# UNCITRAL ARBITRATION RULES, 2010: COMMENT ON CERTAIN REVISIONS

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## II. Introduction

Almost thirty five years after the publication of the UNCITRAL Arbitration Rules, 1976, the UNCITRAL has revised its arbitration rules. The Working Group of the UNCITRAL on Arbitration and Conciliation[1] discussed the possible revisions to the said Rules for about eight sessions and completed the same after nearly four years of discussion. The UNCITRAL Arbitration Rules, 2010[2] were adopted by the UNCITRAL on 25 June 2010 and by the General Assembly of the United Nations on 6 December 2010.[3]

This paper comments on certain critical aspects of the 2010 Rules viz., (1) the power of the arbitral tribunal to rule on its own jurisdiction, (2) interim measures, (3) immunity of arbitrators, and (4) costs and fee in arbitration.[4] In addition, the paper briefly analyses the

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[1] Hereinafter "Working Group".

[2] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (as revised in 2010) (Apr. 2011), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html [hereinafter "2010 Rules"].

[3] *Id.*

[4] For a review of the changes introduced in the 2010 Rules, *see*, DAVID D. CARON, LEE M. CAPLAN, *ET.AL.*, The UNCITRAL Arbitration Rules (2013) [hereinafter "CARON & CAPLAN"]; Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010: A Review*, 2 CHRIST UNIV. L. J. 117-152 (2013); Lee Anna Tucker, *Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects both Greater Flexibility and Remaining Uncertainty*, 1 Arbitration Brief 15 (2011), *available at* http://digitalcommons.wcl.american.edu/ab/vol1/iss2/6/ (last visited September 16, 2013); Matthew Skinner, Sam Luttrell, et.al., *The UNCITRAL Arbitration Rules 2010*, 7 ASIAN INT'L ARB. J. 76 (2011); James Castello, *Plusça change, plus c'est la même chose: Eight Revisions not Adopted in the 2010 UNCITRAL Rules*, 28 ASA BULL. 855 (2010); Stephen

recently published UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[5] and related amendment to the UNCITRAL Arbitration Rules, 2010. The paper also makes note of certain small revisions relating to examination of witnesses without their physical presence, power of the tribunal to appoint experts and the procedure for challenge of experts by the parties. The paper concludes by providing an overview of the level of response of the international arbitration community to the 2010 Rules.

**Power of the arbitral tribunal to rule on its jurisdiction**

The provisions in the 2010 Rules on the power of the arbitral tribunal to rule on its jurisdiction are based on Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985[6], except for a few changes as noted below.

The minor but notable changes in the 2010 Rules vis-a-vis the Model Law are the following:

a) The 2010 Rules clarify that the tribunal has the power to determine its own jurisdiction. In a report submitted to the UNCITRAL on the Revision of the UNCITRAL Arbitration Rules, Paulsson and Petrochilos commented that the 1976 Rules did not expressly empower the tribunal to decide its own jurisdiction in the absence of any objection from a party.[7] This, according to

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L. Drymer, *The Revised 2010 UNCITRAL Arbitration Rules: New Rules / New Roles for Designating and Appointing Authorities*, 28(4) ASA BULL. 869, 873 (2010); Justice Clyde Croft, *The Revised UNCITRAL Arbitration Rules of 2010: A Commentary*, VIC. J. SCHOOL 6 (2010) *available at* www.austlii.edu.au/au/journals/VicJSchol/2010/12.pdf (visited on February 25, 2012)

[5] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules on Transparency,(Oct. 2, 2013) http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf

[6] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended in 2006) (, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [[hereinafter "Model Law"].

[7] Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), ¶181, *available at*

them, was not in consonance with "modern arbitration practice".[8] Therefore, the 2010 Rules clarify that the tribunal "shall have the power to rule on its own jurisdiction…"[9] It may be noted that this change merely spells out what was a well-accepted practice.[10]

b) The phrase "null and void" in Article 16(1) of the Model Law has been replaced with the term "null". The reason for the deletion was that "null and void" did not cover certain situations such as the case where the contract had expired due to completion of its duration. Hence, it was decided in the Working Group to retain "null" as it encompassed all other categories of contractual defects. [11]

c) The term "ipse jure" in the above provision has been changed to "automatically".

d) Article 16(1) of the Model Law provided that a plea of lack of jurisdiction shall be raised in the statement of defence and not thereafter. However, it did not deal with the timing of such plea in respect of a counterclaim or a claim for set-off. The 2010 Rules provide that a plea of lack of jurisdiction in respect of counterclaim or a claim for set-off should be made in the reply to the counterclaim or the claim for set-off and not thereafter.[12]

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http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (accessed on April 11, 2013) [hereinafter "Paulsson & Petrochilos"].

[8] *Id.*

[9] Model Law, *supra* note 6, Art. 23(1); CARON &CAPLAN, *supra* note 2..

[10] Oracle America, Inc. v. Myriad Group A.G., (9th Cir. 2013) (Jul 26, 2013), available at http://caselaw.findlaw.com/us-9th-circuit/1640198.html (last visited August 15, 2013) ("*By giving the arbitral tribunal the authority to decide its own jurisdiction, both the 1976 and 2010 UNCITRAL rules vest the arbitrator with the apparent authority to decide questions of arbitrability. The only difference is that, under the 1976 rules, the authority of the arbitral tribunal is described as ruling on objections to its jurisdiction and under the 2010 rules the tribunal has the authority to decide its jurisdiction. The 1976 rules are more narrowly phrased than the 2010 rules, but there is not a significant distinction between how these sets of rules treat questions of arbitrability.*")

[11] United Nations Commission on International Trade Law, Report of the Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session U.N. Doc. A/CN.9/669, (March 9, 2009), ¶40-43 , [hereinafter "Working Group"]; CARON & CAPLAN, *supra* note 2, p. 454 (for a discussion on the deliberations of the Working Group on this aspect).

