HANDBOOK OF UNCITRAL ARBITRATION

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FOURTH EDITION

SWEET & MAXWELL

ILM	International Legal Materials
IntlALR	International Arbitration Law Review
Int'l Am LR	International American Law Review
Int'l Comp Law Quart	International and Comparative Law Quarterly
J Chart Inst Arb	Journal of the Chartered Institute of Arbitrators
J Int'l Arb	Journal of International Arbitration
JDI	Journal de droit international (Clunet)
Mealey's IAR	Mealey's International Arbitration Report
Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
OLG	Oberlandesgericht (German Higher Regional Court)
PILA	Swiss Private International Law Act
PLI	Practicing Law Institute
RDAI/IBLJ	Revue de droit des affaires internationales International Business Law Journal
Rev Arb	Revue de l'arbitrage
Rev Crit DIP	Revue critique de Droit International Privé
Rules on Transparency	UNCITRAL Rules on Transparency
s.	Section
SIAC	Singapore International Arbitration Centre
TDM	Transnational Dispute Management
TGI	Tribunal de Grande Instance (French Court of First Instance)
Tribunal	Arbitral Tribunal
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006
UNCITRAL Notes	UNCITRAL Notes on Organising Arbitral Proceedings (2016) also referred to as the "2016 UNCITRAL Notes"
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010, with new article 1, para.4, as adopted in 2013 and new article 1, paragraph 5 as adopted in 2021)
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts (2016)
USC	United States Code
YBCA	Yearbook of Commercial Arbitration
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

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TABLE OF CASES

6-73 Another issue is the "real" nationality of a party. For example, a compa incorporated in one jurisdiction may be controlled by a company in anothe jurisdiction. Most practitioners look to the country of ultimate control as well as the country of incorporation with respect to nationality.

6-74 The goal is to provide an "independent and impartial arbitrator". As a result, one of the first issues that should be addressed by the Appointing Authority is wit respect to potential conflicts of interest which are discussed in detail in arts 11 and 12.

SECTION II

COMPOSITION OF THE ARBITRAL TRIBUNAL

Introductory remarks for Section II

7-01 Section II of the Rules deals with the Tribunal. In an international arbitration, the composition of the Tribunal is perhaps the most fundamental point in the procedure. By agreeing to arbitration, the parties have opted out of national court systems. That is for various reasons, whether with regard to cost, efficiency or independence. However, one of the basic reasons is that the parties wish to have any disputes adjudicated by an international Tribunal, independent of the courts.

7-02 Most countries support this approach, as is reflected in the success of the New York Convention and the UNCITRAL Model Law in particular. However, the success of international arbitration depends on the belief that this form of private justice is performing adequately. National courts generally do not review the substance of the decisions of Tribunals on the merits.[1] As a result, one of the basic means of ensuring that international arbitration is meeting the requirements of national law is to ensure that the members of Tribunals meet those requirements.

7-03 Parties generally have the right to appoint a co-arbitrator.[2] The co-arbitrators generally have the right to seek to agree on a presiding arbitrator. And if the co-arbitrators fail to agree on a co-arbitrator, the matter will generally be resolved by an Appointing Authority. The entire initial procedure for the constitution of the Tribunal is private and does not involve state courts. As discussed in the Introduction, the right of the parties to appoint co-arbitrators is viewed as one of the most important attractions in international arbitration. Nevertheless, in investment arbitration, states have increasingly sought to limit this right by providing for the appointment of arbitrators from panels of arbitrators nominated by the states.

7-04 The members of the Tribunal must meet the requirements of the Rules and applicable law. Any dispute as to whether an arbitrator meets those requirements is generally decided in the first instance by an Appointing Authority. However, on the issue of whether an arbitrator has the right to act as such, state courts eventually have the final word.

7-05 In a number of countries, including in UNCITRAL Model Law countries, this control is exercised even during the pendency of the arbitral proceedings, with challenge procedures for example. In other countries, such as France, Switzerland and the US, the control is exercised when an Award is subject to annulment or enforcement proceedings. At that point in time, one of the points that may successfully be raised relates to the independence of the Tribunal.

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1 See, e.g. T. Webster, "Review of Substantive Reasoning of International Awards by National Courts: Ensuring One-Stop Adjudication" (2006) 22(3) Arb. Int. 431–462.

2 See *Sociétés BKMI et Siemens v Société Dutco*, Cass Civ 1re, 7 January 1992, (1992) 3 Rev. Arb. 470–472.

7-06 The issues relating to the composition of Tribunals have given rise to substantial work to develop principles as to the independence of arbitrators as is reflected in particular in the IBA Conflicts Guidelines discussed below. Those principles affect decisions of arbitral institutions and Appointing Authorities, and may influence state courts so that there is more harmonisation of the standards applicable to arbitrators. Nevertheless, for the time being, there are quite different trends and requirements under national law that may affect an arbitration under the Rules and those principles are discussed in a general fashion in this part. In addition, the Rules are widely used for investment arbitration, and there are issues that arise with respect to arbitrators due to the nature of investment arbitration that are discussed below.

ARTICLE 7 NUMBER OF ARBITRATORS

1. **If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.**
2. **Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.**

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Introductory remarks

7-07 Article 7(1) sets out the default rule that, in the absence of an agreement between the parties there will be three arbitrators. Article 7(2) provides for the possibility that the Appointing Authority appoint a sole arbitrator if certain conditions are met.

7-08 The main change from the 1976 Rules was the insertion of art.7(2). Under the 1976 Rules, the Appointing Authority did not have the right to decide that there should be a sole arbitrator rather than the three-person Tribunal. As discussed below, the change has been of limited effect. Article 7 of the Expedited Rules provides for a sole arbitrator. However, as discussed under art.1(5), those rules are only applicable if the parties expressly so agree.

ARTICLE 7(1)

Article 7(1): "If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the

notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed."

