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Documento de Trabajo
Serie Arbitraje Internacional
y Resolución Alternativa de Controversias
Número 5 / 2009

The permanent court of arbitration and the uncitral arbitration rules: current interaction and future prospectives

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Avda. del Valle 21, 28003 Madrid
www.idee.ceu.es

ISBN: 978-84-92456-39-0
Depósito legal: M-15333-2009

Compuesto e impreso en el Servicio de Publicaciones de la Fundación Universitaria San Pablo CEU

Sumario

The permanent court of arbitration and the uncitral arbitration rules: current interaction and future prospectives[1]

Sarah Grimmer

1. Introduction

This paper will discuss the beginnings of the PCA, and some of the most determinative events that have shaped its history and continue to guide its work today. It will focus particularly on the role of the Secretary-General under the UNCITRAL Rules over the past thirty years, and consider how that role may develop in light of the current revision of the Rules.

2. The creation of the PCA

2.1. The first Hague peace conference 1899

In the late 1890's, during the time of the last Russian Czar, Nicholas II, many states were devoting significant resources to their military forces and the amassing of armaments.[2] The result of this trend was that if two or more states became involved in a dispute that proved impossible to resolve through diplomatic means, the chance of war breaking out was high. This outcome was made even more likely by the fact that at the time, the use of armed force was considered to be an accepted method of attaining national aims and resolving international disputes.[3]

At the end of the 19th century, Russia's military was among probably the most powerful in the world.[4] Notwithstanding this, the Czar feared that the massive cost of a long, drawn-out war, in terms of human suffering and material destruction, would bankrupt his country, and among other things, reduce the population to famine.[5] The Czar was convinced that it was necessary to limit the arms-race, and to find an

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1 Legal Counsel at the Permanent Court of Arbitration. Opinions expressed in this paper reflect the personal views of the author and should not be interpreted as binding on the Permanent Court of Arbitration or its International Bureau.

2 Count Mouravieff, 'Russian Circular Note Proposing the First Peace Conference, St. Petersburg, 12 August 1898', in Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, p. xiv.

3 Shabtai Rosenne, 'Introduction' in *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press (2001), p. xv.

4 Robin Sharwood, 'Princes and Peacemakers: The Story of the Hague Peace Conference of 1899' in *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press (2001), p. 448.

5 Peter van den Dungen, "The Making of Peace: Jean de Bloch and the First Hague Peace Conference", Center for the Study of Armament and Disarmament (1983), p. 3; Jean de Boch's study, contained in a six-volume examination of the technical, economical and political features of war, was published between 1898 and 1900 in four languages. Only the last volume called *The Future of War* appeared in the English language.

alternative way to settle conflicts between states, and that this objective could only be successfully pursued, if at all, as part of an international agreement.

Accordingly, in 1898, the Czar invited many of the world's leaders to attend what was to become known as the First Hague Peace Conference (the "Conference"). In convening the Conference, the Czar had two main objectives in mind: (1) to obtain a reduction of military budgets through some agreed system of disarmament, and to reduce the suffering of war (especially by members of the armed forces by limiting some of the more harmful military technology that was emerging)[6]; and (2) to strengthen the systems available for the pacific settlement of international disputes, and in particular, to set international arbitration as a real alternative to war for the resolution of international disputes.[7]

Reactions to the Czar's bold initiative at the time varied, however almost all invitations were accepted.[8] The Netherlands was selected as the host-state because, in addition to familial links between the Czar and the young Dutch Queen Wilhelmina (they were distant cousins), it was seen as a neutral country, had hosted international conferences before, and was associated with "the first great modern international lawyer" Hugo Grotius.[9]

Representatives from twenty-six nations convened at Queen Wilhelmina's summer residence in The Hague from 18 May through 29 July 1899.[10] The Conference resulted in, among other things, the adoption of three conventions, namely, the Convention on the Pacific Settlement of International Disputes, the Convention Regarding Land Warfare, and the Convention Applying to Maritime Warfare the Principles of the Geneva Convention. Arguably the most concrete achievement of the Conference and its conventions, was the establishment of the Permanent Court of Arbitration ("PCA").

