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Settlement of commercial disputes

Submission by the Permanent Court of Arbitration

In preparation for the seventieth session of the Working Group, the Permanent Court of Arbitration (PCA) submitted the following information on its role as designating and appointing authority under the UNCITRAL Arbitration Rules. The submission was received by the Secretariat on 10 July 2019 in English and is reproduced as an annex to this note.

Annex

I. Introduction

1. At its sixty-ninth session, the Working Group invited the Permanent Court of Arbitration (PCA) to provide information regarding its role as designating and appointing authority under the UNCITRAL Arbitration Rules (the “UNCITRAL Rules”). The Working Group noted in particular that information about the duration and cost of designation and appointment procedures would allow it “to better assess the role that appointing authorities could play in the appointment of arbitrators in expedited arbitration,”¹ in a context where it was “widely felt that an arbitral tribunal composed of a sole arbitrator should be the general rule for expedited arbitration.”² The Working Group also noted that the “appointing authority might need to assess quantitative as well as qualitative elements before deciding whether the expedited procedure would apply.”³

2. A representative of the PCA participated at the sixty-ninth session and provided information to the Working Group in respect of these matters.⁴ To complement its oral intervention, the PCA is pleased to make the present submission.

3. Section II of this submission addresses the process for the appointment of sole arbitrators under the UNCITRAL Rules, with the aim of assisting the Working Group in streamlining these procedures in expedited arbitration. Section III discusses the experience of appointing authorities in assessing quantitative and qualitative aspects of cases in the fulfilment of their functions under the UNCITRAL Rules.

II. Process for the appointment of sole arbitrators

A. General information

4. The PCA is an independent intergovernmental organization established in 1899 to facilitate arbitration and other forms of dispute resolution. Under the UNCITRAL Rules, the Secretary-General of the PCA may designate an appointing authority if one has not been agreed by the parties⁵ or, when the parties so agree, act himself as appointing authority for the purpose of appointing arbitrators, ruling on challenges to arbitrators, or deciding on fee arrangements.⁶

5. To date, the PCA Secretary-General has received over 750 requests to designate an appointing authority or act as appointing authority.⁷ In the period from 2005-2018, 90% of all requests involved the appointment of an arbitrator and, of these, 24% involved the appointment of a sole arbitrator. Thus, the PCA Secretary-General received over 65 requests to designate an appointing authority for the appointment of a sole arbitrator, and over 30 requests to appoint a sole arbitrator. The PCA Secretary-General proceeded to appoint a sole arbitrator in 21 cases.⁸ All requests involving the

¹ Report of Working Group II on the work of its sixty-ninth session (A/CN.9/969), para. 46.

² *Ibid.*, para. 37.

³ *Ibid.*, para. 45.

⁴ *Ibid.*, para. 104.

⁵ The UNCITRAL Rules 1976 entrust the PCA Secretary-General with the power to designate the appointing authority in cases where: (i) the parties cannot agree on the choice of a sole arbitrator; (ii) the respondent fails to appoint a second arbitrator; (iii) the two party-appointed arbitrators cannot agree on the choice of the presiding arbitrator; or (iv) when a challenge to an arbitrator is to be decided, and the parties cannot agree on an appointing authority or an agreed appointing authority refuses or fails to act. Under the UNCITRAL Rules 2010 and 2013, a party may request the PCA Secretary-General to designate an appointing authority at any time. UNCITRAL Rules 1976, arts. 6(2), 7(2)(b) and 12(1); UNCITRAL Rules 2010/2013, art. 6.

⁶ UNCITRAL Rules 1976, arts. 6(1), 7(2)(a), 12(1) and 39(2); UNCITRAL Rules 2010/2013, art. 6(1).

⁷ While most of these requests were under the UNCITRAL Rules, some requests were made under other procedural regimes.

⁸ In the remaining cases, the arbitrations either proceeded without the need for any assistance of the appointing authority or the PCA Secretary-General determined that he was not competent to

appointment of a sole arbitrator arose under contracts between different combinations of States, State entities, international organisations and private parties. No such requests were received in any treaty-based arbitrations.⁹

6. Under the UNCITRAL Rules, a sole arbitrator may be appointed in lieu of a three-member tribunal only if (i) the parties so agree, or (ii) upon request of a party the appointing authority decides that, in view of the circumstances of the case, the appointment of a sole arbitrator would be more appropriate.¹⁰ A sole arbitrator was appointed pursuant to a decision of the appointing authority in 3 of the 40 cases where the PCA received a request involving the appointment of a sole arbitrator in the period 2015-2018.