7-09 As stated above, the first issue is whether the parties have agreed on the number of arbitrators. This agreement may be found in the arbitration agreement itself, where there may be a reference to the use of a sole arbitrator or a Tribunal. The parties may disagree on whether or not they have agreed that there be a sole arbitrator. If that is the case, the initial decision should be taken by the Appointing Authority as to whether one or three arbitrators should be appointed and this should be reviewed by the Tribunal as a matter of interpretation of the relevant arbitration agreement. If the Tribunal (or sole arbitrator) decides on review of the arbitration agreement that it was not correctly composed, then it would have to issue an Award to that effect in the absence of an agreement among the parties.

7-10 As mentioned above, by agreeing to the Expedited Rules, the parties are agreeing to submit the dispute to a sole arbitrator. In addition, in some arbitration agreements, there is a provision for a sole arbitrator if the amount in dispute does not exceed a certain amount and for a Tribunal of three arbitrators if the amount is equal to or exceeds that amount. This type of formulation is reasonable but may give rise to difficulties in practice.

7-11 In particular, if a party wishes to have a Tribunal composed of three members, it may be possible to achieve that result indirectly. For example, a party may bring a claim that meets the requirements for a three-person Tribunal notwithstanding that the realistic amount of the claim is much lower. Such behaviour is difficult to contest in practice that may result in additional delay.

7-12 If there is no agreement (at least in the arbitration agreement) as to the number of arbitrators, then the parties should consider whether to agree on a sole arbitrator once the dispute arises. The main advantages of having a sole arbitrator relate to the speed and cost of the proceedings.[3] The disadvantage of having a sole arbitrator is that a party may feel that the sole arbitrator in an international arbitration is not sufficiently conscious of its perspective and background and that a sole arbitrator does not have the benefit of co-arbitrators with whom to conduct the arbitration and deliberate.[4] The possibility of each party generally to designate an arbitrator has become an ingrained feature of international arbitration.[5]

7-13 In drafting the Rules, there was hesitation as to whether there should be a default solution of one arbitrator or provision that the Appointing Authority be empowered to decide on the number of arbitrators. In rejecting this proposal, the Working Group noted in its 49th Session Report A/CN.9/665:

> "60. An alternative proposal was made that, if the parties were unable to agree on the number of arbitrators, that number should be determined by the appointing authority. The Working Group recalled that it had rejected a similar proposal at its

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3 As to the costs and benefits of appointing a sole arbitrator, see J. Kirby, "With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated" (2009) 26(3) J. Int'l Arb. 337–355; see generally N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration*, 6th edn (2015), paras 4.22 and following. See P. Sanders, "Commentary on the UNCITRAL Arbitration Rules" (1977) II YBCA 184, paras 6-1 and following; P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, 2nd edn (Kluwer Law International, 2004), pp.5–7.

4 See discussion under art.9.

5 It is also recognised by the courts as important as is reflected in the *Dutco* decision of the French Supreme Court cited above. Although ingrained, the principle is not absolute as is reflected in the provisions for multipartite arbitration in art.10.

forty-fifth (A/CN.9/614, para. 60) and forty-sixth (A/CN.9/619, para. 60) sessions for the reason that involving an appointing authority at such an early stage of the arbitral proceeding could create unnecessary delays."

7-14 In most institutional arbitrations, the institution has the right to decide whether there will be one or three arbitrators, unless the parties have agreed otherwise. However, if the parties wish to build this flexibility into arbitration under the Rules, they have to reflect it in their arbitration agreement. For example, the parties could designate an Appointing Authority and have the Appointing Authority decide on the number of arbitrators. In that way, the parties would have information as to when the Appointing Authority would tend to appoint a sole arbitrator or opt for three arbitrators.

Article 7(2)

Article 7(2): "Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate."

7-15 Article 7 retains the principle that there should be three arbitrators in the absence of an agreement, but includes an exception where a respondent does not object. In such a case, under art.7(2), if the claimant requests a sole arbitrator and if the respondent does not object or appoint a co-arbitrator, the Appointing Authority may appoint a sole arbitrator if it is more appropriate.

7-16 The Working Group commented as follows in making this change:

> "62. Concern was raised that in practice, the default provision of article 5 of the 1976 version of the Rules created situations where, despite the claimant's proposal in its notice of arbitration to appoint a sole arbitrator, a three-member arbitral tribunal had to be constituted due to the respondent's failure to react to that proposal.
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> ...
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> 63. That suggestion received support and was said to provide a useful corrective mechanism in case the respondent did not participate in the process and the arbitration case did not warrant the appointment of a three-member arbitral tribunal..."

7-17 Usually, a respondent who is participating in the proceedings can be expected to comment on the number of arbitrators in the response. If the respondent does so and seeks to have three arbitrators notwithstanding the proposal of the claimant for a sole arbitrator, then there will be a Tribunal composed of three members.

7-18 There is the possibility that a respondent decides not to file a response and not to participate but still objects to having a sole arbitrator. Under the rule as drafted, the Appointing Authority would still have to appoint three arbitrators. However, by taking such an approach, the respondent may not only be weakening any procedural objection that it has to the proceedings but also appear to be creating procedural difficulties.

7-19 Article 7(2) does not set out the criteria to be applied by the Appointing Authority to decide whether there should be a sole arbitrator or a Tribunal of three members. In ICC arbitration, the ICC Court tends to provide for a sole arbitrator

where the amount in dispute does not exceed US$10 million and the issues in dispute do not appear to be complex. For arbitrations where the amount in dispute exceeds US$10 million one would generally expect the ICC Court to decide that there should be a three-person Tribunal.[6] Other arbitral institutions may have somewhat different approaches, but the general rule is to look at these two factors paying particular attention to the expense of arbitral proceedings.

Article 8 Appointment of arbitrators (articles 8 to 10)

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

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[6] T. Webster and M. Bühler, *Handbook of ICC Arbitration*, 5th edn (2021), paras 12–16 and following.