[12] Model Law, *supra* note 6, Art. 23(2).

Two substantial changes vis-à-vis the Model Law have been made in the 2010 Rules. One, under the Model Law, where the arbitral tribunal determined that it had jurisdiction on a preliminary issue as to jurisdiction; a party could appeal to the court from the tribunal's determination on that preliminary issue.[13] This provision has not been incorporated in the 2010 Rules because of the difference in purposes of the Model Law and the Arbitration Rules. The objective of the Model Law was to a model of arbitration law that countries could adopt as a legislation on international arbitration. Therefore, the Model Law dealt with the role of courts in the arbitral process. The aim of the Arbitration Rules, on the other hand, is to state the procedure for conducting the arbitral proceedings.[14] The 2010 Rules, however, clarify that in case a party challenges the jurisdiction of the tribunal in a court, the tribunal would nevertheless have the power to continue with the arbitral proceedings and make an award.[15] The second substantial change is that the provision in the 1976 Rules that jurisdictional objections, as a general rule, should be decided as preliminary questions[16] has not been retained. The issue as to whether the tribunal has to decide the jurisdictional pleas as preliminary questions has become fairly controversial, especially in the context of investor-State arbitration. Under the 1976 Rules, the tribunal was more or less bound[17] to decide jurisdictional objections as preliminary questions, but the tribunal was given the freedom to proceed with the arbitration when the circumstances so warranted and decide on such objections in its final award.[18] Thus, the 1976 Rules established a presumption in favour of bifurcation of the proceedings into proceedings pertaining to decision on preliminary objections and

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[13] Model Law, *supra* note 6, Art. 16(3).
[14] Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010 & 1976: A Comparison- Part VI* (August 15, 2011), *available at* http://practicalacademic.blogspot.in/2011/08/this-is-sixth-and-last-installment-in.html (last visited September 16, 2013).
[15] Model Law, *supra* note 6, Art. 23(3).
[16] Model Law, s*upra* note 6, Art. 21(4).
[17] Art. 21(4) of the 1976 Rules provided that the tribunal "should" "[i]n general" decide on jurisdictional objections as a preliminary question.
[18] *Id.*

decision on merits.[19] However, the Tribunal was not bound to bifurcate the proceedings in the following circumstances[20]:

- the jurisdictional objections were frivolous and deciding the same as preliminary questions would not reduce costs or the duration of the arbitration;
- the cost and time in deciding the jurisdictional pleas as preliminary questions would not promote reduction in costs or the time of the subsequent stages of the arbitral proceedings;
- The jurisdictional questions are inextricably linked to the issues on merits that it is impractical to decide the former as preliminary issues.[21]

It is possible that certain jurisdictional questions could be decided as preliminary questions while certain other jurisdictional questions were linked to the issues on merits such that it would be impractical to decide the latter as jurisdictional questions. In such cases, tribunals bifurcate the proceedings by deciding certain jurisdictional questions as preliminary questions and the remaining questions along with the issues on merits.[22]

The 2010 Rules do not contain the said presumption and gives the tribunal the discretion to decide jurisdictional objections in its final award. Notwithstanding this, an

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[19] Glamis Gold, Ltd. v. The United States of America, Procedural Order No. 2 (revised) ( May 31, 2005), *available at* http://italaw.com/sites/default/files/case-documents/ita0362.pdf (accessed on June 7, 2013). The said order was issued in the context of Investor-State arbitration and not commercial arbitration. However, the said principles stated in the case would equally apply to commercial arbitration.

[20] *Id.*

[21] *See*, Inna Uchkunova & Oleg Temnikov, *Bifurcation Of Proceedings In ICSID Arbitration: Where Do We Stand?*(August 15, 2013), *available at* http://kluwerarbitrationblog.com/blog/2013/08/15/bifurcation-of-proceedings-in-icsid-arbitration-where-do-we-stand/ (last visited August 15, 2013) (for a survey on the law of bifurcation in ICSID proceedings).

[22] GarantiKoza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent (July 3, 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1540.pdf (last visited August 10, 2013).

authoritative commentary has suggested that there would not be any dilution of the presumption in practice.[23] Nevertheless, it is possible that a Tribunal may interpret this elimination of the presumption as granting wide discretion to the Tribunal to refuse bifurcation requests. This is especially true when the arbitral tribunal would be the one to gain the most if the preliminary issues are decided in the end than as preliminary questions. In order to promote legitimacy of the arbitral process, the presumption as it appeared under the 1976 Rules could have been retained.

*C. Immunity to arbitrators and others*

Considerable discussion took place in the Working Group on the scope of immunity to arbitrators and their appointees. The 1976 Rules did not contain provisions relating to immunity of arbitrators. Hence, some tribunals incorporated an immunity rule in their procedural orders passed in the arbitral proceedings. For instance, one of the tribunals acting under the UNCITRAL Arbitration Rules, 1976 in investor-State arbitration incorporated the following immunity rule in its procedural order:

"***17 Immunity from Suit:*** *17.1 The Parties shall not seek to make the Tribunal or any of its members liable in respect of any act or omission in connection with any matter related to the arbitration*".[24]

Another tribunal went a step further by providing additionally that neither the tribunal nor any of its members shall be required by the parties to the arbitral proceedings to be a party or witness in any judicial or other proceedings arising out of or in connection with the arbitration.[25]

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[23] CARON & CAPLAN, *supra* note 2, at 459.

