12 The Permanent Court of Arbitration

1) Introduction

The Permanent Court of Arbitration (PCA) is one of the major supranational bodies concerned with international disputes, and its work is complementary to that of the International Court of Justice (ICJ) (see Box 6). Both institutions are housed in the Peace Palace in The Hague.

Box 6: The UN Secretary-General on the Importance of the PCA

The importance of the PCA is shown by UN Secretary-General Kofi Annan's Foreword to the *Basic Documents* of the PCA, in which he said that:

"... the Permanent Court of Arbitration and the International Court of Justice are not merely neighbours in the Hague Peace Palace; they are complementary institutions offering the international community a comprehensive range of options for the peaceful resolution of disputes.

"Settling international disputes by peaceful means, in conformity with the principles of justice and international law, is one of the central purposes of the United Nations set out in Article 1 of the United Nations Charter. Arbitration is among the methods of peaceful settlement cited in Article 33 of the Charter, and the Permanent Court has a long and distinguished history in this regard. In 1993, the General Assembly granted the Court the status of permanent observer, enabling it to participate actively in the discussions of the Assembly's Legal Committee.

"I encourage States, international organizations and private parties to make greater use of the Court's services, which also include fact-finding and conciliation; such recourse would help ease the workload of the International Court of Justice and fill gaps concerning arbitrations involving private parties and international organizations. I also urge States which have not ratified the Hague Conventions to do so. Developing countries, in particular, could well find the flexible instruments of dispute resolution to be invaluable."

An historical overview of the PCA is given in the next section, followed by a consideration of the Hague Peace Convention of 1899. That Convention, and the 1907 Hague Convention, set out the thinking behind the concept of an international body whose function would be to secure the peaceful resolution of disputes. This led to the creation of the PCA.

The chapter then goes on to consider some of the present-day procedures operated by the PCA. Two in particular are considered in some detail: first, the PCA's Optional Rules for Arbitrating Disputes between Two States, which are taken as an example of one of the

various sets of Arbitration Rules available from the Court; and second, the PCA's Optional Rules for Conciliation.

The UN has a role to play in the PCA in that many of the Court's dispute resolution procedures – both arbitration and conciliation – are based on United Nations Commission on International Trade Law (UNCITRAL) Rules. Further, the 1976 UNCITRAL Arbitration Rules entrust the Secretary-General of the PCA with the task of designating, on request, an 'appointing authority' for the purpose of appointing the members of an arbitral tribunal. The relationship between the PCA and UNCITRAL is considered in one of the later sections.

The final sections of the chapter look at the work of the PCA and at the type of cases it currently handles.

2) Historical Overview

The PCA was established by the Convention for the Pacific Settlement of International Disputes. That Convention was concluded at The Hague in 1899 during the first Hague Peace Conference, convened on the initiative of Czar Nicolas II of Russia. The aim was to seek *"the most objective means of ensuring to all peoples the benefits of a real and lasting peace, and above all, of limiting the progressive development of existing armaments"*. The most significant achievement of the Conference was the establishment of the PCA, which was the first global mechanism for the settlement of inter-State disputes. The 1899 Convention, which provided the legal basis for the PCA, was revised at the second Hague Peace Conference in 1907.

In recent years there has been a sharp increase in accessions to the Conventions of 1899 and 1907. There are currently 103 States that are parties to one or both of the Conventions.

The Peace Palace in The Hague, completed in 1913, was specifically built to accommodate the Court. The Carnegie Foundation, the Hague Academy of International Law, the Peace Palace International Law Library and, as mentioned earlier, the ICJ are also based at the Peace Palace.

3) Convention for the Pacific Settlement of International Disputes, 1899

Article 1 of the 1899 Convention states that the Signatory Powers have agreed to use their best efforts to ensure the pacific settlement of international differences. Two of the methods of resolving disputes are good offices and mediation. The functions of the mediator are said to consist of *"reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance"*.

Two further methods of resolving differences specified in the Convention are international commissions of inquiry and international arbitration. Article 15 states that the latter has for its object *"the settlement of differences between States by judges of their own choice, and on the basis of respect for law"*.

Article 16 states that in questions of a legal nature, and especially in the interpretation or application of international conventions, *"... arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle"*.

Article 20 of the Convention makes provision for the setting up of the PCA: *"With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a Permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention."*

Article 23 provides that each Signatory Power is to select four arbitrators (known as 'Members of the Court'). They are to be persons *"... of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators"*.

Article 28 makes provision for the setting up of a Permanent Administrative Council. Composed of *"the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who will act as President,* [it] *shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers"*. That Council would be charged with the establishment and organisation of an International Bureau that would, among other things, settle Rules of Procedure and all other necessary Regulations.

