

The Permanent Court of Arbitration.

In the December 1952 issue of this journal (A.R. 384) I had the privilege of calling upon readers to give some consideration to "The Future of the Permanent Court of Arbitration". I pointed out that this institution which, like the much better-known International Court of Justice, has its seat in the Peace Palace at The Hague, is seldom made use of, and I ventured to suggest that in future the Permanent Court of Arbitration would be used more for settling disputes between States on the one hand and private persons on the other. The possibility of its being so used is allowed for by Article 47 of the Convention of 1907 whereby the Court was established (Article 26 of the Convention of 1899) "The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration". I went on to say (see the penultimate paragraph of my cited article)

"Nevertheless, if the idea put forward here were to be accepted, it would not be sufficient simply to refer to the rules of arbitration laid down in the Convention, since the latter is much too permeated with the original intention of providing for arbitration between two States. If the Administrative Council were to decide to make the facilities of the Permanent Court of Arbitration available also for arbitration between a State and a private enterprise, special rules would at the same time have to be drafted which would be applicable in such cases. These rules would have to make provision for the appointment of the arbitrators and the further procedure in a manner suitable for arbitration proceedings of this kind."

Well, such special Rules have now been devised, the work having been undertaken by the Bureau with the approval of the Administrative Council of the Permanent Court of Arbitration. These Rules, dated February 1962, are printed at the end of this article on pp. 135 ff., and I gladly accept the editors' invitation to comment on them.

The new Rules are only of importance to enterprises which conclude contracts with a State; for one of the parties must in any case be a State. Now such contracts are becoming commoner every day. One has only to think of the extensive field of investments in underdeveloped areas, in which the foreign (mostly Western) investor enters into certain agreements with the government of the country, in which he is making his investment. One has only to think, too, of the innumerable contracts entered into by internationally operating companies with governments, often of young States, for such services as building harbours, basic industries, power plants, and public utilities in general. Yet another category is formed by the supply contracts (for machinery, aircraft, raw materials, and all kinds of commodities) in which one of the parties is a State.

From all these contractual relationships disputes may arise, which are usually settled by mutual consultation. But if such consultation between the parties does not lead to any result, what then? Usually no other course is open to the private enterprise in such event than to take legal proceedings in the courts of the country of the other party - the State with which it entered into the contract. That this is not a very attractive solution to the private enterprise - for more than one reason - need scarcely be further elucidated here. Accordingly, the enterprise in question looks around for other possibilities. One of these is to avail itself of the arbitration facilities of the International Chamber of Commerce. Very occasionally it is indeed possible to get a reference to the I.C.C.'s rules for Conciliation and Arbitration inserted in the contracts, but more often than not the attempt to do so is unsuccessful. The reasons for this might be that the State does not feel entirely happy about these facilities created by international business interests themselves, or perhaps simply that these I.C.C. rules were not specifically drafted with a view to disputes between States and private enterprises. These objections do not attach to the new Rules. They come straight from the Bureau of the Permanent Court of Arbitration and its Secretary-General, Professor J.P.A. François, i.e. from the sphere of the States (at present 60 States have acceded), and have been specially drafted with a view to disputes between States and private parties. On the other hand, it may well be asked whether international business interests can agree to these Rules. To answer this, we shall first of all have to subject the main points of the Rules to a closer examination.

The Rules offer parties the choice: arbitration only (Section I), conciliation only (Section II) or first conciliation and then, if the conciliation is unsuccessful, arbitration (Section III). Three possibilities, from which the parties should choose when entering into their contract. This is clearly indicated by the model clause attached to the Rules. This clause, if inserted in the parties' contract, declares that the parties will be free to replace certain procedural rules by others, either at the time of concluding their contract or later. Looked at from the point of view of the parties, this goes without saying. But the clause also gives evidence of flexibility on the part of the Bureau of the Permanent Court of Arbitration: it is still prepared to co-operate even if the parties jointly agree on other procedural rules. The entire set of rules, which have the character of model rules of which the parties may avail themselves, has indeed been conceived as a first draft for disputes of this particular kind. At the end of the commentary that the Bureau itself gives on the draft, it declares its willingness to consider any suggestions for amendments which would enable the Rules to serve their purpose more fully. The Rules can then be adjusted in the

light of experience gained with them in practice or of useful suggestions coming, for instance, from the business community itself. The 1962 Rules can therefore, if they "catch on", be succeeded by revised versions in later years.