[24] Guarachi America Inc. and Anr. v. The Plurinational State of Bolivia, Terms of Appointment and Procedural Order No. 1 (December 9, 2011), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0393_0.pdf (last visited June 13, 2013).

[25] ICS Inspection and Control Services v. The Argentine Republic, Procedural Order No. 1 (May 18, 2010), cited in ICS Inspection and Control Services v. The Argentine Republic, Award on Jurisdiction (February 10, 2012), available at http://italaw.com/sites/default/files/case-documents/ita0416.pdf (last visited June 13, 2013).

Since arbitration rules of several institutions contained an immunity rule, it was decided by the Working Group to incorporate a provision on the immunity of arbitrators.[26] The Working Group was of the view that such immunity should be granted to even the appointing authority under the Rules.[27]

On the scope of immunity, the Working Group contemplated adopting one of the following approaches: the first was to provide for an unequivocal waiver by the parties similar to the then prevailing ICC Rules[28] or the Vienna Rules[29]; the other approach was to grant a similar immunity but with the exception of intentional wrongdoing. The Working Group felt that the current practice of introduction of stricter standards of liability for acts and omissions of judges in vogue in several countries should be taken into consideration in deciding on the scope of arbitrator immunity. The Working Group's stand was that in deciding the scope of arbitrator immunity the interests of the parties should not be compromised by adopting an overly protective arbitral immunity clause. At the same time, it was felt that arbitrators should be protected against claims of negligence or fault by parties.[30] The Working Group therefore opined

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[26] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session ¶136 (October 5, 2006), A/CN.9/614, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 1, 2013) [hereinafter "A/CN.9/614"].

[27] United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶39-40 (July 20, 2006), A/CN.9/WG.II/WP.143/Add.1, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 21, 2013 [hereinafter "A/CN.9/WG.II/WP.143/Add.1"].

[28] International Chamber of Commerce, ICC Rules of Arbitration, 1998 (May 2010), Art. 34,http://www.icc.se/skiljedom/rules_arb_english.pdf.

[29] Article 8 of the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) states: "*Liability of the arbitrators, the Secretary General, the Board and its members and the Austrian Federal Economic Chamber and its employees for any act or omission in relation to arbitration proceedings, insofar as such liability may be admissible by law, shall be excluded*."

[30] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Eighth Session, ¶39 (February 29, 2008), A/CN.9/646,

"*It was generally agreed that any provision that might be introduced in the Rules to exonerate arbitrators from liability should be aimed at reinforcing the independence of arbitrators and their ability to concentrate with a free spirit on the merits and procedures of the case. However, such a provision should not result or appear to result in total impunity for the consequences of any personal wrongdoing on the part of arbitrators or otherwise interfering with public policy*."[31]

In the end, it was decided to take the more common approach of granting limited immunity to the arbitrators.[32] Thus, parties are deemed to have waived all claims against the arbitrator, the appointing authority, or any person appointed by the arbitral tribunal, to the extent permitted by the applicable law.[33] Intentional wrongdoing is the only exception to this waiver. Although a commentary states that the wordings in Article 16 on the exclusion of immunity are ambiguous, the provision requires that the transgression should be more than gross negligence.[34]

*Revisions related to interim measures*

Unlike the 1976 Rules, the 2010 Rules elaborately deal with interim measures. The Model Law was amended extensively in 2006 and several provisions on interim measures by the tribunal were inserted as Chapter IVA.[35] At the time of revising the Arbitration Rules, the Secretariat to the UNCITRAL suggested that the provisions in Chapter IVA could

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http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 23, 2012) [hereinafter "A/CN.9/646"].

[31] *Id.*

[32] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27 at 39, 40. *See*, Introductory Note to the International Bar Association Rules of Ethics for International Arbitrators (1987) ("*The International Bar Association takes the position that (whatever may be the case in domestic arbitration) international arbitrators should in principle be granted immunity from suit under national laws, except in extreme case of wilful or reckless disregard of their legal obligations*").

[33] Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010 & 1976: A Comparison- Part V* (August 13, 2011), available at http://practicalacademic.blogspot.in/2011/08/this-post-is-fifth-part-in-series-of.html

[34] CARON & CAPLAN, *supra* note 2 at. 516.

[35] PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL MODEL LAW JURISDICTIONS 232 (2009) [hereinafter "BINDER"] (commenting that the insertions in 2006 to the Model Law were so extensive that the amendments could have constituted a separate model law on interim measures in international commercial arbitration).

be adopted in the 2010 Rules.[36] Consequently, several provisions in Chapter IVA were incorporated in the 2010 Rules with changes *mutatis mutandis*.[37] Some provisions in the said chapter such as recognition and enforcement of interim measures[38] have not been carried forward in the 2010 Rules since the Model Law is a model legislative instrument wherein the role of courts are to be defined while the Arbitration Rules are in the nature of a contractual instrument dealing with the conduct of the arbitration.[39]

The 2010 Rules do not retain the Model Law provisions pertaining to *ex parte* interim measures.[40] Since *ex parte* interim orders were contrary to the "consensual nature of arbitration"[41] and since several national legislations did not grant the tribunal such a power, the Working Group was of the view that such a controversial provision[42] could undermine the acceptability of the Rules.[43]

Apart from the above, following are the features of the provisions in the 2010 Rules on interim measures:

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[36] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27, 16.

[37] As regards the provisions of interim measures in the 2010 Rules, a commentary suggests that the Travaux Préparatoires of the provisions of the UNCITRAL Model Law pertaining to interim measures (the original provisions and the 2006 amendments) would be relevant in interpreting the 2010 Rules; CARON & CAPLAN, *supra* note 2, Chapter 17.