The Rules of Procedure referred to in Article 20 are contained in Chapter III of the Convention. Article 30 states that, with a view to encouraging the development of arbitration, the Signatory Powers have agreed on the Rules that are to be applicable to arbitral procedure.

The Powers who wish to have recourse to arbitration are to sign a special Act or *'Compromis'* in which the subject of the difference is to be defined. The *Compromis "implies the undertaking of the parties to submit loyally to the Award"* (Article 31).

The Convention then goes on to set out detailed rules for the conduct of an arbitration:

- the appointment of the arbitrators;
- the place of arbitration (the Tribunal is to sit at The Hague, unless the parties decide otherwise);
- the Tribunal is to decide on the choice of language to be used;
- the arbitral procedure is to comprise two distinct phases, namely preliminary examination (which involves the communication of documents containing argument) and discussion (which consists of the parties' oral argument to the Tribunal);
- the Tribunal may require the production of documents, and may demand explanations;
- the Tribunal is entitled to decide its competence by interpreting the *Compromis* and by interpreting any relevant Treaties, and also by applying *"the principles of international law"*;

- the Tribunal may issue Rules of Procedure for the conduct of the arbitration and can decide the forms and periods within which each party is to conclude its arguments;
- when all explanations and evidence have been presented, the hearing is closed.

The Tribunal then deliberates in private. The Award is to be by a majority of votes and accompanied by a *"statement of reasons. It is drawn up in writing and signed by each member of the Tribunal."* Any members in the minority may record their dissent when signing. The Award *"puts an end to the dispute definitively and without appeal"*.

The parties are entitled to provide in the *Compromis* for the right to demand a revision of the Award. The demand for revision is to be addressed to the Tribunal that made the Award. The revision can only be made on the ground of *"the discovery of some new fact calculated to exercise a decisive influence on the Award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision"*.

It is interesting to note that the detailed provisions made over 100 years ago for the conduct of arbitrations between States differ very little from the kind of provisions to be found in present-day arbitrations. Indeed, the concept of international dispute resolution as conceived by the 1899 Convention can be said to be the precursor of present-day international dispute resolution, in the fields of both inter-State dispute resolution and pure commercial arbitration. Further, at a time when mediation is still viewed by some with suspicion, it is worth noting that the Convention included mediation as one of the four methods of resolving international disputes between States.

Revisions were made to the 1899 Convention by the 1907 Convention.

4) Present-Day Rules and Procedures

While the Conventions of 1899 and 1907 established the PCA, a series of comparatively new procedural rules are based on international dispute resolution processes currently in use worldwide. The PCA today makes available a considerable array of procedures for dealing with international disputes.

The PCA Rules are largely based on the UNCITRAL Rules and include Optional Rules for arbitrating disputes between two States; for arbitrating between two parties, of which only one is a State; for arbitrating between international organisations and States; for arbitrating between international organisations and private parties; and for arbitrating disputes relating to natural resources.

There are Guidelines for adapting the PCA Arbitration Rules to disputes arising under multilateral agreements and multiparty contracts.

The PCA also provides Optional Rules for Fact-finding Commissions of Inquiry. In addition, there are Optional Conciliation Rules and specific conciliation rules relating to natural resources and the environment.

Model Clauses are available in relation to these various sets of Rules. For example, the Model Clause in relation to the Rules for arbitrating disputes between two States provides first for a clause dealing with future disputes:

> *"Parties to a bilateral treaty or other agreement who wish to have any dispute referred to arbitration under these Rules may insert in the treaty or agreement an arbitration clause in the following form:*
>
> 1. *If any dispute arises between the parties as to the interpretation, application or performance of this [treaty] [agreement], including its existence, validity or termination, either party may submit the dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this [treaty] [agreement].*
>
> *Parties may wish to consider adding:*
>
> 2. *The number of arbitrators shall be...*
> 3. *The language(s) to be used in the arbitral proceedings shall be...*
> 4. *The appointing authority shall be..."*

The Model Clause for use in the case of an existing dispute provides:

> *"The parties agree to submit the following dispute to final and binding arbitration in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, as in effect on the date of this agreement: ... [insert brief description of dispute]."*

The PCA suggests that the parties may wish to consider adding to this paragraphs 2-4 of the arbitration clause for future disputes.

