

ICCA YEARBOOK

Foreword to the new Permanent Court of Arbitration Optional Rules
by

P.J.H. Jonkman, Secretary-General, Permanent Court of Arbitration

1. The Permanent Court of Arbitration at The Hague ("PCA") has recently adopted two new sets of arbitration rules. The first was issued in October 1992 for optional use in resolving disputes between States 1). The second, approved nine months later, in July 1993, is designed for disputes between States and non-State parties 2).

2. The new Rules resulted from efforts of a distinguished Working Group, chaired by the late Judge Manfred Lachs, that was convened by the PCA's International Bureau to explore PCA arbitration procedures and other activities. The Working Group concluded that the PCA's existing procedures did not seem to meet the needs of parties to arbitration today, and recommended that up-to-date procedures should be provided.

3. The Working Group suggested to bring the procedural rules of the PCA in line with the UNCITRAL Arbitration Rules as they could be considered as the most recent, most comprehensive, most tested in practice and designed to be compatible with civil law, common law and other law systems. Experience since 1981 demonstrates that the UNCITRAL Arbitration Rules provide effective procedures for arbitration of public international law disputes and other cases between States, although the Rules were initially designed primarily for international commercial arbitration.

4. In order to carry out this suggestion, the International Bureau invited a number of legal scholars, arbitrators and arbitration practitioners to form an Expert Group which met on 27 February 1992. The Group proposed *inter alia* the following guidelines for further action:

- a) There should be two new sets of rules: one for inter-State arbitration and another for arbitrations between a State and a private party.
- b) The Rules and administrative services of the International Bureau should be available for use by all States and should not be restricted to disputes in which States are parties to the Hague Conventions of 1899 and 1907.

1) *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, effective 20 October 1992.*

2) *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States of Which only One is a State, effective 6 July 1993.*

c) Both sets of rules should be based on the UNCITRAL Arbitration Rules, and modifications in those Rules should be kept to a minimum. Fidelity to the language of the UNCITRAL Rules was essential to the success of the new PCA-rules as States and private parties desire assurance that they are adopting a tested and effective set of procedures for arbitrating their disputes. Moreover, it was recognized that because the UNCITRAL Rules are already officially translated into the five principle United Nations languages, mere stylistic or non-substantial changes in the wording of the Rules could not be justified in the light of the problems of re-interpretation and disputes over interpretation that accompany the use of new terms.

d) In respect of the new Rules for inter-State arbitration this meant that the UNCITRAL Rules should be modified only as necessary to reflect the public international law character of disputes arising under the new PCA rules or to accommodate the unique characteristics of the PCA system. In addition a majority of the members of the Group were in favour of the inclusion of explicit "truncated tribunal" provisions.

e) In respect of the new Rules for arbitrations between a State and a private party the Group suggested modifications of the UNCITRAL Rules only to indicate the role of the Secretary-General and the International Bureau, to provide a waiver of sovereign immunity of jurisdiction and to include explicit "truncated tribunal" provisions.

f) Both sets of new Rules should be optional and emphasize flexibility and party autonomy. In particular the choice of arbitrators should not be limited to persons who are listed as members of the PCA.

g) Both sets of new Rules should be appropriate for resolving disputes involving more than two parties, provided that appropriate changes are made in the procedures for choosing arbitrators and sharing costs.

5. Following the meeting of the Expert Group, the International Bureau, with the assistance of a drafting committee, prepared a draft of rules for arbitration between two States, reflecting views expressed at the meeting. The draft was distributed to all members of the Group. Comments were received from a number of participants and a revised text was elaborated, aimed at reflecting the predominant views of the members of the Group. During its meeting on 20 October 1992 the Administrative Council of the PCA authorized its Secretary-General to establish the new Rules, taking note of the observations which were recorded in the minutes of the meeting.

6. Subsequently, a draft of rules for arbitration between two parties of which only one is a State was prepared by the International Bureau, in consultation with its drafting committee, and distributed to the members of the Expert Group. The comments received led to the elaboration of a revised text which was submitted to the meeting of the Administrative Council on 27 April

1993 for a first discussion. A second discussion took place at the Council meeting of 5 July 1993. After amending some wording, the Council approved the rules and requested the Secretary-General to publish them.

7. To assist parties each of the Rules is accompanied by an explanatory Introduction, Model Arbitration Clauses that parties may use or modify, and Notes to the Text that identify each modification made in the UNCITRAL Arbitration Rules.

8. The main differences between the UNCITRAL Arbitration Rules and the PCA Optional Rules for arbitrating disputes between two States include:

- a) All time limits placed upon the parties are doubled in view of the institutional needs of States.
- b) Article 5: This provision gives parties the option of having one, three or five arbitrators (the UNCITRAL Rules provide only the option of one or three).
- c) Article 13: New paragraphs have been added. They provide that resignations of arbitrators are subject to approval of the arbitral tribunal and in the event that an arbitrator in a multi-member panel fails to participate in the arbitration, the remaining arbitrators may continue the arbitration if they deem it to be appropriate taking into account the stage of the arbitration, the reasons expressed by the arbitrator for his nonparticipation and other circumstances of the case. The provision responds to the situation in which an arbitrator seeks to resign solely in order to frustrate the proceedings.
- d) Article 16: Unless the parties agree otherwise the place of arbitration will be The Hague.
- e) Article 33: In the absence of an agreement between the parties as to the law to be applied, the arbitral tribunal shall decide in accordance with "international law" which is largely defined in the same manner as in Article 38 of the Statute of the International Court of Justice.

9. The main differences between the UNCITRAL Arbitration Rules and the PCA Optional Rules for arbitrating disputes between two parties of which only one is a State include:

- a) Article 1 (2): Agreement to arbitrate under these rules constitutes a waiver of any right of sovereign immunity from jurisdiction in respect of the dispute in question. If parties also wish to provide for a waiver of sovereign immunity from execution, they may explicitly express this in the Arbitration Clause of their contract (see Model Clause, optional paragraph 5).
- b) Article 16: Unless the parties agree otherwise the place of arbitration will be The Hague.
- c) Article 13: The same provision has been added as described above under 8 c).