2.2. The second Hague peace conference 1907

Eight years after the First Hague Peace Conference, a Second Hague Peace Conference was held, this time with forty-three attendees.[11] At this Conference, a second Convention on the Pacific Settlement of International Disputes was signed, which made some additions and improvements to the 1899 Convention, particularly with respect to the procedures for arbitration and international commissions of inquiry.

Despite the original objectives of the Czar, in the years between the Conferences, and following 1907, there was no deceleration in the arms race: "The years surrounding the 1907 conference witnessed many attempts to navigate the turbulent waters of defense policy. […] Not only did international law fail to mitigate armament competition, but states exhibited strong tendencies toward unilateral solutions of security concerns, including a predilection for preemptive strikes."[12] In retrospect, it is easy to see where all of this was

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6 To this end, three signed declarations resulted from the Conference which prohibited the launching of projectiles from balloons, the use of asphyxiating gases, and expanding bullets. (*see* 'Introduction' by James B. Scott to *The Reports to the Hague Conferences of 1899 and 1907* (1917)).

7 *Supra* note 3.

8 Robin Sharwood, 'The Hague Peace Conference of 1899: A Historical Introduction', in *International Alternative Dispute Resolution: Past, Present and Future (The Permanent Court of Arbitration Centennial Papers)*, 2000 Kluwer Law International, at p. 165: "formal reactions of nations like Britain and the United States of America were warm and welcoming", whereas the Prince of Wales (later King Edward VII) was reported to have commented that the Czar's proposal was "the greatest nonsense and rubbish" he had ever heard of.

9 *Supra* note 3, p. xiii; note 8, p. 164.

10 The attending delegations were Austria-Hungary, Belgium, China, Denmark, France, Germany, Great Britain and Ireland, Bulgaria, Greece, Italy, Japan, Luxembourg, Montenegro (represented by members of the Russian Delegation), the Netherlands, Persia, Portugal, Roumania, Russia, Serbia, Siam, Sweden and Norway (two separate delegations), Spain, Switzerland, Turkey, the U.S.A., and the United States of Mexico.

11 In addition to those who attended the First Hague Peace Conference, the following states – many from Latin America – attended the Second Conference: The Argentine Republic, Bolivia, Brazil, Chile, Colombia, the Republic of Cuba, the Dominican Republic, the Republic of Ecuador, Guatemala, the Republic of Haiti, Nicaragua, Panama, Paraguay, Peru, Salvador, and Uruguay.

12 Scott Andrew Keefer, "Building the Peace Palace: The Hague Conference of 1907 and Arms Control before the World War", *Journal of the History of*

leading. Only seven years after the Second Hague Peace Conference, and just one year after the building of the Peace Palace as an international symbol to peace, the First World War broke out. Whereas during the first fifteen years of the PCA's life, it administered fifteen arbitrations,[13] no arbitrations were commenced during the First World War. In the years between the First and Second World Wars, seven cases were submitted to arbitration.[14] It was of no surprise that during the Second World War, as during the First, no arbitrations were commenced; the world's powers being engaged in non-pacific means of dispute-settlement.[15]

2.3. Structure of the PCA

The PCA is "not a court in the conventional understanding of that term, but rather an administrative organization with permanent and readily available means to serve as the registry for purposes of international arbitration and other related procedures, including commissions of [inquiry] and conciliation, if the [parties] concerned have agreed to such recourse."[16] In short, it is a permanent framework set up to assist temporary arbitral tribunals or commissions, and parties.

The PCA has a three-part structure consisting of an Administrative Council, Members of the Court, and an International Bureau or Secretariat:

1. The Administrative Council is composed of diplomatic representatives to The Netherlands of the states that have signed one or both of the Conventions. These states are known as member states, of which there are currently 109.[17] The Administrative Council decides matters of policy and approves the PCA budget and any new initiatives;

2. Each member state may nominate up to four potential arbitrators who are known as Members of the Court. Their names constitute a list of arbitrators that parties may appoint – but are not obliged to – in PCA proceedings. The founding Conventions stipulate that such persons shall be "of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators."[18] Members are appointed for renewable terms of six years, and their names are published in the PCA Annual Report and on the PCA's website.[19] In the early 1900s, the list of the Members of the Court was used extensively; in the first seventeen PCA arbitrations, 93% of all arbitrators appointed were Members of the Court.[20] In addition to forming a panel of potential arbitrators, the ICJ statute uses Members of the Court to constitute "national groups" which are

International Law 9 (2007), p. 38.