5) The PCA Rules for Arbitrating Disputes Between Two States

An example of the PCA's arbitration rules is the Optional Rules for Arbitrating Disputes Between Two States. The introduction to these Rules explains that they *"... have been elaborated for use in arbitrating disputes arising under treaties or other agreements between two States; they can be modified for use in connection with multilateral treaties. The Rules are based on the UNCITRAL Arbitration Rules with changes...."*

The Rules are in the four sections:

Section I: Introductory rules

Section II: The composition of the arbitral tribunal

Section III: The arbitral process

Section IV: The award

Section I: Introductory rules

Article 1 states that *"Where the parties to a treaty or other agreement have agreed in writing that disputes shall be referred to arbitration under the Permanent Court of*

Arbitration Optional Rules for Arbitrating Disputes between Two States, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing".

Article 2 contains provisions dealing with notices and calculations of periods of time. Commencement of the arbitration is by way of service of a notice of arbitration. Article 3 states that the party initiating recourse to arbitration – the claimant – *"shall give to the other party (hereinafter called the 'respondent') a notice of arbitration"*. The arbitral proceedings are deemed to commence on the date on which the notice of arbitration is received by the respondent. The notice of arbitration is to contain the following information:

"(a) A demand that the dispute be referred to arbitration;

(b) The names and addresses of the parties;

(c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;

(d) A reference to the treaty or other agreement out of or in relation to which the dispute arises;

(e) The general nature of the claim and an indication of the amount involved, if any;

(f) The relief or remedy sought;

(g) A proposal as to the number of arbitrators (i.e., one, three or five), if the parties have not previously agreed thereon."

The notice of arbitration may also include the statement of claim referred to in Article 18.

Article 4 deals with representation and assistance.

Section II: The composition of the arbitral tribunal

Articles 5 to 8 of Section II of the Rules contain provisions dealing with the composition of the arbitral tribunal: one, three or five arbitrators (with a presiding arbitrator in the case of a three- or five-member tribunal). If the parties cannot agree on an appointment, that appointment is to be made either by an appointing authority or by the Secretary-General of the PCA.

Articles 9 to 12 deal with the challenge of arbitrators. Article 9 requires a prospective arbitrator to disclose *"... any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him/her of these circumstances."*

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence. In the case of a party seeking to challenge an arbitrator appointed by another party, the reasons relied on may only be those that came to the notice of a party after the appointment had been made (Article 10).

Where necessary, a substitute arbitrator is appointed. Article 13 makes provision for the appointment of a substitute arbitrator in the event of the death or resignation of an

arbitrator during the course of the arbitral proceedings. Where a sole or presiding arbitrator is replaced, any hearings held previously are to be repeated. Whether such hearings are to be repeated in the case of the replacement of any other arbitrator is a matter for the discretion of the tribunal.

Section III: The arbitral process

Section III deals with the conduct of the arbitral proceedings. Article 15 states that, subject to the Rules, the arbitral tribunal *"may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case".*

Either party may request an oral hearing. If no such request is made, the tribunal will decide whether the arbitration proceeds to an oral hearing or is dealt with on a documents-only basis.

Place and language of the arbitration

Articles 16 and 17 deal with the place of arbitration and the language to be used. Unless the parties have agreed otherwise, the place of arbitration is The Hague. The award is to be made at the place of arbitration.

Subject to the agreement of the parties, the tribunal is to determine the language or languages to be used in the proceedings. That determination applies to the pleadings, any further written statements and to any oral hearing.

Pleadings and documents

Articles 18 to 20 deal with the statement of claim and the statement of defence, and with amendment of those pleadings. Article 18 provides that, unless the statement of claim was contained in the notice of arbitration, the claimant is to serve a written statement of claim on the respondent and the tribunal. A copy of the treaty or other agreement (and of the arbitration agreement, if not contained in the treaty or agreement) is to be annexed. The statement of claim is to include a precise statement of the following matters:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may *"annex to its statement of claim all documents it deems relevant or may add a reference to the documents or other evidence it will submit".*

Article 19 deals with the service of the statement of defence, which is to reply to the particulars contained in (b), (c) and (d) of the statement of claim. The respondent may annex documents relied on or may add a reference to documents or other evidence that will be submitted. The respondent may include in its statement of defence a counterclaim or set-off *"arising out of the same treaty or other agreement or rely on a claim arising out of the same treaty or other agreement for the purpose of a set-off".*

Article 20 states that either party may amend or supplement its claim or defence *"unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement."*

Time limits are to be fixed by the tribunal for the service of the pleadings.

