25 are lawyers by training. The other eight members are mostly

elect a chairman and two deputy-chairmen.[18]

The old statute and rules as amended in 1960 delineated specific types of disputes over which the MAC had jurisdiction, including salvage, collision, affreightment, towage, and similar disputes.[19] The new Statute and Rules expanded the official scope of the MAC's jurisdiction. In addition to the prior types of disputes, the MAC has jurisdiction over pilotage, scientific research, and the raising of ships.[20] Perhaps more important than the expanded jurisdiction over particular actions is a catch-all phrase providing that the MAC should resolve "disputes which arise from contractual or other civil law relations originating in merchant shipping."[21]

Consistent with universal arbitration practice, the MAC will hear disputes only if the parties have agreed to be bound by its rulings. The Statute and Rules provide two means for the parties to manifest their consent to be bound. First, the parties can submit a written agreement providing for MAC adjudication.[22] The written agreement may be in the form of a contract entered into prior to the dispute. For example, a standard procedure for *Ingosstrakh*, the Soviet insurance agency for foreigners, is to require that maritime disputes arising under its policies be submitted to the MAC.[23] Furthermore, prior to salvage operations, a Soviet salvor probably will require the owner of a distressed ship to sign a salvage agreement providing that the MAC resolve any possible disputes.[24] The parties may also sign the written agreement to arbitrate after the dispute has arisen. Second, in the absence of a written agreement, the parties can indicate consent to jurisdiction by their conduct. The complainant can manifest his consent to MAC jurisdiction by filing his complaint, and the defendant can manifest his consent by responding affirmatively to the Commission's inquiry concerning consent to jurisdic-

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administrators, five of whom also captains by training. See Appendix for a recent list of members and their professions.

18. MAC Statute, *supra* note 10, at § 3; MAC Rules, *supra* note 11, at § 2(3).

19. For a translation of the old statute see THE MERCHANT SHIPPING CODE OF THE USSR (1968), *supra* note 2, at 123 app. I. For a translation of the old rules, see *id.* at 126 app. II.

20. MAC Statute, *supra* note 10, at § 1; MAC Rules, *supra* note 11, at § 1.

21. MAC Statute, *supra* note 10, at § 1; MAC Rules, *supra* note 11, at § 1.

22. MAC Statute, *supra* note 10, at § 2; MAC Rules, *supra* note 11, at § 1(2).

23. ENCYCLOPEDIA OF SOVIET LAW 494 (F.J.M. Feldbrugge 2d. rev. ed. 1985).

24. *See, e.g.*, Chernogorsk v. Moschula, *reprinted in* W. BUTLER, *supra* note 6, bklt. 5 at 1. In that case the distressed Greek ship signed a MAC salvage form prior to salvage by a Soviet ship.

tion.[25] The combination of the MAC's recently expanded power to hear most maritime disputes and its recent rule allowing "jurisdiction by conduct" has greatly increased the MAC's potential jurisdiction and flexibility to hear maritime disputes.

According to the MAC rules, the arbitrators themselves decide the question of the MAC's jurisdiction to hear any given dispute.[26] For example, if a party relies on a contractual clause consenting to MAC jurisdiction, the arbitrators will examine the arbitration clause of the contract to see whether it confers jurisdiction on the MAC. Thus, if two parties disagree as to whether they previously agreed to arbitrate, or whether the MAC is the proper forum, the unwilling party will be forced to appear before the MAC.

When the dispute contains elements both of a maritime dispute and of a trade dispute a question may arise as to whether the MAC or the FTAC should hear the dispute. With respect to this overlap, Lebedev notes that the FTAC would probably hear a dispute between a maritime shipper and a receiver, although if both sides agreed, the MAC could hear it as well.[27]

The Rules stipulate that the MAC both locate in and hold its hearings in Moscow.[28] The arbitration panel, however, may hold sessions in another location if necessary.[29] Holding the proceedings in Moscow presents a number of logistical problems for Western parties, including travel and visa restrictions, currency restrictions, limited telex and telephone communications, and lack of good hotel space.[30] Furthermore, the pleadings and hearings are in Russian, which for most Westerners necessitates the additional expense of a translator. Nevertheless, Moscow is by far the best supplied and equipped city in the Soviet Union, thus

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25. MAC Statute, *supra* note 10, at § 2; MAC Rules, *supra* note 11, at § 1(2).

26. MAC Rules, *supra* note 11, at § 1(3).

27. Lebedev, *Some Aspects of the Practice of the Maritime Arbitration Commission*, in TOPICAL PROBLEMS OF MARITIME LAW 71, 72 (Soviet Association of Maritime Law, 1976) (In Russian) [hereinafter Lebedev, *Practice of the MAC*].

28. MAC Rules, *supra* note 11, at § 2.5. The address of the MAC is:

USSR Chamber of Commerce and Industry
Maritime Arbitration Commission
6 Kuibyshev Street
Moscow 103684, USSR
Telephone: 253-21-93
Telex: 411430 or 411126 SU TPP Arbitrage
Cable: MOSCOW TORGPROMPALATA ARBITRAGE

The FTAC's address, telephone, telex, and cable are the same.

29. MAC Rules, *supra* note 11, at § 2.5.

30. *See* Jarvis, *supra* note 9, at 357-59.

making arbitration more manageable there than in any other Soviet city.

A case is initiated before the MAC when the complainant files a petition to sue with the MAC. The petition must include the names and addresses of the parties, the plaintiff's demands, the signature of the plaintiff, the grounds for the MAC's jurisdiction, an account of the facts of the case and indication of the evidence, and the name of the requested arbitrator or a request that the MAC's chairman appoint one.[31]

Along with the petition to sue, the complainant must submit a document from the Soviet Union Bank for Foreign Trade in Moscow stating that the complainant has deposited an arbitration fee of two percent of the amount claimed in the suit.[32] The MAC's standard practice is to levy its costs of arbitration upon the party against whom the award had been made.[33] If the parties partially settle the claim, the MAC levies costs on the parties in proportion to the amounts awarded and rejected.[34] Furthermore, if the MAC's costs are less than two percent of the deposited amount, which is not unusual for cases involving large sums of money, the payor will receive the excess.[35] Finally, the MAC may award the prevailing party dispute-related expenses incurred up to five percent of the sum awarded or rejected.[36]

The parties are bound to execute the award voluntarily,[37] although a party may request that the MAC chairman establish an amount and form of security and order a decree imposing arrest of a vessel in a Soviet port until the judgment is paid.[38] In practice, a demand for security usually occurs when a foreign shipper refuses to supply security requested by a Soviet organization in salvage and collision cases.[39] Since it is virtually inconceivable that a Soviet organization would defy the order of the MAC to compensate a foreign party, the foreign party has little need to demand security from a Soviet organization.

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31. MAC Rules, *supra* note 11, at § 4(3). If a representative is filing suit on behalf of the party, the MAC requires a power of attorney or other document confirming representative capacity. *Id.*

32. *Id.* at § 4(4). *See also* MAC Statute, *supra* note 10, at § 10. The money is deposited to the account of the Chamber of Commerce and Industry of the USSR, NO. 60800047, in the same currency in which the damage claim is specified.

33. MAC Rules, *supra* note 11, at § 24(2).

34. *Id.*

35. Maslov, *Awards of the Maritime Arbitration Commission*, 6 GA. J. INT'L. & COMP. L. 529, 532 (1976). *See also* MAC Rules, *supra* note 11, at § 24(1).