7. The UNCITRAL Rules further provide that the parties may agree on the identity of the sole arbitrator.¹¹ Absent such agreement, the sole arbitrator is appointed by the appointing authority.¹² If the parties have not agreed on an appointing authority, the UNCITRAL Rules foresee a two-step procedure, whereby either party may request that the Secretary-General of the PCA designate an appointing authority, which in turn may be asked to appoint a sole arbitrator. Practical experience with this procedure is described below.

B. Appointment of sole arbitrator by the parties

8. Where the parties to the dispute have agreed that a sole arbitrator is to be appointed, the UNCITRAL Rules provide that the claimant may propose a candidate for appointment as sole arbitrator in its Notice of Arbitration.¹³ The UNCITRAL Rules further provide that if within 30 days after receipt by all other parties of such a proposal, the parties have not reached agreement on the identity of the sole arbitrator, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.¹⁴

9. Under this procedure, the time that elapses between the filing of the Notice of Arbitration and the submission of any request for the appointment of a sole arbitrator to the appointing authority varies significantly from case to case. Although the UNCITRAL Rules provide that the claimant may propose a candidate for appointment in its Notice of Arbitration, it is not obliged to do so. Accordingly, the claimant may not make such a proposal until weeks or months after the filing of a Notice of Arbitration.¹⁵ Additionally, once the 30-day period for a response to the proposal of a sole arbitrator has elapsed, the involvement of the appointing authority is not automatic, but depends on the making of a request by a party. The Working Group may wish to consider eliminating this potential for delays in expedited arbitration.

10. For example, the expedited procedure could (i) make it mandatory for the claimant to propose a candidate for appointment as sole arbitrator in the Notice of Arbitration, and (ii) provide that the expiration of the period for party agreement on a sole arbitrator will trigger the procedure for appointment of the sole arbitrator by the appointing authority (or the designation of an appointing authority).

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⁹ As noted in the PCA's submission to UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), sole arbitrators have been rare in investor-State dispute settlement (ISDS) (A/CN.9/WG.III/WP.149, paras. 43 and 57). Only one ISDS case for which the PCA acted as registry was decided by a sole arbitrator.

¹⁰ Note that the appointing authority may choose to appoint a sole arbitrator absent party agreement under the UNCITRAL Rules 2010 and 2013, but not under the UNCITRAL Rules 1976. *See* UNCITRAL Rules 1976, art. 5; UNCITRAL Rules 2010/2013, art. 7(2).

¹¹ UNCITRAL Rules 1976, arts. 6(1) and 6(2); UNCITRAL Rules 2010/2013, art. 8(1).

¹² UNCITRAL Rules 1976, art. 6(2); UNCITRAL Rules 2010/2013, art. 8.

¹³ UNCITRAL Rules 1976, art. 3(4)(a); UNCITRAL Rules 2010/2013, art. 3(4)(b).

¹⁴ UNCITRAL Rules 1976, art. 6(2); UNCITRAL Rules 2010/2013, art. 8(1).

¹⁵ Similarly, where a three-member tribunal is to be constituted, the claimant may delay appointing a first arbitrator after serving the Notice of Arbitration on the respondent. In one recent case, a period of over 8 months elapsed between the service of the Notice of Arbitration and the appointment of a first arbitrator by the claimant.

C. Designation of appointing authorities

11. When asked to designate an appointing authority, the PCA Secretary-General seeks to make the procedure as efficient as possible and generally designates an appointing authority within two weeks of receipt of a request that contains all required documents.¹⁶

12. Upon receipt of a complete request, the PCA Secretary-General reviews the documents submitted to ensure, on a *prima facie* basis, that he is competent to act. Once satisfied, the PCA Secretary-General invites the respondent to provide its comments on the claimant's request within 5-10 working days. After the respondent's comments have been received or the time limit to submit comments has expired, the PCA Secretary-General designates the appointing authority.

13. In designating the appointing authority, the PCA Secretary-General generally takes into account the following factors:

- (i) the comments of the parties;
- (ii) the nationalities of the parties, as well as the regional or global character of the dispute (in order to select a neutral appointing authority);
- (iii) the place of arbitration, if specified;
- (iv) the languages of the arbitration, if specified;
- (v) the amount claimed;
- (vi) the subject matter and complexity of the dispute;
- (vii) the fees charged by the prospective appointing authority; and
- (viii) the anticipated reaction time of the prospective appointing authority.

14. The PCA Secretary-General informs the appointing authority that the designation is "for all purposes under the UNCITRAL Arbitration Rules" and thus covers appointing arbitrators, deciding challenges, and assisting with issues relating to arbitrator fees.

15. As of June 2019, the administrative fee for the analysis of a request for the designation of an appointing authority by the PCA Secretary-General is EUR 3,000, which includes the cost of the designation of an appointing authority if that is the next appropriate step.