Jurisdiction of the tribunal

Article 21 contains provisions dealing with 'competence / competence': the power of the tribunal to rule on objections that *"it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement".*

The tribunal has power *"to determine the existence or the validity of the treaty or other agreement of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of the treaty or agreement and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the treaty or agreement. A decision by the arbitral tribunal that the treaty or agreement is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

A plea that the tribunal does not have jurisdiction must be raised no later than in the statement of defence or, in relation to a counter-claim, in the reply to such counter-claim. The arbitral tribunal should generally rule on a plea concerning its jurisdiction as a preliminary question. However, it is entitled to proceed with the arbitration and rule on the matter of its jurisdiction in the final award.

Further written submissions

Articles 22 and 23 deal with further written submissions and periods of time. The tribunal is to decide which further written statements, in addition to the statements of claim and defence, are to be required from the parties, and shall fix the periods of time for communicating such statements. Article 23 lays down that the periods of time fixed by the tribunal for service of pleadings.

Evidence and hearings

Provisions relating to evidence and hearings are set out in Articles 24 and 25. Article 24 states that each party has the burden of proving the facts on which it relies to support its claim or defence. The tribunal may require a party *"to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in its statement of claim or statement of defence".* Furthermore, the tribunal may at any time during the proceedings call on the parties to produce documents, exhibits or other evidence. It is to take note of any refusal to do so, as well as any reasons given for such refusal.

Important provisions relating to the conduct of oral hearings are contained in Article 25. The tribunal is to give the parties adequate advance notice of the date, time and place of the oral hearing. If witnesses are to be heard, at least 30 days prior to the hearing each party is to communicate to the tribunal and the other party the names and addresses of the witnesses it intends to call, the subject matter of the testimony of those witnesses and the language in which such testimony will be given. Where appropriate, arrangements will be made for the translation of oral statements made. Hearings are held in camera unless the parties agree otherwise. The tribunal is entitled to require the retirement of any witnesses during the testimony of other witnesses and to determine the manner in which witnesses are to be examined. The evidence of witnesses may be in the form of written statements. The tribunal determines the admissibility, relevance, materiality and weight of the evidence.

Interim measures

Article 26 gives power to the tribunal to make interim orders of protection aimed at preserving the respective rights of the parties. Such interim measures may be dealt with by way of an interim award, and the tribunal is entitled to require security for the costs of such measures. A request for interim measures to a judicial authority *"shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement".*

Experts

Provisions relating to the appointment of experts are contained in Article 27. The tribunal is entitled to appoint one or more experts to report to it on specific issues. The parties are to give such experts any relevant information and produce to them for inspection any relevant documents or goods. The tribunal is to provide the parties with a copy of the experts' reports. The parties can comment on the reports, and may request that the tribunal-appointed experts attend the hearing for interrogation. The parties are entitled to present their own expert witnesses to testify on the points at issue.

Default

Article 28 contains default provisions:

> *"If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate its claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate its statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue."*

In the event that one of the parties fails to appear at the hearing *"without showing sufficient cause for such failure"*, the tribunal may proceed with the arbitration. Where a party invited to produce documentary evidence fails to do so without good cause, the tribunal may make the award on the evidence before it.

Close of pleadings and waiver

The tribunal declares the hearings closed, having first inquired of the parties whether they have any further proof to offer, witnesses to be heard or submissions to make. However, if it considers it necessary owing to exceptional circumstances, the tribunal may reopen the hearings at any time before the award is made (Article 29).

The final Article in Section III deals with waiver: Any party who knows that any provision or requirement of the Rules has not been complied with is deemed to have waived its right to object, unless it has promptly stated its objection to such non-compliance.

Section IV: The award

The final Section of the Rules deals with the award, applicable law, settlement and other grounds of termination of the arbitration, interpretation and correction of the awards, additional awards and costs.

Awards: interim, interlocutory, partial and final

Article 31 provides that where there are three or five arbitrators, any award or other decision of the tribunal is to be made by a majority of the arbitrators. Where there is no majority, or when the tribunal authorises, the presiding arbitrator may decide questions of procedure (subject to any revision by the tribunal).

Article 32 states that, in addition to making a final award, the tribunal is entitled to make interim, interlocutory or partial awards. It will be recalled that Article 26 stated that interim measures of protection may be made in the form of an interim award.

The award is to be in writing and is to state the reasons on which it is based, unless the parties have agreed otherwise. It is to be signed by the arbitrators and is to contain the date on which and the place where it was made. If there are three or five arbitrators and any one of them fails to sign, the award is to state the reason for the absence of signatures. The award is final and binding on the parties, who *"undertake to carry out the award without delay"*. The award cannot be made public without the consent of the parties.