This flexibility is typical of the Rules as a whole. Take, for instance, the crux of any procedure for settling disputes appointments. And in the first place, the appointment of arbitrators. This is primarily a matter for the parties. To begin with, they are allowed to determine how many arbitrators there are to be, though the number must always be uneven (Section I, Article 5, first paragraph, in conjunction with Article 6, last paragraph). If they do not agree on the number, the Tribunal will consist of three arbitrators. Again, it is the parties who must first try to agree on the choice of arbitrators. If they do not succeed in doing so, either party may call in the help of the Bureau. The latter will then (Article 5) send each party an identical list containing the names of persons who, in the Bureau's opinion, could suitably be invited to act as arbitrators. The list must contain twice as many names as there are arbitrators to be appointed. The parties will return the list after crossing out the names of the persons they do not wish to have as arbitrator and numbering the remaining names in order of preference. If there are no names on which both parties are agreed, the Bureau will continue to make proposals so long as the parties agree to its doing so. The whole arrangement is inspired by the desire that the two parties should agree on the choice of arbitrators. No arbitrator is forced on the parties, unless the parties have expressly authorized the Secretary-General of the Permanent Court of Arbitration to appoint arbitrators on his own initiative if the parties cannot agree on these appointments (Article 6). In order to be certain that an arbitral tribunal will be constituted, this authority will have to be expressly granted to the Secretary-General. The obvious time for doing this is, of course, when the agreement containing the arbitration clause is concluded; to this clause it could then be added that the Secretary-General will have the authority referred to in Article 6 of the Rules. But if this opportunity has been missed, this authority can still be granted to the Secretary-General at a later date; it is more likely, however, that they will then prefer the more non-committal form of arbitration to which the Rules give pride of place.

There is an important difference here from the arbitration rules of the International Chamber of Commerce. Under those rules, there must be arbitration, if necessary in the absence of the unwilling party. But here the parties can always torpedo the arbitration by failing to agree on the choice of arbitrators, whatever proposals the Bureau may make. The business community will try to secure the binding arbitration arrangement, i.e. the arrangement whereby

the Secretary-General is authorized to make the appointments in case of need. The States, or some of them which have not yet had much experience of arbitration, may perhaps prefer to adopt a wait-and-see attitude. They are bound to accept arbitration, but unless the Secretary-General has been authorized to cut the Gordian knot (Article 6), they must first agree on the choice of arbitrators. Some people may find this a serious drawback. Personally, I regard it rather as a wise move which may help States to get over a certain hesitance to take the plunge into arbitration. Should it lead to a deliberate torpedoing of the arbitration, matters will still be no worse than they would have been without the arbitration rules. The dispute will then have to be brought before the competent court.

When making its proposals, the Bureau is not bound to adhere to the well-known list of the Permanent Court of Arbitration, containing four names per Contracting Power, which is published annually in the Report. It would hardly have been feasible to insist on this, because hitherto it has been the custom of countries to place mainly the names of specialists in public international law on this list, though other names do appear there. Indeed, in the last few decades it has in any case been the practice at the Court that arbitrators have always been appointed from among persons outside the list, so that the arbitration became a special arbitration within the meaning of the Conventions under which the Court was set up. In the special cases for which the new Rules are intended, the choice will almost always fall entirely or largely outside the names on the list. And in this matter the Bureau, too, if its co-operation in making the appointments is sought, will have full freedom and will be guided in making its proposals by the nature of the dispute, as evidenced by the originating request, which is required to contain a summary description of the dispute (Article 3).

In the case of Conciliation, the appointment rules are more stringent. This is understandable, for the result of a conciliation - unlike the arbitral award - is not binding on the parties. A conciliation leads to a proposed arrangement that the parties may accept (Article 14 of Section II) or reject (Article 15). In the latter event, an official report is drawn up which, without reproducing the terms of the proposed arrangement, simply states that it has not been possible to conciliate the parties. Everything that takes place in the course of the conciliation remains secret, unless the parties authorize its publication, with the exception of reports by experts and interrogatories of witnesses of which the parties will have received official copies (Article 17). The evidence is therefore not under the ban of secrecy and can be used later in any arbitral or judicial proceedings which may follow the unsuccessful

conciliation. The non-binding character of conciliation has led to the rule that in this case the Secretary-General is authorized to appoint the members of the Conciliation Commission himself if, within six months after filing the originating petition, the parties have been unable to agree on the constitution of the Commission after going through a procedure identical with that for the appointment of arbitrators which we have just been considering (Article 5 of Section II). If, in the event of its failure, the conciliation is followed by arbitration, Section III, which lays down the procedure for this, contains the customary rule that the members of the Conciliation Commission may not be members of the arbitral tribunal (Article 3).