D. Appointment of sole arbitrators

16. When the PCA Secretary-General acts as appointing authority pursuant to the agreement of the parties and receives a request to appoint a sole arbitrator, he reviews the documents submitted to ensure, on a *prima facie* basis, that he is competent to act. Once satisfied, the PCA Secretary-General ordinarily follows a list procedure for the appointment, as envisaged by the UNCITRAL Rules.¹⁷

17. A regular list procedure is comprised of the following steps:

- (i) The appointing authority compiles a list of potential arbitrators containing at least three names. At this stage, all candidates considered for

¹⁶ The required documents as indicated on the PCA's website (<https://pca-cpa.org/en/services/appointing-authority/designation-of-appointing-authority/>), are: (i) a copy of the arbitration clause or agreement establishing the applicability of the UNCITRAL Rules; (ii) a copy of the Notice of Arbitration served upon the respondent, as well as the date of such service; (iii) a copy of any response to the Notice of Arbitration; (iv) an indication of the nationalities of the parties; (v) the names and nationalities of the arbitrators already appointed, if any; (vi) the names of any institutions or persons that the parties had considered selecting as appointing authority but which have been rejected; and (vii) a power of attorney evidencing the authority of the person making the request. The applicant will also be asked to pay the PCA's non-refundable administrative fee.

¹⁷ UNCITRAL Rules 1976, art. 6(3), UNCITRAL Rules 2010/2013, art. 8(2).

appointment are required to confirm their willingness to act, to conduct a check for conflicts of interest and to submit written statements of impartiality and independence, making any required disclosure and committing to notify the parties of any conflicts that may subsequently arise.¹⁸

- (ii) The appointing authority communicates the list of potential arbitrators to the parties, inviting each party to strike the candidates to whom it objects from the list and to rank the remaining candidates in order of preference.
- (iii) The parties then submit their lists individually to the appointing authority (without copying the other party). The UNCITRAL Rules provide that the parties have 15 days to return their lists.¹⁹
- (iv) Thereafter, the appointing authority appoints the sole arbitrator either on the basis of the returned lists or by direct appointment if the list procedure fails (e.g. if the parties, between them, have struck all the names from the list). The parties have returned lists with no name being acceptable to both sides in only one of the 15 list procedures conducted by the PCA for the appointment of a sole arbitrator in the period from 2005-2018.

18. The combination of (i) consulting the parties in respect of the composition of the list and (ii) enabling the parties to rank and strike candidates on the list is intended to lead to an appointment that corresponds as closely as possible to the joint preferences of the parties.

19. The PCA Secretary-General also regularly enquires with parties whether they would agree to a modified list procedure, pursuant to which the number of strikes by each side is limited to “50% minus 1”. This approach is designed to assure that at least one common candidate remains on the list.

20. The following appointment mechanisms have also been used in place of the default list procedure,²⁰ generally at the joint request of the parties:

- *List procedure excluding “strikes”*: The parties are limited to ranking candidates on the list and/or commenting on the relative qualifications and suitability of candidates.
- *List procedure on the basis of lists from the parties*: The list procedure is conducted on the basis of names separately supplied by each party, rather than a list composed by the appointing authority.
- *Selection between options submitted by the parties*: Following bilateral discussion, the parties jointly submit a shortlist of candidates to the appointing authority, who will then select one candidate for appointment without providing reasons for its choice.
- *Selection at discretion of appointing authority*: Selection of the sole arbitrator may be placed in the hands of the appointing authority. While the parties may be 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.²¹

¹⁸ See Model Statements of Independence Pursuant to Article 11 of the UNCITRAL Rules, set out in the Annex to the UNCITRAL Rules 2010/2013.

¹⁹ UNCITRAL Rules 1976, art. 6(3)(b); UNCITRAL Rules 2010/2013, art. 8(2)(b).

²⁰ Under the UNCITRAL Rules, the list procedure generally applies to both the appointment of sole arbitrators and presiding arbitrators by the appointing authority. Similarly, the mechanisms listed here have been used for the appointment of sole and/or presiding arbitrators.

²¹ D. Pulkowski, “Permanent Court of Arbitration” in R.A. Schütze (ed.), *Institutional Arbitration: Article-by-Article Commentary* (forthcoming, 2nd ed., C.H. Beck/Hart/Nomos, 2019), art. 8.

21. As with the designation procedure, the PCA Secretary-General seeks to make the procedure for the appointment of sole arbitrators as efficient as possible. The time required for the appointment largely depends on the chosen procedure. Where all information is submitted in a timely manner,²² most list procedures for the appointment of a sole arbitrator are completed in four to six weeks. Direct appointments usually take less time. In all cases, objections to the PCA Secretary-General's competence to act may delay the appointment process as the parties may request the opportunity to make one or more rounds of submissions before the PCA Secretary-General makes his *prima facie* determination.

