Spotlight on the PCA's Appointing Authority Activities

The appointing authority in international arbitration plays an essential, yet often underappreciated, role in ensuring the efficient conduct and integrity of proceedings. Arbitration rules may empower an appointing authority to facilitate the formation of a tribunal by appointing an arbitrator where a party fails to make an appointment or where agreement cannot be reached on the arbitrator to be appointed. The appointing authority may also decide challenges regarding the independence and impartiality of an arbitrator or resolve objections to the fees charged by a tribunal.

The PCA Secretary-General is the specified appointing authority under the PCA Arbitration Rules 2012 and regularly serves as the appointing authority under UNCITRAL Arbitration Rules and other *ad hoc* proceedings with the agreement of the parties. Additionally, the Secretary-General is empowered under the UNCITRAL Arbitration Rules to designate the appointing authority in the event that one has not been agreed upon by the parties. The International Bureau of the PCA will also provide support to other individuals serving as an appointing authority. For instance, the PCA has served as the secretariat to the appointing authority of the Iran-United States Claims Tribunal since the establishment of that body.

The powers of the appointing authority under the PCA Arbitration Rules and under the revised UNCITRAL Rules are broadly similar, involving 10 specific functions. The appointing authority may –

- determine that a sole arbitrator should be appointed instead of the default three-member tribunal (for instance, in small value disputes where the costs of a three-member tribunal would be prohibitive);
- appoint a sole arbitrator if the parties have not reached agreement on the individual to be appointed;
- appoint the second arbitrator if the respondent party has failed to do so;
- appoint the presiding arbitrator if the arbitrators appointed by the parties have not reached agreement on the individual to be appointed;
- constitute the tribunal in the case of an arbitration with more than two parties or other circumstances where the application of the rules has not led to the constitution of the tribunal;
- decide a challenge regarding the independence or impartiality of an arbitrator;
- determine, in exceptional circumstances, that a party should be denied the right to appoint a replacement arbitrator (for instance, in the event of abusive resignations intended to delay the proceedings);
- review, and if necessary adjust, the tribunal's proposed method for determining its fees;
- review, and if necessary adjust, the tribunal's final determination of its fees and expenses; and
- review, and if necessary adjust, the amount of any deposit requested by the tribunal as an advance on its fees and expenses.

To date, the Secretary-General has received 787 requests to act as appointing authority or to designate an appointing authority. These requests have related to arbitrations between States under public international law, proceedings involving international organizations, treaty-based investment arbitrations between an investor and a State, contract-based arbitrations involving a State or State-entity, contract-based arbitrations between private parties, and other forms of dispute resolution. The PCA's appointing authority activity in 2018 is described on page 14 of this Report.

Since 2005, 90 percent of appointing authority requests to the PCA in all types of cases have involved the appointment of an arbitrator; 10 percent have involved one or more challenges to an arbitrator. Among requests for the appointment of an arbitrator, 54 percent have involved the appointment of the second arbitrator; 20 percent, the appointment of the presiding arbitrator, and 24 percent, the appointment of a sole arbitrator. The Secretary-General was requested to act as the appointing authority in 34 percent of cases and to designate or replace an appointing authority in 66 percent of cases.

The procedure to be followed in appointing an arbitrator is dependent upon the applicable arbitration rules, which may be modified or elaborated in the treaty, contract, or *compromis* on which the arbitration is based or in another agreement between the parties. The Secretary-General, when acting as appointing authority, will give effect to the procedure agreed between the parties to the arbitration agreement. Before proceeding to an appointment, the Secretary-General may seek further information as to the nature of the case and the circumstances pertaining to his competence to act under the applicable rules.

When asked to appoint the second arbitrator on behalf of a respondent party, the Secretary-General will typically take account of the following factors, subject to any specific requirements in the agreement to arbitrate: (a) the nationalities of the parties and prospective arbitrators, (b) the place of arbitration, (c) the language(s) of the arbitration and the language abilities of prospective arbitrators, (d) the amount claimed, (e) the subject matter and complexity of the dispute, and (f) the qualifications, experience, availability, and place of residence of prospective arbitrators. All candidates considered for appointment by the Secretary-General are required to conduct a check for conflicts

of interest and to submit a written statement of impartiality and independence, making any required disclosure and committing to notify the parties of any conflicts that may subsequently arise.