13 Barring recent years, the first fifteen years were the PCA's busiest period with the following cases coming under its auspices [name of case, parties to the dispute (year of award)]: 1. Pious Fund of the Californias, U.S.A. v. Mexico (1902); 2. Preferential Treatment of Claims of Blockading Powers Against Venezuela, U.K., Germany and Italy v. Venezuela (other joined states: Belgium, Spain, U.S.A., France, Mexico, The Netherlands, Sweden, and Norway) (1904); 3. Japanese House Tax, Germany, France, and U.K. v. Japan (1905); 4. Muscat Dhows, France v. U.K. (1905); 5. Deserters of Casablanca, France v. Germany (1909); 6. The Grisbådarna Case, Norway v. Sweden (1909); 7. North Atlantic Coast Fisheries, U.K. v. U.S.A. (1910); 8. Orinoco Steamship Company, U.S.A. v. Venezuela (1910); 9. Arrest and Restoration of Savarkar, France v. U.K. (1911); 10. Carnevaro Claim, Italy v. Peru (1912); 11. Russian Claim for Indemnities, Russia v. Turkey (1912); 12. French Postal Vessel "Manouba", France v. Italy (1913); 13. The "Carthage", France v. Italy (1913); 14. The "Tavignano", "Camouna" and "Gaulois" Incident, France v. Italy (1912); 15. Dutch-Portuguese Boundaries on the Island of Timor, The Netherlands v. Portugal (1914).

14 1. Expropriated Religious Properties, Spain, France and U.K. v. Portugal (1920); 2. French Claims Against Peru, France v. Peru (1921); 3. Norwegian Claims Case, U.S.A. v. Norway (1922); 4. The Islands of Palmas Case (or Miangas), U.S.A. v. The Netherlands (1928); 5. Chevreau Claim, U.K. v. France (1931); 6. Claims of the Nordstjernan Company, Sweden v. U.S.A. (1932); 7. Radio Corporation of America v. China (1935).

15 No arbitrations were commenced, but one ongoing case was resolved: the Radio Orient case, which concerned a dispute between the States of Levant under the French Mandate and Egypt. The award was rendered on April 2, 1940.

16 *Supra* note 3, p. xxi.

17 For a list of member states, visit http://www.pca-cpa.org/showpage.asp?pag_id=1038.

18 Article 23 of the 1899 Convention, Article 44 of the 1907 Convention.

19 For a list of Members of the Court, visit http://www.pca-cpa.org/upload/files/MC%2020080627.pdf.

20 The Rt. Hon. Sir Kenneth Keith KBE, "Member of the Permanent Court of Arbitration", in Timothy L.H. McCormack and Cheryl Saunders (eds.), *Sir Ninian Stephen: A Tribute*, The Miegunyah Press, (2007), p. 160.

entitled to nominate candidates for election to the International Court of Justice.[21] Members of the Court may also nominate candidates for the Nobel Peace Prize.

3. The International Bureau, headed by a Secretary-General[22] and located in the Peace Palace in The Hague, is comprised of experienced legal and administrative staff that provide support to participants in arbitral proceedings, including full registry services to tribunals and commissions, serving as the official channel of communications and ensuring safe custody of documents, research, editing, financial administration, logistical and technical support for meetings and hearings, travel arrangements, and general secretarial and linguistic support. Having the PCA perform these varied activities can significantly alleviate the administrative burden faced by arbitral tribunals and parties. This can result in lower costs for the parties as administrative work that would otherwise be carried out by a tribunal member at a higher fee, is undertaken by a member of the PCA staff for a much lower fee. The staff members of the PCA, including the Secretary-General, hold the status of international civil servants.

3.The ebb and flow of the PCA caseload (1945 to 2009)

For approximately forty-five years following the end of the Second World War, the PCA was in a state of near dormancy. From the 1990s onwards, however, this situation began to change in a steady way, and over the past ten years, the PCA's caseload has grown rapidly to reach a record number of cases; the PCA currently provides administrative support in thirty-four arbitrations, all involving at least one state, state-entity, or intergovernmental organization.

Apart from the two World Wars, there were several factors that affected both the rise and fall in the number of cases being brought to the PCA's door. Some of these are worth mentioning briefly.