Applicable law, international law and *ex aequo et bono*

Article 33 deals with applicable law. The arbitral tribunal is to apply the law chosen by the parties or, in the absence of agreement, is to decide in accordance with international law by applying:

> *"(a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
>
> *(b) International custom, as evidence of a general practice accepted as law;*
>
> *(c) The general principles of law recognized by civilized nations;*
>
> *(d) Judicial and arbitral decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*

These provisions "*shall not prejudice the power of the arbitral tribunal to decide a case* ex aequo et bono, *if the parties agree thereto*".

It will be recalled that Article 38 of the Charter of the ICJ contains similar provisions.

Termination: settlement, etc

Article 34 deals with termination of the arbitral process by settlement or otherwise. If, before the award is made, the parties agree on a settlement of the dispute: *"the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."*

In addition, if the continuation of the proceedings *"becomes unnecessary or impossible"* before the award is made, the tribunal is to inform the parties of its intention to issue an order for the termination of the proceedings.

Interpretation and correction of the award

Within 60 days after the receipt of the award either party, on serving notice on the other party, may request the tribunal to give an interpretation of the award. This is to be given in writing within 45 days of the receipt of that request and is to form part of the award (Article 35). Article 36 contains provisions for the tribunal to correct the award in relation to errors in computation, clerical or typographical errors or errors of a similar nature. A request for correction is to be made within 60 days of receipt of the award. Alternatively, the tribunal on its own initiative may make such corrections within 30 days after the communication of the award.

Additional awards

Article 37 provides that, within 60 days of the receipt of the award, either party may request the tribunal to make an additional award *"as to claims presented in the arbitral proceedings but omitted from the award"*. If the tribunal considers that the request is justified and that the omission can be rectified without any further hearings or evidence, it may complete its award within 60 days of the receipt of the request.

Costs

The remaining Articles 38 to 41 deal with costs.

6) The PCA Optional Conciliation Rules

i) Introduction

Having considered one example of the various sets of PCA Arbitration Rules, it may now be useful to look at the PCA Conciliation Rules. The PCA Introduction to the Rules, which

outlines their purpose, is well worth reading as it explains the nature of conciliation in a practical way and also seeks to allay fears that many still have concerning the conciliation process.

> *"Parties who have disputes that they are unable to settle through consultation and negotiation with each other may wish to consider conciliation as a method for resolving their differences without the need to resort to arbitration or judicial means.*
>
> *"Although the benefits of conciliation are widely recognized, some parties may hesitate to enter into conciliation because they may be unfamiliar with the process or may have different views concerning how a conciliation should be conducted. In order to facilitate greater use of conciliation, the Permanent Court of Arbitration has, with the approval of the Administrative Council, established these Optional Conciliation Rules ('the PCA Optional Conciliation Rules'). These Rules are based on the UNCITRAL Conciliation Rules, with changes to indicate, inter alia, the availability of the Secretary-General of the Permanent Court of Arbitration to assist in appointing conciliators and of the International Bureau to furnish administrative support (art. 4, para. 3 and art. 8).*
>
> *"The purpose of these Rules is to provide a convenient basis for mutual agreement of parties on practical procedures that are useful in the conciliation process. Thus, for example, the Rules describe how to start a conciliation, how to appoint conciliators, what functions conciliators are expected to perform, and how to encourage parties to speak freely and candidly with conciliators while at the same time preserving necessary confidentiality. These Rules also describe how, if the conciliation is unsuccessful, it may be easily terminated so as not to delay or prejudice recourse to arbitration, judicial procedures or other means for ultimately resolving the dispute."*

The Introduction deals with the scope of the Rules, which are meant to assist in resolving disputes where the parties seek an amicable settlement.

> '[The Rules] *are intended for use in conciliating disputes in which one or more of the parties is a State, a State entity or enterprise, or an international organization. Thus, for example, the same Rules may be used in disputes between two States and also in disputes between two parties only one of which is a State.*
>
> *"The PCA recognizes the importance and complexity of disputes that involve more than two parties. These Rules are also appropriate for use in connection with multiparty disputes, provided that changes are made to reflect participation by more than two parties. The Secretary-General of the Permanent Court of Arbitration is available to consult with interested parties concerning modifications that may be considered in adapting these Rules for use in multiparty disputes.*
>
> *"These Rules, and the services of the Secretary-General and the International Bureau, are available for use by all States and their entities and enterprises, and are not restricted to disputes in which the State is a party to either the Hague Convention on the Pacific Settlement of International Disputes of 1899, or that of 1907, nor is the choice of conciliators limited to persons who are listed as Members of the Permanent Court of Arbitration."*

The Introduction makes the point that there may be little real practical difference between what is described as mediation and what is described as conciliation: *"In modern international practice, the word ' mediation' is sometimes used to designate a process that is very similar to the procedures for 'conciliation' described in these Rules. In such cases, these Rules can also be used for mediation, it being necessary only to change the words 'conciliation' to 'mediation' and 'conciliator' to ' mediator'."*

The Introduction then goes on to deal with the main characteristics of the conciliation process: it is voluntary, the procedure is flexible and the Conciliation Rules are part of an integrated PCA dispute resolution, with the result that procedures for conciliation may be linked to arbitration under the various PCA Optional Arbitration Rules.