Introductory remarks

8-01 Article 8 deals with the appointment of a sole arbitrator. As noted under art.7, the basic default solution under the Rules is a Tribunal of three arbitrators, but, as discussed under art.7, the appointment of a sole arbitrator may render proceedings quicker and less costly.[7] As discussed under the Expedited Rules, under those rules, the default solution is to have one arbitrator.

ARTICLE 8(1)

Article 8(1): "If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority."

8-02 Article 8(1) is applicable where either the parties have agreed that there be a sole arbitrator or the claimant has requested a sole arbitrator and the respondent has not objected.[8] In all other cases, art.9 is applicable. As with art.7(1), the parties may disagree on whether or not they have agreed that there be a sole arbitrator. If that is the case, the initial decision should be taken by the Appointing Authority as to whether a sole arbitrator should be appointed and this should be reviewed by the Tribunal (or sole arbitrator) as a matter of interpretation of the relevant arbitration agreement. If the Tribunal (or sole arbitrator) decides on review of the arbitration agreement that it was not correctly composed, then it would have to issue an Award to that effect in the absence of an agreement among the parties.

8-03 The second requirement is that a party make a proposal for appointment of the sole arbitrator. The proposal may be made at any time, including in the Notice of Arbitration.[9] The provisions of art.2 are applicable with respect to notification of the proposal.

8-04 The third requirement is that 30 days elapse from the date of receipt by all parties of the proposal. Therefore, the period elapses 30 days after receipt by the last party.

8-05 A further requirement is that the parties have not reached an agreement on the sole arbitrator.[10] Implicit in this requirement is also the idea that the parties have not agreed to extend the period to agree on a sole arbitrator.

8-06 If the requirements are met, a party may request that the Appointing Authority appoint the sole arbitrator. Article 8(1) was drafted based on the assumption that the Appointing Authority has already been agreed upon or designated in accordance with art.6.[11] In some instances, a party will have applied to the Secretary-General of the PCA to designate an Appointing Authority at the same time as proposing a sole arbitrator (e.g. in the Notice of Arbitration). In such circumstances, the appointment of a sole arbitrator may be delayed until the Appointing Authority is designated.

7 See the discussion at para.7-12.

8 See O. Akseli, "Appointment of Arbitrators as Specified in the Agreement to Arbitrate" (2003) 20(3) J. Int'l Arb. 247–254.

9 See para.3-74.

10 For a discussion of the traps associated with naming an arbitrator in the arbitration agreement, see Poudret and Besson, *Comparative Law of International Arbitration* (2007), para.392.

11 As the model arbitration clause provided in the Annex, point (a) notes, the parties are encouraged to name an Appointing Authority; see Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2004), p.6.

ARTICLE 8(2)

Article 8(2): "The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator."

8-07 Article 8(2) does not provide a time limit for the Appointing Authority to appoint a sole arbitrator but states that it shall take place "as soon as possible". If the Appointing Authority fails to make the appointment, the parties have recourse under art.6(4). As a result, the basic time limit for appointing a sole arbitrator is 30 days. Even if this period is not met, a party may hesitate to take action under art.6. The better solution is in many cases to contact the Appointing Authority to seek to request an estimate as to the time that will be taken to appoint the sole arbitrator.[12]

8-08 The Appointing Authority is to use the list procedure for the appointment unless the parties have agreed otherwise or "the Appointing Authority determines in its discretion that the use of the list procedure is not appropriate for the case". The main advantage of the list procedure is that the appointment is made by agreement of the parties.[13]

8-09 The advantage of the list procedure is that it provides the parties with some input as to appointment of the sole arbitrator. The extent of this input depends to a certain extent on the length and breadth of the list of potential arbitrators. This input is particularly important where the Appointing Authority has not been chosen by the parties but rather by the PCA. In the latter case, the parties may be faced with a surprise both as to the Appointing Authority and the potential arbitrators that the Appointing Authority wishes to consider.

12 Where an institution having adopted the Rules acts as Appointing Authority, significant modifications may result. For example, see case study 1 presented by Ahmad Idid in "Use of the UNCITRAL Arbitration Rules at Arbitral Institutions by Arbitral Institutions: The Case of Malaysia" (2007) 24(1) J. Int'l Arb. 42–43.

13 The list procedure has been described as the "ideal system for appointing arbitrators"; see Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2004), p.6.

8-10 There is no requirement in the Rules that the Appointing Authority consult with the parties prior to determining whether or not the list procedure is appropriate. While this is understandable in view of the speed and efficiency of the process, it raises issues as to how and why the Appointing Authority may consider in its discretion that the list procedure is not appropriate.

8-11 If it is urgent that proceedings be commenced, then it may be preferable to avoid the list procedure due to the time that it involves. In some cases, an Appointing Authority may wish to avoid use of the list procedure if it is concerned that it will result in systematic rejection of names on the list by one party. However, in such circumstances, it may be possible to circumvent this problem by providing an initial list and then having the Appointing Authority decide based on those objections to proceed without a further list.

8-12 One practical solution for the Appointing Authority is to contact the parties to indicate that it is considering using a procedure other than the list procedure and to provide the parties with a very brief period to comment on that decision. In this way, the Appointing Authority reserves its discretion but may take the comments of the parties into account in exercising that discretion.

8-13 In other circumstances, there is concern that the Appointing Authority will appear arbitrary in deciding not to follow the list method. Particularly where the Appointing Authority is an individual, this may raise questions as to the relationship between the Appointing Authority and the proposed sole arbitrator that could be avoided through the use of a list procedure.

ARTICLE 8(2)(A)

Article 8(2)(a): "The appointing authority shall communicate to each of the parties an identical list containing at least three names;"

8-14 The parties have agreed on the Appointing Authority or the Appointing Authority has been designated by the Secretary-General of the PCA usually based on the Appointing Authority's expertise with respect to international arbitration.