When asked to appoint the presiding arbitrator or a sole arbitrator, the Secretary-General will ordinarily follow a list procedure, as envisaged by the PCA Arbitration Rules 2012 and UNCITRAL Rules. A list procedure is typically comprised of the following steps:

Appointing authority compiles a list of potential arbitrators

- Checks for possible conflicts of interest
- May consult parties with regard to arbitrator profile

Each party may strike proposed names and establish an order of preference

- Names that are struck will not be considered for appointment
- Lists are returned individually to appointing authority (not copying the other party)

Appointing authority appoints on the basis of the returned lists

- According to order of preference of the parties if list procedure successful
- Or direct appointment if list procedure fails

The Secretary-General will also regularly enquire with parties whether they agree to a modified list procedure, pursuant to which the number of strikes by each side is limited to "50 percent minus one". This approach ensures that at least one common candidate will remain on the list.

The combination of (a) consulting the parties in respect of the composition of the list and (b) enabling the parties to rank and strike candidates on the list is intended to lead to an appointment that corresponds as closely as possible to the joint preferences of the parties. Geographic and gender diversity are also key considerations in each case.

At the joint request of the parties, the Secretary-General has also implemented the following alternative appointment mechanisms, in lieu of a list procedure:

- *List procedure excluding "strikes":* The parties are limited to ranking candidates on the list and/or commenting on the relative qualifications and suitability of candidates.
- *List procedure on the basis of a closed list/roster:* The appointing authority's choice is limited to persons nominated to a closed list of arbitrators.
- *Selection between options submitted by the parties:* Following bilateral discussion, the parties jointly submit a shortlist of candidates to the appointing authority, who will then select one candidate for appointment.
- *Selection at discretion of appointing authority:* Finally, the selection of the sole or presiding arbitrator (or, indeed, all arbitrators) may be placed in the hands of the appointing authority. While the parties may be invited to provide general comments on the required profile of the arbitrator, they have no role in proposing or commenting on any specific candidates for appointment.

Of the 34 contested challenges to an arbitrator submitted to the Secretary-General, 28 resulted in determinations: 21 challenges were rejected, 7 were upheld. In five challenges, the challenged arbitrator resigned before a decision was made, and in one case the challenging party withdrew the challenge in the context of broader settlement negotiations.

When asked to decide a challenge to an arbitrator, the general practice of the Secretary-General is to take a decision on the basis of written submissions. In two instances, however, the Secretary-General received oral submissions from the parties regarding a challenge: in one case, an in-person hearing was held at the request of both parties; in another, a hearing was conducted by teleconference.

If the challenge is comprehensive when initially filed, the Secretary-General will first seek the non-challenging party's comments, and this will often be followed by a second round of pleadings by both parties. If the challenge is not comprehensive when filed, the Secretary-General will first invite the challenging party to elaborate its position. The Secretary-General typically grants periods of ten days to the parties to submit their first round of comments plus a similar or shorter period of time for reply rounds. These time periods are flexible depending on the circumstances.

The challenged arbitrator will also be given an opportunity to comment on the challenge. In the PCA's experience, many challenged arbitrators abstain from submitting comments other than to confirm that they consider themselves to be impartial and independent. Sometimes, a challenged arbitrator will submit his or her opinion on the merits of the arguments submitted by a party in support of a challenge. In some cases, the Secretary-General has also found it appropriate to invite the comments of the other members of the tribunal.

Since 2008, the practice of the Secretary-General has been to issue reasons for challenge decisions if any of the parties so request. Since that date, at least one party in every challenge proceeding has requested that the Secretary-General provide reasons for his challenge decision. The PCA is bound by the agreement of the parties concerning the confidentiality of arbitrations it administers. Accordingly, challenge decisions are not published except with the consent of the parties.