[38] Model Law, *supra* note 6, Art. 17-H,17-I.

[39] Working Group, *supra* note 11 at 87; *See also*, Georgios Petrochilos, *Interim Measures under the Revised UNCITRAL Arbitration Rules*, 28 ASA BULL. 878 (2010) [hereinafter "Petrochilos"].

[40] Model Law, *supra* note 6 Art. 17-B,17-C.

[41] Working Group, *supra* note 11 at 101; Petrochilos, *supra* note 39 at. 887.

[42] Provisions on *ex parte* interim measures were so controversial that discussions in the Working Group were "*close to breaking point*" when the draft amendments to the Model Law (finally adopted in 2006) were discussed. BINDER, *supra* note 35 at 232.

[43] United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session¶ 54-55 (September 25, 2007), A/CN.9/641, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited March 11, 2011) [hereinafter "A/CN.9/641"]; *But see*, Petrochilos, *supra* note 39 at 887 (arguing, citing Art. 17(4), that the 2010 Rules does not prohibit *ex parte* interim measures when permitted by applicable law).

*Option to exclude the tribunal's power to grant interim measures:*

The Model Law afforded option to the parties to agree that the tribunal would not have the power to grant interim measures.[44] No such option is available under the 2010 Rules.[45]

**Definition of Interim Measures**: In contrast to the 1976 Rules, the 2010 Rules clearly define "interim measures". This definition is in line with Article 17 of the UNCITRAL Model Law which replaced the original Article 17 thereto with effect from 2006. Thus, according to Article 26(2) of the 2010 Rules, an interim measure is any temporary measure ordered by the tribunal prior to issuance of the final award, and which is in the nature of, but is not limited to, one of the following measures:

a) Maintenance or restoration of the status quo pending the final decision on the dispute;
b) Taking an action, or refraining from taking an action, that would prevent
    i. Current or imminent harm;
    ii. Prejudice to the arbitral process;
c) Providing means of preserving assets out of which a subsequent award may be satisfied;
d) Preserving evidence relevant to the resolution of the dispute.

Under the 1976 Rules, it was required that interim measures which the tribunal could order should be "in respect of the subject-matter of the dispute".[46] This requirement does not find its place in the 2010 Rules. Paulsson considered this requirement to be restrictive, especially when the range of interim measures that could be ordered would extend beyond the meaning of the said phrase.[47]Paulsson relied on the then prevailing arbitration rules of other institutions and recommended that the requirement be

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[44] Model Law, *supra* note 6, *Art.*17(1).
[45] Model Law, *supra* note 6, Art. 26(1).
[46] Art. 26(1) of the 1976 Rules.
[47] Paulsson & Petrochilos, *supra* note 7 at 115-119

dropped.[48] It may be noted that the revisions to the UNCITRAL Model Law made in 2006 do not retain the above requirement. Deletion of this requirement was merely to clarify the existing practice of arbitral tribunals of granting interim measures which are not strictly connected to the subject-matter of arbitration.

Article 17(2) of the Model Law contains an exhaustive list of the kinds of interim measures that the tribunal could order. In order to bring clarity into the provision of interim measures, the Working Group took a stand that the relevant provision in the 2010 Rules should not unduly restrict the power of the tribunal to those measures enumerated in Article 17(2) of the Model Law alone. Further, it was not clear if the 1976 Rules contemplated certain kinds of interim measures such as order to stay parallel judicial proceedings, order for security for costs.[49] Article 26(2) clarifies that the tribunal has the power to order measures that are not limited to those provided therein.[50]

**Conditions for granting interim measures**: The party seeking interim measures of the nature specified in (a) to (c) above has to satisfy the arbitral tribunal that[51]:

i. The harm that the interim measures would prevent is not adequately reparable by an award of damages;
ii. The harm that would be caused to the applicant substantially outweighs the harm likely to result to the party against whom such measure is sought to be directed; and
iii. There is a reasonable possibility that the applicant will succeed on the merits of the claim.

With regard to interim measure specified in (d) above, the aforesaid requirements would apply only to the extent to which the arbitral tribunal considers it appropriate.[52]

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[48] Paulsson & Petrochilos,*supra* note 7 at 115-119.
[49] Petrochilos, *supra* note 39 at 884.
[50] Working Group, *supra* note 11 at 92-93.
[51] Model Law, *supra* note 6, Art. 26(3).

**Modification, suspension and termination of interim measures:** The tribunal possesses the power, either on the application of a party or in exceptional circumstances *suomotu*, to modify, suspend or terminate the interim measure it had previously ordered.[53] With regard to *suomotu* exercise of such power, the tribunal is obligated to give prior notice to the parties.[54] The Rules are silent on whether hearing should be granted to a party in such a situation. Nevertheless, if a party requests the tribunal to grant an opportunity to present its case, consistent with Article 17(1) of the 2010 Rules[55], the tribunal should provide such opportunity.

