

PERMANENT COURT OF ARBITRATION
OPTIONAL CONCILIATION RULES

OPTIONAL CONCILIATION RULES

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INTRODUCTION

Purpose of the Rules

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.

Scope of Application

The PCA Optional Conciliation Rules were prepared primarily for use in assisting to resolve disputes arising out of or relating to legal relationships where the parties seek an amicable settlement of their differences. In addition, parties are free to agree to use these Rules in seeking to resolve any other type of dispute.

These 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.

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.’

Main Characteristics of these Rules

Parties who consider using the PCA Optional Conciliation Rules will wish to be aware of some of the main characteristics of these Rules:

A Voluntary Process

A primary principle that is expressed throughout these Rules is that initiating and continuing conciliation is entirely voluntary. Thus, these Rules provide that conciliation begins when all parties consent (art. 2, paras. 2 and 3) and that one party may terminate the process whenever it unilaterally determines that conciliation is no longer desirable (art. 15, para. (a)). These provisions reflect the belief that conciliation has the best chance to succeed when all parties share the desire to participate, and that, if they do not, it may be more efficient to resort without delay to arbitration or judicial means.

Flexible Procedures

Flexibility is another fundamental characteristic of these Rules. Parties are free to agree to have one or more conciliators (art. 3). The conciliator may conduct the process in such manner as he considers appropriate, taking into account the circumstances of the dispute, any views the parties may have expressed and any special need for a speedy settlement. The role of the conciliator under the PCA Optional Conciliation Rules is to assist parties to understand the issues and to reach an amicable settlement of their dispute. In pursuit of this goal, the conciliator may recommend terms of settlement if and when it is considered wise to do so, but the conciliator is not required to give a recommendation (art. 7, para. 4). The approach of the conciliator under these Rules is to bring the parties to agreement by a variety of means, rather than to focus primarily on influencing the parties by a recommendation.

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An Integrated System

A significant feature of the PCA Optional Conciliation Rules is that they are part of an integrated PCA dispute resolution system that links the procedures for conciliation with possible arbitration under the various PCA Optional Arbitration Rules. This 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, as mentioned above, 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).

A related safeguard arises from the provision of these Rules that makes clear that the conciliator may speak with the parties together or may meet them separately when that is advisable (art. 9, para. 1). These Rules also provide that a party may communicate information to the conciliator subject to the restriction that it not be disclosed to the other party (art. 10). These provisions encourage parties to confide in the conciliator – which may be vital in guiding the conciliator in the search for an amicable solution – and also to protect parties in arbitration or court litigation that may occur if no solution is found in the conciliation.

A model clause that parties may consider inserting in treaties or other agreements to provide for conciliation of future disputes, and a model clause for conciliation of existing disputes are set forth at page 239.

Explanatory ‘Notes to the Text’ appear at page 164.

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Effective July 1, 1996

Application of the Rules

Article 1

1. These Rules apply to conciliation of disputes 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 Conciliation Proceedings

Article 2

1. The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.
2. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.
3. If the other party rejects the invitation, there will be no conciliation proceedings.
4. If the party initiating conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such other period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to conciliate. If it so elects, it informs the other party accordingly.

Number of Conciliators

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Appointment of Conciliators

Article 4

1. (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;
 - (b) In conciliation proceedings with two conciliators, each party appoints one conciliator;
 - (c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.
2. Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,
- (a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or
 - (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.
3. Parties may also enlist the assistance of the Secretary-General of the Permanent Court of Arbitration in connection with the appointment of conciliators. In particular,
- (a) A party may request the Secretary-General of the Permanent Court of Arbitration to designate an institution or person to perform the function set forth in paragraph 2(a) of this article 4;
 - (b) The parties may request the Secretary-General of the Permanent Court of Arbitration to designate an institution or person to perform the function set forth in paragraph 2(b) of this article 4; or
 - (c) The Secretary-General may be the ‘person’ performing the functions set forth in paragraphs 2(a) and (b) of this article 4, pursuant to a request or agreement.

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In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator, and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of Statements to Conciliator

Article 5

1. The conciliator,* upon his appointment requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of its statement to the other party.
2. The conciliator may request each party to submit to him a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of its statement to the other party.
3. At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

Representation and Assistance

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

Role of Conciliator

Article 7

1. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

* In this and all following articles, the term 'conciliator' applies to a sole conciliator, two or three conciliators, and masculine terms include the feminine, as the case may be.

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 therefor.

Administrative Assistance

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person. The parties, or the conciliator with the consent of the parties, may request the International Bureau of the Permanent Court of Arbitration to provide such administrative assistance.

Communication between Conciliator and Parties

Article 9

1. The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.
2. Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings. The conciliator may request the International Bureau of the Permanent Court of Arbitration to arrange for the place where such meetings will be held.

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Disclosure of Information

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. 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.

Co-operation of Parties with Conciliator

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by Parties for Settlement of Dispute

Article 12

Each party may, on its own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

Article 13

1. 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.

Confidentiality

Article 14

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.

Termination of Conciliation Proceedings

Article 15

The conciliation proceedings are terminated:

- (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.

** The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

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Resort to Arbitral or Judicial Proceedings

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.

Costs

Article 17

1. Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term 'costs' includes only:

- (a) The fee of the conciliator which shall be reasonable in amount;
- (b) The travel and other expenses of the conciliator;
- (c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
- (d) The costs of any expert advice requested by the conciliator with the consent of the parties;
- (e) The cost of any assistance provided pursuant to articles 4, paragraph (2) and 8 of these Rules;
- (f) The costs of any services of the Secretary-General and the International Bureau of the Permanent Court of Arbitration.

2. The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

Deposits

Article 18

1. The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph 1 which he expects will be incurred.
2. During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.
3. If the required deposits under paragraphs 1 and 2 of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.
4. Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

Role of Conciliator in Other Proceedings

Article 19

The parties and the conciliator undertake that, unless the parties agree 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.

Admissibility of Evidence in Other Proceedings

Article 20

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;

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- (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.

NOTES TO THE TEXT

These Rules are based on the UNCITRAL Conciliation Rules, with the following modifications:

(i) General modifications:

Article 1, para. 1
Article 5, footnote
Article 7, paras. 2 and 3
Article 14
Article 19

Throughout the Rules, the pronoun ‘it’ (‘its’) is used when referring to parties and means any person, natural and juridical.

(ii) Modifications related to the functions of the Secretary-General and the International Bureau of the Permanent Court of Arbitration:

Article 4, para. 3 (added)
Article 8
Article 9, para. 2
Article 17, paras. 1(f) and (d) (added); para. 1(d) (renumbered)