36. MAC Rules, *supra* note 11, at § 24(3).

37. MAC Statute, *supra* note 10, at § 15; MAC Rules, *supra* note 11, at § 28(1).

38. MAC Statute, *supra* note 10, at § 9; MAC Rules, *supra* note 11, at § 3(4).

39. Lebedev, YEARBOOK, *supra* note 4, at 232. A bank guarantee or cash deposit will suffice as security.

The complainant must file all applications and annexes to applications at the MAC along with copies of the documents for the opposing side.[40] If the complainant fails to file one or more of the required documents with his petition, or fails to pay the required two percent fee, the MAC will notify him of such defect(s) and will allow him two months to correct the defect(s) before it dismisses the case.[41]

The Secretary of the MAC must notify the respondent of the impending suit and send him a copy of the petition if he has not already received one.[42] The respondent then has thirty days from receipt of the notification to submit his written answer and supporting documents.[43] However, even if the respondent does not answer, the MAC cannot issue a default judgment; rather, the MAC must judge the case on its merits.[44] Similar to proceedings in the West, the respondent may file a counterclaim.[45]

Generally, each party selects one arbitrator, and the two arbitrators must reach a unanimous decision regarding the matter.[46] Each side has the right to submit a written challenge opposing the other side's arbitrator to the chairman of the MAC, who then decides if the circumstances justify the challenge.[47] When the two arbitrators cannot agree on a decision, they choose a third, super-arbitrator, to make the final decision.[48] Furthermore, by mutual agreement, the parties may choose a single arbitrator to decide the dispute.[49] Electing this option entitles the parties to a thirty percent reduction in the fee.[50] Although neither the Statute nor the Rules so require, presently all MAC arbitrators are Soviet citizens.[51]

Both the Statute and the Rules mandate that the arbitrators be "independent and impartial" in their consideration of the case,[52] and the Rules further require them to weigh the evidence "according to their inner convictions."[53] Indeed, the Rules specifically forbid the arbitrators

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40. MAC Rules, *supra* note 11, at § 3(2).
41. *Id.* at § 4(5).
42. *Id.* at § 5(1).
43. *Id.* at § 5(2).
44. Lebedev, HANDBOOK, *supra* note 13, at 14.
45. MAC Rules, *supra* note 11, at § 11.
46. Lebedev, HANDBOOK, *supra* note 13, at 11-12.
47. MAC Rules, *supra* note 11, at § 7.
48. *Id.* at § 6(3). If the two arbitrators cannot agree on whom to choose as the third arbitrator, the Chairman of the MAC chooses him. *Id.* at § 6(5).
49. *Id.* at § 6(4).
50. Lebedev, HANDBOOK, *supra* note 13, at 7.
51. *Id.* at 10. *See infra* Appendix.
52. MAC Statute, *supra* note 10, at § 8; MAC Rules, *supra* note 11, at § 2(2).
53. MAC Rules, *supra* note 11, at § 12(5).

from acting as representatives of the parties[54] in the manner that many Western arbitrators are often assumed to act for the party who selects them.

The precise level of the MAC's independence from the Communist Party and the Soviet State is perhaps the major concern of Westerners appearing before the MAC. The general consensus among observers is that neither the MAC nor the FTAC has an inherent bias against Westerners.[55] The Westerners who do suspect that a bias against them exists rely on *Soviet-Israeli Oil Arbitration*, heard by the FTAC. These Westerners view this case as an example of the potential for Soviet state interference and abuse.[56] In that case the dispute arose out of a contract obligating a Soviet enterprise to ship oil to an Israeli company. In 1956, in retaliation for Israel's attack on the Suez, the Soviet government refused to issue the necessary export license for the oil. Without prior procedures, and in apparent violation of Soviet law,[57] the FTAC held that the denial of the license created a *force majeure*, thus making the contract impossible to perform. The FTAC, therefore, excused the Soviet party from performance. Western observers have severely criticized the award, and hope that the case was an isolated incident not likely to reoccur.

The MAC follows Soviet conflict of laws principles. Accordingly, it applies the law of the jurisdiction where the transaction occurred or where the contract was made,[58] which almost invariably results in the application of Soviet law. Furthermore, the MAC applies Soviet law in order to determine where the parties made the contract.[59] Because most

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54. *Id.* at § 2(2).

55. *See, e.g.*, Osakwe, *The Soviet Position on International Arbitration as a Method of Resolving Transnational Disputes*, in RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 184, 192 (T. Carbonneau ed. 1984). *See also* Jarvis, *supra* note 9, at 356. *But see* Chew, *A Procedural and Substantive Analysis of the Fairness of Chinese and Soviet Foreign Trade Arbitrations*, 21 TEX. INT'L. L.J. 291, 324-27 (1986), which suggests that the FTAC is indeed biased in favor of the Soviet party.

56. The award itself, known as Jordan Investments, Ltd. v. Vsesojuznoje Objedinenjije Sojuzneftexport of Moscow, is reprinted in 53 AM. J. INT'L. L. 800 (1959). The award was criticized severely in the West. For a sample of the criticism, see Berman, *Force Majeure and the Denial of an Export License Under Soviet Law: A Comment on Jordan Investments Ltd. v. Soiuzneftesport*, 73 HARV. L. REV. 1128 (1960); Domke, *The Israeli-Soviet Oil Arbitration*, 53 AM. J. INT'L L. 787 (1959).

57. *See* Berman, *supra* note 56, at 1143; Domke, *supra* note 56, at 789-90.

58. THE MERCHANT SHIPPING CODE OF THE USSR (1968), *supra* note 2, art. 14(11), at 43.

59. *Id.*

contracts with Soviet enterprises either are signed in the Soviet Union or stipulate that Soviet law will apply, consideration of foreign law is most unlikely.[60] In principle, however, the parties are free to specify that a law other than Soviet law will apply even if the parties signed the contract in the Soviet Union.[61] Finally, if any rules outlined in the Soviet Merchant Shipping Code or other Soviet statute conflict with a treaty to which the Soviet Union is a party, the rules of the international treaty prevail.[62]

Although the West has given virtually no attention to the issue of the period of limitations, Lebedev reports that the issue, in various aspects, has arisen "rather often" in cases conducted by the MAC.[63] According to the Merchant Shipping Code, the period of limitations for most types of disputes, including contracts of carriage, affreightment, towage, and demands for contribution, is only one year.[64] The Soviet Union, however, is a party to two conventions signed in Brussels in 1910, one of which

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60. *See supra* notes 23-24 and accompanying text.

61. THE MERCHANT SHIPPING CODE OF THE USSR (1968), *supra* note 2, art. 14(11), art. 15, at 43-44. *See also* Lebedev, *Application of Law by the Maritime Arbitration Commission in Settling Disputes*, 6 GA. J. INT'L. & COMP. L. 519, 524 (1976). Jarvis, however, reports on one case, *Varta v. Baltic S.S. Co.*, in which the parties explicitly incorporated the Hague Rules into the contract, but the MAC held that because the charter was fixed in Poland, the MAC would apply Polish law. *See* Jarvis, *supra* note 9, at 353; W. BUTLER, *supra* note 6, bklt. 6, at 82.

62. THE MERCHANT SHIPPING CODE OF THE USSR (1968), *supra* note 2, art. 17, at 44.

63. Lebedev, *Practice of the MAC*, *supra* note 27, at 74.

64. THE MERCHANT SHIPPING CODE OF THE USSR (1968), *supra* note 2, arts. 304-05, at 118. Article 305 of the Merchant Shipping code reads as follows:

> To the demands specified in sections 1-5 of the present Article, a one-year limitations period shall apply. This period shall be calculated as follows:
>
> (1) on demands deriving from a contract of carriage of goods in foreign commerce, from the day of delivery of the goods, and, if the goods were not delivered, from the day on which they were supposed to be delivered;
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> (2) on demands deriving from a contract of carriage of passengers and baggage in foreign commerce, from the day on which the vessel which performed the carriage arrived or was supposed to arrive at the port of destination;
>
> (3) on demands deriving from a contract of affreightment of a vessel for a time, from the day of the contract's termination;
>
> (4) on demands deriving from a contract of marine towage and from transactions concluded by the master by virtue of the rights granted him by law (Articles 50, 55, and 58 of the present Code), from the day the right to the suit arose;
>
> (5) on demands for contributions provided for by Article 257 of the present Code, from the day the respective amount is paid.
>
> To demands deriving from a contract of marine insurance, a two-year limitations period, calculated from the day the right to the suit arose, shall apply.

extends the period of limitations in salvage cases to two years,[65] and the other of which extends the period of limitations in collision cases to two years.[66] Because the provisions of a treaty supersede those of the Maritime Shipping Code,[67] the two year period of limitations applies to salvage and collision cases involving foreigners. A two year period of limitations also applies to marine insurance disputes.[68]

The MAC strictly construes the period of limitations. In one case, the respondent disputed the amount of the payment claimed by the complainant for the charter (*arenda*) of a ship but did not object to the passing of the period of limitations.[69] The MAC, however, noted that the applicable period of limitations had passed, and on its own initiative dismissed the case on this basis alone. In another case involving the collision between an East German trawler and a Soviet steamship, the East German trawler filed suit shortly before the period of limitations ran.[70] The Soviet respondent claimed innocence, but did not file a counterclaim until after the period of limitations had run. Although the MAC acknowledged the guilt of the claimant East German ship, it refused to award damages for the counterclaim because the period of limitations had run.