22. As of June 2019, the administrative fee for the PCA Secretary-General to act as appointing authority under the UNCITRAL Rules is EUR 3,000. For the PCA, this one-time fee covers any and all appointments, challenges and fee consultations or determinations in the course of the case.

23. In recent years, institutions²³ designated as appointing authorities by the PCA Secretary-General have charged fees ranging from USD 530 to USD 5,000 per request to act as appointing authority (e.g. per request to appoint an arbitrator, decide a challenge or determine fees). In addition to this flat fee, some institutions have also charged an hourly rate for time spent by their staff.

24. Individuals designated as appointing authorities have charged fees ranging from EUR 1,000 to EUR 3,000 per request to act. Occasionally, individuals have instead billed fees at an hourly rate, usually subject to a cap.

25. Where appropriate, appointing authorities have also agreed to waive all or part of their fees.

III. Experience of appointing authorities in assessing quantitative and qualitative aspects of cases

26. As recalled above, the Working Group in its sixty-ninth session considered whether the appointing authority might need to assess quantitative as well as qualitative elements before deciding whether the expedited procedure would apply.²⁴ It was queried whether the appointing authority would have the ability and resources to make such assessments.

27. In this respect, the Working Group may wish to note that appointing authorities routinely assess qualitative and quantitative aspects of cases, including their complexity and the amount in dispute, in the fulfilment of their functions under the UNCITRAL Rules. The appointing authority may, for example, be required to make such assessments in the following circumstances.

28. First, as noted above, the appointing authority may be called upon to decide if a sole arbitrator or a three-member tribunal would be more appropriate for a given case.²⁵ The considerations relevant to this determination will likely overlap with any criteria to be applied to decide if the expedited procedure applies.

29. Second, the appointing authority considers qualitative and quantitative aspects of the case when appointing arbitrators. Thus, when making direct arbitral appointments or compiling a list of prospective candidates for purposes of the list procedure, the PCA Secretary-General typically takes into account the following aspects of the case: (i) the nationalities of the parties; (ii) the place of arbitration; (iii) the language(s) of the arbitration; (iv) the amount claimed, and (v) the subject-matter and complexity of the dispute.²⁶

30. Third, the appointing authority will have to analyse various aspects of the case when deciding challenges to arbitrators.²⁷

²² The required documents, as indicated on the PCA's website (<https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/>), are: (i) a copy of the arbitration clause, agreement, or other instrument establishing the applicability

31. Fourth, the appointing authority will assess qualitative and quantitative aspects of the case when assisting with issues relating to arbitrator fees and case deposits.²⁸ For example, pursuant to the UNCITRAL Rules, 2010, the appointing authority may be asked to review and, if necessary, adjust (i) an arbitral tribunal's proposal regarding the manner in which its fees and expenses will be determined; and (ii) an arbitral tribunal's determination of its final fees and expenses.²⁹ In conducting these reviews, the appointing authority will have regard to the UNCITRAL Rules' prescription that "the fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case."³⁰

of the UNCITRAL Arbitration Rules and the designation of the PCA Secretary-General as appointing authority; (ii) a copy of the Notice of Arbitration served upon the respondent, as well as the date of such service; (iii) a copy of any response to the Notice of Arbitration; (iv) an indication of the nationalities of the parties; (v) the names and nationalities of the arbitrators already appointed, if any; and (vi) a power of attorney evidencing the authority of the person making the request. The applicant will also be asked to pay the PCA's non-refundable administrative fee.

²³ The UNCITRAL Rules provide that where no appointing authority has been agreed upon by the parties, either party may propose to the other "the name or names of one or more institutions or persons, one of whom would serve as appointing authority." Thus, the UNCITRAL Rules foresee that an appointing authority may be an institution or an individual. The practice of the PCA Secretary-General has been to appoint both institutions and individuals as appointing authorities since the promulgation of the UNCITRAL Rules.

²⁴ Report of Working Group II on the work of its sixty-ninth session (A/CN.9/969), para. 45.

²⁵ UNCITRAL Rules 2010, art. 7(2).

²⁶ B. W. Daly, E. Goriatcheva and H. A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press 2014), paras. 4.10-4.11.

²⁷ The UNCITRAL Rules provide that "any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." UNCITRAL Rules 1976, art. 10(1); UNCITRAL Rules 2010/2013, art. 12(1).

²⁸ UNCITRAL Rules 1976, arts. 39(3), 39(4), 41(3); UNCITRAL Rules 2010/2013, arts. 41(3), 41(4), 43(3).

²⁹ UNCITRAL Rules 2010/2013, art. 41(3), 41(4)(a)-(b).

³⁰ UNCITRAL Rules 1976, art. 39(1); UNCITRAL Rules 2010/2013, art. 41(1).