**Other ancillary powers of the tribunal in relation to interim measures**: The tribunal is also empowered under the 2010 Rules:

a. To order the applicant to provide appropriate security with respect to the measure[56];
b. To order the applicant to promptly disclose any material change in the circumstances on the basis of which interim measure was sought or was ordered by the tribunal;[57]
c. To order the applicant to pay costs and damages where the tribunal is of the opinion, subsequent to granting interim measure, that the interim measure should not have been granted in the circumstances then prevailing.[58]

*Revisions on costs and fees in arbitral proceedings*

UNCITRAL Arbitration Rules have been considered as providing for cost effective arbitration as compared to institutional arbitration or arbitration under other rules.[59]

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[52] Model Law, *supra* note 6, Art. 26(4).
[53] Model Law, *supra* note 6,Art. 26(5).
[54] Model Law, *supra* note 6, Art. 26(5).
[55] Among other things, Article 17(1) of the 2010 Rules obligate the tribunal to conduct to arbitration by affording reasonable opportunities to the parties to present their case.
[56] Model Law, *supra* note 6, Art. 26(6).
[57] Model Law, *supra* note 6, Art. 26(7).
[58] Model Law, *supra* note 6, Art. 26(8). The power to order such costs and damages is couched in permissive language unlike the analogous provision in the Model Law which casts it in a mandatory language. The reason for the permissive language is to empower the tribunal to pass such an order when law contemplates imposition of such liability. Petrochilos, *supra* note 39 at 886-887.

Therefore, it is not surprising that the 2010 Rules contain elaborate revisions aimed at effective management of costs in the arbitral proceedings.

**Costs in final award or in another decision**: As in the 1976 Rules[60], the tribunal has been given the power to decide on the costs in the final award.[61] Since there could be more than one award in arbitration since the tribunal might fix costs in each such award, it was felt that the 2010 Rules should expressly recognise the existence of such a power.[62] Therefore, Article 40(1) of the 2010 Rules provides that the tribunal is empowered to fix "the costs of arbitration in the final award and, if it deems appropriate, in another decision".

**Costs to be reasonable**: The Secretariat of the UNCITRAL recommended that the term "reasonable" ought to be inserted in the different types of costs enumerated in the definition of "costs".[63] The recommendation was accepted by the Working Group.[64] Accordingly, the 2010 Rules require that costs should be reasonable.[65] Further, the 2010 Rules provide for an additional requirement with regard to the travel and other costs of witnesses. It is stated that only such reasonable travel and other costs would be allowed, and that such costs would have to be approved by the arbitral tribunal.[66] With regard to legal costs, the 2010 Rules state that such costs must be in relation to arbitration and the

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[59] *See,* PUBLISHER'S EDITORIAL STAFF, LEGAL ASPECTS OF INTERNATIONAL SOURCING §6:6 (West, 2010), citing, David J. Branson & W. M. Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 VA. J. INT'L L. 4 (1984).

[60] Model Law, *supra* note 6, Art. 38.

[61] Generally, the arbitral tribunal passes an interim award or a procedural order in which it expressly reserves all questions concerning costs during final determination of the dispute. *E.g.* ¶47, Ulysseas Inc. v. The Republic of Ecuador (Final Award, June, 12,2012), *available at* http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf (last visited October 6, 2012).

[62] United Nations Commission on International Trade Law, Report of Working Group II (Arbitration and Conciliation) tn the Work of its Fifty-First Session¶ 120 (10 November 2009), A/CN.9/684, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited July 17, 2013).

[63] A/CN.9/WG.II/WP.143/Add.1, *supra* note 27 at 36; Paulsson, *supra* note 7 at. 148.

[64] A/CN.9/646, *supra* note 30 at 18.

[65] Model Law, *supra* note 6, Art. 40(2)(a) read with Art. 41 and Art. 40(2)(b)(e).

[66] Model Law, *supra* note 6, Art. 40(2)(d).

tribunal must consider such costs to be reasonable.[67] Thus, the 2010 Rules aims at ensuring greater transparency towards accounting of costs incurred by the parties in respect of arbitration proceedings.

**Costs of legal representation**: The definition of "costs" under the 1976 Rules also encompassed costs incurred by the successful party in relation to legal representation and assistance provided such costs were claimed during the arbitral proceedings and to the extent reasonable as determined by the tribunal.[68] The term "representation" in the phrase "costs for legal representation and assistance of the successful party" has not been retained in the 2010 Rules. Further, since the provision deals with the definition of costs and not the method of apportioning of costs, the Working Group considered references to the successful party as inappropriate.[69] Hence, "costs" under the 2010 Rules includes reasonable "legal and other costs incurred by the parties in relation to the arbitration".[70]

**Review of costs:** Article 41 of the 2010 Rules retains the corresponding provision in the 1976 Rules[71] that the fee charged by the arbitral tribunal shall be reasonable. The 1976 Rules provided that where an appointing authority stated that the tribunal should apply a particular method of computation of fees, the arbitral tribunal was not bound to treat the same as sacrosanct.[72] The 1976 Rules further provided that a party could approach the appointing authority to furnish a statement regarding the basis of determination of fee. However, in all cases, the tribunal had the power to take into account the comment/ statement of the appointing authority to the extent it considered it appropriate.

The position under the 2010 Rules is different. The 2010 Rules imposes a positive duty on the tribunal to inform the parties soon after its constitution the manner in which the tribunal proposes to compute the fee.[73] The parties have the right to approach the

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[67] Model Law, *supra* note 6, Art. 40(2)(e).
[68] Model Law, *supra* note 6, Art. 38(e).
[69] A/CN.9/646, *supra* note 30 at 19.
[70] Model Law, *supra* note 6, Art. 40(2)(e).
[71] Model Law, *supra* note 6, Art. 39(1).
[72] Model Law, *supra* note 6, Art. 39(2).
[73] Model Law, *supra* note 6, Art. 41(3).

appointing authority, if any, within fifteen days after receiving such information to request the appointing authority for review of the tribunal's proposal on fee.[74] Within forty five days of the referral, the appointing authority has to see if the tribunal's proposal is unreasonable considering the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstance of the case. If the tribunal's proposal is unreasonable, the appointing authority is empowered make necessary adjustments to the proposal and such adjustments would be binding on the arbitral tribunal.[75]