3.1. Permanent court of international justice

At the end of the First World War, the League of Nations, and with it, the Permanent Court of International Justice ("PCIJ") was established. With its arrival, a number of states took their cases before that forum (the first permanent international tribunal with general jurisdiction), instead of submitting them to arbitration. Between 1922 and 1940, the PCIJ dealt with twenty-nine contentious cases between states.[23] In contrast to its busier times before the First World War, the PCA dealt with just six matters during the PCIJ's existence.[24]

It is interesting to note that the seeds of the PCIJ and its successor, the International Court of Justice ("ICJ"), were first planted at the Second Hague Peace Conference when delegates considered the establishment of a permanent court with a standing body of judges. Those behind the proposal considered that such a court "which, by embracing in its composition the different juridical systems of the world, would be fitted to ascertain and develop a system of international law based on a large and liberal spirit of equity in touch with

21 Article 4 of the Statute of the International Court of Justice.

22 The current Secretary-General of the PCA is H.E. Mr. Christiaan Kröner, who replaced the former Secretary-General, Mr. Tjaco van den Hout, in September 2008.

23 *See* http://www.icj-cij.org/pcij/index.php?p1=9

24 *Supra* note 21.

the needs of the world" was indispensable to ensuring the continuity of international law.[25] The proposal had never reached fruition in the earlier days because of an inability on the part of the delegates to agree on the method of selection of the judges.[26] Concern for "continuity" and consistency in international jurisprudence was alive and well in 1907, and finds resonance today with disquiet caused by the rendering of arguably inconsistent decisions by modern-day arbitral tribunals over similar legal issues, and the proliferation of *ad hoc* international tribunals.

Despite the advent of the PCIJ and the ICJ, and the overlap in jurisdiction shared between these institutions and the PCA, following the Second World War, the PCA went on to administer a number of very significant arbitrations between states,[27] including the Eritrea and Ethiopia Boundary and Claims Commissions relating to the countries' shared border and alleged violations of international law during the 1998 to 2000 war. Furthermore, a number of states have brought their disputes under the United Nations Convention on the Law of the Sea to the PCA.[28] The PCA has now developed expertise in that important field.

3.2. Expanded PCA mandate

One development that was to change the PCA's future significantly, and to steer it in directions beyond disputes involving just states, came about in the 1930s as a result of a dispute over a radio transmission line. In November 1928, the Government of China and a private party, the Radio Corporation of America ("RCA"), concluded an agreement establishing a radio circuit service between China and the United States. A few years later, the Government of China entered into an agreement along the same lines with another U.S. company, which, according to the RCA, breached the exclusivity of its agreement with China.

The PCA was approached with respect to providing its registry services in this matter, and the Administrative Council allowed it. This set a precedent for the PCA's extended mandate to act as registry for matters involving various combinations of states, state entities, international organizations, and private parties. It is only now that the PCA is experiencing some of the fuller effects of this decision, foremostly with the increasing number of arbitrations involving private investors and governments that the PCA is being asked to administer (discussed further at section D below).

3.3. The UNCITRAL arbitration rules

Another factor contributing to a considerable increase in PCA activity can be traced to a letter dated 26 March 1974 from the United Nations Commission on International Trade Law ("UNCITRAL") to the PCA Secretary-General,[29] enquiring whether the PCA would be interested in having a role under the procedural rules for arbitration being drafted by UNCITRAL with a view to global use. The Secretary-General responded positively. As a result, the PCA was included in the UNCITRAL Arbitration Rules ("UNCITRAL Rules" or

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25 "Report from the Conference from the First Commission Recommending the Creation of a Court of Arbitral Justice (Annex A to the minutes of the Ninth Plenary Meeting)" in *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, T.M.C. Asser Press (2001), p. 179.

26 *Supra* note 3, p. xxii.

27 1. "Heathrow Airport Charges", U.S.A. v. United Kingdom of Great Britain and Northern Ireland (1992);
2. Eritrea v. Yemen (1998 and 1999); 3. Italy v. Costa Rica (1998); "The Iron Rhine Arbitration", Belgium v. Netherlands (2005); Netherlands v. France (2004); Ireland v. United Kingdom (OSPAR Arbitration, 2003)

28 The PCA administered the Ireland v. United Kingdom UNCLOS arbitration, familiarly known as the MOX Plant Case. The PCA also administered the following arbitrations under UNCLOS: Malaysia v. Singapore (Award on agreed terms, September 1, 2005); Barbados v. Trinidad & Tobago (Final Award, April 11, 2006); Guyana v. Suriname (Award of the Tribunal, September 17, 2007).

