



MECHANISMS FOR SELECTION AND APPOINTMENT OF PRESIDING ARBITRATORS OR SOLE ARBITRATORS

(Submitted on 11 May 2020)

1. During the 38th session of the Working Group, several delegations expressed an interest in being provided with further information about possible mechanisms for the selection and appointment of members of courts or tribunals.
2. The present submission by the Permanent Court of Arbitration (“PCA”) outlines some of the procedures for the selection and appointment of presiding arbitrators or sole arbitrators that have been agreed in instruments referring to the PCA, or by disputing parties in proceedings administered by the PCA.
3. This submission is without prejudice to the procedural or institutional context for which an appointment mechanism is designed. While the information provided draws mainly on experience with various methods of arbitrator selection for *ad hoc* tribunals, it may also inform the Working Group’s discussion of procedures for constituting a division of judges or arbitrators within a permanent body.

I. LIST-PROCEDURE UNDER THE UNCITRAL ARBITRATION RULES AND PCA ARBITRATION RULES 2012

4. When asked to appoint a presiding arbitrator or a sole arbitrator, the PCA Secretary-General will ordinarily follow a list-procedure, as envisaged by the UNCITRAL Arbitration Rules¹ or the PCA Arbitration Rules 2012.²
5. Typically, the Secretary-General initially consults the disputing parties with regard to the desired arbitrator profile. The Secretary-General then compiles a list of potential arbitrators that reflects the disputing parties’ preferences to the extent possible, having verified with each candidate that no conflicts of interest exist. Second, each disputing party may strike any number of proposed names and establish an order of preference between the remaining names. Third, a selection is made by the Secretary-General on the basis of the candidates’ rankings on the returned lists. In the event that no candidate who is acceptable to both sides emerges, the Secretary-General may decide to proceed to a direct appointment without use of a list.

¹ Article 6(3) of the UNCITRAL Arbitration Rules 1976, Article 8(2) of the UNCITRAL Arbitration Rules 2010.

² Articles 8(2) of the PCA Arbitration Rules 2012.

6. The Secretary-General will also regularly enquire with the disputing parties whether they agree to a modified list-procedure, pursuant to which the number of strikes by each side is limited to “50 percent minus one”.³ This approach ensures that at least one common candidate will remain on the list.
7. The combination of consulting the disputing parties in respect of the composition of the list and enabling them to rank and strike candidates on the list is intended to lead to an appointment that corresponds closely to the joint preferences of the disputing parties.

II. ALTERNATIVE APPOINTMENT PROCEDURES

8. The following alternative mechanisms have been agreed in instruments referring to the PCA, or by disputing parties in proceeding administered by the PCA, in place of the usual list-procedure described above.
9. *List-procedure excluding “strikes”*: The disputing parties are limited to ranking candidates on the list and/or commenting on the relative qualifications and suitability of candidates. This procedure allows the Secretary-General to take the disputing parties’ views, in terms of ranking, and – as the case may be – comments, in respect of each candidate into account.
10. *List-procedure involving nomination by the disputing parties*: The list-procedure is conducted on the basis of names supplied separately (*i.e.* without copying the other disputing party) by each disputing party as well as names identified by the Secretary-General. The disputing parties are not made aware whether candidates have been proposed by the other disputing party or by the Secretary-General.
11. *List-procedure on the basis of a list composed by the co-arbitrators*: A list-procedure is conducted by the PCA on the basis of names identified by the co-arbitrators.
12. *Appointment in consultation with the party-appointed arbitrators*: In the event that a list-procedure conducted on the basis of names identified by the co-arbitrators fails, the Secretary-General appoints the presiding arbitrator in consultation with the party-appointed arbitrators.
13. *List-procedure on the basis of an open (recommendatory) list*: In the composition of a list of candidates, regard may be had to a recommendatory list of arbitrators possessing special expertise in the subject-matter of the dispute, which may be based on nominations by States.⁴

³ The Secretary-General will in this case send a list containing an uneven number of candidates.