That particular characteristic is useful

> *"because if a dispute is not resolved by conciliation, parties may wish to move promptly to final and binding arbitration. Therefore, these Rules provide several important safeguards that apply in the event that arbitration, or recourse to judicial means, follows an unsuccessful conciliation.*
>
> *"The ultimate safeguard against using conciliation to delay commencement of arbitration is the key provision of these Rules that... permits one party to terminate conciliation if it reaches the conclusion that the conciliation is no longer desirable. Moreover, by agreeing to conciliation under these Rules, the parties undertake that if the conciliation does not result in a settlement they will not introduce in any subsequent arbitration, or judicial proceedings, certain specified evidence that might be harmful. The evidence thus barred by these Rules consists of: (i) any views expressed by either party concerning possible settlement of the dispute; (ii) any admissions made by either party in the conciliation; (iii) any proposals made by the conciliator(s); or (iv) the fact that a party indicated willingness to accept a proposal for settlement made by the conciliator (art. 20). These provisions effectively protect parties and thereby encourage candor and a free exchange of views during the conciliation. Additional safeguards in these Rules include that the parties and conciliator undertake that, unless the parties vary the Rules, a conciliator will not act as an arbitrator or representative of a party in any arbitration or judicial proceeding in respect of a dispute that is subject to the conciliation, and that no party will present a conciliator as a witness in any such proceeding (art. 19)."*

Model Clauses are available.

ii) The Conciliation Rules

There are 20 Rules dealing with general matters, commencement of proceedings, the number and appointment of conciliators, submissions, the role of the conciliator, the conciliation process, settlement, confidentiality, termination of the process and, where necessary, resort to judicial or arbitral proceedings.

Scope of the conciliation process

Article 1 sets out the application of the Rules and provides that they apply to conciliation of disputes:

> *"1 ...arising out of or relating to a contractual legal relationship or other circumstances where the parties seeking an amicable settlement of their disputes have agreed that the Permanent Court of Arbitration Optional Conciliation Rules apply.*
>
> *2. The parties may agree to exclude or vary any of these Rules at any time.*
>
> *3. Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails."*

Commencement of the conciliation process

The conciliation process is initiated by one party sending to the other a written invitation to conciliation under the Rules, briefly identifying the subject matter of the dispute. If the invitation is rejected, the conciliation cannot take place (Article 2).

Appointment of conciliators

Where the parties agree to conciliation, Articles 3 and 4 deal with the appointment of conciliators. There shall be one, two or three conciliators. In cases of difficulty in appointment, assistance can be sought from, among others, the Secretary-General of the PCA.

Conduct of the conciliation

The conciliator will request from each party a brief written statement setting out the general nature of the dispute and the points at issue (copied to the other party). The conciliator may also request each party to submit further written statements of its position, and the facts and grounds in support, supplemented by such documents or other evidence considered necessary (Article 5).

Article 6 states that the parties may be represented or assisted by persons of their choice.

Role of the conciliator

Important provisions are contained in Article 7 relating to the role of the conciliator. These explain the nature of conciliation and are at the very heart of any mediation / conciliation process.

Article 7 (1) states that the conciliator assists the parties:

> *"... in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.*
>
> *2. The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties and the circumstances surrounding the dispute, including any previous practices between the parties.*

3. *The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and any special need for a speedy settlement of the dispute.*
4. *The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore."*

Administrative assistance may be sought to aid the conciliation process, including from the PCA (Article 8).

'Caucus' sessions – and confidentiality

Article 9 deals with communications between the conciliator and the parties, and contains provisions relating to what is arguably one of the most valuable processes in a conciliation (or mediation): what is often referred to as the 'caucus' sessions. The conciliator may invite the parties to meet with him or her (or may communicate with them orally or in writing) and *"may meet or communicate with the parties together or with each of them separately"*.

Article 10 contains provisions that are perhaps linked to the caucus concept. Where the conciliator receives factual information from one party, he or she discloses the substance of the information to the other party, who then has the opportunity to present any explanation. However, *"when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party"*.