8-15 The first step for the Appointing Authority is to compile a list of potential sole arbitrators. There is no list of accepted UNCITRAL arbitrators and no requirement that an Appointing Authority use its own list of arbitrators if it has a list.[14]

8-16 In establishing the list of potential sole arbitrators, the Appointing Authority

[14] Article 6 of the "Rules of ICC as Appointing Authority in UNCITRAL or Other Arbitration Proceedings" (2018) provides in relevant part:

"Article 6: UNCITRAL Arbitration Proceedings

2 When appointing a sole or presiding (third) arbitrator pursuant to Articles 7(2) and 9(3) of the UNCITRAL Rules, the Court shall follow the list-procedure set forth in Article 8(2) of the UNCITRAL Rules, unless all parties agree that the list-procedure should not be used or the Court determines in its discretion that the use of the list-procedure is not appropriate.

3 When following the list-procedure, the Court shall prepare a list of at least three candidates, which shall be communicated to the parties by the Secretariat. Within 15 days of receiving this list, each party may return the list to the Secretariat after deleting the name or names to which it objects and numbering the remaining names on the list in the order of its preference. After expiration of the aforementioned 15-day time limit, the Court shall appoint the sole or presiding arbitrator from among the names approved on the list returned to the Secretariat and in accordance with the order of preference indicated by the parties. If for any reason the appointment cannot be made according to this

should have due regard for the specific requirements, if any, of the arbitration agreement. For example, if the arbitration agreement requires that the arbitrator be admitted as a lawyer in a certain jurisdiction, that will be one of the criteria for admitting a person on the list.

8-17 The second step is to check with those potential sole arbitrators to ensure that they do not have a conflict of interest or other issues that may arise under art.11 of the Rules as to independence and impartiality. This is particularly important as presenting a list with one or more persons who have a conflict of interest with one of the parties could undermine the process.

8-18 The Appointing Authority should communicate the identical list of names in accordance with art.2. It would be very unusual for an Appointing Authority to discuss the list orally with the parties.

8-19 The list should contain at least three names. In many instances, appointing authorities will seek to provide more than three names due to the potential for objections. A list with six names is welcomed by most practitioners as there may be conflicts issues with respect to one or more of the persons on the list.

procedure, the Court may exercise its discretion in appointing the sole or presiding arbitrator.

4 In accordance with Article 6(7) of the UNCITRAL Rules, when making the appointment the Court shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

Similarly, the "Stockholm Chamber of Commerce Procedures as Appointing Authority under the 2010 UNCITRAL Arbitration Rules" provide in art.2 as follows:

"Appointment of Sole or Presiding Arbitrator

Article 2

When requested to appoint a sole or presiding arbitrator under Articles 8(1) or 9(3) of the [Uncitral] Rules, the SCC will follow the list procedure set forth in Article 8(2) of the Rules unless all parties agree that the list procedure is not appropriate for the case.

When appointing arbitrators, the Board shall consider the nature and the circumstances of the dispute, the applicable law, the seat and language of the arbitration and the nationality of the parties.

When appointing a sole or presiding arbitrator under the Rules, the SCC will, in so far as possible, designate a person of a nationality other than the nationalities of the parties, unless otherwise agreed by the parties."

Article 1 of the AAA's "Procedures for Cases under the UNCITRAL Arbitration Rules" of 2015 provides:

"1. Appointment of Sole or Presiding Arbitrator

When requested to appoint a sole or presiding arbitrator, the AAA will follow the list procedure set forth in the UNCITRAL Arbitration Rules (Article 6, paragraph 3). The AAA has extensive experience in using the list procedure because it utilizes a similar procedure to conduct cases under various other rules.

In selecting arbitrators, the AAA will use its extensive panel of arbitrators for commercial cases. That panel includes qualified persons of many different nationalities having varied professional and business backgrounds. The AAA will carefully consider the nature of the case, as described in the notice of arbitration, in order to include in the list persons having appropriate professional or business experience and language ability.

When appointing a sole or presiding arbitrator under the UNCITRAL Arbitration Rules, the AAA will follow its usual practice and, upon the request of either party, designate a person of a nationality other than the nationalities of the parties, unless otherwise provided by written agreement of the parties."

ARTICLE 8(2)(B)

Article 8(2)(b): "Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;"

8-20 Article 8(2)(b) refers to returning the list to the Appointing Authority. A party is not required to and generally does not provide a copy at the same time to the other party. The Appointing Authority may inform the parties of the other party's list or provide them with a copy.

8-21 Each party has the right to delete names to which it objects. There is no limitation on the number of deletions that a party makes under art.8(2)(b). The Appointing Authority may request that the number of deletions be limited. However, if the deletions are for cause (due to a conflict of interest for example), then this may be difficult to enforce.

8-22 Where the list of potential sole arbitrators consists of three persons, and one party objects to two, then it is basically designating the sole arbitrator that it wishes to see appointed. This may appear unfair if the other party ranks all three arbitrators but would prefer to have his first rather than third choice. One way of dealing with this is to provide that a party has a right to object to one or two names on a list without grounds (a pre-emptory objection) but that any additional objections must be based on grounds such as conflict of interest. In this manner, with a list of six potential sole arbitrators, there should be several candidates ranked by both sides.

ARTICLE 8(2)(C)

Article 8(2)(c): "After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;"

8-23 Article 8(2)(c) provides that the Appointing Authority shall appoint the sole arbitrator based on the lists returned to it by the parties. Therefore, if a party is not participating and does not return the list, the Appointing Authority may act based on the lists that have been returned.

8-24 Article 8(2)(c) requires the Appointing Authority to follow the order of preference of the parties. Therefore, if the parties agree on the order of preference, then the person ranked highest is to be appointed. The Appointing Authority is not authorised to disregard this order of preference.

8-25 If the parties do not agree on an order of preference, then one would expect the Appointing Authority to calculate the weighted order of preference using a point system for ranking the potential sole arbitrators who have not been excluded by the parties.

ARTICLE 8(2)(D)

Article 8(2)(d): "If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator."