The MAC normally will not countenance an agreement by the parties to waive the period of limitations. When the parties in one case attempted to waive the statute of limitations, the MAC considered such an agreement a "judicial nullity."[71] In refusing to recognize the waiver, the MAC relied upon the Republic civil codes, including article 80 of the Civil Code of the Russian Republic, which stipulates that "[a] change in the period of limitations or in the manner of its calculation is not permitted."[72] Lebedev notes that such a strict construction of the period of limi-

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65. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Sept. 23, 1910, art. 10, 37 Stat. 1658, TS 576, *reprinted in* 6 BENEDICT ON ADMIRALTY § 4-2 (7th rev. ed. 1987). Both the United States and the Soviet Union are parties to the Convention.

66. International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Sept. 23, 1910, art. 7, *reprinted in* 6 BENEDICT ON ADMIRALTY § 3-11 (7th rev. ed. 1987). The relevant language reads, "Actions for the recovery of damages shall be barred after an interval of two years from the date of the casualty."

67. *See supra* note 62 and accompanying text.

68. THE MERCHANT SHIPPING CODE OF THE USSR (1968), supra note 6, art. 305, at 118, *reprinted in supra* note 64.

69. *See* Lebedev, *Practice of the MAC*, supra note 27, at 74.

70. *Id.* at 74-75.

71. *Id.* at 74.

72. *Id.*

tations is applied when the legal relationship itself (the contract) is subject to Soviet law, regardless of whether the parties have entered an agreement abroad to extend the period of limitations.[73] If the legal relationship itself, however, is subject to foreign law that permits the parties to extend the period of limitations, the Commission may recognize such an agreement.[74] In certain circumstances involving the application of Soviet law the MAC has recognized the parties' agreement to extend the period of limitations. The MAC, in recognizing such an agreement, however, has not done so as a "judicially valid act" but because of a factual circumstance which could only be removed by extension of the period of limitations.[75] The meaning of such limited recognition is not entirely clear, but it may allow for a mutual agreement to extend the period of limitations under extenuating circumstances.

At the proceeding itself, each side presents its case by introducing witnesses and any other relevant evidence. Each side has the opportunity to cross-examine opposing witnesses[76] and to present expert witnesses.[77] The MAC itself may also appoint an expert witness[78] whom the parties may examine. The parties may employ representatives, including foreigners, to present the case for them.[79] A party unfamiliar with the practice of the MAC almost certainly will want to employ the services of *Injurcollegia*, the arm of the Moscow bar which represents foreigners.[80] A representative of this body can give foreigners helpful advice regarding the MAC's procedures and the personal styles of the arbitrators.[81] Either party may request the MAC to close the hearing to the public. The Soviet party will almost always exercise that right.[82]

After the conclusion of the case, the MAC determines the award at a closed session.[83] In practice, one of the arbitrators, or the umpire if one

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73. *Id.*

74. *Id.*

75. *Id.*

76. *See* Lebedev, HANDBOOK, *supra* note 13, at 13.

77. *Id.*

78. MAC Rules, *supra* note 11, at § 12(1), (3). If the arbitration panel appoints an expert, his written opinion will be conveyed to the parties before the hearings. Lebedev, HANDBOOK, *supra* note 13, at 13.

79. MAC Statute, *supra* note 10, at § 11; MAC Rules, *supra* note 11, at § 3(1).

80. *See* Jarvis, *supra* note 9, at 358.

81. *Id.* The Moscow representative will charge an amount equivalent to that charged by a large Western firm. *Id.* at n.93.

82. Osakwe, *supra* note 55, at 187 n.6. *See also* MAC Rules, *supra* note 11, at § 9(1).

83. MAC Rules, *supra* note 11, at § 18.

was appointed, announces the decision orally to the parties.[84] Thus, the parties leave the arbitration knowing the outcome. Within 30 days of the session the MAC must send a written copy of a reasoned award to each party.[85]

In reviewing the case, the arbitrators may consider international treaties, the Merchant Shipping Code, other applicable statutes and regulations, and, on occasion, "good maritime practice"[86] or commercial custom.[87] The MAC's clear preference, however, is to place the primary emphasis on the legal, not commercial or equitable, aspects of a dispute. One Soviet writer has observed that "in all of its decisions [an international arbitration] must operate on the basis of law. It may neither depart from the law merely because such is demanded by commercial considerations nor decide the dispute solely on the basis of equity."[88] Because the Soviet Union does not have a common law tradition, judicial precedent and prior MAC decisions do not affect the decision.[89] As a result, on a few occasions different arbitration boards have made conflicting awards in similar cases.[90] The decision itself achieves legal force upon inscription by the MAC chairman.[91]

Either party may file an appeal with the Supreme Court of the Soviet Union[92] within thirty days of the rendering of the written award.[93] The Civil Chamber of the Supreme Court hears the appeals from the MAC. The Statute and Rules permit the Supreme Court to overturn a decision of the MAC only if it finds a material violation or incorrect application of prevailing laws.[94] If the Supreme Court overturns the decision, the

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84. Maslov, *supra* note 35, at 529.

85. MAC Rules, *supra* note 11, at § 20. The award itself consists of four parts. The first part contains the date and names of the parties and arbitrators. The second part contains a factual account of the dispute and evidence. The third part contains the reasons for the award, and the fourth part contains the judgment of who should pay what to whom. *Id.* at § 21.

86. Lebedev, YEARBOOK, *supra* note 4, at 237.

87. Osakwe, *supra* note 55, at 188.

88. L. LUNTS, MEZHDUNARODNYI GRAZHDANSKII PROTSESS [International Civil Procedure] 165 (1966), *quoted in* Osakwe, *supra* note 55, at 188. This preference for an outcome based on the law as opposed to equitable or commercial considerations is reflected in the fact that 17 of the 25 arbitrators as of March 1987 had a legal background.

89. Lebedev, *supra* note 61, at 523; Maslov, *supra* note 35, at 530.

90. Maslov, *supra* note 35, at 530.

91. MAC Rules, *supra* note 11, at § 28(2).

92. By contrast, FTAC awards are final and unappealable. W. BUTLER, *supra* note 6, bklt. 1 at 13 (FTAC Statute art. 9).

93. MAC Statute, *supra* note 10, at § 13; MAC Rules, *supra* note 11, at § 25.

94. MAC Statute, *supra* note 10, at § 13; MAC Rules, *supra* note 11, at § 26.

case is returned to the MAC for new consideration by different arbitrators.[95] Such appeals apparently are not attempted often, but can be successful. Between 1969 and 1973 the Civil Chamber of the Supreme Court heard thirty-four appeals from the decisions of the Commission and overturned sixteen of the decisions. Thus, the Civil Chamber overturned about six percent of the total number of MAC decisions rendered during this time period.[96] Professor Lebedev, however, reports that the "great majority" of challenges have been upheld by the Supreme Court.[97]

The Supreme Court will not automatically review a case appealed by one of the parties. Rather, the Court will hear an appeal only if the Procurator General (an official whose role is somewhere between a prosecutor and an ombudsman) or one of his deputies also protests the matter.[98] In effect, a government official must always support the appeal, which is a potential cause for concern to Western parties. The right of appeal, however, is not limited to parties. Although it rarely occurs,[99] the Procurator General or his deputies may also challenge an award.[100]

A final issue facing parties before the MAC (or the FTAC) is the enforceablity of its arbitral awards abroad, particularly in the United States. Although a Soviet or Eastern Bloc party will pay its award, if it loses, the question arises whether a Western party can challenge the enforceability of a MAC award in United States courts. Both the United States and the Soviet Union are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[101] which obligates the signatories to respect and enforce the arbitral awards made in other signatory countries. Article two of the Convention obligates the signatory states to recognize an agreement to arbitrate, and article three obligates the states to enforce a valid award.[102] On its face, then, the New York Convention would require a United States court to enforce a MAC award against a Western party.