Good faith and co-operation

The success of any conciliation / mediation process requires the good faith of the parties. Article 11 states that the parties *"will in good faith co-operate with the conciliator and, in particular, will endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings"*.

Settlement / termination

Article 12 contains provisions that again may be linked to the caucus concept: Each party, either on its own initiative or at the invitation of the conciliator, may submit to the conciliator suggestions for the settlement of the dispute.

Article 13 deals with settlement, and shows that the conciliator may take the lead in proposing possible terms of settlement. Article 13 (1) states that:

> *"When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.*

2. *If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.*
3. *The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement."*

Article 14 provides for the confidentiality of the conciliation process and states that, unless the parties agree otherwise *"or the disclosure is required in connection with judicial proceedings pursuant to article 16 hereof, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."*

The conciliation proceedings are terminated in any of the following ways:

"(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration" (Article 15).

Commencement of other proceedings during the conciliation process

Article 16 states that the parties undertake not to initiate any arbitral or judicial proceedings during the course of the conciliation process *"except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights".*

Costs

Articles 17 and 18 deals with costs and deposits. Costs of the conciliation are fixed by the conciliator and are to be borne equally by the parties (unless the settlement agreement provides otherwise). The parties bear their own costs.

The conciliator may request a deposit as an advance on the costs that he or she expects will be incurred, and may request supplementary deposits during the conciliation. Failure to pay the deposits may result in the conciliator suspending the process.

Use of conciliation material, etc, in other proceedings

The conciliation process may fail and it is therefore necessary to make provision for (i) the role of the conciliator in some other process that may follow on from the conciliation, and (ii) the admissibility of evidence in such other process.

Article 19 states that the parties and the conciliator undertake that, unless the parties have agreed otherwise, the conciliator *"will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."*

Article 20, dealing with the admissibility of evidence in other proceedings, states that the parties undertake:

> *"not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:*
>
> *(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;*
>
> *(b) Admissions made by the other party in the course of the conciliation proceedings;*
>
> *(c) Proposals made by the conciliator;*
>
> *(d) The fact that the other party had indicated its willingness to accept a proposal for settlement made by the conciliator."*

7) The PCA and UNCITRAL

The 1976 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules entrust the Secretary-General of the PCA with the task of designating, on request of a party to arbitration proceedings, an 'appointing authority' for the purpose of appointing the members of an arbitral tribunal and ruling on challenges to arbitrators. The parties may also designate the Secretary-General himself as appointing authority under the UNCITRAL Rules or other instruments.

The PCA provides procedural guidelines for requesting designation of an appointing authority by the Secretary-General of the PCA under the UNCITRAL Arbitration Rules, together with model clauses for PCA services under the UNCITRAL Rules.

Mention has been made earlier of the fact that many of the PCA Rules – both Arbitration and Conciliation – are based on the UNCITRAL Rules.

8) The PCA Caseload – Pending and Recent Cases

In 2004 Mr Tjaco T van den Hout, the Secretary-General of the PCA, stated that the Court's current caseload was then at an all-time high (see Box 7).

Box 7: Comments on the PCA by the Secretary-General of the Court

Speaking at an International Oil and Gas Conference in the City of London in April 2004, Mr Tjaco T van den Hout, the Secretary-General of the PCA, considered aspects of the PCA's cases of relevance to the oil and gas industry, in particular in relation to arbitral tribunals convened under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS III). He stated that the PCA was currently serving as registry for three tribunals hearing inter-State disputes arising under the 1982 Convention, and that there had been a sharp increase in the number of Annex VII arbitrations initiated over the past year by States in the Caribbean, Latin America and Asia. These cases dealt with a broad range of issues regarding natural resources, the environment and marine delimitation, he said, and "no doubt a number of them are prompted by attempts of governments to secure clear and unambiguous title to an area, presumed rich in natural resources, that lies in a contest zone".

One of the Annex VII cases currently pending before a PCA tribunal was the *MOX Plant Case* between Ireland and the United Kingdom. Mr van den Hout stated that Ireland had instituted proceedings against the United Kingdom pursuant to Article 287 and Article 1 of Annex I of UNCLOS III and a five-member tribunal had been constituted. He said that the case concerned discharges into the Irish Sea from a mixed oxide (MOX) fuel plant located at the Sellafield nuclear facility in the United Kingdom, and related movements of radioactive material through the Irish Sea.

A further PCA-administered arbitration in which oil and gas were relevant was the Eritrea-Yemen case. The arbitration was divided into two phases: the first dealing with territorial sovereignty and the second covering maritime delimitation. Evidence of petroleum agreements and concessions was introduced into both phases. In the first phase, the Tribunal concluded that, while the offshore petroleum contracts entered into by the two Governments failed to *"establish or significantly strengthen the claims of either party to sovereignty over the disputed islands"*, they did *"lend a measure of support to a median line between the opposite coasts of Eritrea and Yemen, drawn without regard to the islands, dividing the respective jurisdiction of the Parties"*.