29 Baron van Boetzelaer was the Secretary-General of the PCA at that time.

"Rules"), the only arbitral institution referred to therein. Since then, these Rules have been included in arbitration clauses by countless parties, including international organizations, and governments all over the world.

The PCA Secretary-General has a number of functions with respect to the constitution of arbitral tribunals under the UNCITRAL Rules. They are:

1. To designate an appointing authority to appoint an arbitrator when a party, or the co-arbitrators, have failed to make the necessary appointment in accordance with the Rules;[30]
2. To replace an appointing authority for refusing to act or failing to appoint within the time limits under the Rules;[31]
3. To designate an appointing authority to decide a challenge.[32]

Although the Rules provide for the Secretary-General to designate appointing authorities, it is not uncommon for parties to agree that the Secretary-General act as the appointing authority directly. Although nothing in the current Rules expressly prevents the Secretary-General from designating himself as appointing authority, the PCA does not consider this to be in the spirit of the Rules as they are currently drafted. Therefore, the Secretary-General has never designated himself and has always required an express agreement from the parties before the PCA will act as appointing authority. When parties do agree on an appointing authority, whether it be the Secretary-General or another institution or individual, what would otherwise be a two-step process to the appointment of a missing arbitrator, or a decision on a challenge, is reduced to one step, and is thus, arguably more efficient.

In the first ten years after adoption of the Rules, the Secretary-General of the PCA received four requests to designate or act as the appointing authority. In the second decade (1986 to 1996), the Secretary-General received sixty-two such requests. In the third decade (1996 to 2006), the Secretary-General received 204 such requests. From 2006 to the present day, 102 such requests have been received. In total, since 1976, the Secretary-General has received requests to designate, or to act as, an appointing authority on over 350 occasions.

The Secretary-General generally designates an appointing authority within two weeks of receipt of a request that contains all required documents. In doing so, he takes into account such factors as (1) the comments of the parties, (2) the nationalities of the parties and the regional or global character of the dispute, (3) the place of arbitration, (4) the language of the arbitration, (5) the complexity of the case, and amounts claimed, (6) the fees charged by prospective appointing authorities, and (7) the anticipated reaction time of the prospective appointing authority.

When appointing arbitrators, the Secretary-General takes into account many of these same factors, as well as relevant others, *e.g.*, any required expertise, the nationalities and professional profiles of existing tribunal members. In the appointment process, all arbitrators are required to make a declaration with respect to their impartiality and independence.[33] When the Secretary-General acts as the appointing authority for the

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30 Articles 6(2), 7(2)(b) and 7(3) of the UNCITRAL Rules.

31 Articles 6(2) and 7(2)(b) of the UNCITRAL Rules.

32 Article 12(1)(c) of the UNCITRAL Rules. Under Article

33 Article 9 of the Rules provides that "[a] prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

appointment of the presiding arbitrator or the sole arbitrator, he generally employs the list-procedure as foreseen under the Rules.[34]

Over the years, the PCA, as an institution, has gained unique experience in the operation of the Rules (which is perhaps only rivaled by that of the Iran-U.S. Claims Tribunal given that its procedural rules are a slightly modified version of the UNCITRAL Rules).[35] That experience has revealed a number of trends, for example, the most common request that has been received by the Secretary-General over the last 32 years is for the designation of an appointing authority to appoint the second arbitrator on behalf of a defaulting respondent. Often when a defaulting respondent party is invited by the PCA to comment on a request that the Secretary-General designate an appointing authority, it will begin to participate in the process and make the required appointment. It is then for the claimant to decide whether or not to accept the late appointment, or pursue appointment through an appointing authority. In the latter case, the eventual appointing authority very often will appoint the late proposal of the respondent.

Another trend that is noticeable is the increasing number of requests that the Secretary-General designate an appointing authority for the replacement of a previously-agreed appointing authority pursuant to Articles 6(2) and 7(2)(b) of the Rules.