In addition to granting the parties the right to challenge the tribunal's proposal on determination of fees and expenses, the 2010 Rules also give the parties another opportunity to challenge the decision of the tribunal on costs. Article 41(4)(b) of the 2010 Rules provides that within fifteen days after receipt of the tribunal's determination of fees and expenses, a party could approach the appointing authority for review of such determination. In case the tribunal's determination is found to be to be inconsistent with the tribunal's proposal on fee communicated to the parties soon after its constitution or is manifestly excessive, that authority is invested with the power to make adjustments to the tribunal's determination, which shall be binding on the tribunal.[76] In such situations, the said authority shall be guided by the principle of reasonableness of fee laid down in Article 41(1) of the 2010 Rules. The authority shall make the aforementioned determination within forty five days after the receipt of referral.[77] Where no appointing authority has been designated or if the appointing authority fails to act within forty five days, a party has the right to approach the Secretary-General of the Permanent Court of Arbitration.[78]

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[74] Model Law, *supra* note 6, Art. 41(3).
[75] Model Law, *supra* note 6, Art. 41(3).
[76] Model Law, *supra* note 6, Art. 41(4)(c).
[77] Model Law, *supra* note 6, Art. 41(4)(c).
[78] Model Law, *supra* note 6, Art. 41(4)(b); *See,* Matthew Skinner, Sam Luttrell, et.al., *The UNCITRAL Arbitration Rules 2010*, 7 ASIAN INT'L ARB. J. 76, 93 (2011) (arguing that the appointing authority would be unwilling to conduct a review of the fees and expenses determined by the tribunal).

To safeguard the interest of the party seeking review of fee and the party in whose favour the award was passed, the 2010 Rules clarify that an action seeking review of fee shall not:

a) Affect the determination in the award except insofar as the award deals with the tribunal's fees and expenses;
b) Delay the recognition and enforcement of the award except as regards tribunal's determination on fees and expenses.[79]

In practice, a party would prefer to challenge the decision of the tribunal on costs rather than challenging the tribunal's proposal on determination of fees and expenses as that party would be apprehensive of questioning the tribunal's fee entitlements. Therefore, non-challenge of such determination should not be considered a ground for dismissing the tribunal's decision on costs and expenses.

*Other revisions*

**Examination of witnesses without physical presence**: According to Article 28(4) of the 2010 Rules, witnesses could be examined even by means of telecommunication that does not require their physical presence. Thus, the 2010 Rules recognise witness examination through video conferencing, etc. This provision has the potential to save the parties considerable costs, especially in arbitrations involving a number of witnesses.

**Tribunal appointed experts and challenges**: Under the 1976 Rules, the arbitral tribunal could appoint experts on specific issues without consulting the parties.[80] The 2010 Rules, however, require the tribunal to consult the parties before appointing experts.[81] Further, the 2010 Rules make it clear that the expert must be independent.[82]

A delegation of the Working Group proposed that parties should have the right to challenge experts for the same reasons and in the same way as arbitrators could be

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[79] Model Law, *supra* note 6, Art. 41(6).
[80] Model Law, *supra* note 6, Art. 27
[81] Model Law, *supra* note 6, Art. 29(1).
[82] Model Law, *supra* note 6, Art. 29(1)..

challenged.[83] Another proposal was that the experts should, along the lines of the IBA Rules on the Taking of Evidence in International Arbitration[84], declare their qualifications and issue a statement of independence and impartiality before accepting their appointment.[85] These proposals were accepted. The 2010 Rules provide, consistent with the IBA Rules[86], that after the appointment of an expert, a party can challenge the independence of the expert.[87] But such challenge can be made only for reasons that the party came to know after appointment of the expert.[88]

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[83] United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules Note by the Secretariat ¶ 37 (December 10, 2009), A/CN.9/WG.II/WP.157/Add.1, http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html (last visited January 24, 2012).

[84] International Bar Association, IBA Rules on the Taking of Evidence,, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited March 11, 2011) [hereinafter "IBA Rules"]

[85] Relevant portion of Art. 6(2) of the IBA Rules provides: "*The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the `Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection*."

[86] Relevant portion of the Art. 6(2) of the IBA Rules reads: "*After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made*."

[87] Model Law, *supra* note 6, Art. 29(2).

[88] Model Law, *supra* note 6, Art. 29(2).

**UNCITRAL Arbitration Rules and Transparency in Investor-State Arbitration:**

At the time of revision of the UNCITRAL Arbitration Rules, there were several proposals to include provisions pertaining to investor-State arbitration such as confidentiality, admissibility of *amicus curiae* briefs, etc.[89] The UNCITRAL was apprehensive in including specific provisions for investor-State arbitration, considering the generic nature of the Rules.[90] Further, the urgent need to revise the Arbitration Rules and the complex issues surrounding investor-State arbitration compelled UNCITRAL to omit investor-State arbitration related provisions in the 2010 Rules. Consequently, the Working Group was of the view that it would seek guidance from the UNCITRAL as to whether to consider specific issues pertaining to investor-State arbitration once the revision of the Arbitration Rules is complete.[91] In its forty first session, the UNCITRAL decided to accord priority to the topic of transparency in investor-State arbitration immediately after the revision of the UNCITRAL Arbitration Rules was complete.[92] The UNCITRAL, however, clarified that the form of the instrument to be adopted should be left to the discretion of the Working Group.[93] Subsequent to the revision of the 2010 Rules, there was a consensus in the Working Group that transparency in investor-State arbitration was an important issue that needed attention.[94] During the deliberations in the Working Group, it was observed that although the ICSID Rules and Regulations were revised to incorporate transparency in ICSID Arbitration, such standards would not squarely apply to non-institutional investor-State arbitration.[95] Therefore, it was stated that it might not be possible to adopt an instrument on the lines of the corresponding provisions of the ICSID Rules and Regulations. Consequently, the Working Group decided to come out with legal standards on transparency in investor-State arbitration.