8-26 Article 8(2)(d) refers to a situation where the appointment cannot be made in ac-

cordance with this procedure. This is not the case where the parties rank the potential sole arbitrators differently but rather where there is no common ground between the parties.

Pursuant to this article, the Appointing Authority is not required to (and usually not expected to) appoint a sole arbitrator from the list. If, for example, the appointment cannot be made from the list due to objection by one party to all arbitrators, then the preferred course (whether or not the objections are justified) is to appoint someone as sole arbitrator who was not on the list. 8-27

ARTICLE 9

1. **If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.**
2. **If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.**
3. **If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.**

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Introductory remarks

Article 9 deals with an arbitration where there is one claimant and one respondent. Article 10 deals with an arbitration where there is more than one claimant or more than one respondent. Article 9(1) sets out the basic requirement that a party appoint an arbitrator and the principle that the co-arbitrators select the presiding arbitrator. Article 9(2) deals with the appointment of a co-arbitrator by an Appointing Authority where a party fails to appoint a co-arbitrator. Article 9(3) deals with the appointment of a presiding arbitrator where the parties fail to agree on a presiding arbitrator. 9-01

In most arbitrations there is a Tribunal of three members. As discussed in particular under art.11, an arbitrator is required to be impartial and independent. However, virtually all international arbitration rules now embody the principle that generally each party in a bipartite arbitration has the right to appoint or nominate 9-02

an arbitrator. The importance of this right was confirmed by the French Supreme Court in the *Dutco* case.[15]

9-03 A party's fundamental right to appoint a co-arbitrator is based on the concern that parties should have an equal right to choose the persons who will adjudicate their dispute. It is submitted that this reflects various legitimate factors.[16] First, selecting the arbitrators is an indirect way of maintaining some form of party influence over the arbitral process. Secondly, there is a difference between proceedings and the merits and parties may well have preferences as to how certain arbitrators approach matters. Thirdly, although international arbitrators are internationally oriented, they do have national origins. When choosing an arbitrator one should be conscious that national influences may emerge during the hearings and in the deliberations of the arbitral Tribunal. Fourthly, international arbitration is evolving, in some areas very rapidly. Therefore, it is important to choose as a co-arbitrator and as presiding arbitrator someone who is open to and critically aware of any new developments and who takes an approach to those developments that is consistent with the desires of the party whom he or she represents.

9-04 The selection of a co-arbitrator is also viewed as relevant for the merits. Parties prefer to win the arbitration or at least to lose it on terms that they find acceptable. In certain types of cases, a party may therefore choose a co-arbitrator based on his or her reputation with respect to interpretation of contracts. The problem in this respect is the lack of transparency with respect to past decisions of arbitrators. With the notable exception of ICSID Awards and investment Awards under NAFTA for example, most Awards are not published. Even when extracts of the Awards are published in some instances it is without identifying the arbitrators involved. As a result, in this area parties do not have the advantage of reviewing past decisions of the arbitrator as they would have with respect to reviewing decisions of a judge. This is viewed as a problem for users of arbitration, and in effect hampers the selection of arbitrators based on objective criteria.

9-05 With respect to investment arbitration under the Rules, however, the opposite problem occurs. Investment arbitration focuses on a limited number of specific issues that are addressed in the context of various cases. Since the details of investment arbitrations and Awards are published, as well as the decisions on challenge relating to them, parties may thereby acquire additional information relating to conflicts. This issue is discussed in particular under art.13.

ARTICLE 9(1)

Article 9(1): "If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal."

9-06 As discussed under art.7, the default position under the Rules is that a Tribunal will consist of three members.

9-07 Article 9(1) creates a legal obligation applicable to each party to appoint an arbitrator. The requirements with respect to arbitrators and with respect to disclosure are discussed under art.11. This affects the procedure with respect to appointment of an arbitrator.

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[15] *Sociétés BKMI et Siemens v Société Dutco*, Cass Civ 1re, 7 January 1992, (1992) 3 Rev. Arb. 470–472.

[16] For a discussion see T. Webster, "Selection of Arbitrators in a Nutshell" (2002) 19(3) J. Int'l Arb. 261–274. Since that article was written the IBA Conflicts Guidelines have been issued.

Article 9(1) is subject to a contrary agreement between the parties and the requirements of applicable law. 9-08

In *Karaha Bodas Co*,[17] one of the issues was whether the claimant had the right to appoint an arbitrator independently. The arbitration in that case related to two different agreements, a Joint Operating Agreement (JOC) and an Energy Sales Agreement (ESC). The claims were considered closely interrelated and were consolidated. The claimant operator (KBC) appointed an arbitrator. The respondents did not object to that appointment, although the arbitration agreement in the ESC provided that KBC should jointly propose an arbitrator with a government entity (Pertamina). Subsequently, the respondents did object and seek to set aside the Award in favour of KBC on the basis that it had appointed an arbitrator unilaterally. The Fifth Circuit Court of Appeals rejected the objection to enforcement of the Award.[18] 9-09

The wording of the ESC was particular (and differed in this respect from the other agreement, the JOC) in that it referred to a joint nomination of an arbitrator. The US Court of Appeals interpreted the requirement in a manner to ensure that there would be an effective dispute resolution clause, even if the dispute was with Pertamina, which presumably was the intent of the parties when the ESC was signed. Moreover, in *Karaha Bodas*, the respondents did not object to the claimant's appointment of an arbitrator when the appointment was made.[19] 9-10

A party who is appointing an arbitrator should provide notice of that appointment in accordance with art.2. 9-11

Relationship between the parties and the arbitrators

There is an issue as to the legal nature of the relationship between the arbitrators and the parties, which depends on the law of the seat of the arbitration. This issue is usually discussed in the context of liability of arbitrators, which is discussed 9-12

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[17] *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 297–298 (5th Cir. 2004); see also prior appeals in the *Karaha Bodas* case at 264 F.Supp.2d 470 (S.D. Texas 2003).