3.4. The PCA as registry in UNCITRAL rules cases - bilateral and multilateral investment treaty disputes

In addition to the specific role of the Secretary-General under the UNCITRAL Rules, the PCA has also seen a remarkable increase in the number of requests to provide full administrative support to tribunals conducting arbitrations under the Rules. The PCA is currently providing administrative support in a total of thirty-four arbitrations. Of those, thirty are conducted under the UNCITRAL Rules, or slightly modified versions thereof. Seventeen cases arise under bilateral investment treaties ("BITs"), and six under multilateral investment treaties.

The rapid increase in the number of BIT disputes that the PCA has seen in the last year alone is not surprising for two main reasons: (1) the proliferation of BIT disputes in recent years, and (2) the appropriateness of the PCA as an administrative institution for these kinds of matters. There are approximately 2,500 BITs in the world today.[36] In 1995, only six investor-State disputes were known of, and in just 10 years, that number multiplied by 38, with 226 known cases in 2005.[37] Most BITs include relatively general dispute resolution provisions on investor-state dispute settlement, and certain procedural aspects of such arbitrations are often regulated with reference to existing procedural rules – usually those of the International Centre for Settlement of Investment Disputes ("ICSID") or the UNCITRAL Rules. The PCA already has over 30 years of experience in the operation of the UNCITRAL Rules, particularly with respect to the constitution of tribunals. Further, the PCA, like ICSID, is a treaty-based arbitral institution; it has the endorsement of all 109 of its member states. It stands to reason that many of these parties are comfortable with an intergovernmental organization administer an arbitration. As it stands, all of the UNCITRAL arbitrations in which the PCA is involved include a state, state entity, or intergovernmental organization.

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34 Article 6(3) of the UNCITRAL Rules.

35 *See* http://www.iusct.org/tribunal-rules.pdf.

36 *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD Work Programme on International Investment Agreements, supervised by Anna Joubin-Bret, p. 1.

37 *Ibid.*

The present kaleidoscope of PCA cases involving parties of which only one is a state, shows the significance of the PCA's mandate beyond state/state disputes. Although it was not possible in the 1930s to see into the future, the decision to expand the PCA's mandate in this way served it and its member states well, and provided disputing parties and their tribunals with an institution, uniquely qualified to administer their dispute resolution procedures.

3.5. Current revision of the uncitral arbitration rules

At its 39th session in New York, UNCITRAL agreed that revising the UNCITRAL Rules should be given priority, and subsequently work has begun on this project.[38] Three issues that are currently under consideration by the UNCITRAL Working Group are particularly relevant to the PCA, and will have an impact on its future work:

1. *The timing of requests to designate appointing authorities:* Under the current Rules, a party may request the designation of an appointing authority only at certain stages in the procedure. This is not ideal, as the following, frequently seen, scenario demonstrates: an arbitration has been commenced by Party A against Party B. There is no agreement to an appointing authority. Party A notifies its appointment of the first arbitrator to Party B, who from that date, has thirty days to appoint the second arbitrator. However, Party B has never participated in the arbitration to date, giving Party A reason to doubt that Party B will appoint an arbitrator in time. If Party A's doubts prove correct and Party B does not appoint within thirty days, Party A may only then request that an appointing authority be designated, and only once that is done, request the appointing authority to appoint an arbitrator on behalf of Party B. This can take a number of weeks. Under the revised Rules, it is proposed that any party may request the Secretary-General to designate an appointing authority at any time following the filing of the Notice of Arbitration.[39] This appears to be an improvement to the current Rules as parties will be able to request a designation at the outset of a case which could save time later in the proceedings.

2. *The role of the Secretary-General as designator of appointing authorities:* Under the Rules as they stand, the role of the Secretary-General is limited to designating appointing authorities. As previously mentioned, parties may agree, and often do, that the Secretary-General act as the appointing authority directly. An amendment has been proposed for the Rules that would expressly mention this possibility, but leave the ultimate decision to the parties. The revised provision could read: "the parties may agree on a person or institution, including the Secretary-General of the Permanent Court of Arbitration at The Hague, to act as appointing authority under these Rules".[40] It has also been proposed that the role of the Secretary-General be expanded to allow him or her to act directly as the appointing authority in circumstances where the parties are unable to agree on one. When approached by UNCITRAL, the Secretary-General of the PCA advised that he would be able to act in either capacity.