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95. MAC Rules, *supra* note 11, at § 26.

96. G. VAN DEN BERG, THE SOVIET SYSTEM OF JUSTICE: FIGURES AND POLICY 170 (1985).

97. Lebedev, HANDBOOK, *supra* note 13, at 19-20.

98. *Id.*

99. *Id.*

100. MAC Statute, *supra* note 10, at § 13; MAC Rules, *supra* note 11, at § 25.

101. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 [hereinafter New York Convention]. The legislation pertaining to the enforcement of the Convention is available in 9 U.S.C. § 201-08 (1982).

102. New York Convention, *supra* note 101, at arts. 2, 3.

At least one United States court has held that an agreement to arbitrate before the FTAC is enforceable through its court. In *Amtorg Trading Corp. v. Camden Fibre Mills*,[103] the New York Court of Appeals held enforceable an arbitral clause which bound a Pennsylvania purchaser (Camden) to arbitrate before the FTAC any contract disputes with its Soviet seller (Amtorg). The court held that the American corporation "chose to do business . . . and to accept, as one of the conditions imposed, arbitration in Russia; it may not now ask the courts to relieve it of the contractual obligations it assumed."[104] The court did note, however, that statutory remedies were available to Camden if the arbitration in fact proved to be unfair.[105] Thus *Amtorg* merely held that an *agreement* to arbitrate in the Soviet Union was enforceable; it did not hold an actual *award* to be enforceable. Nevertheless, *Amtorg* establishes strong precedent supporting any Soviet party seeking to enforce a MAC (or FTAC) award in United States courts. Furthermore, the court decided the case prior to the negotiation of the New York Convention, a treaty which further strengthens the argument of a party seeking enforcement of a MAC award.

Nonetheless, a court reviewing the enforceability of a MAC or FTAC arbitration agreement or award must examine several issues.[106] First, the court must determine that the agreement to arbitrate was voluntary and not a contract of adhesion.[107] Because obtaining a contract with a Soviet firm that does not provide for Soviet arbitration is nearly impossible, a United States court could consider such an agreement to be an involuntary contract of adhesion and therefore unenforceable as a matter of public policy.[108] The success of this argument may depend to a great degree on the size and bargaining power of the Western party, i.e., a smaller, weaker party may be much more likely to prevail.

Second, the court may consider whether the MAC is indeed an arbitration panel. Arguably, the MAC is not an arbitration panel as defined in American terms, and, therefore, its awards need not be enforced as

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103. 304 N.Y. 519, 109 N.E.2d 606 (1952).

104. *Id.* at 521, 109 N.E.2d at 607.

105. *Id.* at 521-22, 109 N.E.2d at 608.

106. For a discussion of these issues and the enforceability of Socialist arbitral awards, see Orban, *The Challenge to the Enforcement of Socialist Arbitral Awards*, 17 VA. J. INT'L. L. 375 (1977).

107. *See* DOMKE ON COMMERCIAL ARBITRATION § 5:04 (Wilner rev. ed. 1986).

108. *See* Orban, supra note 106, at 379-80. Article 5(2)(b) of the New York Convention permits nonenforcement of a foreign arbitral award if the award is contrary to the public policy of the forum country.

arbitration awards according to the New York Convention.[109] If a United States court found the MAC to be in substance a court rather than an arbitral body, it might hold that the New York Convention's mandate to enforce arbitration awards is inapplicable. One basis for holding Soviet maritime arbitration to be in essence a court proceeding is that in stark contrast to American arbitration, the MAC is highly formal and institutionalized, and looks primarily to the law for guidance in dispute resolution.[110] In fact, several observers liken Socialist arbitration proceedings to Western European commercial courts.[111]

III. AMERICAN MARITIME ARBITRATION

The federal policy of the United States strongly favors arbitration.[112] Observers cite the following advantages of arbitration: avoiding the expense of litigation;[113] resolving disputes quickly;[114] resolving disputes with commercial principles in mind[115] without being bound by rules of law;[116] having the input, guidance and the technical sophistication of an expert in the field;[117] and retaining flexibility for the parties.[118] For these reasons, arbitration has largely replaced litigation in many areas of admiralty law, most notably in charter party[119] disputes.[120] The major

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109. *See* Orban, *supra* note 106, at 380-84.

110. *See infra* notes 214-31 and accompanying text.

111. Orban, *supra* note 106, at 383; J. LEW, *supra* note 3, at 30.

112. Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968).

113. *See, e.g.*, Zubrod, *Arbitration from the Arbitrator's Point of View*, 49 TUL. L. REV. 1054, 1056 (1975).

114. *Id.* When compelling circumstances exist, arbitration panels can be formed, briefed, and produce conclusions within twenty-four hours. Zubrod, *Maritime Arbitration in New York*, 39 ARB. J. 16, 21 (DEC. 1984). *But see* Jarvis, *The Problem of Post-Hearing Delay in Maritime Arbitrations: "When Did You Say We Would Receive the Arbitrators' Award?"*, 9 MD. J. OF INT'L L. & TRADE 19 (1985). Jarvis argues that maritime arbitration is plagued with delay because no limit exists on the time arbitrators have to render the decision and because they render long written decisions.

115. Osakwe, *supra* note 55, at 187.

116. Orban, *supra* note 106, at 377.

117. Feinberg, *Maritime Arbitration and the Federal Courts*, 5 FORDHAM INT'L L. J. 245, 246 (1982).

118. *Id.* at 245-46.

119. A charter party is a contract for the use of a ship, usually for a specified time or a voyage. It is in effect an agreement to rent a ship. *See* G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY 193-97 (2d ed. 1975).

120. 2 BENEDICT ON ADMIRALTY, *supra* note 65, at § 109. *See also* Halcoussis Shipping Ltd. v. Gonzales Corp., 1977 A.M.C. 1658, 1662 (S.D.N.Y. 1977) (Gotley, D.J.), in which the court noted that "ship charters almost invariably contain provisions for submitting disputes to arbitration . . . [I]t was and is the custom of the ship brokerage

exception to the extensive use of arbitration involves personal injury and wrongful death suits initiated by seamen and other marine workers.[121] This exception exists because a series of federal statutes, including the Jones Act,[122] the Death on the High Seas Act,[123] and the Longshoremens' and Harborworkers' Compensation Act[124] create statutory rights to a jury trial. Most plaintiffs exercise their right to a jury trial because of the perception that jurors will award higher damages than arbitrators.[125] In addition, parties arbitrate few salvage awards in New York[126] in part because London arbitration dominates the field.[127]

A. *The Federal Arbitration Act*

Prior to the Federal Arbitration Act[128] courts routinely refused to enforce arbitration awards or agreements to arbitrate.[129] In 1925 Congress enacted the Federal Arbitration Act (Act)[130] primarily in order to require courts to enforce maritime arbitration awards. By its terms, any written agreement or provision in a contract that shows an intent to settle disputes by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[131] The Act has had the intended effect of reducing enormously the amount of admiralty litigation.[132]

Sections three and four of the Act contain the most important provisions. Section three provides that if a suit brought in court is referable to arbitration under a valid arbitration agreement, any party to such a suit may apply for a stay of the court proceeding until the arbitration is conducted.[133] Section four of the Act grants a party to a valid arbitration agreement the right to bring suit in federal district court for an order compelling an unwilling party to proceed to arbitration.[134] The courts

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business to include some arbitration clause in each charter."