[18] In doing so, the Court stated in particular:

> "On appeal, Pertamina reasserts its argument that KBC's unilateral selection of an arbitrator violated the ESC's requirement that 'PLN on the one hand and [KBC] and Pertamina, on the other hand, will each appoint one arbitrator.'
>
> ...
>
> The ESC arbitration clause refers to 'any dispute or difference of any kind whatsoever' arising among 'the Parties.' Section 2 of the ESC defines 'parties' to include PLN, Pertamina, and KBC. By its terms, the arbitration clause covers a dispute between KBC and Pertamina arising under the ESC, as well as a dispute in which the interests of KBC and Pertamina are aligned.
>
> If the ESC required KBC and Pertamina jointly to select an arbitrator for disputes in which KBC and Pertamina were opposed, as Pertamina contends, Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator. Such an interpretation would make the ESC arbitration clause illusory. In addition, Pertamina had numerous opportunities early in the proceedings to object to KBC's selection of Professor Bernardini as an arbitrator and to nominate its own arbitrator. Pertamina did not challenge the composition of the arbitral panel until after the entire panel had been selected and seated.... The procedural infirmities Pertamina alleges do not provide grounds for denying enforcement of the Award."

[19] Under the 1976 Rules, there was no provision for appointment of the three members of the Tribunal by an Appointing Authority in a multiparty situation.

in particular under art.16.[20] In some jurisdictions, this relationship is one of contract (such as Germany).[21] In others, the relationship is akin to that of an agency agreement.[22] In still others, the relationship is closer to that of a quasi-judicial function (as is the case in the US). In France, jurisprudence and commentators qualify the relationship as sui generis, taking elements from contractual and quasi-juridical functions. In any event, when an arbitrator accepts an appointment under the Rules, the arbitrator is accepting the application of the Rules and the duties imposed on arbitrators under the Rules. In addition, where an arbitrator is agreeing to act in accordance with the laws of the place of arbitration (either referred to in the arbitration agreement or designated by the Tribunal in accordance with art.16) the arbitrator has the benefit of the provisions of that law.[23]

9-13 When an arbitrator is approached about an appointment, there are a number of issues that may arise. The issue of disclosure of conflicts is discussed under art.11 as is the declaration of impartiality and independence. In ad hoc arbitration, the appointing party and the arbitrator usually discuss a number of other issues, including the availability of the arbitrator and the remuneration for the arbitrator. In addition, some arbitrators have standard terms of appointment that deal with issues such as hourly rates, expenses, cancellation fees, value added tax, retention of documents and limitation of liability. The IBA Representation Guidelines provide a reasonable objective point of reference as to what is permissible in the nature of pre-appointment contacts both with respect to co-arbitrators and presidents of the Tribunal when they state as follows:

> "8(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.
>
> (c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> (d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.
>
> ...
>
> The following discussion topics are appropriate in preappointment communications in order to assess the prospective Arbitrator's expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest: (a) the prospective Arbitrator's publications, including books, articles and conference papers or engagements; (b) any activities of the prospective Arbitrator and his or her law firm or organisation within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator's independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings."

[20] See Poudret and Besson, *Comparative Law of International Arbitration* (2007), paras 437 and following.

[21] This is the case in Germany, for example. See *OLG München* 21 December 2006, 34 SchH 12/06. See also S. Kröll "Germany" in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (Kluwer Law International, 2007), Suppl.48, p.25.

[22] Such is the case in the Netherlands where arbitrators are required to accept their "mandate" in writing. See art.1029 of the Netherlands Arbitration Act, in force 1 December 1986; see B. van der Bend, M. Leijten and M. Ynzonides (eds), *A Guide to the NAI Arbitration Rules* (Kluwer Law International, 2009), pp.13–15.

[23] Article 29 of the English Arbitration Act of 1996 limits liability of arbitrators, for example.

9-14 The discussion of some of these issues between the party and the co-arbitrator may give rise to disclosure obligations and a challenge, as discussed under art.12. In one unreported UNCITRAL case, a party made financial arrangements with a co-arbitrator who then discussed those arrangements with the co-arbitrator for the other side with a view to agreeing on a lump-sum fee arrangement. The respondent in the case objected to what it considered to be inappropriate discussions of the fees and challenged the co-arbitrator. The Appointing Authority, in a nuanced opinion, basically rejected the challenge but indicated that the behaviour was unfortunate. The arbitrator resigned.

9-15 One of the ways of dealing with these issues is with transparency. If a co-arbitrator submits his or her terms of appointment to the party, then those standard terms of appointment should be provided to the other party with the appointment. Since the terms of appointment are usually discussed amongst the members of the Tribunal (and at the initial procedural hearing), the more prudent course is to submit the terms of appointment to the appointing party as a proposal subject to further discussion. By doing so, the arbitrator is indicating that, if the parties are not willing to accept those terms of appointment, the arbitrator may resign.

9-16 Another manner of dealing with these issues is to ensure equality of treatment among the arbitrators. In one unreported UNCITRAL case, a co-arbitrator's rate as set out in his standard terms of appointment was superior to that of the other co-arbitrator and the presiding arbitrator. After discussion among the Tribunal, the Tribunal jointly proposed the same hourly rate for all arbitrators. This equality of payment may be disadvantageous for one or more arbitrators. However, the alternative, of having co-arbitrators paid at different rates, may result in difficulties as regards the principle of equality.

Selection of the presiding arbitrator

9-17 Article 9(1) also provides that it is the two co-arbitrators who shall choose the presiding arbitrator. This provision is to be contrasted with the rule under various other arbitration rules where it is the parties (and not the co-arbitrators) who choose the presiding arbitrator.[24]

9-18 Article 9(1) does not deal with contacts between the co-arbitrators and the parties or their counsel with respect to appointment of the presiding arbitrator. Neither is this issue dealt with in the IBA Conflicts Guidelines (except with respect to pre-appointment contacts). The issue of such contacts is dealt with in the AAA's Code of Ethics for Arbitrators in Commercial Disputes.[25] The common practice of co-arbitrators is to contact the lawyers who appointed them and discuss the profiles and suitability of proposed presiding arbitrators. This practice is not only acceptable but in most instances desirable.