3. *The role of the PCA in fee arrangements:* The suggestion has been made that the Rules could be improved if the PCA were to play a practical role in relation to fixing fees.[41] It is widely accepted that it is advantageous to have an institution act as a "buffer" between parties and tribunals when dealing

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38 *Report of the Working Group on Arbitration and Conciliation on the Work of its 46th Session* A/CN.9/619 (20 March 2007)

39 *Ibid*, para. 75. The proposed text is: "any party, with the Notice of Arbitration or any time thereafter, may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority."

40 A/CN.9/WG.II/WP.145, para. 40.

41 A/CN.9/WG.II/WP.145/Add. 1, para. 45.

with fees as the presence of a third party can help to avoid awkward situations. Through its work in administering arbitrations, the PCA has extensive experience in establishing different fee arrangements for different cases. While arbitrators in UNCITRAL Rules cases are typically paid at hourly rates agreed to by the parties, the PCA is experienced in facilitating a variety of fee arrangements in such cases, *e.g.*, having the parties and arbitrators agree on fixed fees, to the fee schedule of an institution, or to different hourly rates between the tribunal members.[42]

Conclusion

The context in which the PCA was conceived is in many ways light years from present-day reality. Although the PCA was created as a result of an inchoate movement towards peace, two world wars, and many others, occurred during its lifetime. As a result of this, and numerous other factors, the PCA has experienced sharp peaks and drops in activity. The decision taken by the PCA's Administrative Council in its early years to expand its role from an administrative home created for inter-state conflicts to include disputes between states, state entities, international organizations, private parties, and any combination of these entities, certainly laid a foundation for a bright future. This, along with the inclusion of the PCA Secretary-General in the UNCITRAL Arbitration Rules and the unique experience in the operation of those Rules that the PCA accumulated over ensuing years, has been pivotal in making the PCA relevant in today's world, particularly given the proliferation of investor-state disputes.

Awareness of the PCA and its work continues to grow. In January 2005, the UN Secretary-General Kofi Annan wrote "I am heartened that in recent years, […] more State and non-State actors are making use of the [PCA's] services. As the number of the disputes in the world shows no sign of diminishing, I urge more States, international organizations and private parties to do so."[43]

[42] The advantage of this latter approach for parties, is that it avoids members of a tribunal, who would normally charge less, charging the same hourly rate as the highest-charging member of the tribunal.

[43] Kofi Annan, "Foreword" in Permanent Court of Arbitration, *Basic Documents: Conventions, Rules, Model Clauses and Guidelines* (The Hague: Permanent Court of Arbitration, 2005), p. vii.

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Resumen: La Corte Permanente de Arbitraje, establecida a través de una convención internacional en 1899, es el foro más antiguo de resolución internacional de disputas basado en un tratado. Aunque la actividad de la CPA ha fluctuado a lo largo de sus 109 años de vida, en la actualidad está llevando a cabo más arbitrajes que nunca. El presente trabajo analiza distintos elementos que han tenido que ver con las vicisitudes que ha sufrido la actividad de la Corte Permanente de Arbitraje. En este sentido se presta especial atención a la relación entre el aumento de la actividad de la CPA y la puesta en práctica del Reglamento de Arbitraje de UNCITRAL. Asimismo se estudia en qué medida la revisión del Reglamento puede afectar al trabajo de la CPA en el futuro.

Palabras clave: Corte Permanente de Arbitraje, resolución de controversias, Reglamento de Arbitraje de UNCITRAL.

Abstract: The Permanent Court of Arbitration, established by an international convention in 1899, is the oldest treaty-based forum for international dispute settlement in the world. Although the PCA has experienced significant fluctuations in activity over its 109 year lifetime, it is currently involved in more arbitrations than ever before. This paper discusses a number of the more distinct reasons for the various rises and falls in PCA activity, and pays particular attention to the effect of the PCA's inclusion in the UNCITRAL. Arbitration Rules on its recent surge in activity. This paper will also look at how the current revision of the Rules may effect the PCA's work in the future.

Keywords: Permanent Court of Arbitration, dispute settlement, UNCITRAL Arbitration Rules.

ISBN: 978-84-92456-39-0

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