121. *See* Jarvis, *supra* note 114, at 34.
122. 46 U.S.C. § 688 (1982).
123. *Id.* at §§ 761-68.
124. 33 U.S.C. §§ 901-50 (1982).
125. *See* Jarvis, *supra* note 114, at 34 n.77.
126. DOMKE ON COMMERCIAL ARBITRATION, *supra* note 107, at § 13:10.
127. *See* Jarvis, *supra* note 114, at 32 n.63.
128. 9 U.S.C. §§ 1-14 (1982).
129. Baur, *Maritime Arbitration in New York,* 8 INT'L. BUS. LAW. 306, 306 (1980).
130. *See supra* note 128.
131. 9 U.S.C. § 2 (1982).
132. 2 BENEDICT ON ADMIRALTY, *supra* note 65, at § 104.
133. 9 U.S.C. at § 3 (1982).
134. *Id.* at § 4.

have held that it is for the courts, not the arbitration panel, to decide whether a valid arbitration agreement exists.[135] A court's decision as to the arbitration agreement's validity is final; thus, the arbitrators may not disregard the court's decision on the matter. A party wishing to object to arbitration must raise such an objection in response to a petition to compel arbitration and not after the award in a hearing to confirm or vacate the award.[136]

The Act also provides courts with considerable power to intervene in the arbitration process when necessary. Section five provides that, when no contrary provision exists in the arbitration agreement and when a party for some reason fails to select an arbitrator, the court may designate an arbitrator or umpire.[137] Section eight authorizes a federal court to seize a vessel as security according to its usual proceedings, to direct the parties to proceed with arbitration and to retain jurisdiction to enter its own decree upon the arbitrator's award.[138] Section nine of the Act provides that if the parties have agreed that a judgment of the court shall be entered confirming the arbitration award, any party may apply within one year for such a court order. The court must issue the order unless the award has been vacated, modified or corrected as provided in sections ten and eleven of the Act.[139] In practice, however, courts are rarely called upon to confirm awards because the parties abide by them.[140]

Section ten of the Act provides for the vacating of arbitral awards

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135. Cobec Brazilian Trading & Warehousing Corp. v. Isbrandtsen, 1982 A.M.C. 1355, 1356 (S.D.N.Y. 1980) (Motley, D.J.). Indeed, section four of the Act says in part, "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4 (1982). Section three provides for a stay of arbitration only when the court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration under [the parties'] agreement." 9 U.S.C. § 3 (1982).

136. *Cobec*, 1982 A.M.C. at 1356; 2 BENEDICT ON ADMIRALTY, *supra* note 65, at § 105.

137. 9 U.S.C. § 5 (1982).

138. *Id.* at § 8.

139. *Id.* at § 9. One case, Varley v. Tarrytown Assocs., Inc., 477 F.2d 208 (2d Cir. 1973), held that the language of the statute dictates that a court only confirm an agreement when the agreement specifically provides for judicial confirmation. *Id.* at 210. A year later in I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424 (2d Cir. 1974), however, the same court held that an agreement providing that the arbitrators' decision be *final* could be confirmed by a federal court because the parties could not have contemplated further litigation. *Id.* at 427. *See* Sommer, *Maritime Arbitration—Some of the Legal Aspects*, 49 TUL. L. REV. 1035, 1052 (1975).

140. Sommer, *supra* note 139, at 1051.

under certain circumstances. The grounds for overturning an award include: corruption or fraud; evident partiality of the arbitrators; arbitrator misconduct in refusing to postpone a hearing upon sufficient cause or in refusing to hear relevant evidence; and the arbitrators' exceeding their powers.[141] Although the statute does not so provide, courts have assumed that one additional ground for overturning an award would be "manifest disregard" for the law. The Supreme Court implied the existence of this additional ground in *Wilko v. Swan*,[142] and a number of other courts have relied on this language.[143] Few courts, if any, however, actually have overturned the award of an arbitration panel because of its "manifest disregard" for the law. One court held that as long as an award is "not irrational," it will not overturn an award for "errors of fact or law or a misinterpretation of a contract where the arbitrators have not gone beyond the scope of the submission."[144] Nor will a court overturn an award when the arbitrators have made a clearly erroneous interpretation of the law.[145] Underlying the courts' deference toward arbitral awards is the strong federal policy in favor of arbitration.[146] This policy of refusing to overturn arbitral awards has led one observer to conclude that "it is so rare that an award is upset that it can safely be said that in the United States, there is in fact no meaningful judicial review of the arbitrators' work."[147]

Section eleven of the Act entitles the courts to modify or correct an award under three circumstances: (1) when there is evident material miscalculation of numbers or an item referred to; (2) when the arbitrators make an award on a matter not submitted to them; and (3) when the matter is imperfect in a way that does not affect the merits of the controversy.[148]

The Act gives arbitration panels considerable power to act in a judicial manner in order to further the arbitration process. Section seven gives the panel the authority to summon witnesses and in effect to sub-

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141. 9 U.S.C. § 10 (1982).

142. 346 U.S. 427, 436-37 (1953). *See generally* Kimball, *Vacating Maritime Arbitration Awards: Is It Really Possible?*, 13 J. MAR. L. & COM. 71, 85-88 (1981).

143. *See, e.g., I/S Stavborg*, 500 F.2d at 430 & n.12; Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d. Cir. 1972).

144. Telfair Shipping Corp. v. Instituto Rio Grandense Do Arroz, 1978 A.M.C. 1120, 1123 (S.D.N.Y. 1978) (Ward, D.J).

145. *I/S Stavborg*, 500 F.2d at 432.

146. Kimball, *supra* note 142, at 71.

147. Baur, *supra* note 129, at 309.

148. 9 U.S.C. § 11 (1982).

poena documents.[149] If any witness should refuse to attend the hearings, the arbitration panel may petition a federal district judge for an order compelling attendance or citing the reticent person for contempt.[150]

The question has arisen in several cases whether an arbitration panel may award attorneys' fees absent a specific provision in the parties' agreement permitting such an award. Several recent cases have held that arbitrators exceed their authority by awarding attorneys' fees without the express consent of the parties.[151]

A final issue is whether, under the Act, a court may award punitive damages to a party for reprehensible conduct. Nothing in the Act forbids the award of punitive damages, and a number of non-maritime cases indicate that such awards would be upheld.[152] Furthermore, one author argues that it is appropriate to award punitive damages in maritime disputes for reprehensible conduct, because it enables the wronged party to collect the full amount of relief it would otherwise receive if an action had been brought in court.[153] Although the argument may seem sensible, the SMA has refused to award punitive damages thus far. If a panel does award punitive damages, however, the losing party is likely to challenge the award as exceeding the scope of the arbitrators' authority under section one of the Federal Arbitration Act, which, in defining the arbitrators' authority, nowhere mentions the power to award punitive damages.

B. *Arbitration Procedures*

The Society of Maritime Arbitrators (SMA) in New York has issued the most influential set of rules and procedures for American maritime arbitration. In 1963 nine maritime arbitrators founded the Society, and it since has grown to an organization of some 120 members. The SMA conducts annual seminars for arbitrators, provides a roster of qualified arbitrators to interested parties, and prints a set of rules loosely based on the American Arbitration Association's rules. Parties can choose whether

149. *Id.* at § 7.

150. *Id.*

151. Sammi Line Co. v. Altamar Navegacion S.A., 605 F. Supp. 72, 73-74 (S.D.N.Y. 1985); Transvenezuelian Shipping Co., S.A. v. Czarnikow-Rionda Co., 1982 A.M.C. 1458 (S.D.N.Y. 1982) (Carter, D.J.).

152. Willis V. Shearson/American Express, 569 F. Supp. 821 (M.D.N.C. 1983); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984).

153. *See generally* Raymos, *Punitive Damage Awards in Maritime Arbitration: A Legitimate Part of the Arbitrator's Arsenal?*, 10 MAR. LAW. 251 (1985).

or not to use the arbitrator roster in selecting their arbitrators, and can also choose whether or not to use the SMA rules. The SMA does not designate the parties' arbitrators or administer arbitration proceedings in any way, but merely provides suggested arbitrators and procedures. Parties usually decide at the outset of the hearings whether to follow the SMA rules, although some contracts may contain such a provision in the arbitration clause.[154]

The vast majority of the world's maritime arbitration is conducted in London and New York. Accordingly, the majority of SMA members reside in the New York area, and the Society's rules specify that unless the parties agree otherwise the arbitration be held in New York.[155] The following discussion, therefore, will focus on the SMA procedures and on arbitration as practiced in New York and will examine the procedures from the acquisition of jurisdiction to the awarding of damages and costs.