[24] For a discussion see T. Webster, "Selection of Arbitrators in a Nutshell" (2002) 19(3) J. Int'l Arb. 261–274; D. Bishop and L. Reed, "Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration" (1998) 14(4) Arb. Int. 425–426

[25] The AA's Code of Ethics provides in part as follows:

9-19 It should be clear that both co-arbitrators are carrying out the process in the same fashion. As a result, a co-arbitrator should confirm with the other co-arbitrator that he or she is adopting this approach. If a co-arbitrator disagrees with the approach, then the best course of action is for the other co-arbitrator to inform the parties of the proposed procedure to determine the parties' positions. Although most parties will accept such consultation, if there is a refusal by one party, then the co-arbitrator who wishes to so consult should consider leaving the appointment of the presiding arbitrator to the Appointing Authority.

9-20 In *Pacific Holdings v Grand Pacific*,[26] the parties each nominated an arbitrator in an ICC arbitration. The party nominees were confirmed by the ICC Court on 25 September 2006. The parties agreed that the co-arbitrators should agree on the chair. Shortly thereafter, one of the co-arbitrators had ex parte discussions with the lawyers appointing him. On 2 October 2006, counsel for the other party set out limitations as to such contacts.[27] Thereafter, the contacts ceased. A challenge against the co-arbitrator was filed and rejected by the ICC Court and subsequently by the Hong Kong court. The latter stated that:

> "17. In short, in the context of this case, any sensible onlooker would trust the arbitrators to have conducted themselves professionally, properly and without inflicting any wounds, however slight, on the fairness of the proceedings."

9-21 In *Pacific Holdings*, the court also refused to order further disclosure from the co-arbitrator of the substance of the ex parte discussions with appointing counsel on the basis of his statement that those were "non-substantive" in nature.

9-22 In an unreported ICC case, one counsel recorded his understanding that the co-arbitrators were to discuss potential chairs with the lawyers appointing them. The other counsel objected to the procedure. The parties then left the selection of the president of the Tribunal to the ICC. The likely result of a situation where the parties cannot agree on the procedure for selecting the presiding arbitrator is in fact to have the presiding arbitrator designated by the Appointing Authority.

9-23 In selecting a presiding arbitrator, there is also the related issue of geographical proximity. Practitioners are used to dealing with people from various countries, cultures and legal traditions. However, in the selection of a presiding arbitrator, there is a natural tendency to look to those who one deals with most.

"CANON III: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

[...]

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;"

[26] *Pacific Holdings v Grand Pacific* [2007] HKEC 1289.

[27] In particular counsel stated that:

"The agreement between the parties is that the party-appointed arbitrators will nominate the third arbitrator. It is neither an express nor, in our view, an implied term of that agreement that there should be discussions amongst the parties and the arbitrators as to the identity of the third arbitrator, although our clients have no objection to there being such a discussion provided it is conducted transparently. We do not consider it appropriate for any part of that discussion to take place between the parties and their nominated arbitrators on an ex parte basis. Such a discussion conducted on that basis would, in our view, be inconsistent with the strict terms and spirit of the ICC Rules which require arbitrators to be and remain independent of the parties (art.7.1). It would also be inconsistent with the terms and spirit of the Hong Kong Arbitration Ordinance, which requires arbitrators to act fairly and impartially as between the parties (s.2GA(1)(a))."

9-24 In seeking to agree on a presiding arbitrator, frequently co-arbitrators will seek to identify potential presiding arbitrators who are known to them professionally. The co-arbitrators can then either create an informal discussion list or a list for the parties to rank their preferences. Both systems can work well if the co-arbitrators share familiarity with a wide range of potential co-arbitrators. If the co-arbitrators do not share this familiarity, then the procedure may be more difficult and it may be impossible to agree on a presiding arbitrator. Under art.9(3), where the co-arbitrators are unable to reach an agreement, the Appointing Authority is authorised to act under the same conditions as set out in art.8, namely to appoint a presiding arbitrator through use of the list procedure.

Role of the presiding arbitrator

9-25 The presiding arbitrator has an important role in the arbitration, both from an organisational and decisional point of view. Usually, it is the presiding arbitrator who prepares the initial drafts of correspondence with the parties, procedural orders and the Award itself. In addition, the presiding arbitrator presides over the hearings in virtually all cases and directs the deliberations. As discussed under art.33, unlike in many other arbitration rules, under the Rules the presiding arbitrator does not have the right to issue an Award in the absence of approval of a majority of the Tribunal.

9-26 From the decisional point of view, the presiding arbitrator is either appointed by agreement of the co-arbitrators or by appointment of the Appointing Authority. As a result, the parties have much less influence on the selection of the presiding arbitrator than on the co-arbitrator. The presiding arbitrator may be less well-known to the parties and may have a different legal background. The presiding arbitrator frequently has to balance the interests and the arguments of the parties and the co-arbitrators to reach a conclusion. This is discussed further under art.33.

ARTICLE 9(2)

Article 9(2): "If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator."

9-27 Article 9(2) is intended to deal with the situation where a respondent does not participate in the proceedings, and in particular where the respondent fails to appoint an arbitrator. Nevertheless, the provision is drafted to cover the situation where a claimant fails to appoint an arbitrator as well. Article 9(2) does not deal with the situation where there is more than one respondent and they fail to agree on the co-arbitrator, as that situation is dealt with under art.10.[28]

9-28 The situation where a claimant fails to appoint an arbitrator is exceptional. It can arise in particular in three instances. The first instance is where the claimant has issued a Notice of Arbitration but where the main claims are those of the respondent. As a result, in this case, the claimant may have less of an incentive to proceed than the respondent and may fail to appoint an arbitrator.