Unless the parties agree otherwise", one will legitimately be inclined to add here; for the parties can at all times replace the rules of procedure by others, as is evident from the model clause attached to the Rules. They will not readily do this, however, since in the event of an unsuccessful conciliation the conciliators will no longer be able to view the dispute impartially.

The task allotted to the Bureau of the Permanent Court of Arbitration, with at its head the Secretary-General, is a continuous administrative one, both in arbitration and in conciliation. It is not therefore confined to the appointment of arbitrators and conciliators. Thus the Bureau sends out notices to the parties and receives and distributes documents. In practice, it will arrange for a secretary or registrar to be attached to the arbitrators (Article 23, Section I) or for a secretary to assist the Conciliation Commission (Article 14, Section II), and also for the necessary interpreters and other facilities. It is also conceivable that the arbitrators or conciliators may themselves select their own secretary; the Rules again leave them completely free to do so. The seat of the arbitral tribunal or conciliation commission is the Peace Palace at The Hague, unless the parties decide otherwise in consultation with the Bureau (Article 7, Section I, and Article 6, Section II); for it is conceivable that the dispute may be located entirely in the Far East, in which case Bangkok, for instance, would be a much better venue. Here again, therefore, there is the necessary flexibility.

The question of costs is an important one. To begin with, there are the purely administrative costs. For these, the Bureau can ask for an advance payment (Article 9, Section I, Article 8, Section II). When the fees and expenses of the arbitrators or conciliators are being fixed, the Secretary-General is called in (Article 32, Section I, and Article 19, Section II) and the Tribunal or Commission fixes the amount after consulting him. His task is therefore a delicate but useful one, since he will know from experience what amounts have been fixed in comparable cases.

It will do our Dutch hearts good to see that the arbitration rules not only prescribe that there must be an uneven number of arbitrators (a provision not found in the conciliation rules, although here too the Commission is to consist of three persons unless the parties agree otherwise (Article 4, Section II), but also that the arbitral award must state the reasons on which it is based, unless the parties stipulate otherwise. We therefore get an arbitral award, with a statement of the underlying reasoning, which is to be read out at a public session unless the arbitrators decide that the award is to remain secret (Articles 28 and 29 of Section I). The award must be based on law, unless the parties have authorized the arbitrators to decide *ex aequo et bono* (Article 30). This too seems to me completely acceptable. Since good faith nowadays plays such a large part in law, the difference between one system and the other has been reduced to a difference of degree. Many of the disputes to be settled under these Rules will turn on the question of what obligations are inherent in a contract concluded between a government and a private enterprise. As far as business interests are concerned, it seems to me even questionable whether it should be their endeavour to have the arbitration clause in their contracts so worded as to authorize the arbitrators to establish those obligations on an equitable basis. A ruling on the basis of law, including the good faith which is a necessary adjunct thereto, seems to me to be at least equally desirable.

The foregoing is intended to be no more than a first introduction and in no sense an exhaustive discussion of the Rules which have just been accepted by the Permanent Court of Arbitration for the settlement of disputes between a State and a private party. My own assessment of these Rules is that they offer an interesting possibility for the settlement of disputes, particularly for our major international concerns, which could stand them in particularly good stead in the case of transactions with underdeveloped territories. No forecast can be made as to how those territories will react to these Rules. The Permanent Court of Arbitration has clearly approached the matter with the utmost caution; I have in mind particularly the procedure for appointing arbitrators, which as a matter of principle does not seek to force the issue, and the introduction of conciliation into these Rules. The Rules are so worded, moreover, as to allow the parties every opportunity of adapting them to the special circumstances of each case. All in all, as a Dutchman one can only rejoice at this initiative by the Permanent Court of Arbitration, which has opened up a new field of activities for the Court.

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(Translated from "Arbitrale Rechtspraak", May 1962, No. 497)