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[89] For instance, the Milan Club of Arbitrators, a Non-Governmental Organisation, proposed that the Rules should contain optional clauses dealing with investment arbitration. *See,* A/CN.9/646, *supra* note 30 at 60.

[90] United Nations Commission on International Trade Law, Report of the United Nations Commission on International Trade Law: Forty-first session,June 16 -July 3, 2008,, ¶ 312- 314, U.N.Doc.A/63/17, [hereinafter "A/63/17"].

[91] A/CN.9/646, *supra* note 30 at 54-69.

[92] A/63/17, *supra* note 90.

[93] A/63/17, *supra* note 90 at 314

[94] A/CN.9/646, *supra* note 30 at 57.

[95] A/CN.9/646, *supra* note 30 at 58.

The Working Group was of the opinion that legal standards on increased transparency in investor-State arbitration would add credibility to the process.[96] The Working Group had been working on these standards since the publication of the 2010 Rules. On July 11, 2013, the UNCITRAL adopted the Transparency Rules. Apart from introducing the Transparency Rules, the UNCITRAL has also amended the 2010 Rules by inserting paragraph 4 in Article 1 of the 2010 Rules.[97] The said Article 1(4) provides that the UNCITRAL Rules on Transparency in Treaty based Investor State Arbitration would be a part of the UNCITRAL Arbitration Rules, 2010 in investor-State arbitrations applying the UNCITRAL Arbitration Rules, 2010 reads:

Thus, the Transparency Rules are applicable to investor-State arbitrations initiated under an investment/ investor protection treaty. Salient features of the Transparency Rules are as below:

- The Transparency Rules are applicable for investor-State arbitrations in which the UNCITRAL Arbitration Rules is made applicable pursuant to a bilateral or a multilateral treaty containing provisions on protection of investors, unless otherwise agreed by the Parties to the treaty.
- Foot note 1 of the Transparency Rules defines "treaty" comprehensively in the following manner:

"*[A]ny bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.*"

The first part of the definition states the meaning of a treaty while the second part provides an inclusive list of consensual instruments that would be within the purview of "treaty".

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[96] A/CN.9/646, *supra* note 30 at 58.

[97] Article 1(4) of the 2010 Rules (as amended) reads: "*For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency*."

- "Parties to the treaty" is defined in foot note 2 of the Transparency Rules as not only including as State but also a regional economic integration organisation which is a party to the treaty.
- The Transparency Rules are applicable to such treaties concluded on or after April 1, 2014, unless the parties to an arbitration agree to make it applicable or the parties to such a treaty agree to apply the Transparency Rules to arbitrations that might be invoked under that treaty.[98]
- If the Transparency Rules are applicable, the parties to the arbitration cannot derogate from the applicability by agreement or by other means, unless the treaty itself permits such derogation.[99]
- The Transparency Rules permit the arbitral tribunal to adapt a particular provision of the Transparency Rules to suit specific circumstances if necessitated from a practical perspective so long as such adaptation is in consonance with the aims of the Transparency Rules.[100]
- Wherever the Transparency Rules permit the arbitral tribunal to exercise discretion, such exercise shall take into account public interest and the interest of the disputing parties in fairly and efficiently resolving the dispute.[101]
- The Transparency Rules would not affect an already existing authority of the tribunal under the UNCITRAL Arbitration Rules to conduct the arbitration in a transparent manner.
- In case of conflict between the Transparency Rules and the applicable arbitral rules, including the UNCITRAL Arbitration Rules, the former shall prevail while in case of conflict between the Transparency Rules and the treaty, the treaty provisions shall prevail.[102] In case of conflict between the Transparency Rules and the mandatory provision of the law applicable to the arbitration, the latter shall prevail.[103]

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[98] Model Law, *supra* note 6,Art. 1(1), 1(2).
[99] Model Law, *supra* note 6, Art. 1(3)(a).
[100] Model Law, *supra* note 6, Art. 1(3)(b).
[101] Model Law, *supra* note 6, Art. 1(4).
[102] Model Law, *supra* note 6, Art. 1(7).
[103] Model Law, *supra* note 6, Art. 1(8).

- The said Rules provide for a repository of information published under the Transparency Rules. Article 8 of the Transparency Rules state that the Secretary-General of the United Nations or an institution named by the UNCITRAL would be the repository.[104]
- The Transparency Rules provide that the repository shall make the following information available to public[105]:
    - Notice of arbitration and response
    - Pleadings and other written submissions
    - List of exhibits to pleadings and submissions
    - Written submissions by non-disputing parties to the treaty and by third persons
    - Hearing transcripts wherever available.
    - Orders, decisions and awards.
    - Expert reports and witness statements, on request to the arbitral tribunal.
- The Claimant and the Respondent are obligated to provide a copy of the notice to the arbitration. Transmitting the other documents mentioned above is the obligation of the tribunal.[106]
- The tribunal is empowered under the Transparency Rules to permit written submissions by third parties after consultation with the disputing parties. In determining whether to permit such submissions, the tribunal shall take into account the relevant factors, which include but are not limited to the following[107]:
- Whether the third party has a significant interest in the arbitration proceedings.
- The extent to which such submission shall assist the tribunal in determining the issue by providing a perspective, an insight or the knowledge that is different from that of the disputing parties.