An arbitration panel obtains jurisdiction over a dispute only when the parties have consented in writing to the jurisdiction.[156] Consent to jurisdiction is generally found in an arbitration clause in a charter party,[157] bill of lading, or, less frequently, in an agreement to have an existing dispute heard before a certain panel of arbitrators.

Most charter parties impose no particular qualifications upon the arbitrators other than that they be "commercial men."[158] There is widespread agreement that the term "commercial men" excludes lawyers[159] (unless they are no longer practicing law), but beyond that the term is not exactly clear. The rationale for excluding lawyers is that lawyers

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154. Baur, *supra* note 129, at 307.

155. Society of Maritime Arbitrators, Inc., Rules for Arbitration Procedures § 6 (1983) [hereinafter SMA Rules].

156. 9 U.S.C. § 2 (1982).

157. There are dozens of charter party forms in use and, in addition, many industries have developed their own. The most widely used form for charters is the New York Produce Exchange (NYPE), which first appeared in 1913, was revised in 1946, and again in 1981. The New York Produce Exchange itself was disbanded sometime in the late 1960s or early 1970s, but its charter party form still exists. *See* Healy, *Commentary on 1981 Revision of the New York Produce Exchange Form Time Charter*, 13 J. MAR. L. & COM. 521 (1982). The NYPE Arbitration Clause, which is typical, reads, "Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men." Government of the Republic of Korea v. New York Navigation Co., 469 F.2d 377, 378 n.1 (2d Cir. 1972).

158. *See, e.g., supra* note 157.

159. *See, e.g.*, Baur, *supra* note 129, at 307.

would not understand many of the technicalities of the business, would unnecessarily delay the proceedings, and would decide issues in a "legalistic" way without regard for commercial values.[160]

The SMA rules provide that an arbitration proceeding commences when one party serves written notice of a demand to arbitrate upon another party.[161] Provided that the respondent does not contest the issue of whether he has agreed to arbitrate, each party selects one arbitrator,[162] usually from the list of SMA arbitrators. The rules contemplate that the arbitrators selected by the parties will be impartial.[163] Most parties, however, assume that each party will select an arbitrator predisposed to his own side.[164] If a party fails to select an arbitrator, a federal court can do so for him.[165]

The two arbitrators then select a third arbitrator, or umpire, who presumably is absolutely impartial.[166] The two arbitrators choose the third arbitrator in the utmost of confidence, and any consultation of the matter between the arbitrators and the parties is at the least unethical, and could in fact invalidate the arbitration.[167] The third arbitrator acts as the chairman and has responsibility for administering the arbitration.[168]

One characteristic of New York (and London) arbitration is that a small number of arbitrators do the majority of the work.[169] In 1984, although the Society had over 120 members, thirteen arbitrators occupied

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160. *See* Iwasaki, *A Survey of Maritime Arbitration in New York*, 15 J. MAR. L. & COM. 69, 72-73 (1984).

161. SMA Rules, *supra* note 155, at § 5. It is possible to have more than two parties in an arbitration, and indeed such "consolidated arbitrations" are becoming more common. In New York, arbitrations may be consolidated provided there is a common question of law or fact, if there is a risk of inconsistent results and to do so would not result in prejudice to any of the parties. *See* Miller, *Consolidated Arbitrations in New York Maritime Disputes,* 14 INT'L. BUS. LAW. 58, 61 (1986). The situation often arises when a charterer subcharters to a third party. *Id.*

162. SMA Rules, *supra* note 155, at § 9.

163. *See id.* at §§ 7, 8.

164. Baur, *supra* note 129, at 307; Iwasaki, *supra* note 160, at 70. One observer reports that "[i]ndeed, there are arbitrators today who are almost always appointed either by Owners or by Charterers, because their sympathies are thought to lie in one direction or the other." Jarvis, *supra* note 114, at 45.

165. SMA Rules, *supra* note 155, at § 9; 9 U.S.C. § 5 (1982).

166. *See* SMA Rules, *supra* note 155, at § 10. *See* Baur, *supra* note 129, at 307, who writes, "it is generally expected that the only truly neutral man will be the third arbitrator or umpire. . . ."

167. Zubrod, *supra* note 113, at 1059.

168. Jarvis, *supra* note 114, at 26.

169. *See* Iwasaki, *supra* note 160, at 71; Jarvis, *supra* note 114, at 35 n.79.

over sixty percent of the possible arbitrators' positions.[170] Such a high level of arbitrator concentration among a few arbitrators inevitably leads to delay in arbitration proceedings.

Prior to the first hearing, the parties traditionally prepare a "submission agreement" to present to the arbitrators. The submission agreement focuses on and defines the issues. Normally it will include: the names of the principals; the vessel involved; the date of the charter party; the agreed upon facts of the dispute; the amount of damages claimed; a counterclaim, if any; and an express agreement to submit the dispute to the arbitrators named therein.[171]

Because the arbitrators and parties usually hold full-time jobs, the hearings are often held after normal work hours and for a few hours at a time. Generally, both parties are represented by counsel. The initial hearings normally are held in the office of the law firm representing the claimant, and any subsequent hearings are held in the office of the attorney scheduled to present either witnesses or evidence.[172] A stenographer keeps a record of the proceedings.[173]

An arbitration hearing usually begins with the arbitrators' on-the-record statement of their relationship, if any, with the parties to the dispute[174] in order to expose any possible conflicts of interest. Because the parties seek arbitrators with extensive experience, contacts, and involvement in the maritime industry, the arbitrators are likely to have had some contact with the parties or their lawyers.[175] The parties make any formal demands for discovery at the first hearing, although the attorneys often cooperate in the exchange of documents before the initial hearing.[176] Each attorney then makes an opening statement regarding his client's position.[177]

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170. *See* Jarvis, *supra* note 114, at 35 n.79.

171. Zubrod, *supra* note 113, at 1060.

172. *Id.*

173. SMA Rules, *supra* note 155, at § 14.

174. *Id.* at § 8. This step is necessary to ensure impartiality, and because the Federal Arbitration Act, 9 U.S.C. § 10, allows a court to overturn an award for "evident partiality." The Supreme Court, in a non-maritime case, vacated an award for failure to disclose repeated and significant prior dealings with one of the parties, which created an "appearance of bias." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968). It appears, however, that as long as the arbitrators disclose any dealings, a demand to vacate will have to prove "evident partiality" (the Statute's requirement), not merely appearance of bias, in order to succeed. International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981).

175. *International Produce*, 638 F.2d at 551-52.

176. SMA Rules, *supra* note 155, at § 20; Baur, *supra* note 129, at 308.

177. SMA Rules, *supra* note 155, at § 20.

Finally, the primary purpose of the first hearing is to allow the claimant to present witnesses and introduce other evidence to support his case. The parties may offer any evidence without regard for the legal rules of evidence.[178] Because one of the grounds upon which a court may overturn an arbitral award under the Federal Arbitration Act is the arbitrators' refusal to hear competent evidence,[179] arbitrators are most unwilling to refuse to hear evidence and are inclined to receive into evidence nearly anything "for what it is worth."[180]

At the conclusion of the hearings, the parties usually supply closing and reply briefs to the arbitrators.[181] The arbitrators review the evidence individually and meet to discuss the case.[182] When the arbitrators have reached a decision, the umpire usually drafts the opinion which he then circulates between the other two arbitrators.[183] When three arbitrators hear the case, a majority of them must concur in the judgment.[184] A dissenter may write his own opinion. The arbitrators must write and sign the award.[185] The SMA Rules require that the arbitrators "render the Award as expeditiously as reasonably possible in light of all the circumstances of the case."[186] In stark contrast to the purported goal of issuing arbitration awards quickly, at least one observer opines that arbitrators in practice render the awards much too slowly.[187]

The arbitrators refer to a number of sources for guidance on their decision. In addition to the applicable statutory and common law, the arbitrators review customary commercial practice.[188] Although more than 2000 SMA decisions are on LEXIS, officially the decisions have no precedential value[189] and play no role in the arbitrators' decisions. Nonetheless, many attorneys are convinced that prior SMA decisions do indeed sway arbitration panels.[190]

The arbitrators themselves determine their fee, and under the SMA

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178. *Id.* at §§ 20, 22.