⁴ See Article 8(3) of the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, pursuant to which the Secretary-General, “[f]or the purpose of assisting the parties and the appointing authority”, will make available “a list of persons considered to have expertise in the subject-matters of the dispute at

14. *Appointment on the basis of matching proposals by the disputing parties:* The disputing parties separately submit lists of candidates ranked in order of preference. In the event of matches of names on the disputing parties' lists, the disputing parties are deemed to have agreed on the candidate with the best joint ranking.
15. *Appointment based on proposals from the disputing parties:* Each disputing party nominates an agreed number of candidates, accompanied by written observations. The Secretary-General then selects one candidate for appointment, taking the disputing parties' views into account.
16. *Appointment based on names jointly submitted by the disputing parties:* Following direct consultations, the disputing parties jointly submit the names of (two or more) candidates to the Secretary-General, without disclosing which candidate is preferred by one or other party. The Secretary-General will then select a candidate for appointment from that joint list.
17. *Appointment on the basis of a closed (mandatory) roster constituted by the treaty parties:* All arbitrators, including the presiding arbitrator, must be appointed from a closed list (roster) of arbitrators, constituted by the treaty parties on the basis of criteria identified in the treaty.⁵
18. *Appointment at the discretion of the Secretary-General:* The selection of the sole or presiding arbitrator (or, indeed, all arbitrators) is placed in the hands of the Secretary-General. While the disputing parties are invited to provide general comments on the required profile of the arbitrator, they have no role in proposing, or commenting on, any specific candidates for appointment.
19. *Appointment by agreement of the disputing parties, based on suggestions from the Secretary-General:* The Secretary-General conveys a list of suitable candidates to the disputing parties, who then directly consult with each other with a view to reaching agreement on the appointment of the presiding arbitrator.

hand for which these Rules have been designed". The Panels of Arbitrators and Experts for Environmental Disputes as nominated by PCA Contracting Parties is available on the PCA's website (<https://pca-cpa.org/en/about/panels/panels-of-arbitrators-and-experts-for-environmental-disputes/>).

⁵ Article 2(4) of the Schedule to the Protocol on Environmental Protection to the Antarctic Treaty, done at Madrid on 4 October 1991, 2941 UNTS 1 at 28, provides that the PCA Secretary-General will maintain a list of arbitrators on the basis of nominations by the States parties. Article 2(1) entitles States parties "to designate up to three Arbitrators", who "shall be experienced in Antarctic affairs, have thorough knowledge of international law and enjoy the highest reputation for fairness, competence and integrity. The names of the persons so designated shall constitute the list of Arbitrators".

III. FACTORS TYPICALLY TAKEN INTO ACCOUNT BY THE SECRETARY-GENERAL

20. As noted in a prior submission to the Working Group,⁶ the Secretary-General, when asked to appoint a presiding arbitrator or sole arbitrator, will typically take account of the following factors, subject to any specific requirements that the treaty parties or disputing parties may have identified:

- the nationalities of the parties,
- the place of arbitration,
- the language(s) of the arbitration,
- the amount claimed, and
- the subject-matter and complexity of the dispute;

and, with respect to any prospective arbitrator:

- nationality,
- qualifications,
- experience,
- place of residence,
- language abilities, and
- availability.

21. Attention to geographic and gender diversity of appointments is also given in each case.

22. All candidates considered for appointment by the Secretary-General are requested to conduct a check for conflicts of interest and submit a written statement of impartiality and independence, thereby making any required disclosure. The Secretary-General also typically asks candidates to provide the disputing parties with a *curriculum vitae* to ensure that up-to-date information about each candidate is readily available to the disputing parties.

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⁶ Submission by the Permanent Court of Arbitration, Arbitrator Appointments and Arbitrator Challenges, A/CN.9/WG.III/WP.146, paras 41 et seq. (<https://undocs.org/en/A/CN.9/WG.III/WP.146>). See also Spotlight on the PCA's Appointing Authority Activities (<https://pca-cpa.org/wp-content/uploads/sites/6/2019/04/EN-Spotlight-on-the-PCAs-Appointing-Authority-Activities-1.pdf>).