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[104] Model Law, *supra* note 6, Art. 8.
[105] Model Law, *supra* note 6, Art. 3.
[106] Model Law, *supra* note 6, Art. 2.
[107] Model Law, *supra* note 6, Art. 4(3).

- The tribunal is also empowered to allow or invite third party submissions on issues relating to the interpretation of the Treaty.[108]
- The hearings of the tribunal shall be open to public and the tribunal shall make logistical arrangements to facilitate public access, unless public hearing is not feasible.[109] Where there is a need to protect confidential information or the integrity of the arbitral process, the tribunal shall hold that part of the hearing in private.[110]
- Article 7(2) defines Confidential or Protected Information. The expression includes within its scope confidential business information, information protected under the treaty from being made public, information protected under the law of the respondent State from being made public, and information whose disclosure would impede law enforcement.[111] Article 7(1) exempts disclosure of such Confidential or Protected Information. The arbitral shall decide whether information is confidential or not after consulting with the parties.[112]
- The tribunal shall consult with the disputing parties and make arrangements, such as redaction of information from a document, to prevent disclosure of confidential information.[113]
- In case the tribunal determines that information contained in a document should be made available to the public, a party to the arbitration or a third party participating in the proceedings would have the freedom to withdraw all or part of the document containing such information from the record of the proceedings.[114]

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[108] Model Law, *supra* note 6, Art. 5(1).
[109] Model Law, *supra* note 6, Art. 6(1) and (3).
[110] Model Law, *supra* note 6, Art. 6(2).
[111] Model Law, *supra* note 6, Art. 7(2) (defines "Confidential or Protected Information").
[112] Model Law, *supra* note 6, Art. 7(3).
[113] Model Law, *supra* note 6, Art. 7(3).
[114] Model Law, *supra* note 6, Art. 7(4).

- In case disclosure of certain information would jeopardise the integrity of the arbitral process, such information shall not be made to the public.[115] The tribunal, in such cases, could even take appropriate measures to delay or restrain the publication of information after consultation with the parties.[116]

**Conclusion**

The 2010 Rules do not contain the more innovative provisions such as those relating to emergency arbitrators, etc. which are found in the SIAC Rules, 2010 and the ICC Rules, 2012.[117] These innovations do not find place in the 2010 Rules for several reasons: one, it was decided that the revised Rules should not contain "unnecessary amendments" altering non-controversial practices under the Rules which were in vogue for a long time[118]; two, unlike the Rules of arbitral institutions, UNCITRAL Arbitration Rules did not have the comfort of having an arbitral institution to correct a problematic provision[119]; three, it was felt that since one of the main advantages of the Rules was its capability of being applied in different kinds of arbitrations such as commercial arbitrations, arbitrations between State and State, arbitrations between Individual and State, etc., changes specific to certain kinds of arbitration should not be made[120]; four, it was decided that the concepts and terminologies used in the revised Rules should be in harmony with the Model Law and other instruments of the UNCITRAL. Although the UNCITRAL has been cautious in revising its rules[121], the international arbitration community has welcomed the 2010 Rules with open hands. Several arbitral institutions

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[115] Model Law, *supra* note 6, Art. 7(6).
[116] Model Law, *supra* note 6, Art. 7(7).
[117] *See,* Art. 26 read with Schedule I of the SIAC Rules, 2010 and Art. 29 read with Appendix V of the ICC Arbitration Rules 2012.
[118] *See,* James Castello, *Plusça change, plus c'est la même chose: Eight Revisions not Adopted in the 2010 UNCITRAL Rules*, 28 ASA BULL. 855, 867 (2010) (hereinafter "Castello") (arguing that "the rejection of certain [suggested] revisions demonstrates that delegates [of the Working Group] approached each proposal with a critical eye. They declined to embrace change just for the sake of "modernization" and, instead, sought to examine whether the concrete effect of each proposal would benefit users and improve the arbitral process.")
[119] *Id.* At 868.
[120] A/CN.9/614, *supra* note 26 at 16- 18.
[121] *See*, Castello, *supra* note 118 at. 855; *See also.*, Badrinath Srinivasan, *UNCITRAL Arbitration Rules 2010: A Review*, 2 Christ U. L. J. 117-152, 152 (2013).

have based/ revised their arbitration rules based on the 2010 Rules.[122] Several arbitral institutions have agreed to act as appointing authority under the said Rules.[123] This, in itself, is indicative of the success of the UNCITRAL Arbitration Rules 2010. By adopting the Transparency Rules, the 2010 Rules do not only make a strong case for popularity but also for credibility.

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[122] Several institutions have adopted or modelled their dispute resolution rules on the 2010 Rules. *E.g.* the Arbitration Rules of the Cairo Regional Center for International Commercial Arbitration, *available at* http://www.crcica.org.eg/arbitration_rules.html (last visited January 7, 2013); CEAC Hamburg Arbitration Rules, http://www.ceac-arbitration.com/index.php?id=19 (last visited January 7, 2013); Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration, *available at* http://www.rcakl.org.my/scripts/view-anchor.asp?cat=10#15 (last visited January 7, 2013); the P.R.I.M.E. Finance Arbitration Rules, *available at* http://www.primefinancedisputes.org/index.php/arbitration.html (last visited January 7, 2013); Swiss Rules of International Arbitration, *available at* https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (last visited January 7, 2013); the Permanent Court of Arbitration Arbitration Rules 2012, *available at* http://www.pca-cpa.org/showfile.asp?fil_id=2054 (last visited January 7, 2013).

[123] Examples of such institutions are the Permanent Court of Arbitration, Singapore International Arbitration Centre, and Arbitration Institute of the Stockholm Chamber of Commerce.