179. 9 U.S.C. § 10(c) (1982).

180. Healy, *An Introduction to the Federal Arbitration Act,* 13 J. MAR. L. & COM. 223, 233 (1982).

181. *See* SMA Rules, *supra* note 155, at § 24 (1982).

182. Zubrod, *supra* note 113, at 1062.

183. Zubrod, *supra* note 114, at 19.

184. SMA Rules, *supra* note 155, at § 19.

185. *Id.* at § 28.

186. *Id.* at § 27.

187. *See generally Jarvis, supra* note 114.

188. Wodehouse, *New York Arbitration as Seen by a Londoner,* 1986 LLOYD'S MAR. & COM. L.Q. 43, 50 (1986).

189. Jarvis, *supra* note 114, at 40 & n.95.

190. Iwasaki, *supra* note 160, at 84.

Rules must consider the "complexity and urgency of the subject matter and the time spent."[191] Fees generally range from a few hundred dollars in a very simple matter to over $20,000 per party in a complex matter involving millions of dollars and many hearings.[192] In addition to any award assessed against it, each party pays the travel and other expenses of any witnesses it produces, and the expenses of the arbitrator it appointed.[193] The expenses of the third arbitrator and the costs of the proceedings are split between the parties.[194] The arbitrators do not have the authority to award attorney fees.[195]

Ordinarily, the arbitrators, not the courts, decide whether equitable principles such as passing of the Statute of Limitations bar a claim.[196] For example, the Carriage of Goods by Sea Act (COGSA)[197] provides for a one year period of limitations.[198] Although the arbitrators are not bound to apply this one year period of limitations, most do so on the grounds that applying the applicable period of limitations in arbitration proceedings will discourage dilatory suits and create a consistent and predictable body of law.[199]

IV. THE COMPARISON

Superficially, maritime arbitration in the Soviet Union and the United States (as practiced by the SMA) are quite similar, especially in their procedural aspects. In each country, arbitration provides the disputants an out-of-court opportunity to present supporting witnesses and evidence and to challenge opposing witnesses and evidence in order to win an award. In each country jurisdiction is in principle consensual and is usually the result of an express agreement consenting to arbitration[200] (or occasionally in the Soviet Union the result of "jurisdiction by con-

191. SMA Rules, *supra* note 155, at § 37. The SMA does not, however, publish information regarding the fees charged by their members.

192. Baur, *supra* note 129, at 308. *See also* Jarvis, *supra* note 114, at 38 n.86.

193. SMA Rules, *supra* note 155, at § 36.

194. *See id.*

195. *See supra* note 151 and accompanying text.

196. Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568, 571 (2d Cir. 1972) (holding that barring prejudice to the parties, the arbitrators decide the issue); *Government of the Republic of Korea*, 469 F.2d at 380.

197. 46 U.S.C. §§ 1300-15 (1982).

198. *Id.* at § 1303(6).

199. Chevron Chem. Int'l, Inc. v. Bowoon Shipping Co., No. 2299 (Oct. 20, 1982) (LEXIS Admiralty Library).

200. *See supra* notes 22-24, 156-57 and accompanying text.

duct").[201] The parties in each country normally compile a stenographic record of the arbitration for use in an appeal to a judicial court.[202] The arbitrators issue written reasoned awards that set forth facts and conclusions.[203] The arbitrators set their own fees and allocate expenses between the parties.[204] A small number of arbitrators—approximately twenty-five in the Soviet Union and a dozen in the United States—dominate the field.[205]

These similarities are attended by a number of minor procedural differences. The MAC usually employs two arbitrators instead of three.[206] The MAC issues an oral award shortly after the last proceeding, and a written award within thirty days,[207] while the SMA arbitrators issue their awards "in a timely fashion"[208]—which in practice is often far from timely. The MAC normally assesses costs against the losing party,[209] while the SMA normally splits the costs among the parties.[210] The MAC may award attorneys' fees,[211] while American arbitrators do not have this authority.[212] Finally, Soviet arbitration is probably less expensive than American arbitration.[213] Thus, it appears that the Soviets have achieved two of the primary goals of arbitration—speed and economy—more effectively than the Americans.

Beyond the superficial procedural similarities and differences, however, there are striking contrasts found in the concepts underlying Soviet and American arbitration. First is the role of the state in the arbitration proceedings. This difference manifests itself in the respective arbitration statutes and rules. The Soviet state *created* the MAC by statute,[214] and the statute provides many of the rules that the MAC applies. The Soviet Chamber of Commerce and Industry, which issued the MAC's Rules of Procedure, is subject to the will of the state, even though it is a "social organization"[215] and not a state organization. By contrast, the American

201. *See supra* note 25 and accompanying text.
202. *See supra* note 173 and accompanying text.
203. *See supra* notes 85, 185 and accompanying text.
204. *See supra* notes 32-36, 191-95 and accompanying text.
205. *See supra* notes 14, 169-70 and accompanying text.
206. *See supra* notes 46, 166 and accompanying text.
207. *See supra* note 85 and accompanying text.
208. *See supra* note 186 and accompanying text.
209. *See supra* notes 33-35 and accompanying text.
210. *See supra* notes 193-94 and accompanying text.
211. *See supra* note 36 and accompanying text.
212. *See supra* note 151 and accompanying text.
213. *See* Jarvis, *supra* note 9, at 359.
214. *See supra* note 10 and accompanying text.
215. *See supra* note 12 and accompanying text.

Federal Arbitration Act merely serves to ensure enforcement of the arbitration agreements and subsequent awards instituted by private parties.[216] Another manifestation of the influence of the Soviet State over Soviet arbitration is the role of the Procurator General, who must approve any appeal before a party may pursue it[217] and who may pursue an appeal in his own right.[218]

A second significant difference between Soviet maritime arbitration and American maritime arbitration is the institutional and formal approach of Soviet arbitration as opposed to the ad hoc and informal approach of American arbitration. The MAC is a permanent statutory body with its own set of mandatory rules and is the exclusive forum for maritime arbitration in the Soviet Union. By contrast, the SMA is a loose professional association whose rules are not mandatory with respect to parties and arbitrators. Furthermore, the SMA is not the exclusive forum for American maritime arbitration.

The difference in approach is largely a consequence of the differing goals of the two arbitration systems. The Soviets desire a system of arbitration that looks to their law and not to some ill-defined notions of (Western) commercial custom and equity.[219] The Soviets' emphasis on applying predominantly Soviet law as opposed to custom and equity provides predictability, ensures that the outcomes will be ideologically acceptable, and helps foster a feeling in the West that the awards are impartial. The use of a permanent arbitral institution has helped the Soviets achieve these goals. By contrast, the American goal is to provide a speedy, inexpensive decision without all of the legal technicalities and perceived inconvenience of a lawsuit.[220] The ad hoc approach has proved the most effective way to avoid the complications and expense of a lawsuit.

As the preceding discussion suggests, in contrast to American arbitration, Soviet maritime arbitration is in reality a hybrid of arbitration and court proceedings. Whether or not the MAC is in substance a court or an arbitration institution could become important if a party attempts to enforce its MAC award in a United States court because the New York Convention only obligates signatories to enforce *arbitral* awards.[221] Thus, the question becomes to what degree is the MAC a court, and to

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216. *See supra* note 130 and accompanying text.
217. *See supra* note 98 and accompanying text.
218. *See supra* notes 99-100 and accompanying text.
219. *See supra* notes 86-89 and accompanying text.
220. *See supra* notes 113-16 and accompanying text.
221. *See supra* notes 101-02 and accompanying text.

what degree is it an arbitration institution?