The following were some of the pending and recent PCA cases (some proceedings under the PCA auspices may be excluded from listing for reasons of confidentiality).

Pending cases

Malaysia / Singapore

In this dispute the PCA is acting as Registry. The case concerns land reclamation by Singapore in and around the Straits of Johor and was instituted by Malaysia on 4 July 2003 pursuant to Article 287 of UNCLOS III and Article 1 of the Convention's Annex VII.

Guyana / Suriname

This case commenced in February 2004 when Guyana gave written notification and a statement of claim to Suriname, submitting a dispute concerning the delimitation of its maritime boundary with Suriname. The arbitral tribunal will be constituted under Annex VII of UNCLOS III.

Barbados / Trinidad

The PCA is acting as Registry in an arbitration between Barbados and the Republic of Trinidad and Tobago relating to the delimitation of the exclusive economic zone and continental shelf between the two parties. The arbitration was submitted under UNCLOS III.

Telekom Malaysia Berhad / Government of Ghana

The PCA is serving as registry for an arbitration under the UNCITRAL Arbitration Rules concerning an investment dispute between Telekom Malaysia Berhad, a Malaysian company, and the Government of the Republic of Ghana.

Belgium / Netherlands

The Kingdom of Belgium and the Kingdom of the Netherlands have submitted a dispute to an arbitral tribunal established under the auspices of the PCA. The dispute concerns the so-called 'Iron Rhine Railway' case.

MOX Plant case

The Permanent Court is serving as Registry in arbitration proceedings between Ireland and the United Kingdom. Those proceedings were initiated pursuant to Annex VII of UNCLOS III.

Saluka Investments B.V. v Czech Republic

The International Bureau of the PCA is serving as Registry in an arbitration that is being conducted under the UNCITRAL Arbitration Rules.

Eritrea-Ethiopia Boundary Commission

The International Bureau serves as Registry for a Commission established pursuant to an Agreement made in December 2000 between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia. The Commission has a mandate *"to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law"*.

Eritrea-Ethiopia Claims Commission

This Commission was established and operates pursuant to Article 5 of the Agreement signed in Algiers on 12 December 2000 between Eritrea and Ethiopia. The Commission is directed to: *"decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."*

Recent cases

Decisions of the PCA are referred to in various parts of the Manual. Some recent arbitrations include the following.

Netherlands / France

The International Bureau served as Registry for an arbitration relating to the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides and the Additional Protocol of 25 September 1991. A Final Award was rendered on 12 March 2004.

Bank for International Settlements

The Tribunal concerning the Bank for International Settlements rendered a Final Award in September 2003. That Award determined the compensation to be paid for shares that had been withdrawn by the Bank.

Ireland v United Kingdom

The International Bureau served as Registry in these arbitration proceedings initiated pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention). A week of hearings began in October 2002 at the Peace Palace. By agreement of the parties, the hearings were open to the public, and the written pleadings are available on the PCA website.[52] The Tribunal issued its final award on 2 July 2003.

Larsen / Hawaiian Kingdom

By the terms of an agreement to arbitrate made between the parties, it was agreed that a dispute alleged in the Complaint for Injunctive Relief filed on 4 August 1999 be referred to final and binding arbitration in accordance with the PCA's *Optional Rules for Arbitrating Disputes between Two Parties of which Only One Is a State*. One allegation by Lance Paul Larsen, a Hawaiian subject, was that the Government of the Hawaiian Kingdom was in continual violation of its 1849 Treaty of Friendship, Commerce and Navigation with the United States of America, and in violation of the principles of international law laid down in the 1969 Vienna Convention on the Law of Treaties. Mr Larsen relied on the alleged unlawful imposition of American municipal laws over the claimant's person within the territorial jurisdiction of the Hawaiian Kingdom.

9) Conclusions

The PCA is the world's oldest inter-governmental arbitration institution. Although the Court was conceived for the purpose of dealing with disputes between States, its mandate is flexible and allows it to respond to the ever-changing dispute resolution needs of the international community.

For example, in relation to disputes between a State and a non-State party, the PCA's *Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State* can provide a means for resolving a wide variety of cases involving international trade, investment and intellectual property.

The range of dispute resolution processes provided by the PCA makes the Court suitable for the resolution of disputes by way of both arbitration and conciliation.

52 www.pca-cpa.org.