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[28] For an illustration of how the art.7(2) of the 1976 Rules was used to appoint a co-arbitrator on behalf of two respondents, see *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006.

9-29 The second instance is where a party does not have a co-arbitrator to appoint. Although it has become more infrequent, in some instances a party will commence arbitration proceedings without understanding the procedure or being familiar with potential arbitrators. In such a situation, the party may be willing to rely on an appointment made by the Appointing Authority.

9-30 The third instance is where the party may be unable to make a timely decision. If companies are subject to insolvency proceedings, for example, then there may be an issue of whether the party is permitted to proceed with the proceedings and who is authorised to act for the company.

9-31 Article 9(2) provides that a party may request that the Appointing Authority make the appointment after the expiration of the 30-day period following the appointment of the first co-arbitrator. Article 9(2) does not set an absolute time bar on the appointment of an arbitrator by the other party. Therefore, if, following receipt of the request by the other party, the receiving party appoints an arbitrator, one would expect that the Appointing Authority would not go on to appoint an arbitrator for that party. This situation arose in *Chevron Corp v Ecuador*, where the Appointing Authority refrained from appointing an arbitrator on the grounds that it had become moot.[29]

9-32 If a party does not object to the appointment of an arbitrator on its behalf, then it will not be able to object on this basis to the enforcement of an ensuing Award. In *Karaha Bodas*, the claimant requested an appointment on behalf of the respondents. The respondents failed to object. The respondents' subsequent objection to enforcement of the Award due to this appointment was rejected by the US Court of Appeals.[30]

9-33 Article 6 provides that a party making a request for appointment to an Appointing Authority shall transmit a copy of the Notice of Arbitration and any response to the Appointing Authority. Article 6(4) provides that the Appointing Authority shall provide the parties with an opportunity to present their views (as was done in the *Chevron* case referred to above). Therefore, both the requesting party and the other party may provide additional information.

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[29] *Chevron Corp (USA) & Texaco Petroleum Corp (USA) v The Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008.

[30] The procedure was described as follows by the Court of Appeal:

> "In its notice of arbitration sent to Pertamina [the state entity], KBC appointed Professor Piero Bernardini to serve as an arbitrator. Pertamina did not designate an arbitrator within thirty days, nor did it object to KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator under the default appointment provisions of the contracts. Pertamina did not respond to this letter. The ICSID questioned KBC about the consolidation of claims under the JOC and the ESC and KBC's unilateral appointment of an arbitrator. KBC responded by letter dated June 22, 1998. The ICSID confirmed receipt of KBC's letters and in a June 29, 1998 letter to all parties, recapped the prior correspondence, noted Pertamina's failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. The ICSID Secretary-General identified Dr. Ahmed El-Kosheri as its candidate and asked for any objections by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. Despite the Secretary-General's invitation to do so, neither Pertamina nor PLN lodged objections or responses to the proposed appointment. On July 13, 1998, having received no communications from Pertamina, the ICSID notified Pertamina and PLN of its intent to appoint Dr. El-Kosheri and made the appointment on July 15, 1998. Under the JOC and ESC, Professor Bernardini and Dr. El-Kosheri then selected the chairman of the arbitration panel, Yves Derains."
>
> *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 297 (5th Cir. 2004).

9-34 Article 9(2) sets out no procedure or criteria that are to be applied by the Appointing Authority in appointing a co-arbitrator. If one party is not participating, then it would be very unusual for the Appointing Authority to consult with the parties as to the appointment, as the defaulting party would probably not respond. As a result, such consultation could result in further imbalance as between the parties.

9-35 In the absence of a set procedure or criteria, institutional appointing authorities will probably make the appointment based on their practice under their own rules.[31] For arbitrations under the ICC Rules for example, if a party fails to make an appointment, the ICC Court will seek to make the appointment based on a nomination made by the national committee of that party.[32] The ICC is not required to follow this procedure when acting as an Appointing Authority, and may well not follow it; however, one reasonable approach is to look for a co-arbitrator of the same nationality as the party who has failed to appoint an arbitrator.

ARTICLE 9(3)

Article 9(3): "If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8."

9-36 Article 9(3) sets a time limit of 30 days after the appointment of the second arbitrator for the co-arbitrators to agree on a presiding arbitrator. Frequently in international arbitration the co-arbitrators will seek additional time to seek to agree on a presiding arbitrator. A 30-day period may seem more than adequate to agree on a presiding arbitrator. Nevertheless, discussions between the co-arbitrators sometimes take longer, due, for example, to issues as to availability and to the desire to discuss the profiles or the individuals with the appointing lawyers. It is therefore not infrequent that this period is extended by 10–15 days for example.

9-37 There are no statistics available as to how often the parties agree or fail to agree on a presiding arbitrator. However, in ICC arbitrations for 2020 for example the ICC appointed one-third of all presidents.[33] In LCIA arbitrations for 2021, the LCIA appointed 40% of the presiding arbitrators.[34] One can reasonably expect that the appointing authorities are called upon to appoint the same proportion of presiding arbitrators in UNCITRAL arbitrations.

9-38 As with art.8, the first issue with respect to art.9(3) is whether an Appointing Authority has been designated. If an Appointing Authority has not been designated and cannot be agreed upon by the parties, then the Secretary-General of the PCA will be called upon to designate the Appointing Authority.

9-39 As provided in art.8, to initiate the procedure with respect to the appointment of a presiding arbitrator, a party must file a request with the Appointing Authority. In accordance with art.6, the request should include the Notice of Arbitration and any response. A requesting party may also include further background with respect to the matter.

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[31] See the discussion of institutional rules when acting as Appointing Authority at paras 8-09 and following.

[32] See T. Webster and M. Bühler, *Handbook of ICC Arbitration*, 5th edn (2021), paras 13-36 and following.

[33] See T. Webster and M. Bühler, *Handbook of ICC Arbitration*, 4th edn (2018), para.12-44.

[34] *https://www.lcia.org/lcia/reports.aspx.*