At a minimum, the MAC fulfills many of the functions which American courts traditionally fulfill. First, similar to a court and unlike American arbitration, Soviet arbitration places primary emphasis on correctly interpreting and applying the law.[222] The only ground for overturning an award in the Soviet system is a "material violation or incorrect application of the prevailing law."[223] By contrast, an American court will allow an arbitration ruling to stand even if there has been a clear error of law[224] and will overturn a decision only for "manifest disregard" of the law.[225] Second, if a dispute arises in the United States as to whether the parties agreed to arbitration, a federal court decides the issue.[226] In the Soviet Union, however, the arbitration panel itself decides this issue.[227] Third, in the United States if a party fails to select an arbitrator, a federal court may make the selection.[228] In the Soviet Union the chairman of the MAC is empowered to select arbitrators.[229] Last, an arbitral proceeding in the United States achieves legal force when a federal court confirms it,[230] while a Soviet award achieves legal force when the Chairman of the MAC signs it.[231]

Soviet arbitration, however, retains many of the essential elements of American arbitration. First, jurisdiction is in principle consensual, and the parties must agree to be bound by MAC arbitration before the MAC can acquire jurisdiction.[232] A small company with little practical bargaining power may challenge an agreement to arbitrate when it in effect signed an adhesion contract with obligatory arbitration.[233] Second, the arbitration process is wholly outside the official judicial structure. The sole exception to this is the appeals process,[234] which is analogous to the American procedure of judicial confirmation. Third, the arbitrators are not professional judges, but are, like their American counterparts, ex-

222. *See supra* note 88 and accompanying text.
223. *See supra* note 94 and accompanying text.
224. *See supra* notes 142-47 and accompanying text.
225. *See supra* notes 142-43 and accompanying text.
226. *See supra* note 135 and accompanying text.
227. *See supra* note 26 and accompanying text.
228. *See supra* note 137 and accompanying text.
229. *See supra* note 31 and accompanying text.
230. *See supra* notes 139-40 and accompanying text.
231. *See supra* note 91 and accompanying text.
232. *See supra* notes 22-25 and accompanying text.
233. *See supra* notes 107-08 and accompanying text.
234. *See supra* notes 92-93 and accompanying text.

perts in the field.[235] Finally, similar to the members of the SMA, the MAC members do not receive contributions from the state; rather the arbitrators set their own fees.[236]

The American arbitration system, like its Soviet counterpart, also performs certain judicial functions. As a court might, the American arbitrators may compel witnesses to attend hearings and to produce documents, although the panel may require the court's assistance.[237] Nothing in the Soviet Statute or Rules of Procedure, however, authorizes the MAC to compel witness attendence or the production of evidence. Thus, it is not the case that American arbitration is "pure" arbitration or that only Soviet arbitration bears a resemblance to judicial proceedings.

Although Soviet maritime arbitration is very institutional and in many ways does not resemble American arbitration, it sufficiently resembles the process of arbitration, with adaptations to achieve Soviet goals, for an American court to enforce its awards.

V. CONCLUSION

The American experience has fostered an ad hoc system allowing the parties to establish panels as disputes arise and to choose arbitrators and rules they employ with nearly unlimited discretion. This may reflect the "free-wheeling" nature of the Western commercial world, which mostly takes the view that government and judicial interference should be kept to a minimum. By contrast, the Soviet experience has established a permanent arbitration body with a limited selection of arbitrators and a set of mandatory rules. This may reflect the Soviet mistrust of the commercial world and the state's desire to control it as it controls most aspects of life in the Soviet Union. Although there are substantial differences in the systems, each has proven an effective means for settling disputes.

Timothy A. Power

235. *See supra* notes 16-17 and accompanying text.
236. *See supra* notes 12, 32-35 and accompanying text.
237. *See supra* notes 149-50 and accompanying text.

APPENDIX

Following is a list of the members of the Maritime Arbitration Commission provided by the MAC in March of 1987. The level of education "Candidate of Judicial Sciences" is roughly equivalent to an American Ph.D., and the "Doctor of Judicial Sciences" is yet a higher degree.

1.	Abova, Tamara Evgen'ievna	-Candidate of Judicial Sciences; Senior Research Fellow at the Institute of Government and Law, Academy of Sciences, USSR
2.	Barinova, Ida Ivanovna	-Candidate of Judicial Sciences; Section Chief of the Department of Maritime Law, Soyuzmorniiproyekt (State Planning, Design and Scientific Research Institute of Marine Transportation, Soviet Ministry of the Maritime Fleet)
3.	Bogdanov, Leonid Leonidovich	-Economist; Chairman of the Board of Directors of Ingosstrakh (Insurance Agency for Foreigners)
4.	Bratus', Sergei Nikitch	-Doctor of Judicial Sciences; Honored Scientist of the RSFSR; Professor; Senior Research Fellow, All Union Scientific Research Institute of the Soviet Legislature
5.	Burguchev, Georgi Stepanovich	-Jurist; Chief of the Legal Department of the International Investment Bank
6.	Vislykh, Aleksandr Petrovich	-Captain of Long Distance Voyages; Candidate of Technical Sciences; Deputy Director of Glavflot, Ministry of the Maritime Fleet
7.	Gaidaenko, Ivan Ivanovich	-Jurist; Deputy Chairman of the Presidium, General Secretary of the Chamber of Commerce USSR
8.	Zubov, Gennadi Nikolaevich	-Honored Jurist of the RSFSR; Chief of the Administration for Contractual-legal Affairs, Ministry of Foreign Trade
9.	Ivanov, Georgi Georgievich	-Doctor of Judicial Sciences; Chief of The Legal Department of the Ministry of the Maritime Fleet
10.	Kabatov, Vitali Alekseevich	-Doctor of Judicial Sciences; Professor at Moscow State Institute of International Relations
11.	Kokin, Aleksandr Sergeevich	-Candidate of Judicial Sciences; Deputy Chief of the Legal Department of the Ministry of the Maritime Fleet
12.	Komarov, Aleksandr Sergeevich	-Candidate of Judicial Sciences; Deputy Director of the Administration for Contractual-legal Affairs, Ministry of Foreign Trade
13.	Kuznetsov, Aleksandr Aleksandrovich	-Captain of Long Distance Voyages; Deputy Director of Glavgosrybflotinspektsia, Ministry of Fisheries
14.	Lebedev, Sergei Nikolaevich	-Candidate of Judicial Sciences; Department Chairman of Moscow State Institute of International Relations
15.	Makovski, Aleksandr L'vovich	-Candidate of Judicial Sciences; Deputy Director of the All Union Scientific Research Institute of the Soviet Legislature
16.	Maslov, Georgi Aleksandrovich	-Candidate of Judicial Sciences; Chairman of "Sovfrakht" (All Union Association for the Chartering of Foreign Tonnage)
17.	Mainagashev, Bronislav Semenovich	-Captain of Long Distance Voyages; Chairman of the All Union Association "Moreplavanie"

18.	Nesterov, Mikhail Mikhailovich	-Jurist; Chief of the Contractual-legal Department of the State Committee on Foreign Economic Relations
19.	Platov, Veniamin Georgievich	-Economist; Senior Dispatcher (controller) of the Office of Dispatchers, at the Chamber of Commerce, USSR
20.	Pozdniakov, Vladimir Sergeevich	-Doctor of Judicial Sciences; Honored Scientist of the RSFSR; Professor, Department Chairman of the All Union Academy of Foreign Trade
21.	Pokrovski, Stanislav Grigor'evich	-Jurist; Captain of Long Distance Voyages; Director of the Contractual-legal Department of "Sovfrakht" (All Union Association of the Chartering of Foreign Tonnage)
22.	Romanovski, Edward Kuz'mich	-Deputy Director of the Main Administration for International Transportation at the Ministry of Foreign Trade
23.	Sadikov, Oleg Nikolaevich	-Doctor of Judicial Sciences; Professor; Sector Chief of the All Union Scientific Research Institute of the Soviet Legislature
24.	Trushinski, Yuri Mikhailovich	-Captain of Long Distance Voyages
25.	Yudovich, Aleksandr Borisovich	-Captain of Long Distance Voyages; Candidate of Technical Sciences; Deputy Director of Main Maritime Inspection, Ministry of the Maritime Fleet